

THE STATE

Versus

NKULULEKO MABHENA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mrs C Baye and Mr E. Shumba
GWERU 30 AND 31 JANUARY 2024

Criminal Trial

M. Mhene, for the state
A. Chinamatira, for the accused

KABASA J: The accused appeared before us on a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. A plea of not guilty was entered although the accused admitted killing the now deceased.

The state alleges that on 30 July 2020 the now deceased and the accused had a misunderstanding over what relish they were to eat that evening. The two were brothers who were staying together. As a result of the misunderstanding the accused took a knife and stabbed the now deceased on the chest leading to his death. The accused then tied a rope to the deceased's neck and loaded the body into a wheelbarrow, pushed it for about 80 m and dumped the body along the road.

In his defence the accused did not deny inflicting the injury which resulted in the death of the now deceased. He however explained that he was defending himself as the now deceased had slapped him and was threatening to assault him using an axe handle. He therefore prayed for a conviction on the lesser charge of culpable homicide.

To prove its case the state produced the post-mortem report which was compiled by a pathologist, doctor Juana Rodriguez Gregori. The cause of death was given as:-

Acute anaemia

Cardiac and pulmonary laceration

Stab wound

The following marks of violence were observed:-

- a) Incised wound 2.5 cm in length located on the 2nd anterior intercostal space 1 cm into the sternum and penetrating into the thoracic cavity
- b) Fracture of the 3rd costal arch with abundant free blood in the thoracic cavity
- c) Laceration of the left atrium and upper lobe of the left lung
- d) Pale cut surface on the liver

The accused's confirmed warned and cautioned statement was also produced and in it he said:-

"I do admit to the allegations being levelled against me. I stabbed the now deceased with a knife once on the left side of the chest after he had slapped me once with an open hand on the left cheek. I was holding a home-made knife and he was holding an axe handle. I am asking for forgiveness. I did not intend to kill him."

The evidence of eight witnesses was admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. Nothing turned on these witnesses' evidence as it only established how the deceased's body was discovered and later ferried to his homestead before it was taken to the mortuary and finally to hospital for post mortem examination.

The state led evidence from two witnesses. The first witness was an uncle to the accused and the now deceased. His evidence was largely common cause. He did not witness the stabbing and so could not controvert the accused's story.

The second witness was one of the Police Officers who attended the scene. His evidence was also largely common cause. The knife the accused used, the wheelbarrow he used to ferry the deceased's body, the rope he tied the body with were issues that were not disputed. Nothing turned on this witness's evidence.

The knife used in the assault had the following measurements:-

Weight	-	150 g
Length	-	29, 7 cm
Blade	-	17, 5 cm

Handle - 12, 20 cm

Width of blade - 3 cm

In his defence the accused accepted using this knife. He explained how the events unfolded. The two had a dispute over relish with the accused wanting the dried meat he believed was in the now deceased's bedroom. The two went together to check and found nothing. Whereupon the now deceased suggested that accused prepares okra instead. The accused however did not want okra and so asked for a gallon of maize to use in exchange for vegetables. The now deceased remarked that the accused was disrespectful, slapped him, closed the door to that bedroom and took the axe handle with which he wanted to assault the accused. The accused who had a knife which he had brought in order to cut the dried meat used that knife to stab the now deceased. In panic he loaded the body onto the wheelbarrow and dumped it at the road.

No one else witnessed this incident and so it was really the accused's version which was before the court. Whilst the dumping of the deceased's body raised eyebrows, the accused's explanation was reasonable. He said he panicked and decided to dump the body upon realising that he had killed his brother. Such explanation was not shown to be beyond doubt false nor was the explanation regarding how the deceased was stabbed. The explanation was reasonably possibly true. (*S v Kuruone* HH 961-15, *R v Difford* 1937 AD 370).

The only issue was whether the defence raised by the accused is available to him.

Section 253 of the Criminal Law Code sets out the requirements to be met where one pleads self-defence. There are:-

- a. The accused must be under an unlawful attack
- b. Such attack must have commenced or was imminent
- c. The accused's conduct must be necessary to avert the attack after exploring all avenues of escape.
- d. The means to avert the attack must be reasonable in all the circumstances
- e. The harm or injury caused to the attacker must not be grossly disproportionate to that liable to be caused by the unlawful attack.

Turning to the facts at hand, the attack on the accused was unlawful and it had commenced. The accused had been a victim of a similar attack before and therefore his conduct was necessary to avert the attack. He had the knife in his hands and the exit was where the now deceased was.

In *S v Kapenya & Anor* HH 14-2018 HUNGWE J (as he then was) explained that a court should not adopt an armchair approach in considering the defence of person. He had this to say:-

“The question whether an accused can successfully claim the defence of private defence is determined by examining objectively the nature of the attack and defence to determine whether they conform to the principles of law that are set out (above). This means that each requirement of the attack and defence must be judged from an external perspective rather than in terms of the accused’s perceptions and his assessment of the position at the time he resorted to private defence. In applying the test the court must be careful to avoid the role of an armchair critic ... weighing the matter in the secluded security of the room. Instead the court must adopt a robust attitude, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence. See *S v Ntuli* 1975 (1) SA 42 A at 436 D.”

That said, the accused’s actions met the requirements of self-defence. However there is no doubt that he plunged the home-made knife of the dimensions aforesaid with severe force into the deceased’s chest. The injuries observed by the pathologist do not show a weak blow as the accused sought to suggest. The knife penetrated 1 cm into the breastbone and penetrated the chest cavity fracturing the 3rd costal arch. The upper lobe of the left lung was lacerated and the liver was also lacerated.

Section 254 of the Criminal Law Code provides that:-

“If a person accused of murder was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime, he or she shall be guilty of culpable homicide if all the requirements for defence of person specified in section two hundred and fifty-three are satisfied in the case except that the means he or she used to avert the unlawful attack were not reasonable in all the circumstances.”

The accused had been slapped, granted the now deceased was holding the axe handle but to plunge a knife into the chest with such force exceeded the bounds of self-defence. The accused must have appreciated this and that is why he was at pains to explain the stabbing. He initially made as if he did not intentionally stab the deceased but the knife just somehow found its way to the now deceased’s chest. However he ultimately did acknowledge that he stabbed the now deceased and not that it was accidental.

His action was not reasonable in all the circumstances. Whilst the defence is available to him it however avails him only as a partial defence.

Counsel for the accused and the state counsel's addresses correctly articulated this point.

The accused is accordingly found not guilty of murder but guilty of culpable homicide.

Sentence

In assessing sentence we considered the following:-

The accused is a 34 year old first offender. From the outset he accepted that the deceased died at his hands and accepted causing the death. However the state apparently were not accepting the limited plea.

Throughout the trial the accused expressed regret and was genuinely remorseful.

He has spent 3½ years in pre-trial incarceration. He had been granted bail but was not able to raise the US\$100. The fact that none of his relatives were prepared to pay the bail for him is probably indicative of their attitude towards him.

The taking of his own brother's life is likely to haunt him for the rest of his life. Society will label him a murderer who killed his brother and that is a burden that can be heavy to carry.

The psychological imprisonment is likely to be far worse than the imprisonment that comes with the four corners of a prison cell.

Aggravating is the fact that a life was unnecessarily lost. Life is precious and a gift given to each one of us which should not be taken by another human being.

Courts have time without number implored society to respect the sanctity of life.

After the deceased's death the accused tied his neck in order to pull him and load him into a wheelbarrow so he could dump his body at the roadside. Granted he panicked but he took time to prepare a meal and eat before doing that. That was lack of respect for the deceased's body.

SI 146/23 has a presumptive penalty of 5 years where there are aggravating factors and 3 years where such do not exist and there is contributory negligence, evidence that the accused assisted the deceased or paid compensation. The use of a knife and the treatment of the deceased's body would amount to aggravating circumstances justifying the imposition of 5 years.

However had this matter been concluded close to the time of the commission the accused would have completed his sentence. 3½ years is a long time to be in prison awaiting to hear one's fate.

The sentence must therefore fit the offender, the offence and be fair to society.

A vengeful attitude must not cloud the court's mind as sentence should be assessed rationally. Tampering justice with mercy ensures a balanced approach.

Given the 3 ½ years the accused has been in prison, the conviction on the lesser offence of culpable homicide, his genuine show of remorse and regret and the stigma that he will now live with for the rest of his life, a wholly suspended sentence would meet the justice of the case.

Accused is accordingly sentenced to:-

3 years imprisonment the whole of which is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Masawi & Partners, accused's legal practitioners