

THE STATE
versus
TICHAONA GENGEZHA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 4, 5, 8 & 23 November 2021

Assessors: Mr Shenje
Mr Chakvinga

Criminal Trial

P Gumbo, for the State
Ms Z Takawira, for the accused

MUREMBA J: The accused (29) is charged with murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He is alleged to have caused the death of Russel Kandororo by stabbing him with a knife on 14 August 2020 on both sides of the abdomen resulting in his death on 24 August 2020.

The stabbing is alleged to have happened at Kashashe Bottle Store in Guruve, in the evening around 7pm. In denying the charge the accused did not deny being at the scene on the evening in question. His defence however, is that he is not the one who stabbed the deceased. He averred that he was actually a victim of assault himself on the evening in question. He said that he was stabbed on the shoulder, but since it was dark, he did not see who stabbed him.

The State's evidence

The State had eleven witnesses who were lined up to give evidence. However, the evidence of six of its witnesses was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. *Viva voce* evidence was led from Brian Ruveira, Artwell Kandororo, and Smart Kandororo. From their evidence what is common cause is that they were in the company of the deceased drinking beer in Siyawamwaya bottle store at Mudhindo

business centre in Guruve. Around 7 pm the accused phoned Brian Ruveira enquiring about the whereabouts of Smart Kandororo, a nephew to the deceased. The accused is said to have made accusations that Smart Kandororo was having a love affair with Tracy Mavhunga whom the accused said was his wife. The accused threatened to assault the witnesses especially Smart Kandororo. The accused asked Brian Ruveira where they were and he was told that they were at Siyawamwaya Bottle Store. Brian Ruveira's phone was on loud speaker. So, the rest of the witnesses and the deceased could clearly hear what the accused was saying. The accused was known to all of them as he is from the area where the witnesses reside. The witnesses said that after the phone call, they stayed a little longer and then decided to go home, in the villages. They left the bottle store spaced out. Brian Ruveira, the deceased and Smart Kandororo who were walking ahead of the others met the accused at Jena homestead. As soon as the accused saw them, he started attacking Smart Kandororo and the two fought. When Artwell Kandororo arrived at the scene, he asked what was happening. The accused took to his heels and fled from the scene. Artwell Kandororo was an elder brother whilst Smart Kandororo was a nephew to the deceased. Brian Ruveira was the deceased's friend. At Jena homestead visibility was good because there were lights at the nearby houses.

The State witnesses said that after the accused had fled into the night they continued walking home. When they got to Kashashe Bottle Store which is close to Siyawamwaya General Dealer, the accused emerged from the gate of a certain house with a durawall. The accused was holding a log and was shouting that Smart Kandororo had defeated him at Jena homestead. He drew closer and attempted to strike with the log. It was Brian Ruveira's evidence that the accused was attempting to strike Smart Kandororo. But according to Artwell Kandororo and Smart Kandororo, the accused intended to strike Artwell Kandororo. However, they all said that when the accused attempted to strike with the log he was held by Artwell Kandororo, who then disarmed him of the log. According to Artwell Kandororo and Smart Kandororo, when the accused was being disarmed, he drew a silver knife from somewhere around his waist. According to Brian Ruveira, the accused drew the knife from the pocket of his pair of a three – quarter short. The accused cut the sleeve of the jacket that Artwell Kandororo was wearing. Fortunately, his arm was not cut. When Artwell's sleeve was cut, he let go of the accused and started to run away from him. He had noticed the knife. The accused chased after Artwell

Kandororo, but he (accused) then made a U-turn and faced the deceased who was walking following behind. It is not really clear why the deceased was following behind, but it is said that the deceased was drunk and was not fighting anyone. All the three witnesses said that when the accused turned, he then advanced towards the deceased who was walking towards him. The accused deliberately bumped into the deceased and pushed him. The deceased fell on his back. The accused straddled on top of the deceased and stabbed him three times, viz once on the shoulder and twice in the abdomen on both sides. Smart Kandororo said that as the accused was stabbing the deceased, he (Smart Kandororo) moved closer up to a distance of 2m with the intention of rescuing his uncle. However, each time he moved closer, the accused would stand up and swing the knife thereby causing Smart Kandororo to retreat and he (the accused) would then kneel on the deceased and stab him. The accused did this three times as he continued to stab the deceased. He only stopped when Artwell Kandororo who had been 20 – 30 metres away when the accused started stabbing the deceased came running and kicked him with booted feet. That is when the accused stood up and ran away. Visibility was said to have been good at this place because there were lights that were coming from the nearby shops. In addition, the sun had just set and it was still dusk. People could see objects at a distance.

After the accused had run away, the deceased immediately stood up and walked towards the back of Kashashe bottle store toilet. Brian Ruveira followed him and shouted that the deceased had been injured. All of them followed the deceased and found him trying to put back his intestines which were protruding from the abdomen. They took off their shirts and tied them around the wound. They tried to walk with him to the clinic, but after 20 metres the deceased could not walk anymore. They looked for a car which then ferried him to the clinic. From there he was referred to Guruve hospital and then to Bindura hospital where he later died.

Tracy Mavhunga's evidence was to the effect that the accused is her former husband. She denied having been in a relationship with Smart Kandororo.

Tedious Masauso is a nurse at Bepura Clinic. He attended to the deceased on 14 August 2020 when he was brought to the clinic. He observed two wounds on the abdomen. He sutured the wounds and the deceased regained consciousness. He referred the deceased to Guruve Hospital.

Conrad Shambare, a medical doctor at Bindura General Hospital attended to the deceased from 16 August 2020 to 24 August 2020 when he then passed on.

Masoso Tarwirei, a driver in the Zimbabwe Republic Police ferried the deceased's remains for an autopsy at Parirenyatwa hospital.

Enos Muranda is a police officer in the Zimbabwe Republic Police. He attended the scene of crime. Smart Kandororo, Artwell Kandororo and Brian Ruveira made indications to him.

Reza Effort, the investigating officer gave *viva voce* evidence, but he had nothing to say about who murdered the deceased because he was not an eye witness to the stabbing incident.

The State produced the post mortem report which states that death was due to among other things, severe abdominal trauma due to stab wound.

The defence's evidence

The accused said that on the day in question he had a misunderstanding with the State witnesses who testified in court. He said that Tracy Mavhunga was his wife. He was lodging a place for her at a bar called Masowe at Mudhindo Business Centre. He said that this is where he was staying with Tracy. The accused said that on the day in question when he got into the kitchen, he found Tracy on the phone and he asked her who she was talking to and she said that it was Brian Ruveira. The accused requested for Tracy's phone and phoned Brian Ruveira, warning him not to talk to his wife. Brian Ruveira said it was well. What is pertinent is that all this was new evidence which was never put to the State witnesses who said that it was the accused who phoned Brian Ruveira first, making accusations that Smart Kandororo was having an affair with his wife Tracy Mavhunga. The State had also adduced evidence to the effect that Tracy was the accused's former wife, but the accused never challenged it. In fact, that evidence was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act. It was admitted and accepted without question by the accused.

The accused then said after he had spoken with Brian Ruveira, his next-door neighbour, one Partson Murakwani Chideno arrived. Partson said that he was going to Zambezi Bar to buy tobacco. The accused said that he suggested that they go together since he was proceeding to his mother's rural home. When they were at Zambezi, the accused said that he received a phone call from Smart Kandororo asking him where he was. The accused said that when he told Smart

Kandororo that he was at Zambezi Bar, Smart Kandororo invited him to come to Siyawamwaya bottle store. The accused said that he asked Partson Murakwani to accompany him to Siyawamwaya bottle store and they started for Siyawamwaya. Again, this was all new. It was never put to the State witnesses that Smart Kandororo had on the fateful night phoned the accused inviting him to come to Siyawamwaya. It should be remembered that the State witnesses said it is the accused who had phoned Brian Ruveira making threats to assault them, but especially Smart Kandororo.

The accused said that on their way from Zambezi to Siyawamwaya bottle store, they met with the State witnesses at Jena's place around 7-8pm. He said it was now darkish and when they were about 5 metres away from each other, the State witnesses asked if he was Tichaona and he confirmed. The State witness switched on their torches. They asked him if he wanted to cause trouble. Smart Kandororo pounced on him and Brian Ruveira and the deceased joined in assaulting him with hands. Artwell Kandororo who was the eldest, then arrived at the scene. The accused said that he told Artwell Kandororo that he did not know why they were assaulting him, but Artwell also started assaulting him. The accused said that he realised that he could get injured. He then fled from the scene towards Tamari bar. Partson, the accused's neighbour had just been standing at the scene. Again, this version of how events unfolded at Jena's place was totally new. It was only coming out in the defence case. It was never put to the State witnesses during their cross examination. It should be remembered that when the State witnesses testified, they all said that when they met with the accused at Jena homestead, it is the accused who just started fighting Smart Kandororo from nowhere and Smart fought back. Accused is said to have run away when Artwell Kandororo who was walking behind arrived at the scene and asked what was happening.

The accused testified that after he fled from Jena's place, he phoned his uncle Lisbern Gengezha and told him what had happened. The uncle asked the accused to come to his house. The accused said he proceeded there and the two of them met by Lisbern Gengezha's gate. Lisbern Gengezha said that he would accompany the accused home, but whilst they were still standing by the gate, the State witnesses emerged from the gate of Zambezi Bar. They were proceeding towards Kashashe bottle store which is close to Lisbern Gengezha's house. They then spotted him (the accused) and switched on their torches and said, "There is Tichaona". The

accused said that he stood behind Lisbern Gengezha who asked the State witnesses why they had had an altercation with the accused. The accused said that they were unable to answer, but they immediately started to assault him (the accused). Although Lisbern Gengezha tried to restrain them, he did not succeed. The accused said that at that point he was stabbed on the shoulder, and since it was dark, he could not see who had stabbed him. The accused said that when he tried to flee, he was held by the jacket and was tripped to the ground. The accused said that he was hit on the leg with something which felt like a metal object. The accused said that he managed to remove his jacket and fled to Lisbern's place where he stayed for about 30 minutes. He said that he then called out Lisbern's name. The State witnesses answered pretending to be Lisbern. When the accused went out, they attacked him using catapults. The accused said that he went back to Lisbern's house. Lisbern later came into the house saying that the deceased had sustained injuries. However, Lisbern said that he did not know how the deceased had sustained those injuries. Lisbern then suggested that the accused uses the back gate to go to his mother's home, which the accused did. This whole version of how events happened when the accused and the State witnesses met at Kashashe bottle store was totally different from the narration that was given by the three State witnesses, yet the accused's version was never put to the State witnesses by the defence counsel for them to comment.

The accused said that when he got home, he told his mother what had happened. She said that people from the Kandororo family were troublesome. She went on to say that they would come for him. Accused said that he consequently went into hiding and stayed in a gum tree plantation for three days. The accused said that he later learnt that the Kandororo boys were searching for him all over. This prompted him to leave for Mvurwi where he stayed with his mother's sister for 5 months. He said that he was afraid to go back home because he had then heard about the deceased's death and that the Kandororo boys were still looking for him. He said that he eventually left for Harare and was arrested in Domboramwari in Epworth in January 2021 at the instance of one Keda Kandororo whom he had met in Domboramwari. Keda Kandororo alerted the police who then arrested him. The accused vehemently denied stabbing the deceased. He said that he did not even have a knife on his person. The accused said that he did not see who stabbed the deceased because visibility was poor at the scene. The State witnesses had even lit their torches. Whilst he admitted that there was light from Vine Juice Shop, he said that the light

was not bright enough for one to see what exactly was happening. The accused said that in his view the deceased was stabbed during the scuffle as the State witnesses were assaulting him (the accused) indiscriminately. The accused said that he managed to direct three blows at Smart Kandororo.

Lisbern Gengezha testified as a defence witness. He said that on the fateful night he received a phone call from the accused when he was already asleep. The accused said that the deceased, Smart Kandororo, Brian Ruveira and Prince had assaulted him. Lisbern said that he asked the accused to come over to his place so that he could accompany him home. The accused came shortly thereafter, entered the house and found him still in bed. The accused started narrating what had happened as Lisbern was dressing up. As Lisbern was looking for his shoes under the bed, the accused said that the State witnesses could follow him and he exited Lisbern's house. It must be noted that this version of events was totally different from the version the accused gave. The accused said that he met Lisbern by his (Lisbern's) gate. The accused never said that he went inside Lisbern's house and found Lisbern sleeping.

Lisbern said that when the accused went out, he followed right behind him. They were 10 metres apart. He said that the accused then exited the gate. Lisbern said that soon after that he heard some noise. He then saw three people namely Smart Kandororo, Russel (the deceased) and Prince assaulting the accused using sticks. Brian Ruveira was holding a torch. Lisbern said that when he attempted to hold Smart Kandororo, he was pushed aside. Lisbern said that he left and went to the shop that was opposite where he sat. The accused started shouting that he had been "killed" meaning that he had been severely injured. Lisbern said that because of the severity of the assault he could not go there, but remained seated. Again, this version of events was totally different from the version of events as narrated by the accused. The accused said that the State witnesses emerged from Zambezi Bar and as they were walking towards Kashashe they saw him and his uncle Lisbern standing by the gate. They lit their torches and said, "There is Tichaona" and he hid behind Lisbern. Lisbern asked them what the altercation was all about. They did not answer him but immediately started assaulting him.

Lisbern said that as he was seated at the shop that was opposite the scene, the accused continued to be assaulted but he eventually managed to escape in less than 10 minutes. Lisbern said that he just heard the State witnesses saying that the accused had escaped and that

someone had been injured. Lisbern said that he then left for his place where he found the accused crying. Lisbern said that he told the accused that someone had been injured. He let the accused out of his premises using the back gate and the accused proceeded to his home. Again, this version was nowhere similar to the version given by the accused who said that when he was injured, Lisbern was standing at the scene. The accused never said that Lisbern left the scene and went to sit at the shop which was opposite the scene. The accused spoke about escaping from the scene, leaving Lisbern there, going to Lisbern's house, spending 30 minutes there and then coming out calling out to Lisbern where upon the State witnesses started pelting some stones at him. Lisbern's version did not have all of this evidence. Lisbern said that as soon as the accused escaped as he (Lisbern) was seated at the opposite shop, he (Lisbern) followed the accused to his (Lisbern's) house where he found him crying.

Analysis of Evidence

The three State witnesses who were eye witnesses to the incident gave their evidence very well. They impressed the court as credible witnesses. They were consistent in their evidence and they corroborated each other in all material respects. Their evidence was so detailed that it cannot be said that they made up the story. The defence counsel sought to attack their evidence saying that what the witnesses had said in the statements to the police was different from what they said in court. To begin with, the discrepancies related to immaterial issues which are of no consequences and these did not destroy the credibility of the witnesses. Besides, they did not affect the State's version of events.

What is material is that the State witnesses explained fully how the deceased was stabbed three times by the accused as they watched helplessly. Smart Kandororo would get as close as 2m but he could not help the deceased since the accused would stand up and swing the knife. Brian Ruveira and Artwell Kandororo were about 20m when the accused started stabbing the deceased. Visibility was said to have been good because there were some lights close by. Although the accused said that visibility was poor, we did not believe him. This is because he himself could see and identify the State witnesses one by one. He even said that he had struck Smart Kandororo three times. Even his witness Lisbern was able to identify Brian, Smart and

Prince whom he said were assaulting the accused. This confirms the State witnesses' evidence that visibility was good at the scene.

Going by the circumstances of this case, we do believe the State's witnesses' evidence that it is the accused who stabbed the deceased. To begin with, the deceased was in the company of his friend, brother and nephew. There was never a misunderstanding amongst them. There was therefore no reason for any one of them to stab the deceased. Visibility was good. So, it cannot even be said that one of them could have mistakenly stabbed the deceased. These are people who could see each other clearly. Besides, the State witnesses explained how the accused stabbed the deceased. The deceased was stabbed not once, but three times and the stabbings happened as the deceased was lying on the ground on his back. The accused said that the deceased must have been stabbed when he (the accused) was still at the scene. Surely, if this was true the accused would have seen the person who stabbed the deceased. It is unbelievable that a person can stab someone by mistake 3 times. Clearly, the accused's defence was just but a lie. This is why most of the things he said in the defence case were never put to the State witnesses during their cross examination. The accused was just making up his story as the trial progressed. The accused's story was even worlds apart with that of his witness. Whilst an accused has no duty to prove his innocence, we are convinced that his story or explanation was just false. It showed that the State's evidence reflected the truth of what happened.

In view of the foregoing, we are satisfied that the State managed to prove its case beyond reasonable doubt. We will find the accused guilty as charged because the events as narrated by the State witnesses right from the time the accused phoned Brian Ruveira clearly show that the accused was spoiling for a fight right from the word go. He was accusing Smart Kandororo of having a love relationship with his wife. When he met the State witnesses at Jena homestead, he was aggressive and he fought Smart Kandororo. He ran away from the scene when Artwell Kandororo arrived because Artwell Kandororo is bigger than the accused both in stature and age. So, it is understandable that the accused ran away when Artwell kandororo asked what was happening. However, for the accused this was not going to be the end of the matter. He emerged once again as the State witnesses were walking home. They did not have an issue with the accused, but he continued to be aggressive. He still wanted to fight them. He was now armed with a log. When he attempted to strike with it and he was held by Artwell, he immediately

produced a knife and cut Artwell on the shoulder with it. When Artwell ran away, the accused turned for the deceased who was said to have been drunk and was walking innocently. From what was explained, it did not look like the deceased ever suspected that the accused would stab him or come after him. The accused stabbed him twice in the abdomen and once on the shoulder. The accused would even stand up and swing the knife to ward off Smart Kandororo who was trying to come to the deceased's rescue. He would then kneel down and stab the deceased again. He only stopped when he was kicked by Artwell Kandororo who had come running from a distance of 20 - 30m from the time he had started stabbing the deceased. The intention of the accused can be inferred from his or her conduct. In *casu* from the way the accused stabbed the deceased, he exhibited an intention to kill. He had come with a knife which he was hiding. He produced it when the State witnesses least suspected it and he immediately cut the sleeve of Artwell Kandororo's jacket. The accused's determination to kill was shown by his persistence. He was alone, but he was determined to confront 5 people. After the fight at Jena homestead, he could have let go and proceeded home, but he decided to have another confrontation with them. As they were walking, he emerged from the gate of Lisbern's durawall and struck. We are left with no doubt that the accused was determined to kill on the night in question and he achieved his objective.

In the result, we find the accused guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act.

Sentence

In arriving at the appropriate sentence we took into account the following mitigatory factors. The accused is 27 years old. He is a youthful offender who deserves to be treated with leniency. It could be that he committed this offence because of immaturity. He might have failed to have a full appreciation of the actual consequences of committing such a heinous crime. The accused is a first offender. First offenders are generally treated with leniency, the aim/objective being to rehabilitate them and give them a second chance. The accused has a family to take care of. There is no doubt that they will suffer in his absence.

In aggravation it is clear that the accused committed a very serious offence. He committed a gruesome murder. There is no indication that he was drunk or that he had been

drinking on this day such that it can be said that his judgment was impaired because of intoxication when he committed the offence. This is a murder which was committed in aggravating circumstances because it was premeditated. He started by phoning and making threats that he wanted to assault the State witnesses. He was alleging that Smart Kandororo was having an affair with his wife Tracy Mavhunga. When the accused met with the deceased and company, he fought with Smart Kandororo. When he ran away, he felt that he had been overpowered. He ran ahead of them and then reappeared from the gate of his uncle Lisbern Gengezha. He was now armed with a log and a knife. He first struck with the log and then with the knife when his opponents least expected it. He started by striking Artwell Kandororo with it on the shoulder. When Artwell ran away, the accused advanced towards the deceased who was drunk and seemed not to have an appreciation of what was going on. The deceased was just walking oblivious of what was going on. The accused pushed him and he fell on his back. The accused stabbed him three times as he knelt on him. Each time Smart Kandororo advanced to rescue him, the accused would rise, and swing the knife. When Smart retreated the accused would then kneel and stab again. It is Artwell Kandororo who came running from a distance of 20-30m and kicked the accused who then stood up and ran away. Had it not been for Artwell Kandororo, who knows how many times the accused would have stabbed the deceased? The deceased had not done any wrong to the accused. The accused aimed at the abdomen and the stabbings resulted in the intestines protruding. The deceased died after ten days. Obviously, he died a painful death.

Considering the youthfulness of the accused and that he is a first offender who probably acted out of immaturity we are not inclined to impose a death penalty or imprisonment for life. We believe that despite the heinous offence committed, the accused deserves another chance in life. The accused is sentenced to 35 years' imprisonment.

Takawira Law Chambers, accused's legal practitioners