

THE STATE

Versus

MARGARET MAKOTOSE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 10 OCTOBER 2006 AND 12 OCTOBER 2006

Judgment

CHEDA J: Accused was charged with murder. She pleaded not guilty but instead tendered a plea of guilty to culpable homicide.

The facts of this case can be summarised as follows: -

Accused who was a woman of 21 at the time of the alleged offence was married to Nhamoinesu Mutiyavo (hereinafter referred to as “Nhamoinesu”).

Nhamoinesu brought in his 5 year old girl into his union from his previous marriage with Laina Moyo. During her stay with the accused and Nhamoinesu she met her death.

The State called Laina Moyo the natural mother of the deceased. Her evidence in brief was that she had a child with Nhamoinesu from which the deceased was born. Their marriage ran into difficulties resulting in their separation.

Nhamoinesu ended up with custody of the deceased under circumstances which are not clear, but, however, are not relevant for this case. She was not happy with Nhamoinesu having custody of the child in the first place. She had allowed him to have custody for 2 weeks but he extended custody to 2 months.

She gave her evidence very well and truthfully and no serious challenge of her evidence was made by defense counsel.

Bella Dzingwe was accused's neighbour and had been since 2004, when she moved in with Nhamoinesu. Prior to this, she had Laina Moyo as her neighbour for between 2-3 years.

It was further her evidence that her residence and that of accused was divided by a durall wall. Her evidence is that between the 22nd and 23rd November 2005, in the morning she observed Nhamoinesu leaving the house, leaving accused and deceased behind.

She heard accused uttering the following threatening words to the deceased, "Yesterday you were being too pompous or way ward when your father was present, today I want to assault you".

She heard a subdued cry emoting from accused's yard. Thereafter she heard the door being closed with both accused and deceased having gone inside. She then heard the loud cries and also heard a beating sound from the house.

It was also her evidence that accused was in the habit of insulting and assaulting the deceased almost on a daily basis. She further stated that the deceased was very quite and disciplined child.

Under cross-examination, she stated that accused was not friendly but they exchanged greetings. She further stated that she was under the impression that it was accused who had destroyed Nhamoinesu and Laina's marriage and as such she sympathised with Laina Moyo. She, however, made it clear that despite this she did no hard feelings against accused.

We find that she gave her evidence very well, despite the intensive cross-examination she was subjected, she did not seek to conceal her lack of knowledge in this matter.

An example is when she told the court that she only heard cries and a beating sound but did not see accused beating deceased on that day.

We accept her evidence as we find her to have been a credible witness. We therefore accept her evidence.

Lubelihle Madingane also gave evidence, she is also accused's neighbour. They live in detached houses and are separated by trees. The distance between her house and that of the accused is approximately 15metres. Her evidence was that on the 23rd November 2005 she was inside her house when she heard a child crying. She thought it was her sister's child and went outside to investigate and discovered that infact it was Natasha (the deceased). While she was still standing she saw accused holding a stick. She got concerned and went to make a report to a neighbour. The stick was about 1metre long and moderately big. She was quite sure that the cry was that of deceased as it was coming from the accused's house. When asked why she went to make a report to the neighbour is because she had previously observed accused assault the deceased. She went further and stated on that earlier occasion she witnessed accused insulting the deceased to fetch her own switch which accused used to assault her with.

She went home on the same day and when she returned on the 25th November, she then received a report that the deceased had passed away.

She was adamant that she did not see accused on the 23rd of November 2005, and not 22nd November 2005. We find her to have been a very honest witness and her evidence is accepted in toto.

The State sought and obtained from the defense evidence of the following witness:-

- (1) Nhamoinesu Mutiyavo
- (2) Beatrice Ngondo
- (3) Blessing Barnet

(4) Violet Kadete

(5) Douglas Phiri

Defense called the accused herself. It is common cause that she at the time of the offence she was married to deceased's father and she had always treated deceased, like any mother would and would chastise her in a normal manner.

Her evidence is that on the 22nd November 2005, she was home as usual wherein she gave the deceased food (sadza) before she went to the shops. Upon her return she found the deceased having soiled herself. She plucked a switch from a Peach tree.

Out of rage she beat up the child on the back and legs. While she was beating her up, the child ran away but slipped and fell on three occasion. Accused then took her to the toilet to bath her. She sat in a dish. After finishing bathing her, then accidentally fell upon a shower stand shaped like a microphone.

It is during that fell that deceased sustained these injuries which eventually led to her death. After bathing her, she left for another township and on her return she found accused's father having arrived. She then informed him of that the child had soiled herself and she had assaulted her. She eventually applied hot water compress on her heard.

On the 23rd of November 2005, it is her evidence that the deceased's father left, leaving her with her child. She later observed that the child's condition has changed for the worse. The child was subsequently taken to the clinic and was pronounced dead on arrival.

She disputed Bella's evidence that she assault the child resulting in Bella hearing some subdued or muffled noise from the child knock against the wall and a door being banged. She denied ill treating the child or even beating her up without reason. She vehemently denied as the deceased on the 23rd of November 2005, and as such she could not have been heard to cry.

Under cross-examinations accused admitted assaulting her on the 22nd of November 2005. She assaulted her on the feet, pushed her away from herself, pushed her against the wall thereby cutting her head against the wall. She also fell on the floor. Deceased fell on the ground three times.

Accused admits assault the deceased but only on the 22nd of November 2005, and not on the 23rd of November 2005. This aspect of the evidence is to be weighed against that of the other State witness. Both Bella and Lubelinhle's evidence is that accused assaulted the deceased on the 22nd of November 2005. This fact is independently confirmed by Doctor Ravindran who stated in his evidence in brief that: -

- (1) that he conducted a post-mortem on the 28th of November 2005 on external examination and he found a swelling on the back of the head, which was as large as a lemon.
- (2) he could feel pieces of bones on and there was a cracking nose.
- (3) this was confirmed when he carried out a post-mortem examination.
- (4) the occipital bone was fractured into pieces.
- (5) the wound extended up to the brain carrying damage to the brain.

He was of the opinion that death was due a heavy blunt object with great of force.

Asked to why he was of the view that a great force was used, his view was that it is very difficult to fracture the bones of a child of that age because the sutures are not yet fully developed because there is the membrane joining the bones absorbs the pressure to the head.

He specifically ruled out the possibility of the deceased having died as a result of falling on the ground in that:-

- (1) the fall on its own would not result in those injuries and;
- (2) that a fall against a shower stand would have resulted in alaceration.

We find that accused was not a convincing witness. We find as a fact that: -

- (1) accused had a long history of insulting and assaulting the deceased.

- (2) assault the deceased with a switch, pushed her to the floor and against the wall several times.
- (3) the child died as a result of injuries sustained as a result of a blunt object inflicted on the deceased with great force.

Accused's version of events is accordingly rejected.

Counsel for accused submitted that although accused had tendered a plea of guilty to culpable homicide he was won of the view that the proper conviction will be that of murder with constructive intent.

Firstly the concession by the Mr Mashoko is proper and accepted. The accused is accordingly found guilty of murder with constructive intent.