

THE STATE
versus
LYDIA KAHWEMA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 5 March 2019

Criminal Trial

ASSESORS: 1. Mrs Mawoneke
2. Mr Chipere

M Musarurwa, for the State
Ms T Jaricha, for the accused

MWAYERA J: The accused was initially charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 26 February 2018 and at Mangatu Village, Chief Marange, Mutare the accused unlawfully caused the death of Tafadzwa Kahwema by assaulting him several times all over the body and hitting his head against the wall intending to kill him or realising that there was a real risk or possibility that the conduct might cause death and continued to engage in that conduct despite the risk or possibility thereby causing severe head injuries from which the said Tafadzwa Kahwema died. The accused pleaded not guilty to murder but admitted to having negligently caused the death of the deceased. The accused tendered a plea of guilty to culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The State accepted the limited plea of guilty to culpable homicide. A statement of agreed facts summarised the circumstances of the matter as follows:

On 26 February 2018, the deceased a 13 year old juvenile was sent home from school for not having a ball point pen. This annoyed the accused person, the mother of the deceased. The accused then assaulted the deceased with switches several times all over the body and further hit the deceased's head against the wall. The deceased sustained severe injuries from which he passed on. The body of the deceased was ferried for post mortem examination. Dr T. Javangwe conducted the examination and concluded that the cause of death was traumatic

force, subcutaneous/intramuscular secondary to blunt force and head injury post mortem ex 1 refers.

Having been satisfied that the accused assaulted the deceased with switches several times all over the body, and further that the accused hit the head of the deceased against the wall in circumstances where she ought to have foreseen that serious injuries or death could occur liability squarely attached on the accused. The accused further failed to act reasonable by failing to guard against the possibility of death given the excess of the corporal punishment imposed. We concluded that the accused was negligent in assaulting the deceased in the manner that she did. We thus concluded the accused was guilty on her own plea of guilty to culpable homicide.

The accused is accordingly found guilty of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In passing sentence we have considered all mitigatory and aggravatory factors submitted by Ms *Jaricha* and Mr *Musarurwa* respectively. We have also considered the circumstances of the matter and sentencing principles ably identified by counsel in cases. See *S v Phiri* HH 116/15, *S v Nsoro* HH 190/16.

The court in passing sentence has to seek to strike a balance between the offence and the offender while at the same time tempering justice with mercy in such a manner as not to make society lose confidence in the justice delivery system. It is mitigatory that accused pleaded guilty as a sign of regretting the offence. A plea of guilty should be credited for what it is worth and the sentence to be imposed must reflect the reduction emanating from such plea of guilty sentence. See *S v Makumbe* HH 39/2013. See also *S v Fergas* (1) ZLR 487 @ 493 B the Supreme Court had this to say:

“A plea of guilty must be recognised for what it is, a valuable tool for smooth administration of justice while not absolving it will be rewarded.”

The accused has been convicted of a grave offence of culpable homicide. The penalty provision reflects that a sentence of up to life imprisonment can be considered in appropriate cases. This is a clear indication that society and the legislature view the offence as serious. Section 48 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 protects the fundamental right to life. This means that no one should take away another's God given right to life. The courts have to weigh in and show that the sanctity of precious human life cannot be

eroded by violent and irrational individuals. The court is duty bound to mark its abhorrence of domestic violence by passing appropriate sentences.

The degree of negligence in this case is very high. The accused's conduct bordered on recklessness as she brutally and viciously assaulted her 13 year old child using switches and further busting the head against a wall. The moral blameworthiness is high given the child looked up to the mother for protection and support. The child had been sent away from school for a ball point pen and for him to be visited with such a vicious attack by the mother was unwarranted. The mother had a duty and obligation to maintain the child.

The deceased lost his life at the hands of his mother. This is one of the worst type of domestic violence on a vulnerable child by the parent. The courts have to send the message loud and clear that domestic violence of any nature will not be tolerated but severely punished. A civilised community should uphold a homely atmosphere which is peaceful and readily available to resolve differences in a peaceful manner. To severely and fatally assault a child for a pen is unacceptable and must be condemned. The child was subjected to torture both at home and at school. The right to education was offended by being chased away from school. Further the child's rights were crushed by the mother who violently attacked the child instead of shoulder the duty of care and provision on herself. The irresponsible and cruel conduct by the mother calls for a custodial sentence.

The accused is sentenced as follows:

8 years' imprisonment of which 4 years' imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving use of violence on the person of another for which she is sentenced to imprisonment without the option of a fine.