

THE STATE

Versus

MGCINI LUNGA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr O. Dewa and Mr M Ndlovu
BULAWAYO 21 AND 22 SEPTEMBER 2023

Criminal Trial

C. Mabhena, for the state
S. Chingarande, for the accused

KABASA J: The accused appeared before us charged with murder to which he pleaded not guilty.

The state allegations are that the accused and now deceased were husband and wife but were not staying together. On 3 May 2022 the deceased visited the accused at his home. The two had a misunderstanding over some text messages and pictures which were in the deceased's phone. The accused then picked up a knife and stabbed the deceased several times resulting in her death.

In his defence the accused did not deny stabbing the deceased using a knife and that she died as a result of the injuries he inflicted. He however said he was provoked and he was also intoxicated and so did not appreciate what he was doing at the time he stabbed the deceased.

To prove its case the state led evidence from two witnesses, the accused's mother and the deceased's mother. The evidence of seven witnesses was admitted as it appeared on the summary of the state case. Such admissions were in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. These witnesses are:-

Edward Ndlovu

Mary Mhlanga

Lucky Mabvure

Crebby Mabvure

Calisto Jani

Ishmael Ndava and

Doctor Juana Rodriguez Gregori

The following exhibits were also produced by consent:-

The accused's confirmed warned and cautioned statement

Post-mortem report

A kitchen knife

A blood stained blue blanket and

A blood stained T-shirt

The kitchen knife which inflicted the fatal injuries has the following dimensions:-

Length – 28, 8 cm

Length of blade – 17, 4 cm

Length of handle – 11, 4 cm

Weight 0,086 kg

The accused's mother's testimony was hardly challenged. The accused had informed her in the morning of the fateful day that he wanted to visit the deceased's grandfather to discuss some problems. He later called asking to be taken to a certain lady ostensibly for counselling. His mother proceeded to this lady's house where the accused was supposed to meet up with her. The accused took long to arrive at this house and when he eventually arrived he told the witness that he had murdered his wife.

The witness was not able to tell whether the accused was intoxicated. Before this fateful day, she knew that the accused and the deceased had problems over infidelity issues.

The second witness was the deceased's mother. Her evidence was to the effect that on 3 May 2022 around 12 noon she received audio messages from the accused and he was insulting her. He also told her that he wanted to cause her pain that she had never felt before

and he was not concerned as to how that would affect her. He accused her of having invited the deceased to South Africa. She received another message telling her that the accused was done with the deceased. As a result of that ominous message, the witness called her mother to check on Nicolla (the deceased) and later learnt of the deceased's death.

This witness gave her evidence well and without rancour. We got the impression that she was merely relating what she knew and nothing else. She did not seek to embellish her evidence. We were satisfied she was a credible witness whose testimony could be safely relied on.

The witnesses whose evidence was admitted in terms of section 314 of the C P E Act did not have much to tell as none of them witnessed the attack on the deceased. Their evidence was largely common cause and not much use will be achieved by regurgitating what they said.

The accused testified in his defence. He admitted stabbing the deceased but said it was not his intention to. He was provoked and drunk and did not know what he was doing.

He however recalled what he did that day, the conversation with his mother and deceased's grandfather. Before the fateful day he used to see messages in the deceased's phone pointing to infidelity but they would talk and he would forgive her. On this day he saw similar messages and pictures and he failed to control himself resulting in the knife attack.

From the totality of the evidence the following is not in dispute:-

1. The accused was husband to the deceased but they were not legally married.
2. The two were not staying together.
3. On 3 May 2022 the deceased visited the accused at his home.
4. The deceased did not leave that home alive as she was stabbed to death.
5. She sustained the following marks of violence:-
 - (i) Incise wound in right of face (interior lip) 6 cm long
 - (ii) Contused wound, 1, 5 cm long in left eye brow
 - (iii) Multiple incise wounds in the neck with section of internal structure

- (iv) Incised wound in right shoulder and clavicular region
- (v) Incised wound in right lateral side of thorax (11 costal arch) and two in abdominal region
- (vi) Incised wound, 6 cm long, penetrating in lumbar region.

She died due to hypovolemic shock as a result of the stab wounds.

The only issue is whether the accused stabbed the deceased intending to kill her or realising that there is a real risk or possibility that his conduct may cause the deceased's death but continued nonetheless.

Section 239 of the Criminal Law Code provides that:-

239 (1) "If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realisation, referred to in section forty-seven, the person shall be guilty of culpable homicide, if, as a result of the provocation –

- (a) he or she has the intention or realisation referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control."

Was the accused provoked? In his very detailed warned and cautioned statement, which was confirmed, he stated that a message came through on the deceased's phone and she tried to hide it. He snatched the phone from her and the deceased tried to use the knife because there were critical contents in the phone. She cut his hand with the knife and he disarmed her. They started fighting using bare hands and when she was overpowering him he then took the knife and stabbed her.

The reason for the stabbing was therefore not provocation but self-defence. This detailed statement was recorded on 3 May 2022, the very day of the incident. This was the first opportunity accused had to give his side of the story. All he had to do was state what precipitated the stabbing. He said it was self-defence because he was already aware of these messages and the pictures he now sought to portray as the reason for losing control leading to the stabbing.

If he already knew of the messages and the pictures it cannot be said he acted in the heat of the moment. If he harboured ill-feelings from whatever had happened in the past such cannot be said to amount to provocation as envisaged by section 239.

We find ourselves unable to go into the defence of person because of the lack of consistency in the accused's story. If he was indeed defending himself that story would have been repeated throughout, i.e. from the date of his arrest to the time of his trial. The truth can never change depending on circumstances. Only a lie changes to suit whatever narrative a person is seeking to peddle.

We also do not lose sight of the fact that the accused had sent audio messages to the deceased's mother, ominous messages which he then acted out causing the pain he had promised deceased's mother he was out to cause her. He must have contacted her again after the heinous act as he then told her he was done with her daughter and indeed he was as the deceased's mother called on her mother to check on the deceased, only to learn that her daughter was no more. This shows a person who had planned what he intended to do and carried the plan through. One who is provoked acts in the heat of the moment. There can be no planning under such circumstances.

It was therefore clear that the issue of provocation was thrown in in an attempt to explain what the accused realised was an unwarranted attack on the deceased.

We turn now to the issue of intoxication. Even if it were to be accepted that he was intoxicated, he had not been drugged or had his drink spiked. He would have been voluntarily intoxicated and the law says where one is voluntarily intoxicated to such an extent that he lacked the requisite intention, knowledge or realisation, such a person is guilty of voluntary intoxication leading to unlawful conduct and liable to the same punishment as if he or she had been found guilty of the crime originally charged (See s222 of the Criminal Law Code).

The accused could not have been intoxicated. His own mother was not able to tell that he was drunk. Surely if he was as drunk as he would have the court believe, his mother would have noticed that.

He sought to hide behind a finger by saying he could not recall the stabbing because he was so intoxicated yet he gave a detailed account to the police of what he wanted them to accept as the events which led to the fatal stabbing. What kind of intoxication is that which

allows a person to have a clear recollection of what they seek to portray as the events leading to their unlawful conduct on the very day of the incident but months later that person can no longer recall because they were intoxicated?

The truth of the matter is the accused knew what he was doing. He took a knife, a kitchen knife with a blade of 17, 4 cm and cut into the deceased's face, neck and stomach causing laceration of neck vessels and pulmonary vessels, laceration of trachea and laceration in interior lobe of the right lung. He literally acted out the threat he had issued to the deceased's mother.

What could have been his intention if not to cause death when he used such a weapon with such viciousness as to cause the type of injuries observed by the pathologist? He desired death and went about to cause it (*S v Moyo* HB 19-17). He succeeded in perpetrating the harm he had communicated to the deceased's mother, which is the death of her daughter. (*S v Mugwanda* 2002 (1) ZLR 547 (S)).

We were satisfied that his story was shown to be not only improbable but beyond doubt false (*S v Kurauone* HH 961-15, *R v Difford* 1937 AD 370). He knew what he was doing and did not lose self-control.

It matters not that the deceased did not live to tell her story. The accused told it for her by seeking to be selective with the truth.

We are therefore satisfied the state proved its case beyond a reasonable doubt. The accused is accordingly found guilty of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

In assessing an appropriate sentence we considered that the accused is a 31 year old first offender. He is a father to a 5 year old daughter. He attained "O Level" as his highest level of education.

He contributed towards the funeral expenses and paid the deceased's mother compensation for insulting and causing her pain by murdering her daughter. He also paid compensation for the loss he caused to the deceased's family. He has been in pre-trial incarceration for 1 year 3 months.

The taking of a life is likely to haunt him for the rest of his life, especially as the deceased was the mother of his now 5 year old daughter.

In aggravation is the fact that a life was needlessly lost. Gender-based violence has haunted society for a long time and is not abating. A home should be a place of peace and safety, not a battleground where the weaker sex is almost always at the receiving end.

The deceased's 4 year old daughter may not have witnessed the brutal assault but she must have heard her mother screaming during that assault. She was in that house so there is no way she would have been spared the trauma of hearing her mother's screams for scream she must have. Children ought to be protected from such heinous acts which traumatise them and may adversely affect them throughout their lives.

The threat to cause the deceased's mother pain she had never felt before came to pass and one can only imagine the pain any parent endures losing a child under such circumstances.

Society looks to the courts to mete out sentences which show that violence can never be tolerated especially when it leads to loss of life.

In assessing sentence though the court must strive to mete out a sentence which fits the offence, the offender and is fair to society (*S v Shariwa* 2003 (1) ZLR 314).

In doing so the court should approach sentence rationally and not from a vengeful attitude (*S v Chera & Anor* 2008 (2) ZLR 58)

Having considered all these factors and the recommended presumptive penalty of 15-20 years imprisonment, a sentence of 19 years imprisonment will meet the justice of the case.

Accused is accordingly sentenced to:-

19 years imprisonment

