

THE STATE
versus
AQUINATA NYAKUFA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 15 & 16 June 2016

ASSESSORS: 1. Mr Chidawanyika
2. Mr Chipere

Criminal Trial

J Matsikidze, for the State
V Chinzamba, for the accused

MWAYERA J: The accused was indicted for trial before this court on a charge of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The State alleges that on 11 September 2009 and at village 10, Mayo, the accused unlawfully and with intent to kill or realizing that there was a real risk or possibility that her conduct may cause death continued to engage in that conduct despite the risk or possibility and caused the death of 8 days old Ruvarashe Nzirawa by applying cooking oil all over the infant's body holding her over the flames of a burning fire and immersing her in a bucket of water laced with salt and cooking oil causing her burns from which she died.

On the date of hearing the accused pleaded guilty to culpable homicide and the state accepted the limited plea of culpable homicide. In line with the plea of culpable homicide the state alleged that the accused negligently caused the death of the deceased by failing to realize that death may result from her conduct.

There being no disputed facts, the state and defence counsels submitted a statement of agreed facts as part of the record.

For completeness of record the material facts surrounding the matter as discerned from the statement of agreed facts are as follows:

1. The accused is a female adult aged 40 years residing at village 10 Mayo and is not employed.
2. The deceased Ruvarashe Nzirawa was a female infant aged 8 days.
3. The deceased was the accused's niece.
4. On the 11th September 2009 the accused and other family members, all members of the Apostolic sect were at Rosana Mvere's homestead with the intention of holding an all night prayer.
5. During the course of the night the accused purported to attempt to cure the deceased of an unknown ailment.
6. As part of the "curing" of the deceased the accused removed the deceased's clothes.
7. The accused proceeded to apply cooking oil as well as rub salt on the deceased before praying for her. She further inserted a staff in the infant's mouth.
8. A fire was lit and accused poured more oil on the deceased and some on the fire. She then dangled the deceased above the flames of fire and eventually placed the infant in a bucket of water to which she added salt and cooking oil once again inserting the staff in the baby's mouth and left it there.
9. The infant was eventually retrieved around 2100hours on the request of one Godfrey Tizai and other church members and it was discovered that she had died.
10. The matter was reported to the village head and the police leading to accused's arrest.
11. A post mortem examination established that death was due to severe burns.
12. The accused acted unlawfully and negligently caused deceased's death.

The state with the consent of the defence produced the post mortem report as exh 1. It outlined the cause of death as severe burns as observed by Dr Bothwell Sande.

The statement of agreed facts was read into the record and the contents confirmed understood and appreciated by the accused just like the charge of Culpable Homicide. Mr *Chinzamba* took the liberty to confirm with the court that he had fully explained the essential elements constituting the offence of culpable homicide to the accused. Mr *Chinzamba* stated that the accused understood the essential components of the offence and the exigencies thereto and he confirmed that the plea of guilty tendered by the accused was a genuine plea of guilty in full appreciation of the offence committed. Having been satisfied that in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] of accused understood the charges, the

essential elements of the offence to which he pleaded guilty as well as the acts and omissions as set out in the statement of agreed facts, the court formally convicted the accused of culpable homicide as defined in s 49 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*].

Having convicted the accused on her own plea of guilty of culpable homicide whereby she admitted having caused the death of Ruvarashe Nzirawa by applying cooking oil all over the infant's body holding her over the flames of burning fire and immersing her in a bucket of water laced with salt and cooking oil causing her burns negligently failing to realise death may result from her conduct, we were addressed in mitigation and aggravation respectively by Mr *Chinzamba* and Mrs *Matsikidze*. We found the submissions of both counsels helpful as we grappled to come up with an appropriate sentence in culpable homicide occasioned under some weird spiritual beliefs of praying for the child who was negligently burnt occasioning loss of life.

Sentence

In passing sentence we have considered all mitigatory factors advanced in your favour by your legal practitioner Mr *Chinzamba*. You are a female first offender who pleaded guilty to the charge of culpable homicide thereby showing contrition. Mr *Chinzamba* urged the court to take note of the fact that the culpable homicide occurred when the accused was trying to help by curing the 8 day old baby. Further he submitted that although the accused was capable of legal liability she suffered diminished responsibility when she committed the offence. She believed she was assisting the child as she was prone to helping people when she was possessed by the Holy Spirit. We have also taken note of the fact that the matter has been outstanding since 2009 September, even if the accused was out of custody for the larger part of the 6 year period as she was only incarcerated for 6 months before being admitted to bail that period of suspense and anxiety is traumatic. The accused will leave with the trauma of having caused the death of her sister's baby under the pretext of curing her.

We have also considered aggravatory factors submitted by Mrs *Matsikidze*. The accused stands convicted of a serious offence where precious innocent human life was lost. The constitution guarantees the right to life regardless of age, colour or creed. Young life was irresponsibly taken away in a weird unusual and bizarre manner to borrow Mr *Chinzamba*'s words.

The degree of negligence in the circumstances is certainly high when one considers the manner in which the accused spread cooking oil on the baby and also poured cooking oil

enhancing the fire. Finally the accused burnt the baby by dangling the deceased above the flames of the fire and eventually placed the infant in a bucket of water. The burnt deceased was placed in a bucket of water in which the accused added water and cooking oil inserting a staff in the deceased's mouth. This depicts roasting of the deceased in practical terms if we may borrow the State Counsel's words. The deceased must have died a painful death. We are alive to cases cited by Mr *Chinzamba* in which non-custodial sentence was considered as appropriate. We however, distinguish those cases from the circumstances of this case. The negligence in this case if it were to be visited by community service would put to disrepute the otherwise noble sentencing principle of community service, a preserve for minor offences. In fact the thought of community service in the circumstance of this case would trivialize a serious offence and would make society lose confidence in the justice delivery system. A sentence should fit the criminal, crime and be fair to society' while at the same time being blended with mercy.

There is no room in a progressive civilized community for extremist practices. The religious cult of purporting to have super natural evil and healing spirit under the realm of being possessed by the Holy Spirit has no place in as far as it infringes on other people's rights. In this case precious human life was lost.

Religion is there to protect life, the God given right protected by the Zimbabwean Constitution in s 48. No one has a right to take away that right. The prevalence of offences being committed under extremist beliefs cannot be ignored and exemplary sentence are called for in order to deter not only accused but like-minded people. Such extremist religious beliefs are barbaric and have no place in a civilized and progressive society which upholds human rights and the sanctity of human life. The offence is deserving of a custodial sentence.

Sentence

7 years of which 2 years imprisonment is suspended for 3 years on condition accused does not within that period commit an offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.