

THE STATE

Versus

BVUMAI MACHENA

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
GWERU 29 JANUARY 2004

Judgment

CHEDA J: Accused who was aged 27 at the time of the alleged offence was charged with the murder of Edward Gazura who was aged 44.

Accused pleaded not guilty to this charge but tendered a plea to culpable homicide. The state did not accept this plea and have chosen to lead evidence. The state called Adam Gasura a 10 year old boy who is the deceased's son. His evidence in essence is that he was the herd boy on this fateful day. One of the cows went through a fence over to drink water in the dam. Accused rushed to turn the beast away and appeared angry. On seeing him in this mood he ran away to his home whereupon he went into the hut where his brother was. Accused later followed him driving the cattle which the witness was herding. He called him outside but he refused to come out while his brother Paul did.

Later in the evening the witness saw accused coming again, this time his father had arrived from the fields. Accused and deceased exchanged greeting. He then overheard accused saying that deceased's cattle had destroyed his crops. The next thin he saw accused throwing a blow on the deceased with a clenched fist. They then grabbed each other and they fell on the ground such that deceased was on top. He then saw the deceased stand up and said that he had been stabbed. Deceased

staggered, leaned on the fowl run, fell down and subsequently died. He denied that their cattle had destroyed deceased's crops. He also denied that deceased was the first one to strike accused with a stick or with anything at all.

Lucia Gasura, deceased was her brother also gave evidence. She stated that on the day in question at about 14.30 hours she was at home when she saw Adam (the last witness) come and enter the hut where his brother Paul Gasura was. He then later saw accused following Adam. Accused was driving cattle, which cattle were being herded by Adam. On arrival he went straight towards the boy's hut and called out twice on Adam to come out. However, Adam did not come out but instead Paul came out of the hut. On seeing him accused said "..... There is a grown up" to which Paul replied "Uncle we thought the young man had taken the cattle to the grazing area, we did not know that he had taken them to your field." She also stated that accused then enquired the whereabouts of the deceased. He was then advised that the deceased spends time at the fields and only comes home in the evening. Accused then told Paul to tell the deceased that he was going to return in the evening.

In the evening deceased arrived alone. Before he sat down, accused also arrived. Deceased offered him a stool to sit on while he accused sat on the wheel barrow and they exchanged greetings. She also stated that accused then started accusing deceased of letting his cattle turn his fields into a grazing area. Deceased denied having done so and further advised accused that he had always thought that the boys were taking them to the grazing area. They further exchanged some words and she also heard accused saying "I will kill you". At that time accused punched the deceased and they then grabbed each other falling down with deceased on top of accused. At that stage she, together with deceased's wife stood up and approached them with a view of stopping the fight. Before they could do anything deceased stood

up from accused and remarked that he had been stabbed. He then staggered and fell to the ground and subsequently died.

It is also her evidence that deceased did not provoke accused neither was he armed. She also denied that suggestion by accused that deceased was the aggressor as he is the one who started throwing a stick at him.

Victor Ngoni also gave evidence. He is a duly attested member of the Zimbabwe Republic Police and was the investigating officer in this matter. The gist of his evidence is that he attended the scene of the crime together with one Constable Kuzipa. He observed that there were no crops which had been destroyed. They went right round the field and saw spoor of one animal near a small puddle of water. He further observed that, accused's finger was injured and on enquiry accused advised him that he had been bitten by the deceased. The state then closed the case.

Accused gave evidence. His evidence is that on the day in question he found deceased's cattle in his fields having eaten his crops. He drove them to the deceased's homestead whereupon he found Paul Gashura present and he advised him of same. He went away and later went to the business centre where he met deceased. They started talking about the alleged destruction of his crops by deceased's cattle. It is further his evidence that deceased insisted him to accompany him to his home in order to discuss this issue relating to the destroyed crops.

Instead of being apologetic, deceased boasted that he was not going to look after his cattle because accused had settled at a grazing area and then threatened him with death. It is also his evidence that deceased picked up a stick, threw it at him but he ducked it. Deceased then grabbed him bit him on the finger, they then fell down. While they were falling down accused dropped a knife which looked like an Okapi. Accused picked it up while still lying down. Opened it using his left hand and then

thrust it on the deceased and the blow landed on deceased's left side of the chest as evidence by the post mortem which was accepted by the defence.

The facts which the court finds to have been proved by the state are as follows:

- (a) that accused and deceased were related and are from the same neighbourhood;
- (b) accused's crops were not destroyed by deceased's cattle;
- (c) accused went at deceased's homestead twice at about 1430hours and also in the evening;
- (d) that on his visit during the day he was very angry and had advised Paul to inform his father about the destruction his father's cattle were alleged to have done;
- (e) deceased was stabbed once on the left side of the chest;
- (f) deceased had spent the day at his fields
- (g) deceased was not at the business centre and hence did not meet accused there;
- (h) accused arrived alone at deceased's homestead;
- (i) deceased did not provoke accused in any way;
- (j) deceased did not assault accused at any stage;
- (k) deceased was now armed at all;
- (l) deceased did not own and/or possess an Okapi knife.

All state witnesses gave their evidence well without seeking to exaggerate despite a very intense and thorough cross-examination they were subjected to by the defence counsel. The first two witnesses lost their father and brother respectively. One would have expected them to lie in an effort to pin the accused down. This, was however not the case. None of them attempted to say that they saw how deceased was stabbed. The corroborated each other in

that deceased was at home when accused arrived and that it was accused who threw the first blow at deceased. An independent witness the police officer stated that there were no crops that had been destroyed and that only one beast entered the field and only went to where there is a paddie of water or where there used to be a small dam. This is the place where cattle used to drink before accused took occupation of this area which is now his field. I find that accused was not a faithful witness in that:

- (a) if his crops had been destroyed the police officer would have seen it.
- (b) It was not the deceased who visited him at his homestead because he in fact had advised Paul (i.e. deceased's son) that he was going to come back in the evening. It is therefore not true for him to make it appear that deceased invited him to his home.
- (c) That the Okapi knife belonged to deceased because according to state witness, deceased did not possess or own such a knife and if indeed it belonged to deceased he should have produced it to the police or left it behind for all to see. It is therefore clear that he hid it in order to avoid its production as an exhibit.

Mr Masuku has argued