

THE STATE

Versus

LYTHON MATHE

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

HWANGE CIRCUIT COURT 13 AND 14 JULY 2011

W Mabhaudi state counsel

Mukuku defence counsel

Criminal Trial

KAMOCHA J: The 30 year old accused was charged with the crime of murder. It being alleged that on 18 October 2009 and at the 433 peg along the Bulawayo-Victoria Falls road he did wrongfully, unlawfully and intentionally kill and murder Judson Mukatini, a male adult in his life time there being.

The accused pleaded not guilty when the charge was put to him. The state outline was read and produced as exhibit one and I do not propose to read it again. I, however, will read exhibit two – the accused’s defence outline which reads thus:-

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

1. He will state that he was not involved neither does he know anything in connection with the murder of the deceased.
2. He will state that the cellphone in question did not belong to the deceased but it was his own which he was given by some Congolese he had assisted to cross the border illegally from Zambia into Zimbabwe through the Victoria Falls border post.
3. He will also state that Natally Natasha Sibanda was his girlfriend and that is the reason why her photograph was in that phone.
4. He denies ever following the deceased and Natally Natasha Sibanda on the fateful day and argues that she is trying to incriminate him in order to protect herself and the real culprits since they could have acted in common purpose.
5. He also denies that he threatened her in order for her not to report the matter.
6. He will state that he was detained by the police for five days before his arrest on this matter and that he was severely tortured by the police and forced to make

admissions and indication and that is the reason why his warned and cautioned statement was not confirmed.

Wherefore he prays that he be found not guilty and that he be acquitted of the charge.”

Exhibit 3 was a post mortem report by Doctor I. Jekenyia who examined the remains of the deceased. The doctor observed the following marks of violence. There was a 15cm long and about 1cm wide groove of the neck from the right to the left side of the neck passing just under the voice box. The doctor opined that that could have been a ligature strangulation case.

There were extensive abrasions 15 x 5 cm of the left face running downwards in front of the left ear. There was a degrooving wound 6 x 6cm with bone exposure of the left forehead and frontal region. That injury had associated frictional (abrasive) burns which could have been caused by the friction with the tarred road.

There was a degrooving (i.e. no skin) wound 5 x 4cm of the right cheek in front of the right ear.

The middle lower jaw had a complete fracture. The left upper arm had bruises. The internal examination revealed wide spread hemorrhages of the brain. There were bilateral lung ruptures but there was no haemothorax. There were multiple double and single fractures of the sides of the chest.

The doctor remarked that the deceased was most likely killed by ligature strangulation and then placed on the road.

The cause of death was asphyxia manual strangulation, trauma and murder.

This report suggests that the deceased died a very painful death.

Exhibit 4 was a Nokia 1680 cellphone black in colour.

The evidence of the following witnesses was admitted by consent in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07], Enock Chamunorwa, Maxwell Nyamunda, Joseph Muteswa, Cst Binha and Doctor I. Jekenyia.

The state called two witnesses to give viva voce evidence. The first one was Natally Natasha Sibanda who has been in custody since October 2009 as she had been regarded as an accomplice in this matter. The customary warning was administered in terms of section 267 of the Criminal Procedure and Evidence Act [Chapter 9:07].

Thereafter the witness told the court that she was 20 years old and was not employed. She frankly told the court that she was a lady of the night or a sex worker.

It was her evidence that she knew the accused as a person who lived in Victoria Falls. She often met him in bars and beer halls in Victoria Falls. In fact, when she arrived in Victoria Falls from her rural home in Filabusi she rented a room at the accused's parent's house. But the accused was not living there during that period. He did not live at his parent's house when she rented a room there.

She said the accused had never proposed love to her. She was never his girlfriend. She had never had sex with him even as a sex worker. She emphasized that she had never talked business with him.

She did not know the deceased prior to the fateful day. On that day she left Muboyi Bar around 3am to go to the Chinotimba Sports bar where she found the deceased standing by a corner in the bar. He asked her what drink she would like to have and she told him that she would like to have a black label beer. He bought her 3 pints of black label which she started to drink. The two introduced themselves to each other.

The deceased had a mobile phone with which he started taking photographs of the witness. She identified exhibit 4 as the phone.

After taking photographs of the witness the deceased asked her how much it would cost him to spend a night with her and she told him that it would cost him \$20. He said he did not have the money on him but he had it in his truck at the Truck Port. The parties agreed that she would collect her money at the truck port. They agreed to walk to the truck port. The witness said she was not drunk at that time. She described herself as a heavy drinker who can go through a crate of beer. That, of course, has to be taken with a pinch of salt in the light of her stature. She has got a small body which is unlikely to take 24 pints of beer.

The witness left the Sport bar with the deceased going to the truck inn. They got to the main Bulawayo road. As they walked along the road she noticed some 5 people following them. As they continued walking a car approached and the beam of its lights illuminated the area where the witness who was with the deceased and the five people were. She looked back and recognized the accused. She was unable to recognize the other four people because they covered their faces with hats.

When the car went past they used a path which cuts through a bushy area. The accused and his colleagues used another bush path also leading in the direction the witness and deceased were going. The deceased was playing music on his mobile phone as they walked.

When they got to a spot where paths cross each other they met with the accused and his colleagues.

They pounced onto the deceased and the witness. Accused grabbed hold of the deceased by his neck while he held the witness by his hand. The accused strangled the deceased. The witness broke free from deceased's hand and ran into the bush and hid behind some trees. The assailants threw the deceased to the ground and began to search his pockets and his shoes. The music on the phone continued while deceased was on the ground. The deceased could not scream or shout for help because he was strangled. After they had searched him she could hear them saying they should look for the woman who was in the company of the deceased. On hearing that, she moved away from where she was. They searched for her without success. She eventually managed to make her way home. She did not tell anybody for fear of being killed by the robbers.

After 3 or 4 days she went back to Muboyi bar. When she left the bar going home she met the accused who said to her words to the following effect;

"You prostitute, you are causing my arrest. If I hear something again I will go to prison with you and allege that you are my wife. Or better still, kill you and go to prison once and for all."

This came as a surprise to her as she had not caused the accused's arrest at that stage and did not know that he had been arrested for murder. She had not yet told the police about what she had seen him doing at that stage.

Some two or three days after she had encountered the accused, the police picked her up for questioning about theft cases in Victoria Falls area in general. They asked her if she knew any thieves in Victoria Falls. She told them that she knew the accused. The police did not raise the subject of the murder case at that point.

That subject was raised on a different occasion. The circumstances leading to that were that the police decided to raid all sex workers from bars and beer halls in Victoria Falls and took them to the police station.

While she was there she saw the accused who asked her why she had been arrested and she told him that she did not know. Whereupon the accused told her that if the police asked her about thieves in Victoria Falls she should say she did not know any.

On seeing that accused was under arrest she got the courage to tell members of the CID about the murder of the deceased. She told them the role that was played by the accused. She recognized him at the scene of the crime.

She told the police that deceased had taken pictures of her using his mobile phone. When the accused claimed ownership of the phone she challenged him to operate it and take a photograph of her but he declined to take the challenge. He refused to take the golden opportunity to prove that the mobile phone was his.

The witness said the phone did not belong to the accused. It belonged to the deceased. It had the photographs of her taken by deceased at the Sports bar.

On the fateful day she had seen the accused sitting outside the Sports bar. The next time she saw him was when he and 4 others were following her and the deceased and next saw him when they pounced on the deceased. He was one who actually strangled him. She said she could not be mistaken about his identity. She knew him very well before he committed the offence. She had no reason to falsely incriminate the accused.

She emphatically denied ever being the accused's girlfriend. She did not know why he was claiming to be her boyfriend when he had never proposed love to her. He had never even offered her money for sex. His claim remained a mystery to her.

The witness was cross examined by the defence counsel but was not shaken at all. She stuck to her story and merely emphasized what she had said in her evidence in chief. She was a good and credible witness who is worth to be believed. Her evidence was given clearly and in a straight forward manner. This court accepts her story. Where her evidence conflicts with that of the accused this court prefers her version of what took place to that of the accused.

The second state witness was detective inspector Collen Sigauke who is a member of the Zimbabwe Republic Police. He told the court that this case was first treated as a road traffic accident until the police received a post mortem report.

During the investigation the police gathered information establishing that the deceased had been last seen with Natasha who when questioned implicated the accused. Through further investigation the accused led the police to one Enock Chamunorwa to who he had pledged the deceased's mobile phone for goods he had purchased from him. The phone exhibit 4 was recovered from Chamunorwa.

The phone contained the photograph of Natasha taken by the deceased on the day he was murdered as testified by Natasha. Inspector Sigauke said he would never have known that the phone had been pledged to Chamunorwa if the accused had not told him.

It was his evidence that the accused was aware that he had been implicated by Natasha. Accused incriminated her a day after his arrest. He said she had been part of the plan to rob and kill the deceased. He alleged that she was the one who had tipped him that the deceased

had a substantial amount of money on him. He never at any stage told the witness that Natasha was his girlfriend.

The witness denied that the accused was first arrested and then released and re-arrested. So when the accused alleged to Natasha when he met her that she had caused him to be arrested he was being untruthful. He merely expected to be arrested for the murder hence his threat that if arrested he would say she was his wife or better still kill her.

The accused gave evidence and performed very badly. He was not worth to be believed. His claim that Natasha was his girlfriend was false. He was merely carrying out his threats that if arrested he would allege that she was his girlfriend. The accused then went on to falsely implicate her leading to her detention on remand for nearly two years.

His suggestion that he got the phone from a Congolese national he had assisted to illegally cross the border from Zambia is false. If that had been the case the mobile would not have had photographs of Natasha taken by the deceased. Further if the phone was his he would have taken the opportunity to demonstrate how it was used to take photographs when invited to do so.

The accused had told the court that he had witnesses to call in support of his story that Natasha was his girlfriend and that they were present when he used the phone to take photographs of her. He named the witnesses but when his legal representative interviewed them it turned out that they did not support his story. The witnesses were then abandoned. His story was false.

This court finds that the accused and four others pounced on the deceased as narrated by Natasha and killed him after robbing him of his valuables. Thereafter threw his body onto the main Bulawayo highway so that it could be said he died in a road traffic accident. They killed the deceased in a brutal manner.

The accused is clearly guilty of murder with actual intent.

Natally Natasha Sibanda

This witness who turned out to be the key witness was treated as an accomplice and was given the customary warning in terms of section 267 of the Code, gave her evidence clearly and frankly to the satisfaction of the court. She has been in custody since October 2009. She has been unnecessarily prejudiced for such a long time.

Judgment No. HB 105/11
Case No. Hwange 101/11

She is entitled to absolution from any prosecution relating to this murder case.

She is further entitled to her release from custody forthwith (immediately) and a warrant for her liberation is hereby issued.

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