

STATE  
versus  
TENDAI KANYONGO  
and  
LOVEMORE PAWANDIWA

HIGH COURT OF ZIMBABWE  
KUDYA J  
HARARE 12, 13 AND 14 OCTOBER 2011 AND 20, 22 AND 27 MARCH 2013

#### ASSESSORS

1. MR P MUSENGEZI
2. MR A H MHANDU

#### **Criminal Trial**

*E. Nyazamba*, for the State  
*Ms T. Sithole* and *Ms A. Mapanzure*, for the first accused  
*S. Simango*, for the second accused

KUDYA J: The two accused persons are jointly charged with murder. They are alleged to have killed the 28 year old Given Dandajena , a secondary school teacher at a local school, on 31 July 2010 at Sekanevamwe bottle store, Kapondoro business centre in Mutoko by kicking him with booted feet several times on the head and all over his body. They denied the charge.

The State called the evidence of five witnesses and produced three documentary exhibits. The five state witnesses were Memory Marote, Pondo Tibu, Milk Chimwara, Sergeant Fanuel Mvumba and Constable Wonder Kasinagwara. Exh 1 was the post mortem report while exhibit 2 and 3 were the confirmed warned and cautioned statements of each accused person, respectively. The accused persons were the sole witnesses in their respective defences.

It was agreed that the deceased arrived at Sekanevamwe bottle store at 7pm on the day in question. He was in the company of his headmaster Paradzai Dinhidza, and two friends Pondo Tibu and Milk Chimwara. Memory Marote, the bar maid, was serving patrons behind an iron grill protected counter and playing loud music for their entertainment. The bottle store and its surroundings were well lit by ZESA power. At around 7:15pm, the two accused and Koshiwayi Mudiwakure also made their way into the bottle store.

It was common cause that the deceased accused the first accused of having stolen his pint of beer on a previous occasion. The first accused bought a pint of beer and asked the barmaid to deliver it to him. He however refused to accept the beer and renewed his bond of friendship with accused one. Koshiwayi was angered by the behaviour of the deceased. He sought assurance from him that the matter of the stolen beer was truly resolved. A verbal altercation ensued between the deceased and Koshiwayi after Koshiwayi had insulted him. At that time accused one was with the barmaid by the counter. It was common cause that the deceased slapped Koshiwayi in the face. Koshiwayi retaliated by punching him in the face. Accused one refused to use the barmaid's private entrance to exit from the bottle store. He ran to where the two protagonists were. Memory did not see how the deceased fell to the ground. Tibu Pondo and Milk Chimwara who were closer to the incident than her stated that the deceased was felled by both Koshiwayi and accused one who had rushed to the protagonists and joined in the melee. Memory, Pondo and Milk all stated that accused one kicked and stamped on the head of the fallen deceased with booted feet. Pondo and Milk intervened by grabbing hold of Koshiwayi and accused one respectively. Accused two took the opportunity to lift the deceased from the ground by his collar and dragged him outside the bottle store. Memory said accused 2 held the deceased by the collar while Pondo and Milk said he held deceased by the throat. Where the version of Memory and the other two witnesses differ, we accept the evidence of the other two because they were closer to the fighters than Memory. Memory closed the bottle store and rushed to call the headmaster who had left the bottle store before the commotion broke out. Pondo held onto Koshiwayi until he had cooled down. Milk released accused one who rushed after accused two and the deceased expressing his fear that accused two would be killed by the deceased but shouting to on-lookers to let the fight be. Milk rushed after them as did Koshiwayi and Pondo.

Both Pondo and Milk observed through the medium of an electric bulb and tower light that lit the area the accused two throttling the deceased who was busy trying to unclasp his grip. Milk rushed and struggled to release accused two's grip from the deceased's throat. He succeeded. The deceased reeled and staggered from the release of the vice-grip. Accused one rushed at the deceased and punched him while Koshiwayi rushed at the deceased, kicked him and felled him to the ground. Both accused 1 and Koshiwayi kicked and stamped him with booted feet. The second accused joined them in kicking the deceased. Pondo grabbed hold of accused 1. Koshiwayi continued to kick the deceased. Pondo let go of accused one

and rushed to stop Koshiwayi. He was forcibly pushed of by Koshiwayi who together with accused relentlessly kicked the deceased.

The fatal blow was delivered by Koshiwayi who kicked the deceased's head against a rock close to where he lay on the ground. The deceased hit the back of his head onto the rock. He lay motionless on the ground. The two accused persons and Koshiwayi ran away into the night. The headmaster arrived and failed to revive the deceased. He took him in a wheelbarrow to Kapondoro clinic where he was pronounced dead on arrival.

The evidence of Memory, Pondo and Milk was not seriously challenged in cross examination by counsel for the two accused. The three witnesses maintained their versions in chief. They were adamant that the two accused joined Koshiwayi in assaulting the deceased. They disputed that the two accused restrained Koshiwayi from assaulting the deceased. Milk and Pondo stated that together with them the deceased drank 6 litres of opaque beer at Chimwara bottle store and a pint of beer at Sekanevamwe. They further revealed that the whole incident took about 20 minutes of which 5 minutes covered the events outside the bottle store. Apparently the two accused are nephews to Pondo and cousins to Milk. We were satisfied that the Memory, Pondo and Milk were truthful witnesses. They were percipient witnesses who told the truth of what happened. They were in good books with the two accused persons and Milk and Pondo are related to the accused persons. We believed them.

On receiving news of the deceased's death in the early hours of the following day from a local business Mr Musiyiwa, accused one advised accused two before he surrendered himself at Makosa police station, some 10km away. Accused two rushed to the clinic and confirmed the death of the deceased. Koshiwayi was arrested by Sadhaki Chibvamupero, a member of the neighbourhood watch committee who also apprehended accused two at the funeral wake of the deceased. Koshiwayi and accused two were taken by Makosa police the following day.

The two accused made warned and cautioned statements to Sergeant Mvumba that were witnessed by constable Kasinagwara on 2 August 2010. The statements were confirmed by a magistrate at Mutoko Magistrates court on 19 August 2010. The first accused stated that:

"I deny the offence of assaulting and killing the now deceased. I gave him the beer that he wanted. The deceased refused the beer and began talking to Koshiwayi Mudiwakure who was asking him why he had refused the beer that he had been crying for. Given Dandajena then slapped Koshiwayi Mudiwakure on the face with an open hand. He fought with Koshiwayi whilst pulling each other on the ground. I did not assault the deceased, but I wanted to grab Lovemore and Koshiwayi, so that they

refrain from assaulting him. I then went home whilst leaving Given lying on the ground at around 2000 hours.”

The second accused said:

“I admit the offence of assaulting Given Dandajena until he died. We assaulted him with Koshiwayi Mudiwakure and Tendai Kanyongo after he had asked Tendai about his pint (beer). Koshiwayi and the deceased began fighting in the bottle store whilst I was restraining them, but the deceased hit me on the eye, which angered me. I then started to assault him. He was then pushed onto the ground by Koshiwayi, who then kicked him on his head and he banged his head on the rock. Tendai then told me that Given had died at around 2200 hrs. I then ran to the hospital where I discovered that it was the truth.”

The first accused started drinking with the accused two and Koshiwayi at 5pm at a tuck shop close to his home. They carried on drinking at Karimatsenga bottle store before proceeding to Sekanevamwe. The deceased accosted him over a pint of beer that had been drunk by a disabled man in his company on an earlier occasion. He confirmed the belligerent attitude of Koshiwayi toward deceased that led to the slap and counter punch. He rushed to stop the fight. He was helped by accused two stop the fight. Accused 2 took the deceased outside to quell the commotion. He was overpowered by Koshiwayi who alone assaulted deceased outside and kicked his head against the rock resulting in his death. He confirmed that Milk separated deceased and accused 2. Contrary to his warned and cautioned statementhe disputed that deceased fell on the floor of the bottle store. He disputed assaulting the deceased in any way. He drank 6 litres of opaque beer with his two friends. He had been friends with deceased for two years. He was in control of his senses. He tried to stop Koshiwayi from assaulting the deceased outside the bottle store but was in the process left holding his shirt. He had a good relationship with Memory, Pondo and Milk.

The second accused confirmed imbibing 6 litres of opaque beer before reaching Sekanevamwe bottle store where he shared one more scud of opaque beer with his companions before the fight erupted between Koshiwayi and deceased. He did not witness how the fight started as he had gone to answer to the call of nature at a toilet some 150 m outside the bottle store. He rushed in to stop the fight. He took deceased outside in bid to quell the fight. He was overpowered by Koshiwayi who exhibited an insatiable desire to assault the deceased. Koshiwayi single handily bashed the deceased until he kicked his head against the rock. Accused 1 was left holding Koshiwayi’s shirt when he tried to stop the fight. The incident outside bottle store took no more than two minutes. He left the scene with

accused 1. He denied assaulting the deceased. The deceased told him Koshiwayi had belittled him. He alleged that he made his warned and cautioned statement after he been tortured by being hit on his testicles by a rubber band and having his head knocked against Koshiwayi's head. He however did not alert the confirming magistrate because he feared he would be taken back to the police. He exonerated accused one of any wrong doing that fateful evening. He had taken alcohol but was in his sound senses.

The first accused was an untruthful witness. In his confirmed warned and cautioned statement he denied the offence but implicated Koshiwayi and accused one in the assault. In court he exonerated the second accused. The second accused also lied before us. In his confirmed warned and cautioned statement he admitted assaulting the deceased together with Koshiwayi and accused one. In court he exonerated accused one of any wrong doing. In his warned and cautioned statement he justified his aggression on deceased on basis that he punched him in the eye as he was stopping the fight. The investigating officer sergeant Mvumba confirmed the swollen eye. In his defence outline he referred to it. In his evidence in chief he, however, disputed it. His allegations of torture were not canvassed by his counsel in the detail he gave when he cross-examined the investigating officer, sergeant Mvumba. The allegations of torture were in our view an afterthought after he woke up to the consequences of his self-incriminating statement.

We believed the evidence of the state witnesses whereverit differed with that of each accused.

We have paid regard to the definition of murder set out in s 47 of the Criminal Law (Codification and Reform ) Act [*Cap 9:23*] as amplified in *S v Mugwanda* 2002 (1) ZLR 138 (S) at 508H-581F with particular reference to actual and legal intention. We are satisfied that the two accused persons and Koshiwayi did not agree to kill the deceased by word or conduct. They agreed to drink beer together. The two accused joined in the assault of the deceased in solidarity with their drinking mate Koshiwayi. It is not possible to find that they must have foreseen that Koshiwayi would kick the deceased's head against a rock and kill him. The post mortem report confirmed that death was a result of the severe head injury at the back of the head. That injury was inflicted by Koshiwayi.

We are satisfied that there are no jurisdictional facts that give rise to corporate liability between the two accused and Koshiwayi. Each accused's actions must be measured against the cause of death. It is clear to us that accused one committed the offence of assault as defined in s 89 (1) (a) of the Criminal Law (Codification and Reform) Act, *supra*.

In regards to accused two, we considered that he in addition throttled the deceased for about 3 minutes outside the bottle store. His vice-grip was unclasped after much effort by the Milk Chimwara. At the time it appeared that the deceased was also fighting to remove the grip. The deceased did not die from asphyxia. The evidence did not reveal that he was almost in the throes of death from asphyxia when the grip on his throat was loosened by Milk. He was alive until the fatal kick from Koshiwayi. We are unable to find accused two guilty of murder or even attempted murder. His actions amount to assault.

We accordingly find each accused guilty of assault in contravention of s 89 (1)(a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].