

**THE STATE**

**Versus**

**MELI MGUNI**

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr. Ndubiwa and Mr. Ndlovu

HWANGE 8 March 2024

**Criminal trial**

*Ms. M. Musaka* for the State

*Ms. A. Kunda* for the accused

**DUBE-BANDA J:**

[1] The accused is appearing before this court charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 17 March 2023 he unlawfully caused the death of Vusumuzi Ngwenya referred to as deceased by stabbing him once on the chest and once on the buttock with an okapi knife intending to kill him or realising 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.

[2] The accused pleaded not guilty to the crime of murder and offered a plea of guilty to the lesser crime of culpable homicide. The State accepted the plea of guilty to the crime of culpable homicide. The State tendered into the record of proceedings a statement of agreed facts, which is before court and marked Annexure "A". The statement reads as follows:

- i. The accused was aged 15 years of age at the time of the commission of the offence and he resides at Sindiso Mguni's homestead, Village Ndimimbili 2, Chief Mabikwa, Lupane.
- ii. The deceased was aged 21 years of age at the time he met his death. He used to reside at Clifford Ngwenya's homestead, Village Mawala, Chief Sikhobokhobo, Nkayi.
- iii. Accused and deceased were cousins.
- iv. On the 17<sup>th</sup> of March 2023 and at 2100 hours, accused, deceased and one Sufficient Mguni who is accused's brother and is at large were at Sindiso Mguni's shop,

Mabhalabhala – Zimela Business Centre, Ngwaladi, Nkayi. Deceased was standing by the counter while Sufficient was standing behind the counter.

- v. Deceased and Sufficient had a misunderstanding. The two then went out of the shop.
- vi. Deceased ran towards Sufficient while at the same time throwing stones at him. Sufficient moved backwards to avoid the stones.
- vii. Deceased got to where Sufficient was and they both fell down whilst manhandling each other. Deceased overpowered Sufficient.
- viii. Accused ran out of the shop to where deceased and Sufficient were. Deceased was still on top of Sufficient. Accused picked a knife where deceased and Sufficient were fighting and stabbed the deceased once on the buttock and once on the chest.
- ix. Thandolwenkosi Sibanda also proceeded to the scene and dragged the accused back into the shop and warned him not to get involved in Deceased and Sufficient's issues.
- x. Deceased ran away from the scene while Sufficient remained and went back into the shop. Deceased was found laying dead near the shops a few minutes after he had left the scene.
- xi. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death of the deceased.

[4] The State tendered the following exhibits: the first a post mortem report 331/259/23 exhibit 1. The post mortem report was compiled by Dr. S. Pesanai who concluded that the cause of death was haemorrhagic shock; stab wound heart and assault. The second exhibit is the birth certificate (exhibit 2) of the accused which shows that he was born on 4 June 2007, making him 15 years old at the time of the commission of this offence and 16 years old at the time of the trial. The accused was assisted by his father - Sindiso Mguni.

[5] The totality of the facts and the evidence adduced in this trial show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased.

[6] The accused stabbed the deceased in an attempt to help his brother who was engaged in a fist fight with the deceased. His brother was being overpowered. He picked a knife at the scene and proceeded to stab the deceased on the buttocks and chest. The facts show that accused stabbed the deceased in defence of his brother. In terms of the law in this jurisdiction

the defence of defence of another person has been codified in s 253 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In respect of the attack, it is required that the attack must be unlawful, must have commenced or was imminent, while the defensive act must be directed against the attacker and necessary to avert the attack. It is further required that the means used must be necessary in the circumstances. The attack on the accused's brother was unlawful and had commenced. The accused was entitled to take immediate action in defence of his brother. The only problem is that he used excessive force which was disproportional with the attack. He stabbed the deceased twice on the buttocks and heart. This was disproportional to the attack on his brother. In stabbing the deceased in the manner he did a reasonable man placed in the same circumstances as the accused would have foreseen the possibility of death and would have guarded against it. The conduct of the accused shows that he fell below the reasonable person standard. The accused ought, as a reasonable man, to have foreseen the death of the deceased and guarded against it. The accused was negligent and it was his negligence that led to the death of the deceased. On the basis of the facts and the evidence of this case, the court is satisfied that the State's concession was properly taken.

In the result: the accused is found not guilty of murder and found guilty of the lesser crime of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

### Sentence

[7] It is often said that sentencing is the most difficult phase of a criminal trial, and rightly so. This case brings into sharp focus the dilemma that is often faced by the trial court when sentencing a child for violent crime. In determining an appropriate sentence this court must consider the applicable sentencing principles, taking into account the specific circumstances of this case. A consideration of the well-known triad of sentence consisting of the crime, the offender and the interests of the offender, is necessary.

[8] It is trite that in the sentencing of a child, every court must take into account the provisions of s 21(1) of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023 which provides that that the best interests of the child are the paramount consideration when determining the most appropriate sentence to impose and the court shall strive as best as it can to ensure that the sentence is rehabilitative in nature and imprisonment as a sentence

imposed on a child is to be used only as a last resort and then only for the shortest possible period of time. In terms of the Regulations a “child” means any person under the age of eighteen years. The accused is 16 years old and therefore a child.

[9] The personal circumstances of the accused are these: he is 16 years old; residing with both parents; he dropped out of school at Form 1; he dropped out of school because he was a below average student. His family compensated the family of the deceased by means of a head of 21 cattle. The circumstances surrounding the commission of this crime show that the accused is indeed a child. He did not know the cause of the fight between his brother and the deceased, when he saw his brother being overpowered, he merely picked up a knife and stabbed the deceased. This clearly was an unwise and ill-considered decision typical of children.

[10] On the other hand the accused ended the life of a young person who was aged 21 when he met his death. He used a lethal weapon on a delicate part of the human body, i.e. the chest. He used so much force that the knife perforated the heart of the deceased. At the moment the deceased was stabbed he was not armed.

[12] Significantly, the probation officer compiled a pre-sentence report exhibit 3 which is before this court. In that report the probation officer recommended that the passing of sentence be postponed for five years on condition the accused is not convicted of the same offence during that period. The expert expressed an opinion that the accused took responsibility of his actions and was remorseful and that he was unlikely to repeat the same offence.

[13] A sentence of direct imprisonment is not warranted in this case. The sentence must rehabilitate the accused. It must not break him. In the circumstances, the following sentence will meet the justice of this case.

The accused is sentenced to 3 years imprisonment wholly suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical 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  
*Dube & Associates*, accused's legal practitioners