

THE STATE
versus
LUSHIAS KATSANDE

HIGH COURT OF ZIMBABWE
MWAYERAJ
HARARE, 30 & 31 May 2012, 1 June 2012, 17 July 2015,
18 March 2015, 20, 21 and 23 October 2015

Assessors: 1. Mrs Shava
2. Mr Mutambira

Criminal Trial

M Nhamo, for the State
Ms M Maboyi, for the accused

MWAYERAJ: It is alleged that on 16 March 2010 and at Nyadire River, Chatseka Village 2, Chief Chitsungo, Pfungwe, the accused killed Nyarai Tore or realising that there was real risk or possibility that his conduct might cause death the accused struck Nyarai Tore on the breasts and threw her body into Nyadire River thereby causing her death. The accused pleaded not guilty to the charge.

In summary the accused denied ever causing the deceased's death or even assaulting her in the alluded manner or any other manner. He stated on the day in question, he was busy handing out food from donors to fellow villagers. Later in the evening he learnt that the deceased had proceeded to her in-laws leaving behind minor children including a two year old.

The state adduced evidence from witnesses and also tendered exhibits in the form of photographs from indications, a wrapping cloth, sandal and 2,5m long wooden stick. A post mortem report by Dr Mugwagwa exhibit 'A' was also tendered by consent. The cause of death could not be determined due to the fact that the body was recovered when it was in an advanced state of decomposition.

From evidence adduced common cause aspects were clear. It is common cause that the accused is a brother in-law to the deceased. Further, it is common knowledge the deceased's husband was not staying at home but working somewhere out of the village. Further it cannot be disputed that the accused and the state witnesses including the children were known to each other. It also became abundantly clear during trial that the accused and deceased attended the same church and that they had what would be termed a love affair relationship. On the night in question the deceased went away leaving her 3 children namely Suwema Kamuzhanje aged 5 Loswita Kamuzhanje aged 4 and Prosper Kamuzhanje aged 2. It is also not in contention that the sandal and wrapping cloth recovered from Nyadire River belonged to the now deceased. That the deceased did not come back after her departure on 16 March 2010 is also common knowledge. Also worth noting as a fact is that the deceased's body was recovered a considerable distance from the point where the belongings were recovered. The Nyadire River at the relevant time was flooded as testified by witnesses. The body was recovered about 5 days later in an advanced state of decomposition.

From the evidence given by the state witnesses and from the accused's defence the issues that fall for determination may be summarised as follows:

1. Whether or not the accused caused the death of the deceased
2. Whether or not the accused made indications on how he committed the offence by assaulting the deceased and throwing her into the river
3. Whether or not the accused recounted how he committed the offence to his friend David Makokora and the village head Ephraim Kandodo.

It is apparent from the common cause aspects as deduced from witnesses, the accused, in full view of Suwema Muzhanje left the homestead in the company of the deceased. The children with the youngest being aged two spent the night alone. Suwema Muzhanje's credibility was beyond question more so when her evidence was viewed in conjunction with the totality of evidence from all other state witnesses and even the accused's version. The accused denied committing the offence pointing out that he was busy with a food programme at school. Worth noting is that such business was conducted during the day and not in the evening or night of the fateful day. The fact that the deceased left home that evening while in the company of the accused remained unrefuted. In fact according to Ephraim Kandodo, a village head and neighbour to the deceased when Suwema Kamuzhanje and siblings approached to advise that the accused had left with their mother and the latter did not return, he confronted the accused. It was clear from the witness that the children, prior to going to him had gone to the accused who chased them away.

Ephraim Kandodo to a great extent confirmed receiving a report from Suwema Kamuzhanje. Upon confronting the accused, the witness recounted to the court how the accused explained that he knew where the deceased was and that he would take the children especially the youngest to her. The witness just like accused's friend David Makorora and the deceased's mother Ennara Tori got to know of details of an affair between the accused and deceased from the accused. The three witnesses got it from the accused that the deceased was pregnant for him. Ennarah Tori a woman fairly advanced in age (about 85) and mother to the deceased narrated that after the news of the disappearance of her daughter the deceased, she after looking for the village head namely Chatseka confronted the accused. She like Ephraim Kandodo was advised of the existing affair and the issue of pregnancy. The accused again revealed to her that he knew the whereabouts of the deceased, whom he said had eloped to Nyamanyara and he was going to take the youngest child to her. The issue of the affair and the pregnancy was confirmed by the accused's friend David Makorora who attended the same church with the accused and deceased. According to the witness the deceased had confessed having an affair with the accused, her brother in law and confessed being pregnant for him. Such a public confession did not go down well with the accused. The witness told the court that after discovery of the body his friend the accused approached him requesting to be accompanied to the village head to explain why he had killed the deceased since he was aggrieved by the deceased's confession. The witness's evidence tallied with other state witness in particular Ephraim Kandodo, Ennara Tori and Suwema that the accused by say so knew where the deceased was. The witness impressed the court as a candid witness and there was no motive for him to fabricate. It was clear from the witness when he was preparing to accompany the accused to open up to the village head they were interrupted by the angry villagers and the accused then fled. The accused was later apprehended by the police.

The accused confessed killing the deceased at Nyadire River to his friend David Makorora. The recovery of a sandal and wrapping cloth belonging to deceased at Nyadire River through the accused's indications to a great extent tallied with the report by the accused to his friend David Makorora. This is also buttressed by the evidence of Crosswell Tsaketsa and Mutombeni, the police details who attended to indications by the accused at the river where he indicated having assaulted the deceased and threw her in the raging river. Some photographs of indications made by the accused were tendered as exhibits by consent. Although it was observed from the pictures accused was in leg irons the defence did not have issue with indications having been freely and voluntarily made.

In fact the state witness Ephraim Kandodo also confirmed that accused led the police

to Nyadire River and the witness witnessed the accused make indications freely and voluntarily. The evidence of indications remained intact as the defence did not make issue with the same but only lamented poor investigation in that the deceased's husband and accused's father were not interviewed.

It is apparent from the accused's defence that he denied having seen or murdered the deceased on the day in question. It is also evident that on the same day the deceased's children say the accused went away with their mother who never returned. The accused said he learnt from his father that the deceased had left the children with him. This version is incredible given that accused's version that he did not know that the deceased had gone missing till 25 March 2010, when he and his father were approached by Ephraim Kandodo. One wonders if the accused had forgotten that he had narrated that the deceased as was usual left the children with his father on 16 March. In fact from the series of events the accused was approached by the state witnesses being asked about the whereabouts of the deceased well before 25 March 2011 and he promised to take the youngest child to it mother since he knew where the mother was. The question is if the children were in custody of the accused why would Ephraim Kandodo, and and accused's father Ennara Tori confront the accused about the children being alone at their homestead. The series of confrontations logically follows the fact that the children were alone at home and not with their grandfather, the accused's father Simon Katsande's custody. Mr Katsande did not testify at the time of trial as he had passed on. However, with or without his testimony it is crystal clear that the obvious anomaly of children of ages two to five being alone in the homestead promoted inquiries into their mother's whereabouts.

On 16 March 2010 the accused in the company of the deceased left the latter's homestead leaving the minor children unattended. Prior to the two leaving the homestead the deceased had confessed at church being pregnant for the accused her husband's brother who was also a prophet at the church. This would not give a good picture at all and would easily be a bone of contention and strife. Thus giving rise to a motive to silence. The circumstances of this case that after the confession the accused went away with the deceased and that the latter never came back, when viewed with the totality of the evidence and even that the accused despite saying the he knew where the deceased was could not lead anyone to the live body and that upon being confronted after recovery of body the accused ran away all point to one direction that the accused is pivotal to the disappearance of the deceased. The accused further to his confessions to the witnesses accepted knowing the whereabouts of the deceased. He indicated he took the deceased and assaulted her at Nyadire River where he subsequently

threw her in the river. The only reasonable inference that can be drawn from these circumstances is that regardless of the inconclusive medical evidence on cause of death due to the decomposed state of the body there is a nexus between accused taking the deceased from home, assaulting and throwing her in a flooded river and her subsequent death. The casual link was not broken in any manner. The accused embarked on conduct realising that there was a real risk or possibility that his conduct might cause death by striking the deceased and throwing her into Nyadire River thereby causing death of the deceased.

The accused is accordingly found guilty of murder as defined in s 47 1(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In arriving at an appropriate sentence we have considered both state and defence counsels' submissions firstly on extenuation and secondly on mitigation and aggravation. We make as a finding that the conviction of the accused person of murder with constructive intention in itself reduces his moral blameworthiness albeit not the criminal liability.

In considering whether or not there are extenuating circumstances the court has to weigh and balance carefully the mitigating and aggravating factors. The court has to consider the factors cumulatively in order to make a correct assessment. In the case of *S v Sigwahla* 1976 (1) 4 SA Holmes JA suggested that depending with the circumstances conviction of murder with *dolus eventualis* on its own or together with other factors may constitute extenuating circumstances. This approach was adopted with approval in the case *S v Siluli* 2005 (2) ZLR 141. In the *Siluli* case the Supreme Court in upholding an appeal against death sentence by the High Court remarked:

“The trial court did make a specific finding on the question of constructive intent. What the court failed to do was to weigh (my emphasis) this factor carefully with other factors of the case before concluding that extenuating circumstances did not exist and passing death sentence.”

In the present case the accused was convicted of murder with constructive intent. The offence was committed in circumstances of mixed fear of family, church and societal condemnation. This emanates from the fact that the accused had been exposed for impregnating a cousin brother's wife through a confession at church by the deceased. These factors when examined in conjunction with the conviction of murder with constructive intent amount to extenuating circumstances.

We have also taken note of the fact that the accused is a first offender, a family man with fairly heavy responsibilities in the form of dependants. Further, in mitigation as

submitted by defence counsel Ms *Maboyi*, the accused has been awaiting the finalisation of his matter for a couple of years. The trial commenced May 2012 and is only being finalised in October 2015 about 3 years delay due to unavailability of witnesses and defence counsel being on maternity leave twice in the period. The period of suspense certainly brings about anxiety. Having a murder charge hovering over one's head is by no stretch of imagination ease. The accused was in custody and the preconviction incarceration has to be taken into consideration in coming up with an appropriate sentence.

As correctly observed by Mr. *Manhamo* for the state, the accused stands convicted of a very grave offence. The aggravatory factors far outweigh the mitigatory factors more so with due regard to the circumstances and manner of commission of the offence. The accused committed the murder in a most brutal and callous manner given the motive was to conceal the murder. By striking and throwing the deceased's body into a flooded river, it would as it turned out to be very difficult to recover the body. The murder was committed as a way of concealing the pregnancy of the deceased, a brother's wife whom the accused had impregnated. Lives were lost by the accused's conduct. The accused as a prophet in the church and secretary to the village chief wielded a lot of influence on the ordinary villagers and his conduct is reprehensible. Further in aggravation is that fact that the precious human life which was lost can never be replaced. No amount of compensation will bring back the mother of the three juveniles. In passing sentence indeed courts have to consider the offence, offender and societal needs and seek to strike a balance with the interests of justice. The gravity of the offence certainly calls for severe sentence. In *casu* life was lost through the accused's brutal attack on a defenceless woman. After the commission of the offence the accused did not seek to mitigate the loss by assisting the deceased's children. He carried on indifferently hoping the raging river would wash away the body. On realising the body had been recovered the accused fled and it only took vigilant police in Harare to arrest and have him back to the scene of crime and thus bringing him to book. Such conduct by the accused goes a long way to reveal the accused's bad behaviour and lack of remorse.

The accused who had the motive to conceal his misdemeanour of impregnating a brother's wife clearly premeditated the offence. He set out with a motive and indeed murdered the deceased in a most cruel manner thereby causing loss of precious human life. The gravity of the offence cannot be understated. The court has to express its displeasure at the lack of respect of the sanctity of human life by imposing a sentence which will not only punish the accused but send a clear message to all citizens that no one has a right to take away the life of another human being. There are civilised ways of resolving problems and not

resorting to violence taking away the life of another. The accused's conduct is condemned given it was highly improper that he, as a prophet and secretary to the chief impregnated a brother's wife. As if that was not enough he mercilessly took away the life of a mother of three juveniles.

From the foregoing it is clear that upon weighing mitigatory factors *vis a viz* aggravatory factors the aggravatory factors far outweigh mitigatory factors. In seeking to strike a balance between the offence, the offender and the societal or interest of justice, it is our considered view that this bad murder case should be visited with a lengthy imprisonment term. We are persuaded by the time accused has been in custody and the extenuating circumstances to depart from life imprisonment. Accordingly accused is sentenced as follows:

20 years imprisonment.

Mupindu Legal Practitioners, accused's legal practitioners
Attorney General's Office, the state's legal practitioners