

STATE

VERSUS

MLABELI SIBANDA

HIGH COURT OF ZIMBABWE

CHEDA J

28 March and 29 March 2011

Mr K. Ndlovu and Ms A. Munyariwa, for the state

Miss Y. Mbayiwa, for the accused

JUDGMENT

CHEDA J: The accused is charged with murder to which charge he pleaded Not Guilty.

The allegation against the accused is that on the 9th of September 2008 at Bodega Stamp Mills, Sun Yet Sen he did wrongfully, unlawfully and intentionally kill and murder Javison Sibanda.

The facts as presented by the State are that accused and deceased were working at Bodega Stamp Mills, Sun Yet Sen, Kezi when this offence occurred. The State sought and obtained admission from the defence, evidence of the following witnesses:

- 1) Taurai Dlamini.
- 2) Bhekinkosi Dube
- 3) Vincent Mbwerere
- 4) Samuel Hove
- 5) Cephas Makombe and
- 6) Doctor Garcia Lucia

The state then led evidence from Antony Ndlovu. He told the court that on the day in question he was at a beer party together with other patrons and amongst them were accused and deceased. At about 1900 hrs while sitting outside a hut he observed accused and deceased sitting together, although they were discussing he could not hear all their conversation. He, however, overheard deceased demanding beer from accused. He then observed the two stand up and were locked on each other and a scuffle ensued. During that scuffle accused tripped the deceased who then fell down. Accused then picked up a home-made wooden stool, which he used to strike the deceased three times on the head while deceased was lying on the ground. He intervened and accused then left the scene. After that because of his drunkenness accused

continued to threaten the witness, he together with others rendered first aid on the deceased but unfortunately he passed away. Accused was subsequently arrested for this offence.

Under cross-examination he conceded that both accused and deceased were drunk but above all deceased was aggressive and troublesome. He did not see deceased holding a knife at any stage. The state then closed its case.

The defence opened its case by calling accused whose evidence was that on the day in question, he was drinking beer with other patrons. It was his evidence that deceased tried to take away his beer but he prevented him. In return deceased slugged him once on the face and they started fighting. He over powered him and he sat on top of him. While on top of the deceased he saw a stool which was nearby which he used to assault the deceased with resulting in his death. He further stated that deceased was armed with a knife.

We find that indeed both accused and deceased were drunk as stated by both Antony Ndlovu and the accused. We also find that the evidence of Anthony Ndlovu is worthy believing and we have no hesitation in accepting it in its entirety. Infact it is corroborated by the accused himself in all respects except with the issue of the knife.

We find that deceased was not armed with a knife or any weapon at all. We further find that the deceased was indeed the aggressor on this date.

We find that in view of accused's drunkenness and provocation he lacked the requisite *mens rea* to kill the deceased. He however acted negligently in the circumstances and we find him guilty of culpable homicide.

Lazarus and Sarif, Accused's Legal Practitioners

Criminal Division, Attorney General's office, Respondent's Legal Practitioners