

THE STATE
versus
TAWONA MICHAEL MHUTE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 9 November 2009 and 23 January 2012

Assessors

1. Mr Gonzo
2. Mr Shenje

F.I. Nyahunzvi, for the State
G. Chikumbirike, for the defence

BHUNU J: The accused is charged with the murder of his wife which allegedly occurred in the course of domestic violence on 3 October 2008. Dr N Gonzalez examined the deceased's remains on 9 October 2008 where upon he compiled a post mortem report.

The doctor has since left the country and is unavailable to give evidence. The State however seeks to rely on and has tendered the postmortem report as evidence against the accused notwithstanding the unavailability of the doctor who compiled the report.

The defence has vigorously challenged the admissibility of the post mortem report in the absence of its author.

Section 278 of the Criminal Procedure and Evidence Act provides for the admission of documents of this nature as follows:

“278 Admissibility of affidavits in certain circumstances

- (1) In any criminal proceedings in which it is relevant to prove—
 - (a) any fact ascertained by an examination or process requiring knowledge of or skill in bacteriology, chemistry, physics, microscopy, astronomy, mineralogy, anatomy, biology, haematology, histology, toxicology,

physiology, ballistics, geography or the identification of finger-prints, palm-prints or footprints or any other knowledge or skill whatsoever;

(b) any opinion relating to any fact ascertained by an examination or process referred to in paragraph (a); a document purporting to be an affidavit relating to any such examination or process and purporting to have been made by any person qualified to carry out such examination or process who in that affidavit states that such fact was ascertained by him or under his direction or supervision and that he arrived at such opinion, if any, stated therein shall, on its mere production in those proceedings by any person, but subject to subss (11) and (12), be prima facie proof of the fact and of any opinion so stated.

(2) In any criminal proceedings in which it is relevant to prove—

(a) any fact ascertained by a medical practitioner in any examination carried out by him which is proper to the duties of a medical practitioner;

(b) that any treatment, including the performance of an operation, was administered by a medical practitioner;

(c) any opinion of a medical practitioner referred to in paragraph (a) or (b) relating to any fact or treatment referred to in that paragraph;

a document purporting to be an affidavit relating to any such examination or treatment and purporting to have been made by a person who in that affidavit states that he is or was a medical practitioner and in the performance of his duties in that capacity he carried out such examination and ascertained such fact in such examination or administered such treatment, and, in either case, arrived at such opinion, if any, stated therein shall, on its mere production in those proceedings by any person, but subject to subss (11) and (12), be prima facie proof of the facts and of any opinion so stated.

(11) An affidavit referred to in this section shall not be admissible unless the prosecutor or the accused, as the case may be, has received three days' notice of its intended production or consents to its production.

(12) The court in which any affidavit referred to in this section is produced in evidence may, of its own motion or at the request of the prosecutor or of the accused, cause the person who made the affidavit or any other person whose evidence the court considers to be necessary to give oral evidence in the proceedings in question in relation to any statement contained in the affidavit or may cause written interrogatories to be submitted to such person for reply, and such interrogatories or any reply thereto purporting

to be a reply from such person shall, on their mere production in those proceedings by any person, be admissible in evidence.

- (13) Nothing in this section shall be construed as affecting any provision of any enactment under which any certificate or other document is made admissible in evidence, and this section shall be deemed to be additional to, and not in substitution of, any such provision.”

The import of the above section is to render any affidavit purporting to have been made by a medical practitioner in the course of his duties admissible upon its mere production by any person. The post mortem report intended to be produced by the State fits squarely within the family of documents admissible upon their mere production by any person in terms of s 278 of the Act. That being the case I find that the objection is unsustainable.

It is accordingly ordered that the postmortem report tendered by the State be and is hereby admitted in this case in terms of s 278 (2) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

*The Attorney General’s Office, the State’s Legal Practitioners.
Chikumbirike and Associates, the accused’s Legal Practitioners.*