

THE STATE

Versus

KHOLWANE NKIWANE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr Dewa and Mr Ndlovu
BULAWAYO 28 & 29 September 2023

Criminal trial

Mr. B. Gundani, for the State
Mr. N. Sibanda, for the accused

DUBE-BANDA J:

[1] The accused, Mr. Kholwane Nkiwane, is appearing before this court charged with the crime of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) [Act Chapter 9:23] (Criminal Code). It being alleged that on 13 November 2021 he stabbed Bambeni Ndlovu (deceased) intending to kill her or realising that there is a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused, who was legally represented throughout the trial, said he admitted the charge. However, a plea of not guilty was entered as required by law. The State tendered an outline of the summary of the State case (Annexure A), which was read and is part of the record. He tendered a defence outline (Annexure B) which was also read and is part of the record. The accused admitted that he stabbed the deceased, and pleaded self-defence and provocation. He sought that he be found not guilty and acquitted.

[3] The accused made admissions in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The admissions relate to the evidence of certain witnesses as it appears in the summary of the State case.

[3.1] The evidence of Dr S Pesanai a registered medical practitioner stationed at the United Bulawayo Hospitals. His evidence is that he examined the remains of the

deceased and compiled a post mortem report (exhibit 1) depicting the injuries inflicted on the deceased and concluding that the cause of death was haemorrhagic shock; stab wound to the heart; and assault.

[3.2] The evidence of Tedi M Mkandla is that the accused and the deceased were husband and wife, the accused is his uncle and the deceased was his aunt. On 13 November 2021 at approximately 8 p.m., he was seated outside the house with couple's children. The accused and the deceased were inside the house. The accused ordered the him and the children to get inside the house. He informed the accused that they were having their supper. The accused returned to the house. Thereafter, he heard the deceased screaming. This witness and a neighbour called Kenedy Nkiwane entered the house and the accused threw the keys to the ground and said "Here, you can have your things. I am going." The witness saw the deceased lying on the floor in a pool of blood.

[3.3] The evidence of Mike Ndou is that he is a member of the Zimbabwe Republic Police (ZRP). On 13 November 2021 he attended the crime scene and on entering the house he noted that there was a pool of blood near the door. In the bedroom he found the body of the deceased on the floor lying sideways and soaked in blood. The witness observed that the deceased had a stab wound on the right side of the chest. The accused was being attended to by an Ambulance crew as he claimed that he had taken Dichlorvos pesticide.

[3.4] The evidence of Joice Maphosa is that she is a member of the ZRP and the investigating officer in this matter. She attended the scene of crime in the company of Mike Ndou and other police officers. She found a blood-stained knife on the window seal. She took the knife and booked it as an exhibit. The body of the deceased was in the bedroom. It had a stab wound on the right side of the chest.

On 15 November 2021 she recorded a warned and cautioned statement from the accused. The accused gave his statement freely and voluntarily without any undue influence being brought to bear on his person. The evidence of Constable Wachenuka is that he is a member of the ZRP. He witnessed the recording of a warned and

cautioned statement from the accused. The statement was given freely and voluntarily without any undue influence being brought to bear on him.

[4] The State tendered with the consent of the accused the following documentary and real exhibits: the Post Mortem Report No. 1213/940/21 (exhibit 1) compiled by Doctor S. Pesanai who examined the remains of the deceased. The confirmed warned and cautioned statement of the accused (exhibit 2). An okapi knife with the following measurements: length of handle 8 cm; length of blade 11 cm; and widest part of blade 2 cm (exhibit 3).

[5] After the tendering of the exhibits the State closed its case without calling any witness to give *viva voce* evidence.

[6] The accused testified in his defence. He testified that on the fateful day he left home at around 3 p.m. going to the local shops. He left the shops around 7 p.m. going back home. He arrived home at around 8 p.m. He was intoxicated. He knocked at the door and he did not see the person who opened the door for him. When he got inside the house, he saw someone walking out of the house. He asked the deceased about the identity of the person who walked out of the house. The deceased responded by saying “he could not ask her about that he should have asked that person.” In answer to the deceased’s response, he slapped her with an open hand.

[7] The accused testified further that he found deceased washing dishes. The knife she was ordinarily using in the kitchen broke a handle, and she was now using the okapi knife for her kitchen chores. She picked the okapi knife and advanced towards him. There was brick in front of the kitchen which caused the accused to stumble and fall. The deceased got on top of him and injured his cheek. The accused tried to disarm her of the knife and a scuffle ensued. The deceased got hold of his private parts and started pulling them and he apologised and screamed. He testified that he was now holding the knife with his left hand and he could not tell how the deceased got stabbed. The accused testified further that he informed the investigating officer that he did not give the statement in his confirmed warned and cautioned statement.

[8] Under cross examination the accused testified that he had an altercation with the deceased at their house. This was after he saw a man walking out of the house. He did not recognise the man he saw leaving the house because it was dark in the sitting room. He conceded that he stabbed deceased with an okapi knife and identified exhibit 3 as that knife he used to stab the deceased. He picked up the knife, held it by his left hand and stabbed her. He directed the knife at her body. He testified that he told the investigating officer that the statement (exhibit 2) is not the one he gave to the police, and she said he will have to tell that to the trial court. He said at the time the statement was recorded he was traumatized by the death of his wife. He testified that he was not forced to give the statement, he gave it voluntarily.

[9] It was put to him in cross examination that the version in the defence outline that deceased was attacking him was an afterthought, his answer was that is what happened. It was further put to him that in his defence outline he says he stabbed deceased because she was pulling his private parts, he agreed. When put to him that according to his version the stabbing must have been a deliberate act, so that deceased would release him, his answer was that the stabbing was an accident, it shocked him. It was put to him that he could not defend himself by accident, his answer was the stabbing was a mistake. It was put to him that in the defence outline he was not telling the truth, he said it was the truth. When paragraphs 5 and 8 of the defence outline were read to him, he disassociated himself of the averments contained therein and said he was not defending himself, the stabbing of the deceased was a mistake. He made a turn and said the defence outline speaking to self-defence was not a fabrication.

[10] He testified further under cross examination that when he disarmed the deceased of the knife, he did not intend to stab her. It was put to him that his evidence in chief was different from his confirmed statement, he agreed. She reiterated that he was not defending himself, the stabbing was a mistake. Cross examined about the different versions he was putting forward; he said the truth is what he told the police. Put to him that he was misleading when he said he accidentally stabbed deceased when he lost balance, his answer was that “he was merely trying to defend himself from the case because of the wrong he had done.” Under re-examination he reiterated that he stabbed the deceased by mistake.

[11] The court’s view is that the accused was a very poor witness. The quality of his evidence was very poor. He was not consistent both within the content and structure of his own

evidence and with the objective facts. He was untruthful and could not stick to one version. He was merely peddling falsehood after falsehood to save skin. In fact, he said it himself that he was merely just trying to defend himself from the wrong that he committed.

[12] The accused admitted in terms of s 314 of the CP&E Act the evidence of certain witnesses as it appears in the outline of the State case. Section 314 is intended to relieve a party of the necessity of proving allegations admitted by the other party to the litigation. It allows for the proof of facts that are not in dispute. The following are the facts admitted by the accused and he cannot riddle out of them, and they constitute the established facts. That on 13 November 2021 at approximately 8 p.m. Mkandla was seated outside the house with the two children of the accused and the deceased. The accused and the deceased were inside the house. The accused ordered Mkandla and the children to get inside the house. Mkandla informed the accused that they will not go inside the house because they were having their supper. The accused returned to the house. Thereafter, the deceased was heard screaming. Thereafter, the body of the deceased was found in the bedroom floor lying sideways and soaked in blood. It had a stab wound on the right side of the chest. The blood-stained knife (exhibit 3) was found on the window seal. The accused gave his warned and cautioned statement freely and voluntarily without any undue influence being brought to bear on his person.

[13] In his confirmed warned and cautioned statement the accused admitted that he stabbed the deceased. The evidence shows that the accused stabbed the deceased with an okapi knife (exhibit 3) on the right side of the chest. It is therefore not in dispute and it is proved by evidence that the injuries inflicted on the deceased were caused by the accused. And that the injuries inflicted by the accused caused the death of the deceased.

[14] In the maze of the accused's versions the court must try and figure out his defence or defences to the charge. In his confirmed statement said the accused said he found the deceased with a man at the house, he got angry and picked a knife and stabbed her. In his defence outline (Annexure B) the accused raises the defence of self-defence and provocation. In his evidence in this court, he contended that he was intoxicated. He further testified that he stabbed the deceased by mistake. Each of these defences need to be subjected to scrutiny and analysis.

[15] It is trite law that an accused is not expected to convince the court as to the truthfulness of his version, whatever explanation he gives, no matter how improbable it may be, the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false. See *R v Difford* 1937 AD 370. However, the accused's version is not looked at in isolation but in light of the evidence led against them, and the probabilities of the whole case. The State must prove the guilty of the accused beyond a reasonable doubt in order to secure a conviction. However, proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it required such proof because it will rarely be achieved. See *Musimike v The State* SC 57/20.

[16] In his defence the accused testified that when he got inside the house, an unidentified man walked out of the house. According to this version when the accused entered the house, he could not have had a chance to go out of the house again, because immediately thereafter an altercation started between him and the deceased. According to the accused, it is this altercation that caused him to stab the deceased. The evidence is that after he stabbed the deceased, he locked himself in the house, and opened the door on arrival on of Mkandla and Kennedy Nkiwane. Looked very closely this version of the accused is at variance with the evidence of Mkandla a s 314 witness. According to Mkandla at around 8 p.m. the accused and the deceased were inside the house. The accused walked out of the house and ordered the witness and the children to go inside the house, these could not go inside the house because they were still having their supper outside the house. The accused went back to the house, thereafter the witness heard the deceased screaming.

[17] Further, in his confirmed statement he said he *found his wife with a man in the house*, and this is at variance with his evidence in court. In court he testified that he when he entered the house, *a man walked out of the house and the deceased was washing dishes*. The two versions are different. It is also conspicuous that Mkandla does not give evidence about this man accused says he saw walking out of the house. The accused testified that he just let this man go, did not even talk to him, did not even attempt to find out who this stranger was, and even to follow him outside of the house where Mkandla and the children were. Although he said it was dark inside the house, this cannot be correct, because the deceased could not have been washing dishes in the dark. In fact, the accused also said there was fire in the sitting

room, this fire must have provided light in the house. The accused's version of seeing a man at the house just does not hold water, it is leaking. It falls like a deck of cards. On the facts of this case, the accused's version of seeing a man walking out of the house is not only improbable but false beyond a reasonable doubt. The accused suggests that he was provoked by the presence of a man at the house, and a closer analysis of the evidence does not show that there was a man at the house. Therefore, the defence of provocation is not available to the accused, because it has no evidence to support it.

[18] Whilst s 314 of the CP & E Act obviate the need to call witnesses where the evidence is not in dispute, there are instances where due to the nature of the accused's defence *viva voce* evidence may assist the court in the resolution of the matter. In this instance Mkandla could have been called to testify and clarify issues pertaining to what happened on the fateful day, however the failure to call him was not fatal to the State case. It is so because the accused's lack of credibility as clearly demonstrated by his prevarification and inconsistencies regarding the reason for the stabbing of the deceased, made it clear that there was no truth in his many versions. The accused was peddling a falsehood after a falsehood. I flag this issue to show that solely relying on s 314 witnesses might, in some cases prejudice the State case.

[19] In his defence outline the accused raised a defence of self-defence. He said he stabbed the deceased in self-defence. Under cross-examination he conceded more than twice that when he stabbed the deceased, he was not defending himself. In fact, the defence of self-defence is not available to the accused. According to his version he was the aggressor, in that he started the scuffle by slapping the deceased with an open hand. The defence of self-defence is not available to an aggressor. It is available to one who is under an unlawful attack, and the accused was not under an unlawful attack.

[20] The accused's version that it was the deceased who was in possession of the knife and she hurt him on the cheek before he disarmed her requires closer scrutiny. He testified that he had a scare emanating from the wound inflicted by the deceased, and indeed it appears he has a scare, but the question is whether the scare emanated from the wound inflicted by the deceased. First, during confirmation proceedings he was asked whether he had any wound or injuries, his answer was in the negative. If indeed he had a wound inflicted on him by the

deceased, he would have simple informed the magistrate who confirmed the statement. In any event the wound would have been still fresh.

[21] Further, the accused's version that the kitchen knife was broken and deceased was now using the okapi knife in the kitchen is just a rehearsed lie. And that when he got home, he found deceased washing dishes is just a lie meant to show that she had access to the knife. According to his version, it was dark inside the house, the deceased could not have been washing dishing in the dark. In any event, the deceased could not have been washing dishes when she had a man in the house. This further shows that this version about the accused finding a man at the house is just a falsehood. Again, the accused's concession that the many versions are "just because he is just defending himself because he did something wrong" shows that the evidence about the deceased getting on top of him, hitting his private parts and him wrestling the knife is all false. The accused was trying to escape been held accountable for this crime.

[22] In his evidence in court the accused said he was intoxicated. The defence of intoxication was not raised in the defence outline. However, a court has a duty to inquire into a possible defence available to an accused, even if he has not specifically taken it. In this case there is however no evidence of the type of beer he was drinking and its alcoholic content. The accused person's recall of events is so clear that it could not be said that he was so beside himself with intoxication when he stabbed the deceased. He knew exactly what he was doing and for what purpose. Therefore, the defence of intoxication as provided in s 220 of the Criminal Code is not available to him in whatever form as a defence.

[23] The recurrent theme in the accused evidence was that the stabbing of the deceased was a mistake. For this defence to succeed, these requirements will have to be satisfied: the mistake must be one of fact; and the mistake must be in respect of a material or essential element of the crime. The test to determine whether the mistake was essential is to ask whether the accused would have committed the crime charged if the facts had been as he believed them to be. For example, it would be an essential mistake if, when accused kills a person he thinks he is killing an animal. (See Prof. G. Feltoe *A Guide to the Criminal Law in Zimbabwe* 25). In this case there was no mistake, the accused picked up a knife and stabbed the deceased. He

knew that he was stabbing a human being. Therefore, the defence of mistake is not available to the accused.

[24] The accused in his evidence also testified that he accidentally stabbed the deceased. In his confirmed statement he said he picked a knife and stabbed the deceased. In fact, in cross examination when it was put to him that he was misleading when he said he accidentally stabbed the deceased when he lost balance, his answer was telling, he said “he was just trying to defend himself because of the wrong he did.” The defence of accidentally stabbing the deceased is not available to the accused. It is clear that all the versions the accused has put forward are just an attempt to defend himself and refusal to be held accountable for the crime he committed.

[25] Mr. *Gundani* Counsel for the State sought a verdict of guilty to Murder. For the court to return a conviction of murder in terms of s 47(1) of the Criminal Code, the State must prove beyond a reasonable doubt that when the accused stabbed the deceased with an okapi knife, he intended to kill her or realised that there was a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility. The accused stabbed the deceased using a huge okapi knife with a handle of 8 cm, and a blade of 11 cm with a widest part of 2 cm. An okapi knife is a lethal and dangerous weapon. The accused stabbed the deceased on the chest which houses vital and delicate organs of the human body. No wonder the knife perforated the heart. The stab wound was 2 x 1 cm, and the wound in the heart was 1 x 0.5 cm. He deployed an excessive force in stabbing the deceased. No human being could endure such a stab wound. No wonder the deceased died. The evidence shows that the accused desired to bring about the death of the deceased and succeeded in completing his purpose.

[25] Having carefully weighed the evidence adduced as a whole in this trial it is clear that the State has proved its case beyond a reasonable doubt against the accused. The accused person is charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. It is no longer necessary in our law to specify whether the accused is guilty of murder in terms of s 47(1) (a) or (b). See *Mapfoche & Another v The State* SC 84/21.

In the result, the accused is found guilty of murder as defined in s 47 (1) of the Criminal Law (Codification & Reform Act) [Chapter 9:23].

Sentence

[26] Mr Nkiwane, this Court has convicted you of the crime of murder as defined in s 47 (1) of the Criminal Code. The murder you have been convicted of was not committed in aggravating circumstances as defined in s 47 (2) and (3) of the Criminal Code.

[27] This Court must now decide what sentence is appropriate for the offences for which you have been found guilty. To arrive at the appropriate sentence to be imposed, this court will look at your personal circumstances, take into account the nature of the offence you have been convicted of, and factor in the interests of society and the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[27] Your personal circumstances have been placed on record. You are 38 years old. You got married to the deceased in 2004, and together you have five children. You are a first offender and you have been in pre-trial incarceration for a period approximating two years. It has been placed on record that you are remorseful of having caused the death of your wife of many years.

[28] The crime you have been convicted of is grave and serious. The prevalence of the crime of murder is such that cognisance is sometimes lost of the extreme consequences that flow from it. A life is ended. Not only is a life ended, but the lives of family and friends are irreparably altered and damaged. The attack was brutal and savage. The kind of brutality you exhibited on the day in question is alarming indeed. The deceased died a violent death. You displayed a high degree of callousness. The injuries which you inflicted on the deceased were callous and brutal. You used lethal weapon and attacked the most delicate and vulnerable part of the human body, i.e., the chest. The extent of the force which you used was so excessive that you managed to perforate the heart.

[29] This court will take judicial notice that it is undeniable that our society is experiencing high levels of violent crimes against women. It is thus important and the duty of this court to impose appropriate sentences, particularly where women are murdered in the context of their marriages, their relationships and homes. Violence against women is rife and society expects the courts to protect women against the commission of such crimes. If offenders are punished too lightly for serious offences, society would lose confidence in our courts and so too would law and order be undermined.

[30] You used an okapi knife against your wife of many years and mother of your five children. You chose to direct the attack on her chest, and perforated the heart. The deceased looked upon you for protection. You abused her trust in a horrific manner. What a horrible way to end the life of another human being. This court must say it, and say it strongly that such conduct will not be tolerated. This court has taken a stand, and it will continue taking a stand against this wanton violence and destruction of life. Such conduct must be answered with appropriate and severe punishment.

[30] The mitigating factors in your favour pale into insignificance when consideration is given to the nature of this crime. The only weighty mitigating factor is that you have been in pre-trial incarceration for a period of two years, otherwise if it were not so, you would have been sentenced to a period of 20 years imprisonment.

[31] Taking into account the facts of this case, the following sentences will meet the justice of this case:

You are sentenced to 18 years imprisonment.

*National Prosecuting Authority, state's legal practitioners
Gula-Ndebele & Partners, accused's legal practitioners*