

THE STATE
versus
ROBERT CHIGUMA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 8 & 9 October 2015 & 10 July 2017

Criminal Trial

ASSESSORS: 1. Mrs Shava
2. Mr Chokuvinga

M. Manhamo for the State
J. T. Razunguzwa for the Accused

ZHOU J: The accused person is facing two counts of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is being alleged, in respect of the first count, that on 21 October 2014 at around 2230 hours and at Plot 11 Wells Farm, Wedza, the accused unlawfully and with intent to kill, murdered the now deceased Gilbert Maweto, or realizing that there was a real risk or possibility that death might result struck the deceased with a piece of firewood several times on the head thereby causing injuries from which the deceased died instantly. In respect of the second count, the allegations are that on 21 October 2014 at around 2300 hours and at Plot 11 Wels Farm Wedza, the accused person unlawfully and with intent to kill, murdered Phinias Nyikadzino Chiwade or realizing that there was a real risk or possibility that death might result, struck the deceased with a machete on the head thereby causing his death instantly. The accused person pleaded not guilty to both counts.

The prosecution led evidence from eight witnesses. Six witnesses gave *viva voce* evidence. These are Khawulani Mpofu, Favour Bwoni, William Mwakonya, Norothy

Chakwenya, Pascal Gwatinyanya and Menard Chitovhoro. The evidence of two witnesses, namely, James Chiwade and Dr Mauricio Gonzalez was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Two postmortem reports prepared by Dr Mauricio Gonzalez were produced in evidence. Exh 1 is the report in respect of the examination of the remains of Gilbert Maweto, while exh 2 is the report in respect of the remains of Phinias Nyikadzino Chiwade.

Kawulani Mpofu is a neighbour of the accused person. He was also a friend of the now deceased persons Gilbert Maweto and Phinias Nyikadzino Chiwade. His evidence was as follows. On 21 October he proceeded to the residence of the now deceased Gilbert Maweto (hereinafter referred to as “Gilbert”) where he met with the latter and the deceased Phinias Nyikadzino Chiwade (hereinafter referred to as “Phinias”). Phinias resided at the same house but occupying different rooms with the accused person. He informed Phinias that he had seen his stolen kitchen cabinet at the accused’s residence. The three of them decided to proceed to the accused’s residence to confirm if the cabinet indeed belonged to the witness. They proceeded to the accused’s residence but found him not present. Only accused’s wife was present. After waiting for him for some time they left. He returned to his residence, leaving the two deceased persons to also proceed to their respective residences. Their agreement was to meet on the following day and go back to the accused’s residence. On the following day he did not see the two deceased persons. He stated that subsequent attempts to get the kitchen cabinet from the accused’s residence were fruitless as it had been removed to a destination unknown to him.

Favour Bwoni resides at Plot 71 Village 2, Fels Bristol Farm in Wedza. He knows the accused person as a local villager. His homestead is about a kilometre from where the accused resided. The deceased Gilbert was his son-in-law in that he was married to the witness’s daughter. He also knew the deceased Phinias as a local villager. He is the one who discovered the body of Gilbert in a fire kiln belonging to the Madzima family on 28 October 2014. He alerted the other villagers about the presence of that body. The police were informed about it after that. He stated that he had expected Gilbert to come to assist him in planting tobacco as per his promise on the last day that he saw him alive. However, Gilbert did not come, and he was worried because he could not get through on his phone. He even inquired with the neighbours of Gilbert but was advised that both Gilbert and Phinias were missing. The body of Gilbert was

discovered some seven days after the date on which he was supposed to have come to assist the witness with the planting of tobacco.

The third witness to testify was William Mwakonya, a duly attested member of the Zimbabwe Republic Police. On 28 October 2014 at about 2000 hours he was assigned by the officer-in-charge at his station to attend to a murder report which had been received. He proceeded to Kujeke Village under Chief Svosve, Hwedza in the company of Sergeant Zimunya. Upon arrival he observed a kiln which had both ends covered with bricks. He used a torch to illuminate the area, and went on to remove the bricks which had been used to close the kiln. Inside the kiln he observed a decomposed body of a human being. He covered the kiln with bricks and left two police constables guarding the place overnight. He returned the following morning in the company of officers from the Criminal Investigations Department's Homicide Section at Marondera. With the assistance of the villagers who were present the bricks covering the kiln were removed. He observed that the body was covered with a cloth around the head, and a tree fibre was used to tie the cloth which covered the head. The body was identified to him by Favour Bwoni as that of Gilbert. When he examined the body using his hands he discovered that the head was smashed. The body was taken to Marondera Hospital. On 1 November 2014 the witness received another report of a body which had been discovered in a shallow pool at the same Kujeke Village. He and Sergeant Zimunya proceeded to the scene. They arrived at the same time as officers from CID Marondera. He observed that the body was covered with a blanket. When the body was removed from the pool with the assistance of villagers he observed deep cuts on the head. According to the witness the cuts were so deep that he could see the brains of the deceased. The body was identified to him as that of Phinias. He took the body to Marondera Hospital as well. He subsequently took the bodies of the two deceased persons to Harare where Dr Gonzalez conducted postmortem examination of the bodies. After the postmortem he returned the two bodies to the relatives for burial.

Norothy Chakwenya, was married to the accused person prior to his arrest. She had only stayed with him for about three months. The witness elected to testify as a witness for the State after her rights in terms of s 291 of the Criminal Procedure and Evidence Act were explained to her. She knew Gilbert as her neighbour. Phinias stayed at the same house where the witness stayed. On the day in question the accused person left home at about eight o'clock in the

evening. When the deceased and Khawulani Mpofu visited their residence the deceased was still away. Upon his return at about ten o'clock that same evening the witness advised the accused about the visit by the three and the issue of the kitchen cabinet which Khawulani Mpofu claimed to be his, and the fact that they had waited for him for about ten minutes. The accused left their room stating that he was going to see Khawulani Mpofu. He returned to their room and picked an axe and stated that he intended to see the deceased persons. He only left the axe behind when the witness insisted on accompanying him. When the accused left his residence it was after ten o'clock in the evening. He only returned around three o'clock in the morning of that night, indicating that he had been to the dam where he used to do some fishing. Upon his return the accused only slept briefly and woke up stating that he was proceeding to Chihota. He declined to disclose the purpose of his visit to Chihota when the witness asked him. Before he left he asked the witness if she knew a tree called *Mutunduru*. After that he took a bicycle and left. This was now after ten o'clock in the morning of the following day. The accused was away for about a week and some days. When he returned he collected his belongings. The witness was away at the garden when the accused came and loaded the property, including the witness's property, onto a motor vehicle. The witness saw the motor vehicle but it left before she got to her residence. She later received a telephone call from the accused person on her mobile phone. He advised her that he was the one who had collected their property. He advised her to wait at their residence. The witness got to know that the accused had actually looked for her at her mother's residence before taking away the property. She slept at the residence, and had to get a blanket from Phinias's room. She had last seen Phinias on the date that he came with Gilbert and Khawulani Mpofu in connection with the kitchen cabinet. On the following day the accused called her and asked her to proceed to "Kariba Dam", a dam which the witness stated to be along the way to Marondera. Officers from the Criminal Investigations Department came at the time that the accused was calling the witness. They asked her to put her mobile phone on loud speaker. She went with the police officers to Fels Primary School, some seven kilometres away, where the accused person was arrested. She identified Phinias's shoes which the accused person was wearing on the day that he was arrested. She identified the shoes in question in court. During cross-examination the witness stated that the police threatened the accused person to confess. When asked to elaborate she only said: "I cannot elaborate."

Pascal Gwatinyanya is a Zimbabwe Republic Police officer stationed at CID Marondera. He proceeded to Hwedza on 29 October 2014 after receiving a report of a body which had been found in a kiln was made by Wedza Police Station. Gilbert's body was in the kiln. The witness stated that both ends of the kiln were closed using bricks. The bricks were removed with the assistance of the people who were present. He noticed that the head of the deceased was covered with a cloth which had a bark string around the neck of the deceased. The body was removed and taken to Marondera Hospital. The witness stated that he discovered that the accused person was communicating with his wife, the last witness, inviting her to come where he was. He and the other officers took advantage of that communication and went with the wife to Fels Shopping centre where the accused was arrested. Upon his arrest the accused admitted to killing Gilbert. The witness and the other officers took accused to the deceased's homestead where he showed them a wheelbarrow which had blood stains. According to the witness the accused stated that he had used that wheelbarrow to carry the deceased's body to the kiln. The witness identified the wheelbarrow, which was produced as exh 6. According to the witness the wheelbarrow belonged to Gilbert's employer. He also observed that there was blood in Gilbert's room. The accused showed the witness the place where he had burnt the clothes which he was wearing on the day that he killed the deceased. The accused professed ignorance of the whereabouts of Phinias when he was asked by the witness. Accused was then taken back to the police station. The following day the accused led the witness and other officers to Karekvale Farm where his property was. The place was some 8 to 10 kilometres from the place where Gilbert used to reside. He discovered that the accused had fertilizer which he had stolen. The issue of the fertilizer was dealt with separately. The witness also found the kitchen cabinet which the accused person was being alleged to have stolen. They left it there because it was the subject of a report at Hwedza Police Station. The witness later took the accused to the police station where he recorded a warned and cautioned statement from him in respect of the murder of Gilbert. The statement was recorded in the presence of Constable Chitovora who witnessed it. It was confirmed by the Magistrate at Marondera Magistrates Court.

On 1 November 2014 he received a phone call from Hwedza Police Station advising that the body of Phinias had been found. He proceeded to the scene where the body was retrieved from a pool and taken to a mortuary. The body was decomposed but was not in the advanced

stage of decomposition which Gilbert's body was, probably because it was in water. The witness observed a big scar in the head of the deceased. On 3 November 2014 he took the two bodies for postmortem examination at Harare Hospital. On 4 November 2014 the witness recorded a warned and cautioned statement from the accused person in respect of the murder of Phinias. That statement was confirmed by the Magistrate at Marondera. The witness identified the two warned and cautioned statements.

Menard Chitovoro is a member of the Zimbabwe Republic Police attached to Marondera CID. His evidence is essentially similar to that of the last witness in relation to the retrieval of the body of Gilbert from a kiln, as well as how they took advantage of the communication between the accused person and his wife to locate the latter at Fels Growth Point where they arrested the accused, and how they were led to the residence of Gilbert. The witness stated that the accused showed them where he had found Gilbert praying and struck him. The accused also took the witness and the other police officers to the place where he had found Phinias sleeping before he attacked him. His evidence regarding the recovery of a blood stained wheelbarrow was consistent with that of the last witness. He witnessed the recording of the accused's warned and cautioned statements in respect of both counts one and two, and was one of the officers who took the accused person to the Magistrates Court for the confirmation of the statements. He was also present when the accused made indications about how he attacked Phinias. The witness stated that the accused's wife identified the black safety shoes which the accused was wearing at the police station as belonging to Gilbert. He and the other police officers also recovered padlocks from the accused. The pair of black safety shoes, the padlock keys, and wheelbarrow were also produced as exhibits.

James Chiwade whose evidence was admitted in terms of s 314 of the Criminal Procedure and Evidence Act, is an elder brother of the deceased Phinas Nyikadzino Chiwade. Gilbert was his employee. His evidence is that on 1 November 2014 he received communication to the effect that the body of Phinias had been found in a nearby stream. He proceeded to the scene where he saw the body wrapped in a brown blanket. He telephoned the police who attended the scene.

Dr Mauricio Gonzalez is a medical practitioner who at the relevant time was employed by the Ministry of Health and Child Care as a Forensic Pathologist. He is the one who

conducted autopsies on the remains of Gilbert Maweto and Phinias Nyikadzino Chiwade and prepared the postmortem reports which were produced in evidence as exh. 1 and 2. In respect of Gilbert, the witness was unable to ascertain the cause of death due to the state of decomposition of the body. As for Phinias, his conclusion was that death was due to brain damage following from skull fractures caused by assault. He observed that there were head injuries and multiple skull fractures.

In his defence outline the accused tendered a plea of not guilty on the ground of insanity to both charges. He did not dispute the factual allegations as outlined in the summary of the state case. He adopted his warned and cautioned statement in which he admitted to the charge. In the defence outline it was stated that a request would be made for “reasonable time to have the sanity of the accused person examined pursuant to section 29 (2) of the Mental Health Act [*Chapter 15:12*]”. No request was made at the commencement of the trial for such an examination to be carried out. In fact, no report was ever placed before the court to suggest that the accused could have been mentally disordered when the alleged offences were committed. There was therefore nothing to trigger the application of the provisions of the Mental Health Act.

The accused person gave evidence before this court. He stated that he knew Phinias as his brother-in-law and Gilbert as a neighbour. Upon being asked by his legal practitioner as to what happened on 21 October 2014, the accused started by apologizing to his legal practitioner for having misled him and to this court, before stating that on that day he arrived home from work. His wife advised him of the visit by Phinias, Gilbert and Khawulani in connection with the kitchen cabinet. He proceeded to the residence of the two deceased persons and confronted them about the allegations relating to the kitchen cabinet. At that stage a misunderstanding ensued during which he took a piece of wood and struck Gilbert twice on the head and he fell down. Phinias was in his bedroom at that time. The accused stated that he proceeded to Phinias’s bedroom where the two exchanged blows. He was pushed by Phinias and fell on the door step. The accused stated that he realized that Phinias had an object which looked like a handle of a plough. When Phinias tried to strike him with that object he got hold of it and wrestled it away from Phinias. He used the object to strike Phinias 4-5 times on his head. Phinias fell down. After Phinias had fallen down he went outside where Gilbert was lying and illuminated him. He realized that Gilbert had died. He went back into the room and discovered

that Phinias had also died. At that moment he panicked. He went into one of the deceased's room and took a wheelbarrow and carried Gilbert's body after having covered the head with a piece of cloth which Gilbert had used during his prayer session. He conveyed Gilbert's body to the kiln. He got a bark string which he tied around Gilbert's neck before placing the body inside the kiln. He returned and collected the body of Phinias which he carried to a nearby stream using the same wheelbarrow. He covered the body using a brown blanket. He left the body in a pond at the stream. He then went back to the deceased's residence. He burnt the raincoat which was blood-stained. He used keys which he found at the deceased's residence to block the keys to the doors before he proceeded to his homestead. He stated that when he went to the deceased persons' residence his intention was not to kill but to discuss the issue of the kitchen cabinet. He stated that he does not know what "spirit was now possessing" him which led him to kill them.

From the totality of the evidence led, it is common cause that the two deceased persons died as a consequence of the injuries inflicted upon them by the accused person. It is also common ground that after killing the two deceased persons the accused carried them from their residence using a wheelbarrow and placed them at the places described above.

The only issue for determination is whether the accused had the intention to kill the two deceased persons or realized that there was a real risk or possibility that death might result but nonetheless proceeded with his conduct which caused the death of the deceased persons. None of the witnesses who testified was present when the deceased persons were struck. Only the accused person was present. Norothy Chakwenya's evidence was that when the accused person left his residence he had attempted to carry an axe with him but left it when the witness sought to go with him to the deceased's residence. Although the accused attempted to dispute that fact during his cross-examination he never challenged Norothy Chakwenya's evidence regarding his desire to carry the axe with him when he went to the deceased persons' residence. The evidence of Norothy Chakwenya is therefore accepted.

The accused stated that he was emotional when he left his residence to go to the deceased persons' residence. He clearly knew that he intended to fight them. The manner in which he immobilized two adults and killed them showed careful planning on his part. In his evidence in this court the accused stated that there was a scuffle with the deceased persons. However, his warned and cautioned statement which he incorporated into his defence, and was produced by

the prosecution as an exhibit, does not suggest that he was in danger as a result of any of the deceased's conduct. As for Gilbert, he actually found him praying when he struck him with a piece of firewood. In the warned and cautioned statement the accused stated that he first struck Gilbert twice on the head and he fell down. Then he went for Phinias and attacked him as well. Upon realizing that Gilbert was attempting to get up the accused struck him five times on the same part of the head until he saw blood coming out of his head. He then dragged him into a room before wrapping him using a white garment. He loaded him onto a wheelbarrow. The fact that he was able to wrap the deceased and put him onto a wheelbarrow without any resistance suggests that he had died or was now helpless. The accused was even able to tie a string around the neck of the deceased. Although the firewood was not produced in evidence, there can be no doubt that severe force was applied in inflicting the fatal blows upon the deceased. The weapon used and the force applied, the number of blows inflicted, the part of the body at which the attack was directed, as well as the fact that the accused person waited to see that his victim had died show that his clear intention was to kill Gilbert.

Phinias was struck several times using a piece of firewood and a machete. The serious head injuries show that severe force was applied. According to the warned and cautioned statement initially he struck Phinias using the firewood referred to earlier on. He then struck him using a brick. Later he got hold of a machete which he used to strike him five times. Again, he made sure that his victim had died, because he was able to wrap the body using a blanket and place it in a wheelbarrow before taking it to the stream where he dumped it. The accused even had the time to burn his own bloodstained clothes and a raincoat after killing Phinias. He clearly had the intention to kill Phinias. He said it in his warned and cautioned statement that he killed him in order to destroy the evidence, by which he meant that he killed Phinias so that there would be no one to witness that he had killed Gilbert.

The accused showed no sign of mental disorder during the trial. He never suggested that he was mentally disordered when he committed the offence. He abandoned his defence outline and apologized to his legal practitioner for having given him false information. He spoke eloquently, and showed that he recalled the events as they happened. He never stated that he was threatened or assaulted by the police officers during investigations. The inconsistencies between his evidence in court and his warned and cautioned statement show an attempt to embellish his

version of events as the trial progressed. In his warned and cautioned stamen he never mentioned a misunderstanding or scuffle with Gilbert. His statement was that he just struck him on the head when he found him praying.

From the evidence led, the accused person unlawfully and intentionally caused the death of both Gilbert Maweto and Phinias Nyikadzino Chiwade. Accordingly, the court's verdict is as follows:

1. In respect of count one, the accused is found guilty of murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]; and
2. In respect of count two, the accused is found guilty of murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

National Prosecuting Authority, legal practitioners for the State
Nyakutombwa Mugabe Legal Counsel, accused's legal practitioners