

THE STATE  
versus  
BETINA BANI

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 13, 14 July and 6 December 2016

### **Criminal Trial**

Assessors:     1. Mr Msengezi  
                  2. Mr Chivanda

*A. Masamba*, for the State  
*P. Zishiri*, for the accused

MAWADZE J: The accused is charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in that on 23 June 2015 at Delamore Farm, Nyabira she unlawfully and with intent to kill or realising that there was a real risk or possibility that her conduct may cause death of her child, strangled the child with a napkin, white vest and red baby jacket on the neck whilst covering the mouth with the napkin causing injuries from which the child died.

The accused is the mother of the deceased who was a 19 months old female baby at the material time.

At the material time the accused was staying with her live in boyfriend one Alexio Macheso at Malaba farm in Darwendale together with the now deceased. The accused eloped to stay with her live in boyfriend after she had given birth to the now deceased who was not the biological child of the accused's live in boyfriend. The accused's parents were staying at Alid farm in Nyabira.

It is the State's case that on 22 June 2015 the accused left her matrimonial home at Malaba farm on the pretext of leaving the deceased with accused's mother at Alid farm in

Nyabira. It is alleged that the accused's mother was not in a position to accept the deceased. The accused then left Alid farm going back to Malaba farm her matrimonial home with the deceased. It is alleged that along the way and at Delamore farm accused strangled the now deceased and dumped the body at Delamore farm together with the deceased's clothes in a bush. The deceased's body was only discovered on 30 June 2015. The cause of the now deceased's death was found to be asphyxia due to strangulation.

In her defence outline the accused denied that she strangled the now deceased but that the now deceased died due to natural causes. The accused said the reason she took the now deceased to accused's mother at Alid farm was because the health of the now deceased was deteriorating. The accused said her mother was however unable to help her hence she decided to return to her matrimonial home at Malaba farm with the now deceased. The accused said along the way the health of the now deceased deteriorated as deceased started to froth from the mouth and was now bleeding from the nose. As a result, accused said she decided to leave the now deceased under a tree as she had no money to take the now deceased to hospital. The accused said the now deceased should have later died due to natural causes.

During the trial a total of 4 exhibits were produced by consent. The probative value of the Exhibits is as follows;

#### Exhibit 1

This is the post mortem report compiled by Dr Mauricio Gonzalez who examined the now deceased's body on 14 July 2015. The doctor observed that the now deceased had bruises on the face and thorax. It was the finding by the doctor that the now deceased's death was due to asphyxia caused by strangulation. From the findings of the doctor it is clear that the now deceased did not die from natural causes.

#### Exhibit 2

This is the now deceased's Health Card. It was found among deceased's clothes when the now deceased's body was discovered in Delamore farm. The details or information on Exhibit 2 led to the arrest of the accused as her name was endorsed on the Health Card as the mother of the child.

### Exhibit 3

This is the accused's confirmed warned and cautioned statement in which the accused said the following:

"I do admit to the allegations. I killed my child since my parents were chasing me away whilst my child was ill and they were not giving me assistance."

There is therefore no mention by the accused in that warned and cautioned statement that the now deceased died of natural causes.

### Exhibit 4

Is the sketch plan which was drawn on indications made by the accused and some of the State witnesses who discovered the now deceased's body at Delamore farm. While the sketch plan was poorly drawn as some points like points E, F, G on the key are not endorsed on the sketch plan, it is material to note that that point X where the now deceased's body was discovered is not along the road but some 10 metres into the bush.

The evidence of Naison Madhlazi, Martin Vurayayi and Dr Mauricio Gonzalez was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In brief their evidence is as follows;

#### Doctor Mauricio Gonzalez

He examined the now deceased's body and compiled the post mortem report Exhibit 1 already referred to. The Doctor's findings on the cause of deceased's death are not in issue.

#### Naison Madhlazi

He discovered the now deceased's body at Delamore farm when he was cutting grass with his wife one Simbai Nyamharipare who gave *viva voce* evidence and they alerted the police.

#### Constable Martin Vurayayi

He is one of the police details from Nyabira Police Station who attended the scene of crime at Delamore farm after the discovery of the deceased's body on 30 June 2015. He found deceased's body under a tree covered with a green towel and there was a bag of the deceased's clothes besides the body. He secured the scene of crime and guarded the deceased's body until the arrival of other police details on 1 July 2015. Lastly he witnessed

the indications made by the accused as per sketch plan exh 4 and later the recording of the accused's confirmed warned and cautioned statement exh 3.

The State led viva voce evidence from Keresia Mangwanda, Simbai Nyamharipare, Sgt. Douglas Kachere, Alexio Macheso and D/Sgt Fidelis Mutsena. The accused gave evidence and did not call any witnesses. We now turn to the evidence placed before us.

Keresia Mangwanda (Keresia)

Keresia is accused's mother who was residing and working at Alid farm in Nyabira. She gave an insight into the accused's life background. Keresia said the accused was impregnated when she was 17 years old and in Form 1 and gave birth to the now deceased. She said the accused was never married by the man who impregnated her and that when the now deceased was about 1 year 4 months the accused eloped to another man, one Alexio Macheso who stays at Malaba farm.

Keresia said a week before 22 June 2015 the accused visited her at Alid farm from Malaba farm and wanted to leave the now deceased with her but she told accused to first wean the now deceased who was breastfeeding. The accused then went back to Malaba farm with the now deceased.

On 22 June 2015 Keresia said the accused visited again at 5.00 pm with the now deceased and said she had weaned the now deceased and wanted to leave her with Keresia at Alid Farm. In response Keresia said she declined to take custody of the now deceased as Keresia had her own 7 months old baby and was employed, hence could not look after the two toddlers. She said she asked the accused why accused was so keen to leave the now deceased and whether the now deceased was ill or accused's live in boyfriend did not want to stay with the now deceased. Keresia said accused's response was that the now deceased was not ill and that accused's live in boyfriend had no problem at all with staying the now deceased. Accused was therefore not able to proffer any reason to Keresia. Keresia said the next day on 23 June 2015 she woke up and cooked porridge for Keresia's 7 months old baby and the now deceased after which she left for work. She had told the accused to return in August 2015 to leave the now deceased as by then Keresia would be on leave and would be able to look after two toddlers. She said upon her return from work at 14.30 hours she found that the accused had left with the now deceased. Keresia was surprised to learn of the now deceased's death on 30 June 20-15 from the police.

Under cross examination Keresia denied that the now deceased was ill when accused visited her on 22 June 2015. In fact, she said the now deceased was plying and eating well. She also disputed that accused told her that her live in boyfriend did not want to stay with the now deceased. In fact, Keresia said accused said her live in boyfriend had no problems staying with the now deceased.

In our view Keresia gave her evidence well. No meaningful questions were put to her in cross examination we find no reason why she would mislead the Court in her evidence.

#### Alexio Macheso (Alexio)

Alexio is the accused's live in boyfriend and was staying with the accused and the now deceased at Malaba farm in Darwendale. He said he started to stay with the accused at Malaba farm where he was a general hand since 2014 and the now deceased was only 5 months old. Alexio said the now deceased enjoyed fairly good health and only suffered from stomach problems when the now deceased was weaned.

Alexio said on 22 June 2015 the accused left Malaba farm with the now deceased saying the now deceased had some stomach problems and that accused was going to seek help from accused's mother at Alid farm. Alexio said the accused returned the next day 23 June 2015 without the now deceased saying she had left the now deceased with the accused's mother. Alexio said he was surprised some days later when police came to Malaba farm enquiring about the whereabouts of the now deceased. He was later informed of the now deceased's death

Under cross examination Alexio said he never had problems staying with the now deceased and that the accused had eloped to him with the now deceased. Alexio dismissed as untrue that he had told the accused that he did not want to stay with the now deceased. No other useful questions were put to Alexio. We did not find any reason not to accept Alexio's evidence.

#### Simbai Nyamharipare (Simbai)

Simbai resides at Delamore farm in Darwendale where deceased's body was found. She is the one together with her husband who discovered the deceased's body on 30 June 2015. The thrust of her evidence is that on 30 June 2015 as she was cutting grass with her husband one Naison Madhlazi she first saw a bag in the grass. She then moved closer to the bag and discovered deceased's body which was wrapped in a blue towel with a napkin tied

around deceased's head. She noted that the deceased was bleeding from the nose. According to her the deceased's body was not along the road but some metres into the bush. She then alerted a member of the neighbourhood Watch Committee who in turn called the police.

The evidence of Simbai was not disputed in any manner.

Sgt Douglas Kachere (Sgt Kachere)

Sgt. Kachere only took over the matter on 1 July 2015 after the accused had been arrested and detained. He said he took accused for indications and proceeded to draw the sketch plan Exhibit 4. He then took deceased's body for a post mortem examination which culminated in Exhibit 1 the port mortem report. Sergeant Kachere recorded accused's warned and cautioned statement exh 3.

Sergeant Kachere admitted under cross examination that he did a shoddy job in drawing the sketch plan exh 4. This is so because some of the points on the key to the sketch plan like points E, F and G are not indicted on the sketch plan.

The material part however of Sergeant Kachere's evidence is that the deceased's body was about 10 m from the road and at a secluded place.

D/Sgt. Fidelis Mutsena (D/Sgt. Mutsena)

In our view D/Sgt. Mutsena is a very crucial witness as his evidence details the investigations carried out by the police after the discovery of the deceased's body. Initially the State had caused his evidence to be accepted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] hence he sat in Court when other witnesses testified. It turned out that his evidence as per his recorded statement was critical and he was called to give viva voce evidence. The Court took judicial notice of the fact that he was in Court as other witnesses testified and properly warned him. However, none of the State witnesses had covered the issues he canvassed in his evidence.

D/Sgt. Mutsena led the team of police details who attended the scene when deceased's body was discovered at Delamore farm on 30 June 2015. He described where the now deceased's body was, which was near at ant hill in the grass some metres from the road linking Delamore farm and Alid farm. He said the now deceased's body was wrapped in a towel and deceased was putting on a dress without pants. On further checking the body he discovered that a napkin had been tied very tightly around the now deceased's eyes, nose and neck. On top of the napkin was also a baby vest and jacket. He said as he removed the items

tied around the face of the now deceased he realised that the now deceased neck was loose suggesting that it had been broken or twisted. He then saw bag of the deceased's clothes close by and as he checked inside the bag amongst the clothes he came across a baby clinic card exh 2 which had the names of the now deceased's mother and her particulars which indicated that the now deceased's mother stayed at Alid farm some 3 to 4 km away. This caused the police to proceed to Alid farm.

At Alid farm Sgt Mutsena said he located the accused's parents who indicated that the accused was now staying at Malaba farm with her live in boyfriend Alexio Macheso and the now deceased. The police then proceeded to Malaba farm where they arrived at about 0100 hours with accused's parents who remained in the police motor vehicle some distance from accused's residence.

D/Sgt. Mutsena said after they located the accused at Malaba farm and asked accused about the whereabouts of the now deceased, the accused sent them from pillar to post giving various explanations which they pursued until the accused's lies were laid bare. In a summary he said this is what happened;

- (a) he said accused's first explanation was that she had left the now deceased in the custody of accused's mother at Alid farm in Nyabira. By then accused was unaware that police details had been to Alid farm and were with accused's parents.
- (b) D/Sgt Mutsena said upon realising that the police were with her parents, accused changed her story and said she had left the now deceased in the custody of the mother of the biological father of the now deceased at Rayton farm where the biological father of the now deceased one Herbert Girapunji was also staying.
- (c) D/Sgt Mutsena then took accused to Rayton farm where they arrived at 03.00 hours and located Herbert Girapunji who admitted to be the biological father of the now deceased but pointed out that he had never taken custody of the now deceased at any stage and that his mother was not the custodian of the now deceased. D/Sgt Mutsena said accused insisted that she had left the now deceased in the custody of Herbert Girapunji and that Herbert Girapunji should reveal where the now deceased was. D/Sgt Mutsena said Herbert Girapunji was shocked by accused's allegations and insisted he never took custody of the now deceased.
- (d) the accused upon further probing then changed her story and said she had left the now deceased in the custody of an elderly woman whose name accused did not know but had met her along Alid farm in Nyabira. The accused was then asked to lead the police to the exact place where she had left the now deceased with this unknown old woman and accused took them to Alid farm in Nyabira but said she was not sure about the exact place.

- (e) D/Sgt Mutsena said upon being further asked accused then changed her story and said she had left the now deceased at Delamore farm and she then led the police details to the exact place where deceased's body had been found.

At the scene D/Sgt Mutsena said he asked accused who had tied the now deceased with the napkin, the vest and jersey and the accused's explanation was that accused had done so because the now deceased was bleeding from the nose. The accused then revealed that she had simply dumped the now deceased in the bush at Delamore farm after killing the now deceased. The reason accused gave for killing the now deceased was lack of material support from the biological father of the child and accused's parents. The accused then said the now deceased was unwell suffering from stomach pains but the biological father was uncaring hence accused's attempts to leave the now deceased with accused's mother so that she could be with her live in boyfriend Alexio. D/Sgt Mutsena said accused told him that Alexio had no problems staying with the now deceased and would buy clothes for the now deceased and was even against the weaning of the now deceased at such a tender age.

Under cross examination D/Sgt Mutsena said the accused prevaricated on how exactly the now deceased had died. He said initially she said the now deceased suddenly bled from the nose and she proceeded to tie her with a napkin to stop the bleeding and in that process the now deceased died. This implied some error or mistake on accused's part. The accused then change her version and said the now deceased started to cough continuously and accused held the now deceased by the throat to stop coughing and that the now deceased died in the process as accused choked the now deceased. D/Sgt Mutsena said the napkin used by accused was very tight with rift knots.

In our assessment D/Sgt Mutsena gave a clear and coherent account in a chronological manner in respect of the investigations he carried out in order to ascertain the accused's version of events. He was a very impressive witness whose demeanour is beyond reproach. We therefore accept his evidence.

#### The accused's evidence

The accused incorporated her defence outline as part of her evidence.

The accused said when the now deceased fell ill her live in boyfriend Alexio was not able to help and said he was not unwilling to stay with the now deceased. The accused said this forced her to take the now deceased to her parents at Alid Farm where she explained the

illness of the now deceased but her parents were unwilling to help. Instead they told her to return to Malaba farm with the now deceased.

The accused said as she walked back to Malaba farm and after 3 km the now deceased started to breath heavily frothing from the mouth and suddenly died. The accused said she decided to leave the now deceased's body by the road side and did not tell anyone about deceased's death. In fact, the accused said she lied to her live in boyfriend Alexio that she had left the now deceased with the mother of the biological father of the now deceased.

The accused said she would not deny that the now deceased died due to asphyxia but her explanation is that this was caused by the towel she used to strap the now deceased on her back. Accused insisted she tied the now deceased with napkin, vest and towel in order to stop bleeding although she denied that this was very tight. The accused disputed that she left the deceased's body in the bush amongst tall grass but by the road side for people to easily see the body. The accused insisted that now deceased died due to natural causes.

Our assessment of the accused is that her evidence is an insult to the virtues of honesty on which every analysis of the facts should be built on. The accused was a very poor witness who clearly was unwilling to tell the truth even at this eleventh hour.

It is clear from the post mortem report that the now deceased did not die from natural causes. The now deceased was strangled. No reasonable court would believe that this was mistakenly caused by the towel accused always used to strap the now deceased on her back. It is like asking the Court to believe that the sun rises from the west.

Assuming that the now deceased had died through natural causes, the accused's conduct is baffling. Why would the accused not tell anyone about the unfortunate death of her child? Why would the accused decide to abandon the body of her child without even a proper burial? Why would accused lie as to what had happened to the now deceased. The answer in our view is simple. The accused behaved in this manner because the now deceased had not died through natural causes. It is clear accused wanted to conceal the death of the now deceased. This explains why she lied to her live in boyfriend and took the police on a wild goose chase until her bag of tricks was empty which compelled her to own up. In fact, the truth of the matter is contained in her confirmed warned and cautioned statement which actually corroborated the findings made by the doctor in the post mortem report.

It is therefore our finding that the accused, after failing to leave the now deceased in the custody of accused's mother, she decided to end the innocent life of the now deceased by strangling her and dumping the body in the bush. The evidence does not at all show that the

now deceased was ill but what motivated the accused to commit this wicked act was simply her desire to run away from motherhood and start afresh with her new found love as it were.

Accordingly, we find accused guilty of murder with actual intent as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

### **VERDICT:**

Guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] – murder with actual intent.

### **SENTENCE**

In arriving at the appropriate sentence we have to strike a balance between the mitigatory and aggravating features of the case. We have considered and what has been and by both counsel.

We are surprised that the issue of a death penalty was even raised in this case as it is clear that it is not applicable in terms of our constitution. There are two reasons for that. Firstly the accused is a woman or female offender. Secondly the accused was a juvenile at the time of the commission of the offence. This court therefore has the discretion to assess the appropriate sentence.

We have considered that the accused is a female first offender. This means that she should be treated with some measure of urgency. It is also common cause that the accused was just 17 years when she committed this offence. As a juvenile although tacitly emancipated through marriage the fact remains that she was still immature and lacked the full capacity to appreciate the consequences of her conduct.

The accused's background is an important mitigatory factor we considered. She was an unsophisticated farm dweller who was barely literate as she had been impregnated while in form one. This means that the accused became a mother at the tender age of about 17 years. Further, she was already into her second marriage as it were before she was even 18 years old. The burden of motherhood weighed heavily on her. This probably explains the accused's conduct.

There is a very high degree of foolishness and immaturity in how the accused committed this offence. The mind boggles how the accused believed she would get away with such a crime. It should have dawned on the accused that she would be asked either by her parents or live in boyfriend about the whereabouts of the child and that her lies would

soon catch up with her. To make matters worse she dumped the child's body together with a bag of the child's clothes which contained the accused's details as the mother of the child. This clearly shows accused's foolishness and immaturity.

It is accused's favour that she has suffered from pre-trial incarceration of about 14 months. One would want to believe that the accused has learnt her lesson. Once the accused decides to be a mother she should know that she cannot run away from the burden of motherhood.

This court has a duty to uphold the sanctity of human life as is protected in our constitution. The accused should know that human blood is sacred and cannot be spilled for whatever reason.

The impression we got from the accused is that she is not contrite at all. Even throughout the trial she showed no signs of contrition. It is frightening that at such a tender age the accused is so hard hearted. This is even confirmed by the cruel manner in which she took the life of the deceased. The deceased was an innocent soul which looked to accused as a mother for protection and comfort. Instead the accused decided to kill the child in a very painful way by strangling the child and leaving the body in the bush to be devoured by animals. Even after her arrest accused was not prepared to immediately own up but sent the police from pillar to post. The accused should be taught about the value of life.

Having said so, we do not believe that an unduly harsh sentence is called for.

In the result the accused is sentenced to 10 years imprisonment.

*National Prosecuting Authority, State's legal practitioners  
Garikayi & Company, accused's legal practitioners*