

THE STATE
versus
VENCANCIO MACHEKANO

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 15, 23, 24 January 2019 and 14 February 2019

Criminal Trial

ASSESORS: 1. Mr Chagonda
2. Dr Sana

M Musarurwa, for the State
D Tandiri, for the accused

MWAYERA J: The accused pleaded not guilty to a charge of murder as defined in terms of s 47 1 (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 14 October 2017 and at house number 1188 Chikanga 1, Mutare, the accused unlawfully caused the death of Lloyd Kudzai Munjoma by assaulting him with sticks all over his body indiscriminately several times intending to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility thereby causing injuries from which the said Lloyd Kudzai Munjoma died.

The cause of death in simple terms is head injury occasioned by blunt trauma. The State with consent of the defence tendered as exh 3 a post mortem report compiled by Dr Roberto Trecu and Ivian Betacourt. The Doctors concluded that the cause of death was severe cerebral oedema, sub-arachnoids haemorrhage and head trauma due to blunt trauma.

Further adduced in evidence by consent were, 3 pages of the deceased's photographs, exh 1, 4 pages of photographs of the accused making indications exh 2 and a sketch plan of the general lay out of the scene was produced as exh 4. The State adduced oral evidence from 3 witnesses while the other 8 witnesses' evidence was formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The evidence was mainly on common cause aspects as such it was not contentious.

Method Mazen'e, a duly attested member of the Zimbabwe Republic Police's evidence was that he received a report of theft of property by the deceased. The report was given by the accused person around 07:00 hours. Upon attending the scene with other details he found the deceased's body and then ferried the body to Mutare Provincial hospital for autopsy. The officer in charge Chikanga Police Station one Gift Tembo's evidence was similar to that of Method Mazen'e. Trymore Kamota a duly attested member of Zimbabwe Republic Police witnessed the recording of the warned and cautioned statement by the investigating officer one Sergeant Simon Mutarwa.

Tererai Machechesi, a member of the Zimbabwe Republic Police's evidence was that he basically drove the police details and accused person to the scene for purposes of recording indications. The other witness whose evidence was admitted is a police detail Talkmore Razau, who was responsible for taking photographs during indications. Alice Munjoma an aunt to the accused's evidence was that she warned deceased to desist from criminal activities in the year 2012 and she subsequently chased him away. The witness identified the body of the deceased. Finally also, admitted as evidence is the evidence of the two doctors who are government forensic pathologists. They examined the body and concluded that the cause of death was cerebral oedema, sub-arachnoids haemorrhage and head trauma due to blunt trauma. The evidence formerly admitted was fairly straight forward on common cause aspects.

David Damson Tembo, a neighbour to the accused told the court that in the afternoon on the fateful day the accused's wife advised him that someone had stolen their solar panel and invertor. He assisted the accused's wife to search for the property with no luck. On the same day at around 2300 hours, he heard people shouting "*thief, thief*", and he went out to investigate. While outside he observed several people surrounding the deceased while the accused was grabbing the now deceased by the belt. The group of people assaulted the deceased whose clothes were by then wet.

The witnesses observed that the deceased had some injuries on his head and face. The witness also told the court that he saw accused assault the deceased 4 times on the back with a switch the accused plucked from a Mutohwe tree. It was during the assault that deceased disclosed his name and admitted that he had stolen property which he hid in the banana plantation. Part of the mob searched but did not recover the property. The witness advised the accused to hand over the deceased to the police but the accused was adamant he would not release the deceased until he recovered his property.

The witness retired to bed and the following morning he observed the deceased's body at the accused's residence. The witness gave his evidence in a clear and straight forward manner. He denied having participated in the assault of the deceased. He actually insisted he advised the accused to report the matter to the police. The witness was credible as he clearly did not seek to exaggerate his evidence by testifying on how the deceased was assaulted before he went out to witness the mob assault the deceased while the accused held grip of the deceased by the belt.

It was clear from the witness's evidence that he together with accused and one Ramosh Shumba were picked by the police as suspects. The two were later released after police investigations revealed they were just witnesses. Ramosh Nhamo Shumba's evidence was basically the same as that of David Damson Tembo. He also went out to investigate upon hearing noise and call alerting "*thief, thief.*" The witness observed a lot of people assault the deceased at the backyard of Mr Tembo. According to the witness, the accused used a switch to assault the deceased but not several times.

The witness also told the court that he advised his neighbour the accused to have the deceased taken to the police station but he later resisted pointing out that he would only take deceased to the police after recovering his property. The manner in which the witness testified was beyond reproach. It was clear from his evidence that when he was observing the accused did not severely and severally assault the deceased but that many people were assaulting while the accused was holding the deceased by the belt and at a later stage deceased was just seated. The witness was truthful that he was also picked by the police but later released after police had investigated the matter. That the witness did not identify part of the mob is understandable given people are said to have been coming from different places some from the bar and others from shops and different directions. They just responded to the alarm of there being a thief as raised by the accused person.

The last State witness who gave oral evidence, the Investigating Officer one Sergeant Simon Mutarwa recounted how he went about the investigations. He exercised his discretion and released the two State witnesses and proffered the charge of murder to the accused person. The witness recorded a warned and cautioned statement from the accused. He further took the accused for indications and recorded same as per exhibits tendered before the court.

I must however, point out that there are shortcomings in the manner in which the Investigating Officer carried out investigations. He omitted to sign for indications and also omitted to cause the accused to sign the indications. The Investigating Officer was aware that

the accused was legally represented but he did not notify or invite the legal practitioner to attend to his client during indications. It was clear the two State witnesses Mr Ramosh Nhamo Shumba and Damson Tembo witnessed the fracas which led to the present allegations but they were not taken for indications. Such shoddy manner of carrying out investigations is not acceptable as it is not only detrimental to the state case but detrimental to the interests of justice. The witness was however sincere with the court and quick to acknowledge his omissions. He lacked sincerity when he sought to exaggerate the accused's involvement by denying the obvious as given by the other state witnesses and accused person that a mob gathered and subjected the deceased to assault. That no one recognised the members of the public who gathered and participated in assaulting the deceased together with accused is not an excuse for misinforming the court that no one ever mentioned about the mob.

The investigating officer poured some cold water into the otherwise warm state case. Were it not for the fact that the indications, the assault by the accused using a stick, the man handing of the deceased by the accused the undisputed pictures of the accused during indications are common cause, the omissions by the Investigating Officer would have dealt the state case a heavy blow.

The accused in turn denied the allegations. He is the only witness who testified in the defence case. He in his defence sought to unconvincingly remove himself from having played a part in the commission of the offence. He portrayed a picture that all he did was chase a man whom he found standing in his campus upon being roused from sleep by dogs. The accused while pointing out his property had been stolen and that he raised alarm for people to attend to the "thief" sought to distance himself from the attack on the alleged thief the deceased. He indirectly implicated the two state witnesses his neighbours whom he seemed to have issue with their release by the police.

It was apparent during cross examination that the accused had insisted on not releasing the deceased till he recovered his property. The accused buckled under cross examination as his denial of the obvious that he plucked a Mutohwe switch and grabbed the deceased by the belt while the mob subjected the deceased to assault was exposed. That deceased at some stage was badly injured and just helplessly sat on the ground exposed the accused as a dishonest witness. He was bent on hiding behind a finger in the face of clear incriminatory evidence. In his defence outline the accused pointed out he chased the deceased who crushed into a pillar at a small foot-bridge stream and fell into the water. He during evidence in chief and under cross

examination oscillated from saying the deceased got injured when he hit on the concrete pillar or slab to saying he did not know if the deceased got injured.

Accused was again exposed as not candid with the court. He desired so much to recover his property. He did not only manhandle and subdue the deceased but called out for the public to deal with a thief. In giving evidence he sought in a contradictory manner to persuade the court to accept that he pleaded with people not to assault the deceased. Seriously what transpired after the accused subdued and grabbed the deceased, facilitating assault by members of the public and detaining the deceased at his house till the following morning is not consistent with a man not involved in the assault and not desirous of punishing the alleged thief.

Generally the accused did not impress the court as a truthful witness. The accused was central and instrumental to the events that occurred. Out of all the people at the scene he had reason to facilitate the assault more than his neighbours he sought to implicate. Belatedly the accused sought to distance himself from the offence on the basis that his assault on the deceased was just 4 strokes by a 40 cm switch and that that could not have caused head injuries which occasioned the death of the deceased. The evidence and sequence of evidence have to be looked at cumulatively. The accused upon hearing the dogs barking went outside and saw the deceased in his campus. The latter revealed he stayed in the banana plantation and took to his heels. The accused pursued and apprehended the deceased who had fallen into a pool of water.

According to the accused the deceased had hit on a concrete pillar or slab. Witnesses observed injuries on the face and head. The accused still called out “*thief thief*” having subdued the deceased whom he grabbed by the belt and satchel. In that subdued manner the deceased was further assaulted indiscriminately by the mob. At no stage did the accused dissociate himself from active participation in dealing with the “thief”. The accused associated with the unlawful act of assaulting the deceased. The unlawful attack on an injured and subdued man ended up with the fatal consequences. The question that has to be addressed is whether or not the accused engaged in the unlawful attack of the deceased with an intention to kill or realising that there was a real risk or possibility that death may occur but none the less persisted with the conduct.

In a criminal trial the state has to prove the guilty of the accused beyond reasonable doubt. The accused on the other hand has no duty to prove his innocence. See *S v Ndlovu and others* HB 81/06. See also *S v Kuiper* 2000 (1) ZLR 113 (5) and *R v Difford* 1937 AD 370 @ 373.

A close analysis of the totality of the evidence does not reveal that the accused set out with a motive to kill the deceased and proceeded to kill him. The evidence does not show that it was substantially certain that death would result. To this end therefore the accused cannot be convicted of murder with actual intention. From the evidence before the court it is apparent that the accused did not take lightly to theft of his property. When the dogs barked at night and he went out only to see deceased in his yard the accused focused on apprehending the deceased whom he suspected to be the thief. The accused mobilised people as he gave chase calling out "*thief thief*". The deceased fell into a pool of water from which the accused pulled him out and maintained grip by the satchel and belt. While the deceased was in that immobilised state the accused maintained grip while the mob assaulted the deceased indiscriminately. The assault was prolonged and the accused facilitated by man-handling the deceased. The accused himself further assaulted the deceased using a switch plucked from a Mutohwe tree.

In this case the accused created a dangerous situation whereby he facilitated the assault of the deceased by members of the public who responded to his call to attend to a thief. The question is simply, would a reasonable man in the circumstances which the accused found himself in have realised that death may result his conduct and guarded against the possibility of death? If the answer is in the affirmative and accused did not take steps to guard against the possibility of death then he ought to be found guilty of negligently causing the death of the deceased. In this case the accused did not take any steps to mitigate the possibility of death.

The assaults persisted while the accused demanded his property back pointing out that he would not release the deceased till he recovered his property. Given the mob attack at his instigation, and the insistence on not releasing the deceased liability occasioned by recklessly cannot be escaped. The accused ought to have realised that there was a real risk or possibility that the mob attack in such an unrelenting manner might cause death but none the less persisted or left it unchecked. In fact the accused upon realising the deceased was badly injured left the latter unattended while outside his house. If it is to be accepted that the accused fed the deceased with porridge he surely was very close to him to observe the deceased was in bad shape. In that bad condition in the morning the accused left the deceased unattended and proceeded to look for his solar panel and inverter and then after failing to recover proceeded to report theft of his property.

The police came and retrieved the body of the deceased. Clearly from the moment the accused called out thief and the mob responded to the call up to the time the deceased passed on the accused insisted that the deceased should lead to recovery of his stolen property. That

insistence which occasioned unlawful attack on the deceased resulted in the indiscriminate attack by the mob on the deceased. The accused at no stage dissociated himself from the active participation in the unlawful attack in circumstances where he realised that his actions may result in death but failed to ensure or guard the possibility of death. Clearly a reasonable man in accused's position would not have allowed a badly injured immobilised man to remain in his campus without necessary medical attention just for the sake of getting alleged stolen property recovered.

The accused in a reckless fashion negligently caused the death of the deceased and is accordingly found guilty of culpable homicide as defined in s 49 1 (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In reaching at an appropriate sentence we have considered all mitigatory factors and aggravatory factors submitted by Mr *Tandiri* and Mr *Musarurwa* for defence and State respectively. The accused is a first offender middle age man of 43. He is a family man with responsibilities. The accused has been awaiting the finalisation of this matter for 14 months. The anxiety which goes with having serious allegations of murder hanging should not be understated. The accused will live with the stigma of having caused the death of a fellow human being. It is correct that the deceased was subjected to mob attack and accused is facing the music alone. However, sight should not be lost of the fact that accused is the one who unrelentingly summoned the mob.

The moral blameworthiness of the accused in this case is high. The manner in which the accused carried on the night to morning envisaged recklessness towards human life. Precious life was lost due to the high degree of negligence of the accused. The deceased had crushed his head on a concrete pillar or slab when he fell in water at the time accused gave chase. There was no reason for further assault on his body. Instead of allowing the law enforcement agents to take over and investigate further the accused and the mob sought to meet out instant justice. In aggravation is the fact that the accused a security guard had apprehended and overpowered the deceased but behaved irresponsibly by leaving the seriously injured man unattended. As correctly pointed out by Mr *Musarurwa* the circumstances of this case are distinguishable from the cases cited *S v Mlambo* HMT 19/18 and *S v Mabunga and Another* HMA 33/18 in that the assault on the deceased in *casu* was prolonged and no help was rendered by the accused. The accused seemed to value his property more than human life. No one has a

right to take away the God given constitutional right to life. The tradition of instant justice is not only barbaric but has no place in a civilised and progressive society like ours. There are proper legal channels to be followed where one is aggrieved and wronged. The offence is deserving of a custodial sentence. However I will suspend a large portion of the prison term in due recognition of the mitigatory factors exhorted by Counsel Mr *Tandiri* on behalf of the accused.

The accused is sentenced as follows:

5 years imprisonment of which 2 ½ imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, State's legal practitioners
Tandiri Law Chambers, accused's legal practitioners