

THE STATE
versus
NORMAN GUNDE
and
NEVER KAMANIKA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 11 July 2023

ASSESSORS: 1. Mr. Kunaka
2. Mr. Gweme

Criminal trial

Ms. *C Mutimusakwa*, for the State
Mr. *Muromba*, for the 1st accused
Mr. *Kanoti*, for the 2nd accused

MUREMBA J: The accused persons pleaded not guilty to the charge of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They however pleaded guilty to culpable homicide as defined in section 49 of the Criminal Law (Codification and Reform) Act. The State accepted their limited pleas.

The State and the defence agreed that the accused persons committed the offence of culpable homicide in the following circumstances. The accused persons were aged 23 and 27 years respectively at the time of the commission of the offence. They both reside in Mafuta Village Chief Rusambo, Rushinga. The deceased person Pios Siyakurima was aged 35 years at the time he met his death. The accused persons and the deceased were not related but were acquainted. On 15 July 2022, the accused persons and the deceased were at Mazowe Bridge Business Centre drinking beer. At about 2200 hours, the deceased stepped on the first accused person's dog and the three had a verbal altercation. The deceased apologized and the altercation ceased. A while later the altercation started afresh. The second accused person slapped the deceased with an open hand and the deceased fell down. Both accused persons then charged at the deceased and started assaulting him by kicking him all over his body

using booted feet. The deceased later died. According to the post mortem report which was produced by consent, the cause of his death was peritonitis secondary to a ruptured duodenum. It was agreed that the accused persons did not have the intention to kill the deceased but were negligent in that they did not pay regard to the amount of force they used when they were assaulting the deceased. It was also agreed that the accused persons failed to realize that the part of the deceased's body which they targeted which resulted in the fatal injury was vulnerable.

The defence counsels submitted that they had fully explained the essential elements of the offence of culpable homicide to the accused persons who understood and admitted to them. The defence counsels submitted that they were satisfied that the accused persons' pleas of guilty were unequivocal. In light of these submissions and the circumstances in which the deceased was killed, we were satisfied that the convictions of culpable homicide were proper. We consequently acquitted the accused persons of the murder charge and convicted them of culpable homicide.

Sentence

In mitigation we considered that the accused persons are youthful as they are aged 24 and 27 years old respectively. They are married men with families they are responsible for taking care of. They pleaded guilty. A guilty plea is a valuable contribution towards effective and efficient administration of justice. Whilst it does not serve to absolve the accused persons of the wrong that they did, it is something which will be rewarded. See *S v Dhliwayo* 1999 (1) ZLR 229 (H). The accused persons remain liable and have to account for their deeds. The guilty plea is however rewarded in the sentence that the court imposes on the accused persons. See *Muleya & Ors v The State* 1998 (1) ZLR 359 (S). By pleading guilty the accused persons have expressed remorse. The accused persons even apologized to the deceased before he died. This shows that they realized the wrong that they did. Both accused persons are first offenders. As such they deserve to be treated with leniency. The accused persons were never granted bail. They suffered pre-trial incarceration for a period of one year. This period will be taken into account. It is further mitigatory that the accused persons were intoxicated when they committed the offence. Although the intoxication was voluntary, it is taken that it could have diminished their appreciation of the need to resolve the dispute without resorting to violence.

In view of the foregoing mitigatory factors, the defence counsels urged the court to impose community service. However, for the reasons submitted by the State counsel we are not inclined to impose community service. It is correct that for a conviction of culpable homicide the punishment ranges from a fine to life imprisonment. The sentence that the court settles for largely depends on the accused's degree of culpability or moral blameworthiness. The sentence should however be fair and just instead of excessive, savage and draconian. See *S v Ngulube* HH 48-02. The sentence should be blended with mercy because mercy is an element of justice itself. See *S v V* 1972 (3) SA 611 (A) at 614. In taking into account all these factors, the court must not forget that the sentence must also be fair to the State which represents the interests of the victims of crime and the society at large. Victims of crime and the society at large want to see fair sentences being imposed on offenders. In any case the criminal justice system exists to protect victims of crime and the society at large through fairness and balance. It is therefore necessary for the courts to impose sentences that build the society's confidence in the criminal justice system. Undue leniency in sentencing shakes society's confidence in the criminal justice system. So, if society is to have confidence in the criminal justice system, it is critical that offenders are made to serve sentences that reflect the objective seriousness of the offence committed. In short, there must be proportionality between the sentence and the circumstances of the offence.

In the circumstances of the present case what is aggravatory is that the accused persons caused the death of the deceased who was 35 years old and in the prime of his life. He lost his life over a very petty issue of having stepped on accused one's dog. The dog did not even die. It does not even look like the dog was injured yet the deceased was made to lose his life. The State counsel correctly submitted that we continue to lose human life as a result of beer brawls. It appears that some people just chose to lose self-control when they get drunk. It is high time we affirm one of the main purposes of punishment in criminal law which is to deter not only the offenders but also others who might consider breaking the law. It must be made clear to people with impulses of engaging in violence once they get drunk and at the slightest provocation that they will meet with severe punishment if they yield to the impulses and commit offences. A sentence of community service in the circumstances of the present case will definitely not operate as a powerful factor in preventing the commission of similar crimes by those who may be tempted to do so as they will be thinking that only light punishment will be imposed. We do not want people to believe that they can drink and kill

other people and get away with light punishment. People should learn to keep their temper in check when they get drunk. Those that cannot do so should simply stop drinking alcohol.

It is our considered view that a custodial sentence will meet the justice of the case. The defence counsels submitted that in the event that the court considers that a custodial sentence is appropriate, it should impose a sentence of four years' imprisonment with a portion suspended on condition of future good behaviour. We do not agree as the sentence will still be too lenient. A sentence of 8 years' imprisonment with 2 years suspended on condition of good behaviour as proposed by the State counsel will in our considered view meet the justice of the case. We will however factor in the period of one year that the accused persons have already spent in custody awaiting trial and deduct it from the 8 years that we would have imposed.

Each accused is thus sentenced to:

“7 years' imprisonment of which 2 years' imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving violence on the person of another and for which upon conviction he is sentenced to imprisonment without the option of a fine. Effective 5 years' imprisonment.”

National Prosecuting Authority, State's legal practitioners
Kantor & Immerman, first accused's legal practitioners
Kanoti and Partners, second accused's legal practitioners