

**THE STATE**

**VERSUS**

**ALBERT TAGWI MTOMBENI**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 11 OCTOBER 2006 AND 12 OCTOBER 2006

Judgment

**CHEDA J:** The accused is charged with murder which charge he pleaded not guilty.

The allegation against the accused are who was aged 20 years at the time of the offence murdered one Aaron Tagwirei Mthombeni who was 42 years age. The accused and deceased were related in that deceased was accused's uncle.

On the 3<sup>rd</sup> day of August 2004 at about 1400 hours, accused approached deceased who was seated at the verandah of his store discussing accused's brother's illness who had since been taken to Kwekwe for treatment.

A misunderstanding arose between them which resulted in the accused striking the deceased with an axe on the back of the head resulting in his death.

Zenzo Ntini. The state opened its case by calling Zenzo Ntini. He knew accused as both are residents of Samambwa area, in Gokwe. He also knew the deceased as he was his employer at Tagwirei Grinding Mill.

On this fateful day he saw the accused arrive at the shopping centre. They exchanged greetings and thereafter went to sit with the deceased on a bench. At about 1500 hours he heard both accused and deceased speaking with loud voices as if they were

arguing. He then left for the toilet nearby and on his return he observed that deceased had been struck with an axe and its blade was embedded on the deceased's head.

Accused was standing there, he tried to remove it but only managed to remove the axe handle. Accused then ran away. A report was then made to the Police which led to the accused's arrest.

Accused was not armed on arrival. He also did not hear what the deceased and accused were discussing, all he could see was the movement of their lips.

The state sought and obtained the admissions of the following witnesses, namely; Tendai Chiundura, Job Nyamadzawo, Assistant Inspector Boniface Munzunze and Sergeant Manyudza Mandove and Doctor G.Z Masokovere. None of them witnessed either the altercation or the murder itself.

In addition, the state produced a post-mortem report number HP 329/04 as Exhibit No. 4. The doctor recorded that there were multiple fractures on perieto-occipital area (skull) and ruptured bloody brain tissue.

The state then closed its case. The accused gave evidence. His evidence is that deceased was his uncle. He stated that prior to this incident, he together with his brother Michael, Dennis and Sebastian Mthombeni had been to see a n'anga in Mbizo township, Kwekwe with regards to his brother Fanuel's illness. The n'anga told them that the cause of the illness was their uncle the deceased who had caused the death suffering of many relatives. The n'anga then asked them as to what he wanted him to do, in response, Michael said that it was better for him to die.

The n'anga then took them through some witchcraft rites with the objective of killing the deceased. Infact accused was asked to stab a piece of cloth which had deceased's name on it which he did.

On the day in question he went to see the deceased and they started discussing about unexplained illness that had afflicted his family.

It is his further evidence that the deceased went into a trance while these discussions were going and confessed to his possession of goblins which were causing all these problems. It is also his evidence that deceased also told him that even his sick brother Fanwell was going to die.

On hearing this he became angry and he pulled an axe. They wrestled over the axe, he over powered him and struck him on the head resulting in his death. He further stated that deceased pulled a gun underneath his shirt but does not say what became of it.

Michael Ndlovu, Monica Takavadii and Thandiwe Takavadii also gave evidence. Their evidence is basically that they were aware of accused's brother's illness and that he wanted money to treat him. They vehemently denied that there was even any discussion about the need or agreement to kill the deceased.

We find that accused and members of his family indeed consulted a n'anga with a view of suffering out whoever, was bewitching them resulting in numerous deaths in general and his brother's illness in particular. These witnesses did not support him as far as the issue of goblins and the agreement that deceased should die in concerned. We, however, find that accused and his relatives/his witnesses believed that they were being bewitched. Surely, with that belief, they must have suspected or at least be told who the witch was, for the simple reason that where there is witchcraft there is witch. Their denial is understandable, is that they are aware of the consequences of engaging in such parties.

We find that accused though his belief in witchcraft, believed that the deceased was causing the death and/or illnesses in the family. He decided to confront the deceased. A misunderstanding developed and he struck the deceased in the manner he did.

Accused used an axe to struck the deceased who was sitting down and aimed his blow on the head. Accused desired deceased's death or if he did not, by engaging in this actually he foresaw death as a substantial certainty but proceeded in resrepentum of the consequences. His use of a lethal weapon a defenceless and unsuspecting man aiming on his head a vulnerable part of his body confirms his objective.

His explanation with regards to him wrestling with deceased over the axe and the gun which he says accused is alleged to have hidden under his shirt is not true and is accordingly rejected.

We find that the state has proved its case beyond reasonable doubt and the accused is found guilty of murder with actual intent.