

THE STATE

Versus

NORMAN SIBANDA

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

HWANGE CIRCUIT COURT 4 NOVEMBER 2010& 7 JULY 2011

P Khumalo state counsel

Mukuku defence counsel

Criminal Trial – Ex Tempore

KAMOCHA J: The 27 year old accused admitted assaulting the deceased with a log 5 times but stated that he had no intention to kill him. He stated that he had delivered three blows with the log aiming at the head of the deceased and aimed two blows at the back. The court entered a plea of not guilty on his behalf.

His legal representative tendered a plea of guilty to culpable homicide but the state counsel would not accept the limited plea.

The outline of the state case was read and produced as exhibit 1. The accused's defence outline was produced as exhibit two. In it the accused said the following;

“Accused denies the allegations of murder against him and he therefore pleads not guilty to the charge.

He will state that he had dropped from the bus on his way from Mbembesi where he had gone on a visit. He will state that he had been drinking some beer in the bus. He was drinking Smirnoff and he had finished a bottle of 750ml and he was drunk.

He met the deceased who was in the company of some young men. The young men then invited him to go and drink traditional brewed beer. He refused and told them that he did not drink the beer known as “sigodokhaya”. This did not go down well with the deceased who quizzed him as to why he did not drink the traditional beer and he asked him who he thought he was.

Deceased hit him twice on the face with an open hand and he bled from the left ear. When he tried to run away, the deceased pursued him and he hit him on the back with a brick. Deceased continued to pursue him and he threw a stone which he dodged.

Accused then took a log and hit deceased five times with the log all over the body.

He will state that he never mentioned anything about ZANU (PF) and MDC and that was the motive for the assault. He will state he had no intention to kill the deceased but he acted out of intoxication, provocation and self defence.

Wherefore he prays that he be found not guilty of murder and he offers a plea of guilty to a lesser charge of culpable homicide.”

The accused made an extra curial statement which was confirmed by a magistrate at Inyathi on 18 August 2003 which was produced as exhibit 3. In it the accused had this to say:

“On the 7th of June during the evening around six o'clock I disembarked from a Sihube bus on my way from Mbembesi whereupon I came across Zenzo Maphosa. There were certain young men there among whom I recognized one of them called Khumbu and they invited me for some traditional brewed beer. I the (*sic*) stated that I did not drink traditional beer. Zenzo Maphosa then asked me who I was who claimed not to drink traditional beer. Following that, Zenzo Maphosa pursued me and struck me once on the back with a stone. I then picked up a wooden log and whilst he was still picking up some stones I struck him five times on the head with the log and I then run away (*sic*) leaving him lying on the ground. I had no intention of killing him other than acting in self defence.”

The accused does not mention being struck with an open hand in the face causing him to bleed from the left ear in his statement. That was clearly an afterthought which must be rejected. Matters were still fresh when he made the statement to the police. His defence outline was made some 7 years after the event. Another material discrepancy is that he alleged in his statement that he struck the deceased five times with the log on his head whilst the deceased was in the process of trying to pick up some stones. Yet in his defence outline he said the deceased was pursuing him and threw a stone at him which he dodged. It was then that he took the log and hit deceased five times all over the body with it. It is not true that he hit deceased all over the body. He aimed all the blows at the deceased's head as stated in his extra curial statement and that is supported by the evidence of Rebecca Mkandla. The accused also tried to under play what he did when he told the court when pleading that he had delivered only three blows to the head of the deceased and two blows to the back of deceased. The correct position is that he aimed all the five blows with the log at the head of the deceased as he lay down.

Exhibit 4 was an affidavit by Doctor Takesure Madzivire who certified the deceased dead at 11.32 hours on 6 July 2003. Exhibit 5 was an affidavit by Constable Bhebhe who identified

the body of the deceased to Doctor I. Jekeny who performed a post mortem on the remains of the deceased and compiled a post mortem report which was produced in this court as exhibit 6. The doctor noted that deceased had a 4cm sutured wound on the right occipital area. There was a left fronto parietal healing incisional wound.

Internal examination revealed right occipito-temporal fractures and the longest of them was 5 cm on the skull. The brain had left subdural haematoma of the parietal frontal and temporal brain depression. The lungs had pulmonary oedema.

The doctor concluded that the cause of death was subdural haematoma skull fracture and head injuries following the assault.

The seventh exhibit was the log used by the accused to assault the deceased.

Dimensions

Length 113cm

Circumference at thicker end 16.5cm

Circumference at thinner end 11cm

Weight 985grams

The court observed that it was hard mopane tree log from a plate rake

The evidence of the following witnesses was formally produced by consent – Barnabas Mazani, Sikhumbuzo Sibanda and Dr I. Jekeny.

Viva voce evidence was led from four witnesses namely Langton Mpofu, Rebecca Mkandla, Ephraim Khabo and Never Khabo. All the witnesses live in village 5 Kennelworth in the Inyathi area. The deceased also lived in that area but the accused was a stranger in the area. He lived in Nkayi.

Langton Mpofu told the court that on the fateful day he and Mloyiswa Sweswe came out of his aunt's homestead when they got onto the road outside the homestead he noticed a stranger who happened to be accused walking in the direction they intended going. They walked behind the person who was about 20 metres in front from them. As they continued walking they met the deceased who was in the company of Never Khabo. They stopped to talk to them. As they were still talking the accused turned back and went to where they were and called the deceased by his nickname saying:-

“Santana you are an MDC supporter, I will kill you today.”

The accused was armed with a brick in each hand.

Mloyiswa Sweswe remonstrated with the accused. He asked him if he was not ashamed of wanting to assault an elderly person. The accused seemed to have taken heed of that and threw the bricks down. He then went back to Tshuma's homestead where he had come from.

Langton Mpfu and Sweswe continued on their way and parted ways with the deceased and Never Khabo.

He said the deceased was not armed with anything when the accused threatened to hit him with bricks. Neither did deceased say anything to provoke the accused into uttering the threats.

As far as the witness was concerned there was nothing to suggest that the accused was drunk. The witness and Mloyiswa never invited the accused to go and partake in traditional beer. Nobody invited him to do so at any stage.

The evidence of Langton Mpfu was supported by that of Never Khabo who had been walking with the deceased. She told the court that when the accused went to where they were he uttered words to this effect,

"You Santana MDC member, I am a ZANU (PF) member - I will kill you today."

Accused then removed the hat that deceased was wearing and hit him with it. He armed himself with bricks which he later dropped after someone had remonstrated with him.

The accused thereafter went into Tshuma's homestead. The witness then continued walking with the deceased until she heard a voice saying words to this effect, "Run away someone armed with a pole or log is coming". She saw the accused coming with a log. She tried to pull the deceased who because of the alcohol he had taken could not run fast. She then ran into the homestead of her maternal uncle.

The accused continued to run after the deceased who ran towards Rebecca's homestead. She could hear thuds from blows being delivered.

After about 5 minutes she went to Rebecca's homestead where she found the deceased lying motionless.

She said deceased had not provoked the accused in anyway. He had not even said anything to the accused. He was not armed in any way when the accused was threatening to hit him with bricks.

She was emphatic that deceased never struck accused with an open hand on the ear causing bleeding from it. Deceased never threw any stones at accused. The witness was of the opinion that accused was not drunk as he appeared normal to her.

She was emphatic that accused was never invited for a drink of traditional beer. He was not under any attack when he went to arm himself with the pole. She said the suggestion that deceased chased the accused was false.

She is corroborated by Rebecca Mkandla on that point who said it was the accused who was chasing deceased as they entered her homestead. The deceased was unarmed. She screamed out at the same time telling accused to stop what he was doing since he was in her homestead. But he did not listen. The deceased ran around a 4 cornered house and fell down.

The accused got up to where deceased was and belaboured him with the pole exhibit 7 as he lay down. The witness said accused aimed his blows to the head of the deceased. She said he delivered at least 5 blows. All were aimed at the head since accused was next to the head. Accused only stopped when the deceased was motionless. He ran away on seeing Ephraim Khabo who gave chase and later returned with the log.

Rebecca said she did not think that accused was drunk. Her conclusion was based on the speed at which the accused ran. Ephraim Khabo's story is to the same effect. He said the accused was able to jump over the fence to return to Tshuma's homestead and put up a strong struggle when he was trying to dispossess him of the log. The witness said he did not detect and smell of alcohol on the accused's breath as he struggled with him. He said the suggestion that the log used by accused was not exhibit 7 was false because when he disarmed him he handed the log to the police.

The witness said the accused aimed the blows to the head.

All the state witnesses gave their evidence well and clearly. They were worth to be believed. Wherever their evidence conflicts with that of the accused I prefer theirs to that of the accused.

The accused was an unreliable witness who changed his story on a number of occasions. For instance he did not mention in his confirmed extra curial statement that he had allegedly been assaulted by the deceased on the ear causing bleeding therefrom. In the defence outline he told the court that he hit the deceased with the log all over the body. The assertion is false because in his confirmed statement he said he aimed all the five blows to the head. The truth is that all the blows were aimed at the head which confirmed the doctor's findings that injuries were on the head. No injuries were observed on the other parts of the body.

It is clear from the evidence that accused was not provoked in any way when he commenced the attack. The deceased was not even aware that he was going to be attacked before Rebecca shouted that accused was about to attack him with a log.

Similarly the accused was the aggressor right from the onset. The deceased did not try to attack him at any stage. Accused was therefore not defending himself from anything.

All witnesses concluded that accused was not drunk. They gave their reasons for arriving at such conclusions. The accused himself said although he may have been drinking he knew exactly what he was doing. From his own version his recollection of events does not show that he was drunk.

Ephraim Khabo who is taller and of bigger stature than accused was unable to apprehend the accused because of the struggle he put and was only able to disarm him of the log. The defence of intoxication is not available to accused.

The motive for the attack seems to have been political as mentioned by the witnesses. The accused's intention was to kill his political opponent. He carried out his intention. This is clear from the way the killing was executed. Accused used a heavy mopane log. He aimed all his five blows to the head when the deceased had already fallen down. He struck him until he was motionless.

This is a clear murder with actual intent. Accused is accordingly found guilty of murder with actual intent.

Verdict: Guilty of murder with actual intent.

Extenuation

Defence Counsel

Accused only went as far as grade 6. He has a rural background. His level of sophistication is low.

Coupled with his political belief – accused was 20 years old at the time he committed the offence. Youthfulness played its part. He acted immaturely due to youthfulness.

These factors amount to extenuation. That is all.

State Counsel

It is very difficult to find extenuation in this matter. Youthfulness may have been extenuating but it is not always. *S v Ndlovu* SC-122-94.

It was held that unless it shows some form of immaturity youthfulness will not always be extenuation.

Political beliefs cannot be extenuation taking into account that people are free to hold different political beliefs.

There are no special circumstances in this case. That is all.

By Court

The accused killed the deceased because he believed he belonged to a different political party from his. In a democracy people are free to belong to political parties of their choice. It would be wrong to punish them for that. That type of behavior should not be tolerated in a democratic society. Killing someone because they hold different political beliefs cannot be an extenuating circumstance. Instead it would suffocate democracy if it were to be allowed.

Youthfulness can only work where a person does something that clearly exhibits immaturity. There was nothing immature about what the accused did in this case. Accused just wanted to eliminate his political opponent.

I find myself being unable to find any extenuating circumstances in this case.

Sentence

The accused shall be returned to custody where the sentence of death shall be executed according to law.

*Criminal Division of the Attorney General's Office, state's legal practitioners
Marondedze, Mukuku, Ndove & Partners, accused's legal practitioners*