

THE STATE**Versus****THEMBA HADEBE**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J with Assessors Mr Damba & Mr Sobantu
BULAWAYO 30 SEPTEMBER & 7 OCTOBER 2015

Criminal Trial

W. Mabhaudi state counsel
L. Ncube defence counsel

KAMOCHA J: The 25 years old accused pleaded not guilty to the crime of murder but tendered a plea of guilty to culpable homicide. The plea to culpable homicide was not accepted by the state.

The allegations were that on 10 June 2013 at Kezi Business Centre the accused did wrongfully, unlawfully and intentionally kill and murder Edmore Ncube a male adult in his life time therebeing by assaulting him all over the body with clenched fists and booted feet.

The state outline was read and produced as exhibit one. Exhibit two was the accused's defence outline which reads as follows:-

- “(1) The accused person pleads not guilty to the charge of “murder”.
- (2) On the 10th June 2013 in the evening the accused person was drinking opaque beer at Phelandaba Bottle Store.
- (3) Later in the evening, the accused person decided to go home, and passed by Thokozani Bottle Store, when (*sic*) he bought an egg to eat.
- (4) As the accused person was eating an egg outside the veranda, the deceased who was visibly drunk, approached him and confronted accused person concerning the whereabouts of deceased's cattle.
- (5) The accused told the now deceased that he had no clue about the deceased's cattle and this angered the deceased who started charging towards accused person intending to assault him, citing that he was being disrespectful to him.
- (6) The deceased pushed accused person several times, until accused got to the edge of the veranda.

- (7) The accused then in self defence threw a punch at deceased who then fell and accused person ran away.
 - (8) The accused person denies murdering the deceased, but however, tenders a limited plea of culpable homicide.
- Wherefore the accused person prays for his acquittal on the charge of murder and that he be found guilty of a lesser charge of culpable homicide.”

The 3rd exhibit was a post mortem report by Dr S Pesanai. The doctor observed the following marks of violence on the remains of the deceased. On the skull he noted (1) scalp haematoma, on the right frontal parietal region; (2) lineal fracture right frontal extending to the parietal and temporal regions.

The brain revealed right epidural haematoma +/- 80mls, right parietal cerebral haemorrhage, generalized subdural haemorrhage.

The lung/pleura had bilateral pulmonary oedema left 420g, right 570g, basal haematoma (+/- 4). The oesophagus showed oesophageal varices.

The doctor remarked that the post mortem was consistent with bleeding in the brain resulting from blunt force trauma. He concluded that death was due to:-

- (1) Intracranial haemorrhage
- (2) Skull fractures
- (3) Blunt force trauma
- (4) Homicide

The above contents of the post mortem report were admitted by the defence counsel by consent without the need to call the pathologist.

This court therefore makes a specific finding that the deceased did suffer the above injuries following the assault on him by the accused although there was an attempt by him to minimize the way he inflicted the injuries. He stated in paragraph 7 of his defence outline that he punched the deceased once knocking him to the ground. The accused then ran away. A close

look at the above injuries seems to suggest that the assault on the deceased was more sustained than that.

In an effort to show that the accused did more than he wanted the court to believe the state called three witnesses.

The first witness was Talent Dube who is aged 26 years. He was the key witness. He knew both deceased and accused as they lived in the same area with him.

On 10 June 2013 he was at Mdluli Bottle Store drinking opaque beer with two friends. The deceased was drinking Black Label beer. The accused who was in the company of Mbekezeli was drinking Gold Blend. At one stage the patrons took to the dance floor to dance to the music which was being played as alcohol seemed to have taken effect on them in different ways. The accused seemed to have been energized and was talkative as he danced. He appreciated what he was doing.

The deceased was heard saying after the drinking session he would be going to his girlfriend called Letwin. The accused replied saying Letwin was also his girlfriend. The deceased insisted that she was his girlfriend. Whereupon the accused said if deceased insisted that she was his girlfriend he would assault him. The deceased went out of the bottle store to go away without responding to the accused's threats.

The witness said the accused told Mbekezeli that they should follow the deceased and assault him for claiming to be in love with Letwin. Accused and his friend Mbekezeli went out of the bottle store to go and assault the deceased. The witness remained dancing in the bottle store.

The accused and his friend later returned to the bottle store and found the witness still dancing. The accused who was still in a boisterous mood was boasting that he had assaulted the deceased. The witness then went out of the bottle store and stood by the entrance. On looking around, he saw the deceased lying near the veranda of the bottle store. His testimony was that he

concluded that indeed the accused had assaulted the deceased because he lay down. Deceased had walked out of the bottle store but was then lying down.

The witness said he went back into the bottle store and began to dance again. He then heard the accused again telling Mbekezeli that they should go and assault the deceased once more because he had belittled him. The two walked out of the bottle store.

He followed and stood by the veranda and watched the events in sequence. He observed the accused lifting up the deceased and punched him. The blow knocked him back to the ground. The accused picked him up by his neck and hit his head against a face brick veranda pillar twice. The deceased was already helpless when the accused was doing that to him. Deceased fell down after his head was bashed against the face brick veranda pillar. The accused left him to fall to the ground and stamped on him with his feet saying "I will kill this one".

As he was doing that, one Kholwani came out of the bottle store and remonstrated with the accused and told him to stop what he was doing. Accused appeared to listen to Kholwani. He stopped the assault and went away with Mbekezeli.

The witness together with the sister of the deceased, Sithole and Zenzo went to where the deceased lay. He noticed some head injuries. Deceased was then taken away.

The witness was cross-examined by defence counsel but was not shaken at all. He said the suggestion that deceased and accused pushed and shoved each other in the bottle store was false and so was the suggestion that the deceased confronted accused about the whereabouts of his cattle. The witness fairly told the court that he did not see Mbekezeli assault the deceased in any way. He just stood by with a bottle of beer in his hand. When it was suggested that accused assaulted deceased once and did not go back to assault him for the second time the witness was emphatic that he did.

The witness was criticized for saying he observed bleeding from the head instead of the nose as reflected in his statement to the police. In his testimony in court he said the injuries were

on the parietal region. That variation is of no consequence in my view. What is important is that the witness observed that the accused took hold of the deceased by the neck and bashed his head against a pillar twice. Whether blood came from the side of his head or nose and mouth is immaterial in such circumstances.

This witness gave his evidence with admirable clarity. The testimony reads well. He is worth to be believed and this court holds that what he told the court is what took place that evening.

The second witness was Zodwa Dube. She did not witness the assault at all but she corroborated the evidence of Talent Dube that deceased and accused had an argument over Letwin. There was no talk about cattle. She confirmed that both deceased and accused were under the influence of alcohol.

The evidence of the following Sergeant Tawanda Shoko, Constable Felix Mugumbate and Dr Sanganai Pesanai was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] by consent.

Kholwani Ndlovu was the third state witness. He confirmed that the deceased talked about wanting to go and visit his girlfriend. He at that stage left to go to the toilet. On his return, the deceased, accused and Mbekezeli were no longer in the bottle store. The accused and Mbekezeli returned shortly after the witness had returned from the toilet. He alleged that the deceased belittled him by grabbing him by the collar. He said he wanted to go and beat him up for that but the witness told him not to do that.

His evidence corroborates that of Talent that accused went out of the bottle store with Mbekezeli and deceased and that accused and Mbekezeli returned to the bottle store. This court finds that the accused returned to the bottle store and went out to go and perpetrate the second assault on the deceased as described by Talent.

The rest of Kholwani's evidence was non committal as he sought to make the court believe that when he noticed the deceased lying on the ground speechless he thought that was due to drunkenness. He went to him and called out his name but he did not respond.

He denied witnessing the assault and restraining the accused. He went on to say he did not even know anything about the assault until he heard about it the following morning.

He was clearly being untruthful for reasons only best known to him. His attempt to mislead the court was so clumsy that it could not mislead anyone as he had heard accused and deceased arguing about a girlfriend and the two went out of the bottle store. The accused returned saying he would assault the deceased. When he (Kholwani) went out of the bottle store he found the deceased lying down unable to talk he concluded that alcohol had taken its toll. That story is incredible. The correct version of what transpired was what was narrated by Talent.

The accused did not have any defence witnesses but gave viva voce evidence. He completely and materially departed from the story he had told his lawyer in his defence. The new version tallied with what all the state witnesses said that there was an argument over Letwin. It was during that argument that the two poked each other with fingers and exchanged blows with clenched fists. He overpowered the deceased who then fell down knocking his head against the ground. Accused then ran away and never returned to the bottle store.

The accused was a bad witness and was deliberately untruthful. He is not worth to be believed. This court has no hesitation in rejecting his story. The court accepts the well given evidence of Talent Dube.

The accused assaulted the deceased twice. During the second assault he bashed the deceased's head against a face brick pillar and was heard saying "I will kill this one". There is a clear intention to kill from what the accused said and bashing the head twice against a face brick pillar. The head is a delicate part of a human body.

The accused is clearly guilty of murder with actual intent.

Sentence

There is very little that can be said in favour of the accused i.e. he is a first offender who is now 25 years.

He tendered a limited plea which was not honestly made as he tried to mislead the court by withholding what he had actually done.

The assault was a brutal one involving bashing the head of the deceased and stamping on him with booted feet.

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

I repeat that young people in the age group 19 to 35 are causing havoc at social gatherings and beer drinks. They kill people without any provocation or at the slightest provocation.

Adequate sentences must be imposed to send a clear and loud message that that type of behaviour will never be countenanced by the courts.

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

25 years imprisonment.

*National Prosecuting Authority's Office, state's legal practitioners
James, Moyo-Majwabu & Nyoni, accused's legal practitioners*