

**THE STATE**

**Versus**

**NKANYEZI MOYO**

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 20, 21 & 24 SEPTEMBER 2012; 15 & 17 JANUARY 2013

*L. Maunze* state counsel

*N. Nyathi* defence counsel

Criminal Trial

**KAMOCHA J:** The 46 years old accused pleaded not guilty to the charge of murder where it was alleged that on 6 August 2011 he wrongfully, unlawfully and intentionally killed and murdered Samson Ndobha Moyo, a male adult aged 82 years.

The state outline was read and produced as exhibit one which I do not propose to reproduce here again. The accused's defence outline which reads as follows was produced as exhibit 2.

"The accused is Nkanyezi Moyo who ordinarily resides at Tsholotsho, Nata area.

The accused person is charged with murder. The brief facts leading to the charge as outlined by the state are that on or about the 6<sup>th</sup> August 2011, the accused unlawfully killed the deceased Ndobha Samson Moyo. The accused is pleading not guilty to the charge of murder or any charge that may arise out of the state's outline.

On the 6<sup>th</sup> August 2011, the accused person (who has a welding machine) left his homestead in Nata to meet his clients at the Mangarambe, Gumpu and Irrigation areas. The accused went as far as Gumpu Stores and on his way back he passed through Nata Business Centre.

The accused person never met the deceased on the 6<sup>th</sup> of August 2011. The accused person never made any indications to the police and will state they were made by Sikwamula Filias Moyo. (The deceased's brother) The accused person's unconfirmed warned and cautioned statement was obtained through torture as the accused was heavily assaulted by the investigating police officer. The accused person challenges the admissibility of his warned and cautioned statement. In the circumstances the accused person denies the charge of murder or any charge arising therefrom and prays for his acquittal."

The third exhibit was an affidavit by Constable Nicholas Sibanda who identified the decomposed body of the deceased to Dr S. Pesanai who performed a post mortem examination and compiled the post mortem report exhibit 4. The doctor was unable to ascertain the cause of death due to the advanced state of decomposition in which the body was. He, however, noted under marks of violence that the cranium was exposed, a laceration of the scalp occipital region involving both parietal bones. The skull had a chipping on the right parietal bone measuring 3 x 2cm. It was his opinion that the injuries on the head were as a result of an assault on the head.

The fifth exhibit comprised of the broken axe handle and the axe itself. The handle was broken at the point where it goes into the axe. The axe itself is 15.5cm long. The blade is 9cm wide and weighs 1.055kg. The handle is 24.4 cm long weighing 0.47kg. The total weight of the axe and handle is 1.525kg. This court notes that the axe is heavy with a sharp blade.

A pair of cream coloured gum boots was produced as exhibit 6. Stains of blood are still visible on the gum boots. Exhibit 7 was a blood stained track suit.

The evidence of the following witnesses was formally admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] Portia Dube, Lizzy Moyo and Doctor Sanganai Pesanai.

*Viva voce* evidence was adduced from three witnesses namely Sikwamula Filias Moyo, Chibutu Mashwana and Detective Sergeant Trust Tarusenga. Sikwamula Filias Moyo hereinafter referred to as Sikwamula was the key witness.

His evidence was that the deceased was his older brother whom he came after. He lives at his own homestead at Malalangenya in the Tsholotsho area. He knew the accused from his (accused's) childhood and he lives in the same area. The accused is a distant relative of his.

On the morning of 7 August 2011 his brother's wife (deceased's wife) arrived at his homestead to inform him that her husband who had taken cattle to the river to drink the previous day had not returned home but the dog which had gone with him had returned in the morning. That was strange to the witness because he had never known the deceased to sleep away from his home.

He then suggested that the deceased's wife, his wife, his son-in-law and himself should go and look for the deceased. He suggested that the women should go and check for him at his son's place while he went to a place where there was a bereavement. The deceased was not there but the accused was at the funeral. He returned to find out if the women had any information but they had none.

The witness then suggested that they should go and search for him in the bush where they first saw his foot prints. They followed the foot prints. They saw drag marks as they approached a river known as Moza river. They followed the drag marks. As they did so they

observed some blood trails and human hair. They also noticed some maize grains which they believed were the maize grains which deceased had eaten at the time he left home. They followed the drag marks until they got to an ant hill where he suggested they should go back home but return the next day to continue with the search starting from where they had left. The search was stopped on the first day because it was getting dark. The witness went to report to the village head about what they had found that far. He also went to make a report to the police at Mbamba. The police advised him to go back and continue with the search and report the findings to them.

The next day the search party proceeded to the point where the search was stopped at the anthill. When they got closer to the anthill the witness noticed that a tree branch had been pushed into a hole on the anthill. The witness pulled the tree branch out of the hole and saw one of the deceased's gum boots and took it out. It was the right foot gum boot. He recognized it as being the deceased's gum boot as he had seen him wearing the gum boots. They were cream in colour. The gum boot recovered from the hole was blood stained. It is the one forming part of exhibit 6.

As the search party approached Moza river the witness's daughter-in-law called him to a point on the river bed where the river bed sand had been disturbed. A close examination of the place led to the discovery of the deceased's body buried at that point.

The witness went to collect two shovels which were used to remove the river sand covering the deceased's body. The body was buried partially naked facing down. The deceased had been wearing a track suit when he left his homestead to go and water his cattle. The track suit had been removed from the deceased. The witness noticed injuries on the back of the head, other injuries on other parts of the head, injuries on the shoulder and other injuries on the part of the body.

After the discovery of the body, members of the neighbourhood watch committee were informed and they came with a policeman. The accused also went to the scene.

The police officer asked the people at the scene if they suspected anyone to be the culprit. Whereupon the witness replied that he was convinced that the deceased had been killed by Nkanyezi Moyo – the accused who was at that time sitting next to him. The officer then called the accused aside and arrested him. But he denied the allegations.

Plumtree police arrived with a coffin in which the body was put and conveyed to Plumtree. The police went to the accused's home where they recovered a pair of khakhi trousers which was still blood stained. The witness was left at his homestead.

The following day the police came with the accused. They had the axe and its broken handle. He identified the axe as belonging to the deceased. Both the axe and its handle were still blood stained. The witness was not there when the axe and its broken handle were recovered following indications by the accused. The deceased had taken the axe with him as he

went out to water his cattle. The axe and its handle were retrieved from the same ant hill hole where the left foot gum boot had been retrieved.

I pause to observe that this witness was not there when the axe and its broken handle where recovered following indications by the accused.

On the day the deceased was buried which was a Friday the police brought the deceased's track suit. The witness was not present when they recovered it buried on the Manzamnyama river bed following indications by the accused.

When asked by the state counsel why he suspected the accused to have killed the deceased the witness then said the accused was always fighting with the deceased and one Aleck Gumbo. He always insulted the two old men. The fights saw them at Chief Mahlathini and then Chief Gampu who finally resolved the matter by ordering the accused to pay damages in the form of 5 goats to Aleck Gumbo for the insults. He was ordered to pay the deceased one goat which the witness went to collect from the accused's homestead. The endless quarrels seemed to have stemmed from accusations of witchcraft.

The witness said he did not see the police harassing the accused. He was surprised at the suggestion that there could be bad blood between him and accused. He explained that accused had not done anything wrong to him. He had no reason to lie against the accused.

Under cross-examination it was put to the witness that he had made indications to the police which led to the discovery of the exhibits. He expressed surprise and disbelief and was emphatic that what he recovered with the search party was the deceased's right gum boot which was in a hole on the ant hill about 40 to 50 metres from the river where the deceased body had been buried. He was not present when the other exhibits were recovered following indications by the accused. The witness's story on that point is supported by the evidence of the investigating officer Detective Sergeant Trust Tarusenga and Chimbutu Mashwana.

This court makes a specific finding that the witness was not present when the other exhibits were recovered. He therefore could not have made indications which led to their recovery.

The witness gave his evidence in detail and in a clear fashion. He was a credible witness who is worth to be believed.

He suspected the accused as the culprit and his suspicion was supported by indications made by the accused pointing at different places where accused had hidden items that were being worn by the deceased on the day he met his death.

Chibutu Mashwana's evidence shows that the accused was in the area where deceased met his death on that particular day. He also saw the accused indicating a hole on the ant hill to the police, in which the axe and a broken handle had been hidden. He confirmed

Sikwamula's story that he was not present when the axe and broken handle were recovered following indications by accused. His evidence was also clear and he was not shaken under cross examination. He was a credible witness who was also worth to be believed.

Detective Sergeant Trust Tarusenga's testimony was that he attended the scene at the Moza river where the deceased body had been buried in a shallow grave on the river bed. He examined the body and noticed the following:- two deep cuts on the head, one on top of the head the other on the back of the head, the third deep cut was above the right eye; the 4<sup>th</sup> deep cut was between the shoulders.

The witness recovered a pair of khakhi trousers from the accused's home. They were found in the accused's bedroom in a washing basket. They were blood stained and were produced as exhibit 8.

The accused made indications which led to the recovery of the axe head and broken handle from the same ant hill hole where the right foot gum boot had been recovered by the search party the day before. The axe and handle had been thrown deeper into the hole that is why the search party had not seen it when it retrieved the gum boot.

The accused went to indicate another hole where he had hidden the left gum boot about 800 metres from the hole on the ant hill. He finally led the police to Manzamnyama river where the green track suit that deceased had been wearing had been buried on the Manzamnyama river bed. That point was 1.6 km from the hole where the left gum boot was recovered and 2km from the ant hill hole where the right gum boot and axe handle were retrieved.

The witness told the court that Sikwamula was not present when the accused was making all those indications to the police. The witness said the accused made the indications freely and voluntarily. His evidence was well narrated and he is worth to be believed.

The accused had no witnesses to call but gave evidence himself. His story is palpably false. He alleged that the indications that led to the discovery of the exhibits at various points were made by Sikwamula who was not even there when those items were recovered. The accused is not worth to be believed. His story is therefore rejected in its entirety.

This court finds that the accused indicated the various points where the exhibits were retrieved. The points were far apart from each other. He was trying to conceal evidence by going to bury the track suit on the river bed in Manzamnyama river.

The evidence adduced by the state is overwhelming and leaves no room for any doubt. The accused inflicted deep cuts on the head of deceased and between the shoulders. There can be doubt that he intended to kill and murder the deceased. He is guilty of murder with actual intent.

