

**THE STATE**

**Versus**

**MTHABISI KHUMALO**

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 28 AND 29 SEPTEMBER 2011

*Ms N. Ndlovu* state counsel

*Ms C. Nunu* defence counsel

Criminal Trial

**KAMOCHA J:** The 19 year old accused was charged with the crime of murder. It being alleged that on 24 December 2009 at 4<sup>th</sup> Avenue and Herbert Chitepo Street in Bulawayo he did wrongfully, unlawfully and intentionally kill and murder Mkhululi Maseko a male adult aged 21 years at the time he met his death.

Going by the estimated age the accused would have been 17 years at the time he allegedly committed the crime. I shall deal with this latter in this judgment.

When the charge was put to the accused his response was that he had no intention of killing the deceased. A plea of not guilty was accordingly entered on his behalf.

The state outline was read and produced as exhibit one while the accused's defence outline was read and produced as exhibit two. While I do not propose to reproduce the state outline, I shall recount the accused's defence outline which reads:

"The accused person is as described on the state papers.

The accused person understands the charge against him and pleads not guilty to murder, but guilty to culpable homicide. He will state that on the 23<sup>rd</sup> of December, 2009, in the afternoon, he was visited by a friend called Butross and they spent the whole afternoon together. Thereafter they decided to go to Gijima Nite Club.

He will state that he arrived at the night club with his friend Butross at around 7pm and two ladies who were acquainted to Butross were already at the night club. He will state that one of the ladies was called Cynthia. The accused will state that at all material

times, he was inside the club with Butross and the two ladies wherein they were consuming copious amounts of alcohol.

At around 3:00 am the following day the four of them decided to leave the night club and go home. He will state that at that time, he was already drunk and was taking Cynthia with him to spent (sic) the night with her. He will state that when they left the night club, Cynthia briefly disappeared and they continued walking without her, assuming that she will follow them. Whilst they proceeded along Herbert Chitepo to look for transport, Cynthia emerged and joined them but she was crying and nose bleeding and claimed that she had been assaulted by the deceased who was walking with his three friends.

He will state that they proceeded to walk and whilst walking, they were approached by the deceased. The deceased was in the company of his friends who however distanced themselves whilst deceased came straight to the accused. He will state that the deceased came straight to him and started assaulting him and he consequently fell on the ground. The accused shall give the details of the fight and how he subsequently stabbed the deceased on the thigh. He will state that he had intended to call Butross his friend to testify on his behalf but the same cannot be located.

He will further state that he stabbed the deceased on the thigh in an attempt to defend himself from the deceased who was overpowering him with blows and whilst he struggled helplessly on the ground. For the avoidance of doubt he will state that at all material times, it had not been his intention to fight with the deceased who was the initial aggressor. Further, it had not been his intention to use the knife in the manner that he did or at all and the knife was produced in the heat of the moment with hindsight, he realized that his judgment had been impaired by the effects of alcohol.

The accused shall tell this honourable court that he did not intend to cause the death of the deceased and that there had been no premeditation in the manner in which the deceased met his death.

Wherefore the accused shall pray for judgment in terms of the law.”

The third exhibit was the accused’s confirmed extra curial statement wherein he said the following when matters were still fresh on his mind.

“I do admit to the allegations leveled against me. What happened on the fateful day is that, I was coming out of Gijima Nite Club in the company of Butross Moyo on our way to board a combi to Pumula. While we were outside the night club, I saw the now

deceased Mkhululi Maseko in the company of a lady by the name Cynthia whom I had a love affair with. I confronted him and asked him where he was going with my girlfriend. Mkhululi attacked me and I fell on the ground then Mkhululi sat on top of me. Butross then gave me an Okapi knife and I stabbed Mkhululi once on his thigh.

Police officers who were on cycle patrol came to the scene and apprehended me. The knife that I used was confiscated by the police. I had no intention of killing him.”

The accused has given two different stories in respect of the same event. In his confirmed extra curial statement he confessed that he confronted the deceased as he was taking away a lady he had an affair with. He claimed that when he had been pinned onto the ground his friend Butross came to his aid and provided him with the Okapi knife with which he stabbed the deceased on the thigh.

The fourth exhibit was an age estimation from compiled by a doctor who estimated the accused's age as 19 years. The estimated age could be wrong because the accused in evidence told the court that he was born in 1992 went to school up to grade 7 which he completed in 1999. Children complete grade 7 at 13 years. If the accused completed grade 7 in 1999 his age is likely to be 22 years now and was 20 years at the commission of the crime.

The fifth exhibit was an affidavit by Cst Tendai Chinyunyu who identified the body of the deceased to the doctor who performed the post mortem examination on the remains of the deceased and compiled exhibit 6. The doctor remarked that deceased had been stabbed with a knife on the thigh and the knife perforated the femoral enteric. The wound was 7cm deep. The cause of death was that the deceased was stabbed on the thigh with a knife which perforated the femoral enteric resulting in hemorrhagic shock.

The last exhibit was the Okapi knife with which the accused stabbed the deceased. Its handle is 12.5cm with a 10cm long blade which was very sharp and had a very sharp tip. The knife is indeed a lethal weapon.

The evidence of the following witnesses was produced by consent in terms of the provisions of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]; Jimmy Brown, Joe Ncube, Cst Zvavanoda; Lawrence Mauru, Ass. Inspector Chinokora; Ass. Inspector Shumba Nhete and Dr A. R. Casteiinos. It was further admitted by the defence counsel that the knife exhibit 7 was the weapon used by the accused to inflict the injury on the deceased.

The state then led evidence from Shadreck Sibanda a cousin of the deceased. He said on the fateful day he went to Gijima Nite Club with the deceased and two other young men during the early hours of the morning. He did not have a watch but he thought it was around

3am. He said after he had taken about 3 pints of beer the deceased suggested that it was time to go back home.

They went out of the night club. The deceased walked in front with the girl called Cynthia while he walked behind with two young men. They were going to look for transport to go home.

As they were walking the witness heard footsteps of a person who ran past them towards the deceased and Cynthia. It was the accused. When he caught up with them the witness heard him saying words to the following effect – “Samantha or Cynthia is mine.”

The deceased replied saying – “No, I am taking her home.”

The witness said he and the two young men moved faster to get to where this was happening and when they were 10 paces away the accused grabbed hold of the deceased. When the deceased was in the process of turning to face the accused, the accused then stabbed him on the thigh – on the outer aspect of the thigh towards the back. The deceased fell down. The police on cycle patrol arrived and summoned an ambulance.

The witness said there was no fist fight between accused and deceased. He said that suggestion was false.

He said the accused was alone when he ran past them to go and confront the deceased. He said it was not correct to say deceased was the aggressor as he was confronted by accused. It was not true that the accused had been knocked down by the deceased who then pinned him to the ground. He said that suggestion was clearly false.

The witness is corroborated by the accused himself in his confirmed extra curial statement where he said he confronted the deceased.

The witness gave his evidence clearly and in a straight forward manner. He was worth to be believed.

The same cannot be said about the accused who was clearly untruthful. He had been so, right from the beginning. For instance he lied in his statement that he had been given the knife with which he stabbed the deceased by Butross Moyo. He also lied that Cynthia was his girlfriend when in fact he had just been introduced to her by Butross that night at the night club.

Where the accused story conflicts with that of Shadreck I prefer that of the state witnesses' evidence which was well given.

The court makes the following specific findings.

- That the accused was the aggressor
- At no stage was he pinned to the ground
- he stabbed the deceased as he was about to turn and face him
- the accused may have been under the influence of alcohol but not to an extent of not knowing what he was doing
- he was able to run and follow the deceased and Cynthia
- he remembers clearly what took place
- the deceased did not provoke the accused.

The accused was not defending himself from anything as he was in fact the aggressor.

But what is the accused guilty of?

He stabbed the deceased on the thigh with a lethal weapon. Is it in the ordinary human experience that when one stabs the other with a knife on the thigh death would result. The thigh is not one of those vulnerable parts of the human body. It is a different story if one used a lethal weapon on a vulnerable part of the human body. The accused chose the thigh. Did he reasonably foresee that death would result? I think not. He would not have foreseen that an artery in the thigh would be perforated.

He is guilty of causing the deceased's death negligently. I would in the result find him guilty of culpable homicide. Accused has got a record.

**Mitigation on tapes.**

### **Sentence**

All that needed to be said on behalf of the accused was well put forward by his lawyer. He is a young first offender whose age is likely to be in the region of 22 years. If the estimated age were to be accepted he would be 19 years. His youthful age has been taken into account. Also to be taken into account is that he has spent over 18 months in pre-trial incarceration. Had it not been for those mitigating features he would have been looking at not less than 12 years.

Here is why.

The accused is a person who moves around carrying a dangerous weapon - the Okapi knife. He relied on it so much that it gave him the courage to run after the deceased and

Judgment No. HB 143/11

Case No. HCT 55/11

CRB 450/12/09

confronted him. He then stabbed him with it inflicting a 7cm deep wound from which he died. The accused showed no remorse at all. He instead lied about what took place.

A young life was unnecessarily lost. The court always guards jealously the sanctity of human life.

This court was referred to the case of Richards 2001 (1) ZLR 129 where community service was imposed the facts in that case are clearly distinguished.

*In casu* imposing community service would be trivialising the offence leading to society losing faith in the criminal justice system.

The accused is in that age group which is the one causing trouble in society. Most murders are committed by this group of people who at the slightest of provocation or even without provocation resort to the use of lethal weapon to kill. This should not be allowed to continue unchecked. A loud message must be sent out there that offenders will be adequately dealt with.

In the result the justice of this case will be met by a sentence of:-

**TEN YEARS IMPRISONMENT**