

**CITY OF BULAWAYO****Versus****THE STATE**IN THE HIGH COURT OF ZIMBABWE  
MAKONESE & TAKUVA JJ  
BULAWAYO 20 & 23 MAY 2019**Criminal Appeal***N. Mangena* for the appellant  
*K. Ndlovu* for the respondent

**MAKONESE J:** The appellant Urban Council was arraigned before a Provincial Magistrate sitting at Tredgold on 6<sup>th</sup> July 2016 on a charge of culpable homicide as defined in section 49 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The allegations against the appellant being that on 5<sup>th</sup> December 2013 and at a tower light along Matshemhlophe Road, opposite Induba Primary School in Iminyela Suburb, Bulawayo, the appellant negligently caused the death of Shepherd Mpala Mgcini who was electrocuted when he came into contact with an unearthed armoured electric cable. Appellant pleaded not guilty to the charge but following a full trial the appellant was convicted and sentenced to pay a fine of \$600,00. This appeal indicates that the appellant was not satisfied with both conviction and sentence in the court *a quo*.

In appellant's grounds of appeal it is argued that the magistrate in the court *a quo* grossly erred and misdirected herself by convicting the appellant when the evidence led and the particulars of the alleged negligence demonstrated that the electric cable had been vandalised and was unearthed. There was therefore no basis for attributing negligence to the appellant. Further, the appellant argues that the court *a quo* erred in convicting the appellant when it was clear that the deceased's own action was a *novus actus interveniens*. It is argued, and the evidence led from state witnesses revealed that the deceased was swinging on the cable in question and held it in a fistful position. The electrocution of the deceased was therefore, a result of his own conduct and his demise could not be attributed to the appellant. The appellant further avers that the court *a*

*quo* erred and misdirected itself in finding the appellant guilty when it was clear that both factual and legal causation had not been established.

### **Factual background**

The facts of this matter as gleaned from the outline of the state case are that on 5<sup>th</sup> December 2013 the deceased and his colleagues were at Induba grounds in Iminyela Township, Bulawayo playing a game of soccer. After the deceased's team had been knocked out of the tournament, the deceased was standing near a tower light. At some point the deceased came into contact with a naked part of the tower light cable and was electrocuted, leading to his death. The deceased was taken to hospital for a post mortem report. The cause of death is listed as cardiac arrest and electrocution. Following this incident Zimbabwe Electricity Supply and Distribution Company officials attended the scene and made the following observations:

- (i) The cable was too old and in a state of neglect.
- (ii) The armoured cable not earthed
- (iii) Earthing connection vandalised

The state has conceded that it does not support the conviction and sentence. The state concedes that there was no conclusive evidence that the death of the deceased was the result of the appellant's negligence. The state notes that the earthing cable was vandalised, leaving it exposed. Further, there was evidence on the record to show that the deceased had swung on the electrical cable before his electrocution. Accused's friends who tried to rescue him confirmed that he had touched the electrical cable and was struck by a bolt of electric current that had surged through his body. One of deceased's friends, one Brave, had to kick a satchel that was strapped on deceased's shoulder in order to free him.

Section 49 (1) of the Criminal Law (Codification and Reform) Act criminalises the negligent killing of another in circumstances where the accused realises the possibility of death occurring and fails to guard against such an eventuality. For a conviction to ensue, the state

bears the burden to prove beyond reasonable doubt that the accused culpably committed the *actus reus* of the offence.

### **Factual causation**

In order to secure a conviction on a charge of culpable homicide, the prosecution has to prove that the accused caused or contributed to the death of this victim. In proving that accused committed an unlawful act with the requisite *mens rea*, the state is enjoined to firstly, demonstrate that the accused is both the factual and legal cause of the death of the deceased. In this regard section 11 of the Criminal Code provides that an accused can only be liable where he or she has caused or substantially caused or contributed to the impugned result. The test for factual causation is the but for test. The question to ask is - but for X's conduct would the deceased have died when he died? If the deceased would not have died were it not for the actions of the deceased, X's conduct is the factual cause of the death. However, if the deceased would have died anyway, X's conduct would not be the condition *sine qua non* of the unlawful consequences, and X would not be held liable for the deceased's death. It should be noted that factual causation or factor antecedent without which the criminal result would not have materialized. It seeks to establish whether or not there was a causal link between the conduct of the accused and the unlawful consequence. See; *S v Mukwambuwe* 2014 (2) ZLR 104 (H) at page 123E-F.

### **Legal Causation**

The test for legal causation entails that one must amongst all the conditions or factors which qualify as factual causes of the prohibited result, look for the one factor which was most operative, decisive, indispensable and most effective in bringing about the unlawful consequence. The test has now been codified under section 53 of the Criminal Law Code. Under this leg of the inquiry, the court investigates and determines whether or not, on the common sense basis, *ipso facto*, looking at what occurred, it was reasonably foreseeable that the accused's conduct would lead to the impugned consequence.

**Application of the facts to the law**

On the facts and evidence led in the court *a quo*, both factual and legal causation were not sufficiently proven. Firstly, the appellant did not vandalise the cable. Secondly, the appellant was not aware at the time of the incident that the cable had been vandalised. Thirdly, and most crucially, the accused was not aware nor responsible for the deceased's actions of swinging on the cable. The deceased was electrocuted when he held onto and swung from a live electric cable at a tower light owned by the appellant. The pathologist who examined the remains of the deceased reveals the cause of death as cardiac arrest and electrocution. The trial court found that the appellant was both the factual and legal cause of the deceased's death on the basis of the medical evidence and oral testimony of Farai Chiyanike and Tariro Chikomo, who are both employees of the Zimbabwe Electricity Supply and Distribution Company (ZETDC).

This court observes that the evidence of these two witnesses was clearly biased in favour of their employer. It seems to me that the two witnesses were keen to absolve ZETDC of any wrongdoing in this matter. It is a fact that ZETDC supplied electric power to the appellant's tower light. They have an overall responsibility to ensure that the electricity they distribute to their customers is safely distributed. This applies to electric power supplied to tower lights and all other social amenities. I have no doubt that ultimately ZETDC was an interested party in the outcome of this case. I am fortified in this approach by section 3 and 4 of the Electricity Act (Chapter 13:19) which provides that the Electricity Regulatory Authority is the body tasked with, inter alia, ensuring the safety, security, reliability and quality of service in the production and delivery of electricity to consumers. Further, an elaborate procedure is provided to an investigation of an incident involving the use of electricity. What is curious is that the two witnesses from ZETDC did not adequately explain why there was a discrepancy between the initial findings and the subsequent investigation which incriminated the appellant. In the first inquiry, an e-mail was generated from one Dlodlo to Ndlovu, in respect of that preliminary inquiry which was conducted in the presence of NSSA officers, suggesting that there was enough insulation on the earthing connection. This piece of information would somewhat exonerate the appellant from criminal liability. The second detailed report then put the blame on the appellant.

Chiyanike and Chikomo who gave evidence for the state should have explained the discrepancies and the different findings. The courts are unanimous that a factual basis on which the expert opinion is founded must be placed before the trial court to enable it to satisfy itself of the cogency of the expert opinion. An expert is not expected to present an opinion “plucked” from the air. The trial court may not, therefore, adopt and make the opinion its own because the expert has spoken. There must be a sound legal basis for accepting such expert opinion. When all the evidence is taken into consideration, the report tendered by the expert before the court *a quo* cannot be considered decisive in the light of an earlier exculpatory e-mail communication.

It is this court’s view that it was not proved beyond reasonable doubt that the appellant was the legal cause of the deceased’s death. What transpired at the tower light was not reasonably foreseeable as the appellant was not aware that the deceased would interfere with an electric cable in the manner he did. In any event, the conduct of the deceased that is, swinging on the electric cable could not have been reasonably foreseeable by the appellant. The failure to establish factual and legal causation beyond reasonable doubt was fatal to the state case. The facts of this case are largely similar to the case of *S v Chipinge Rural Council* 1988 (2) ZLR (S). In that case, a Rural Council constructed a public swimming pool, which was largely patronized by children. The Council had failed to provide a person to supervise the children when they were swimming. One day a 12 year old girl was found floating in the water, drowned. On the evidence, the state had not shown that the Council’s negligent failure to provide supervision at the swimming pool caused the death of the child, since even the supervisor had been present performing his duties in a reasonable efficient manner, he might not have noticed that the deceased was in trouble until it was too late. It must be observed that in that case the Supreme Court actually found that the Council had been negligent. However, it concluded that the Council’s negligence was not and could not be deemed to have been the cause of death.

On the facts of the present case, the state did not prove that anything that the appellant could have done would have avoided the vandalism of the electric cables. It was not shown that anything the appellant could have done would have prevented the 17 year old deceased from swinging on the cable resulting in the eventual fatality. Even if the appellant were to be deemed

negligent, the state did not prove that such negligence, in the context of the facts of this particular case, would have been causation of the death of the deceased.

In the final analysis, it is this court's view that the court *a quo*'s finding that the appellant was guilty of culpable homicide when there was clear uncontroverted evidence of the appellant's regular maintenance and attendance to faults at its tower lights across the city was erroneously arrived at.

In our law, the age of the victim in each particular case is a pertinent factor and consideration in the assessment of the duty of care and the determination of whether or not a party had been negligent. The principle is that the older the victim, the more they are expected to take care of themselves and not take risks that will be detrimental to their life and safety.

In this matter the deceased was 17 years old. It was accepted that he was swinging from the cable at the tower light structure when he was electrocuted. The deceased clearly put his life in danger in acting in the manner he did. He should have known and was expected to have known that all electrical installations must be treated with caution at all times. It was also accepted that the earthing cable had not been vandalised. While the appellant had a duty to ensure that all its installations were in good order, which it did as evidenced by the works and inspection schedule tendered before the court *a quo*, a reasonable man was entitled to conclude that there was no defect with the installations.. The vandalism was an unfortunate event which was not reasonably foreseeable in the circumstances.

In the result, and for the foregoing reasons, the court *a quo* erred in attributing negligence to the appellant when both the factual and legal causation had not been adequately proved.

Accordingly, it is ordered as follows:

1. The appeal succeeds.
2. The conviction and sentence is set aside.

Takuva J ..... I agree

*Messrs Coghlan & Welsh*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners