

STATE
versus
PIAS MUKANDI ALIAS JAMBA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 20 December 2023

Criminal trial - Sentencing judgment

Assessors: Mr Chakuvinga
Mrs Chitsiga

M Mugabe, with *T Mukuze*, for the State
G Mhishi, for the accused

MUREMBA J:

Introduction

The accused person, a male adult aged 33 years old, was arraigned before this court facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). It was alleged that he murdered one Moreblessing Ali between 24 May 2022 and 11 June 2022 at a place between Chibhanguza Nightclub, Nyatsime and Plot 321 Dunmoter farm in Beatrice.

Plea

The accused person pleaded not guilty to the charge. However, he was found guilty as charged after a full trial. The judgment is under HH 666/23.

The relevant facts

In the evening of 24 May 2022, the deceased and her friend and next-door neighbour one Kirina Mayironi went to Chibhanguza Nightclub for a beer drink. They went in the company of the deceased's dog. After drinking beer for some time, the two decided to go home. The dog was the first to leave the nightclub followed by the deceased. The friend, Kirina Mayironi remained in the nightclub for a while talking to a neighbour. When she

eventually followed outside, she found the deceased being assaulted and dragged by a young man whom she did not know, but the young man was wearing a yellow t-shirt. Kirina Mayironi approached him and asked him why he was assaulting the deceased. The young man took out a catapult from the pocket of his trousers and struck her with it. Kirina Mayironi who was hit on the chin ran back into the nightclub as she was bleeding. She told the patrons in the nightclub that she had been assaulted by a young man who was assaulting the deceased.

When the patrons rushed outside to see what was happening, the young man started throwing stones at them. Out of fear of being injured the patrons ran back into the nightclub. Kirina Mayironi did the same. That was the last time Kirina Mayironi saw the deceased alive. After a short while Kirina Mayironi sneaked out of the nightclub and went home. Apparently, what had happened was that when the deceased went out of the nightclub, she bought popcorn from a vendor, one Stanley Nhamo Fusire and started feeding her dog with it. As she was doing so, the accused came and took some groundnuts from the vendor's stall. He left without paying. The vendor followed him and took back the groundnuts. The deceased then told the accused that the things that were on the vendor's stall were for sale. She told him that he needed to pay for whatever he wanted to take. The accused did not answer her. He went away quietly. After a while the deceased left as if she was going to the toilet. A while later she came back from the dark bleeding and her top was soaked in blood around the chest area. She said that the young man whom she had reprimanded about taking the groundnuts without paying was the person who had assaulted her. The deceased then said she was going home. She took the direction where she had come from injured and disappeared into the night. She was alone. Nobody at the nightclub ever saw her again.

By daybreak of the following morning the deceased had not returned home. She was staying alone. Kirina Mayironi went looking for her at Chibhanguza nightclub and other beer outlets but she did not find her. Kirina Mayironi then bumped into one Mercyline Mavhiza also known as Wasu who had also been at Chibhanguza nightclub the previous night. Kirina Mayironi asked Mercyline Mavhiza if she knew the young man who was assaulting the deceased. Mercyline Mavhiza knew him very well. She said he was Pias Jamba (the accused). She said he was a blood brother to her friend; one Stella Mukandi. She said that Stella Mukandi is the one who had introduced the accused to her. Mercyline Mavhiza even told Kirina Mayironi where the accused resided. Kirina Mayironi then phoned and informed the

deceased's children that their mother was missing. When the deceased's children came, they came with the deceased's brother. Kirina Mayironi went with them to make a report to the police. They reported that the deceased was missing. On that day the police started looking for both the deceased and the accused since the disappearance of the deceased was linked to the accused.

It was the accused's defence that on the night of the 24th of May 2022, he had been annoyed by seeing a dog inside the nightclub. He said that he kicked it resulting in the patrons attacking him. He said he escaped and decided to go home. As he was going home the deceased who was in the company of two men followed him demanding to know why he had kicked her dog. She also wanted to see where he resided. The accused said he walked with her for 2-3 km as the two men were following behind them. The deceased who appeared weak then fell down. When the accused realised that the two men were far behind, he left the deceased lying on the ground and went to his mother's plot.

We did not believe the accused's version of events that the deceased followed him in the company of two men as these two men remained a mystery throughout the trial. The deceased lived by herself and she had gone to the nightclub in the company of a female friend and neighbour. The vendor saw her leave the business centre alone. We thus concluded that the accused's story of having been followed by the deceased in the company of two men was just but a made-up story. We also did not believe that the deceased had followed the accused demanding to know why he had kicked her dog and also demanding to know where he resided. The accused had been violent to her and had seriously injured her before. Besides, he was a stranger to her. We did not believe that under the circumstances she would follow him and make demands to see where he resided. It just did not make any sense.

On the 25th of May 2022, the accused left for Hurungwe after learning from his sister Stella Mukandi that people were now looking for the deceased and that he was being linked to her disappearance. The accused's sister had been told by her friend Mercyline Mavhiza. The accused left Beatrice without telling his mother and sister that he was going to Hurungwe. Hurungwe is the place where the accused's parents relocated from when they settled at Plot 321 Dunmoter Farm in Beatrice. On 11 June 2022, the deceased's body was found in a disused well at the accused's mother's plot in Beatrice about 20-40 m from the homestead. The accused's mother who had gone to relieve herself is the one who smelt an overpowering stench of something rotten. She is the one who then alerted the police after

seeing a sack inside the well. When the police came, they saw that there was a human body inside the well. When it was retrieved, it was identified as the body of Moreblessing Ali by her son and brother. It was discovered that the body had been cut into three pieces. The two legs had been severed from the body from the waistline.

Meanwhile, the hunt for the accused by the police continued. A team of investigators had followed him to Hurungwe after getting information that that was where he was being seen. The police put word everywhere that they were looking for the accused. On 16 June 2022, the accused succumbed to pressure and handed himself over to the police at Chidamoyo Police Base in Hurungwe. When he was arrested, he confessed to the murder of the deceased. His warned and cautioned statement was confirmed at the Magistrates Court. The accused also made indications to the police on how he committed the offence. In the process of making indications, he caused the recovery of the deceased's cell phone and sim card which he had hidden in a field under some bricks. He also caused the recovery of the kitchen knife which he had thrown in the disused well, where the deceased's remains had been found. The police officers that had retrieved the body had not been aware that there was a knife in the water. In the process of looking for the knife, police officers also recovered the deceased's clothes that were in the water in the well.

In view of the foregoing, we convicted the accused of murder with actual intent in terms of s 47(1)(a) of the Criminal Law Code.

The Law

In terms of s 47(4) of the Criminal Law Code, a person convicted of murder is liable to death, imprisonment for life or imprisonment for any definite period of not less than 20 years if the murder was committed in aggravating circumstances as provided in subsection (2) or (3) of s 47. If the murder was committed in any other circumstances, the accused is liable to imprisonment for any definite period. In terms of the sentencing guidelines provided for in S.I 146/23, the presumptive penalty for a murder committed in aggravating circumstances is 20 years' imprisonment. For a murder committed in other circumstances, the presumptive penalty is 15 years' imprisonment.

Citing the provisions of s 47(2)(c) of the Criminal Law Code, the State submitted that the murder in the present case was committed in aggravating circumstances because it was accompanied by the mutilation of the body of the deceased. The defence submitted that the

mutilation of the body only happened after death and that as such there was no cruelty of mutilation which was done to the victim before she died. S 47 (2) (c) reads:

“In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim.”

The last part of the provision which reads, ‘*if the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim,*’ suggests that the accused would have inflicted physical torture or mutilation on the victim **before** or **during** the murder. This act of mutilation can be classified as a pre-mortem mutilation. In the circumstances of the present case the accused said that he mutilated or dismembered the body of the deceased after he had killed her. He said that he wanted to dispose of the body and realised that it was too heavy to carry. That is when he went to his mother’s home which was about 1½ km away and took a kitchen knife which he then used to cut off the legs from the body. After that he then put the legs into a sack and carried them to a disused well in his mother’s plot. He then went back to the scene of murder and carried the upper part of the deceased’s body to the well. The State did not lead any evidence in rebuttal of what the accused said. It led no evidence to show that the deceased’s legs were cut off when the deceased was still alive or during the commission of the murder. When the investigating officer testified, he said that the doctor who carried out the post mortem said that it appeared that the deceased’s legs were cut off after she had died. However, the State did not lead *viva voce* evidence from the doctor. So, in view of the foregoing, we accept the accused’s version that the mutilation of the deceased’s body happened after the murder. This act of mutilation can be described as a post-mortem mutilation which was done for purposes of disposing the deceased’s body and to conceal the evidence of murder. S 47 (2) (c) of the Criminal Law Code is therefore not applicable to the circumstances of this case.

However, mutilating a deceased person on its own is a serious offence as it exhibits the highest level of violence. It is even considered a criminal offence in this jurisdiction under s 111 of the Criminal Law Code and it carries a punishment of a fine up to level fourteen or imprisonment for a period not exceeding five years or both. We are therefore of the considered view that in murder cases even if the mutilation is done after the death of the victim, the mutilation should be taken as an aggravating circumstance for the purpose of

determining the appropriate sentence. This is more so in view of s 47 (5) of the Criminal Law Code which provides that the list of aggravating circumstances unenumerated in s 47 (2) and (3) is not exhaustive. The provision provides that a court may find other circumstances in which a murder is committed to be aggravating. In the circumstances of the present case, we take the mutilation of the deceased's body which happened after death as an aggravating circumstance which warrants the imposition of a harsher punishment. We find support from the sentencing guidelines in S.I. 146/23 which provide that it is an aggravating factor if an accused attempted to obstruct justice after the fact by concealing, destroying or dismembering the body. For this, the presumptive penalty is 20 years' imprisonment.

A presumptive penalty is the starting point for the judicial officer to determine the sentence of the offender. It is the sentence that the court is expected to pronounce or pass if there are no reasons justifying departure from the presumptive penalty. Presumptive penalties are meant to provide consistent and predictable sentences in criminal offences. They aim to reduce disparities in sentencing and ensure that similar crimes receive similar punishments. They also aim to increase transparency in the criminal justice system by making the sentencing process more open and accessible to the public. However, in terms of s 5 of the sentencing guidelines, judicial officers are allowed to depart from the presumptive penalties. Obviously, there are reasons for allowing departure and the reasons include the following. To avoid rigidity in sentencing and to allow judicial officers to take into account the unique circumstances of each case. To avoid harsh and disproportionate sentences, particularly for low level offences. To allow judicial officers to consider individual factors that may mitigate or aggravate an offender's culpability. However, it is important to note that s 5 of the sentencing guidelines demands that a judicial officer gives reasons for departing from a presumptive penalty. What this means is that a judicial officer should only depart from a presumptive penalty when there are substantial and compelling aggravating or mitigating circumstances or factors. When a judicial officer departs from a presumptive penalty, they may impose any sentence authorised by law.

The normal range of sentences

As already stated above, a murder which was committed in aggravating circumstances attracts anything from a minimum of 20 years imprisonment, imprisonment for life up to the death penalty. Too many murders are committed in this jurisdiction and many of them are

committed in unique and bizarre circumstances. The present case is one such case. It was committed in strange and unusual circumstances. We will now turn to consider the mitigating factors against the aggravating factors in order to see whether we should impose the presumptive penalty or depart from it by going higher than the presumptive penalty. In the circumstances of the present case the court does not have the latitude of going lower than the presumptive penalty provided for in the sentencing guidelines. This is because s 47 (4) of the Criminal Law Code provides that a person convicted of murder in aggravating circumstances shall be liable to death, imprisonment for life or imprisonment for any definite period **of not less than twenty years**. This means that 20 years' imprisonment is the minimum.

We must highlight at this juncture that the defence prayed for a sentence of 15 years' imprisonment on the basis of the mitigatory factors they submitted. On the other hand, the State prayed for the death penalty in view of the aggravatory factors they submitted.

The mitigatory factors

The accused is a 33-year-old first offender. He is still youthful. Mr *Mhishi* submitted that the accused has a wife and two children that are dependent on him. However, from the evidence led during trial it was clear that the accused is divorced. Stella Mukandi, his sister is the one who said it. She said that the accused was staying with his girlfriend whilst his two children were staying with his mother. The defence never disputed this. It was not explained in what way the accused provides for his children.

Mr *Mhishi* submitted that the accused's upbringing heavily impacted on his behaviour and decision making. The accused is said to have grown up in a disadvantaged neighbourhood where he was exposed to violence, substance abuse and limited opportunities for personal growth and education. He went to school up to grade 7. It was submitted that his circumstances shaped his worldview and may have contributed to the tragic outcome. It was submitted that this court should exercise leniency on this unsophisticated offender.

It was submitted that the accused was highly intoxicated on the day in question and that his judgment was significantly impaired due to the influence of alcohol and a drug called crystal meth that he had taken. We take note that the accused alluded to this during trial. Even when he confessed to the murder, he did mention that he had been drinking alcohol since 11 am up to around 9-10 pm on 24 May 2022. He also said that he had taken crystal meth. There was no rebuttal from the State. So, it is accepted by this court that the accused was heavily

intoxicated when he murdered the deceased. In terms of s 9(1) of the Sentencing Guidelines, intoxication is a mitigating factor that can lessen the accused's sentence. What this means is that we are constrained to impose the death penalty that the State prayed for.

Mr *Mhishi* further submitted that because of being heavily intoxicated, the accused lacked premeditation to commit the offence. It was submitted that his impaired state prevented him from fully considering the consequences of his actions and to carefully plan how to execute the killing. This submission was not rebutted by the State.

Mr *Mhishi* submitted that the accused demonstrated remorse during trial. He submitted that the accused expressed deep regret for his actions acknowledging the pain and suffering caused to the deceased's family. It was submitted that the accused has actively sought counselling and wishes to engage in programmes aimed at addressing the root causes of his behaviour. Mr *Mhishi* submitted that this is a demonstration of a genuine commitment to personal growth and change. It was submitted that the accused must not be punished for pleading not guilty to the charge. It was said that the accused's plea of not guilty was a requirement of the law. Mr *Mugabe* disputed this by submitting that the accused showed no remorse at all during trial. He said if anything, the accused was arrogant and not remorseful during trial.

We are in agreement with Mr *Mugabe* that the accused showed no remorse right up to the time of his conviction. We are not in agreement with Mr *Mhishi* that our law does not allow an accused person to plead guilty to murder. The correct position is that even if an accused pleads guilty to a charge of murder, the court will always enter a plea of not guilty and there will be a full trial to determine the facts and decide whether the accused is guilty.¹ This is on the basis of S 271 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPE&A) which provides for the procedure on plea of guilty. The provision reads:

“Where a person arraigned before the High Court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea, the court may, if the accused has pleaded guilty to any offence other than murder, convict and sentence him for that offence without hearing any evidence.”
(my underlining)

¹Sentencing murderers/Zimbabwe Legal Information Institute – Zimlil <https://zimlil.org/content/sentencing-murderers>. Accessed on 19 December 2023.

Where the accused pleads guilty to a charge of murder, the court is not entitled to convict and sentence him or her without hearing any evidence.² The practice is to enter a plea of not guilty even if the accused pleads guilty to the charge and a trial ensues.³ This is understandable because murder is considered the most serious crime and it carries the harshest penalty of death. The idea is to ensure that the accused receives a fair trial and that justice is served. This approach in murder trials does not bar accused persons from pleading guilty to murder charges and from telling the truth of what really transpired when they committed the offence. Even after the court has entered a plea of not guilty, the accused can still go ahead and tell the court how he or she committed the offence. The approach does not mean that the accused should then deny everything and dispute all the confessions and indications that he made to the police freely and voluntarily during investigations. The accused is not barred from telling the court that he made indications and confessions freely and voluntarily. He or she can help set out the facts of the case to the court. Doing this does not necessarily lead to a conviction. Depending on the circumstances of the killing and the defence proffered by the accused, the accused can be convicted of murder or a lesser offence such as culpable homicide or assault. In some instances, the accused can even be acquitted if for instance, he or she was acting in self-defence. It is all about the court applying the law to the facts presented before it. The foregoing shows that an accused person who is remorseful should therefore not wait until after conviction to then admit to the court that he or she indeed committed the offence. This cannot be taken as a sign of remorse. In the circumstances of the present case if the accused was remorseful, he would not have wasted time disputing the confirmed warned and cautioned statement and the indications that he made to the police.

The aggravating factors

The State prayed for the death penalty, but it did not justify its prayer other than simply saying that the accused committed a very serious offence which left the society in shock and disbelief. It further said that a sentence of 15 years' imprisonment as prayed for by the accused will trivialise this matter and make a mockery of the justice system. It said a more deterrent sentence is called for, so that other would-be offenders will be deterred from

² J R Rowland *Criminal Procedure in Zimbabwe*, LRF 1997, page 17-2.

³ J R Rowland *Criminal Procedure in Zimbabwe*, LRF 1997, page 17-2.

committing similar crimes in future. It must be noted that the State was not able to furnish the court with the victim impact statement(s). It submitted that it was not able to locate any of the deceased's children. It was submitted that they no longer visit their late mother's place which is now deserted. The court would have benefitted a lot from what they would have said about the death of their mother, how it has impacted them and why they have not buried her up to now.

We have already said that because the accused was intoxicated, we cannot impose the death penalty. What we find to be aggravatory factors in the circumstances of this case is that the accused was violent towards the deceased starting at the business centre. The two were strangers and it would appear that the accused was offended by the mere fact that the deceased had told him that he needed to pay for things that he wanted from the vendor. From that small issue, the accused severely assaulted and injured the deceased. He was seen assaulting her by Kirina Mayironi. When Kirina attempted to rescue her friend, the accused struck her with a catapult on the chin. She got injured and bled profusely. When patrons in the nightclub came out, the accused picked up some stones and started throwing them at them. He was also pelting stones at them using a catapult. No one was able to restrain the accused or to rescue the deceased.

The deceased then left the business centre to go home alone; but instead of going home she ended up walking for 2-3 km with the accused towards the accused's mother's plot. The accused is the only person who knows how this happened. It is however unfortunate that he was economical with the truth. His story that the deceased is the one who followed him as she was demanding to see where he stayed was just but a lie. The deceased was already vulnerable in his hands and there is no way she could have followed him making such weird demands. In our judgment we made a finding that the circumstances of the case show that the accused must have taken her against her will. Obviously by taking her and walking with her for 2-3 km the accused intended to do something to her. The accused chose not to tell us what he intended to do and we cannot speculate or make assumptions. However, what we know for certain is that he ended up killing her. It is unfortunate that we are again not sure how he killed her. It is just his word that he struck her with a fist on the jaws. The doctor could not ascertain the cause of death due to decomposition of the body. However, he remarked that there was no visible trauma to the body.

It is aggravatory that the accused targeted a vulnerable person. The deceased was a drunk, defenceless and harmless woman. She was 46 years old whereas the accused was 32 years old. She was no match for him in terms of physical strength. After killing her, he mutilated her body. His intention was to hide the body and conceal the offence that he had committed. He had found the body heavy to carry. The accused was now attempting to obstruct justice.

The sentence

The foregoing shows that the aggravatory factors far outweigh the mitigatory factors and as such a higher sentence than the presumptive penalty of 20 years' imprisonment is called for. As already stated, it is unfortunate that the State was not able to obtain the victim impact statement(s) from the children of the deceased whose whereabouts are not known by the State. All we know is that they have not yet buried the remains of their late mother and it is now 1½ years since she was murdered. We would have benefitted from what they would have said and this would have certainly impacted on the sentence of the court on the accused. We would have been properly guided in arriving at the appropriate sentence. The act of intentionally murdering another person is heinous on its own. To then go on to mutilate the body of the deceased is monstrous, odious and horrifyingly wicked. This act sent shockwaves not only to the community of Nyatsime but to the people of this jurisdiction as a whole. There is no doubt that this caused emotional distress to the deceased's family and loved ones. As already stated elsewhere above, for mutilating the body of a deceased person, the maximum penalty is 5 years' imprisonment. Taking this into account and the fact that this caused emotional distress to the deceased's family and that the family was distressed for almost three weeks as it was looking for the deceased before her body was found in a disused well at the accused's mother's plot where the accused had dumped it. It is our considered view that an additional 10 years' imprisonment to the presumptive penalty of 20 years' imprisonment will meet the justice of this case. Hopefully the accused who is still youthful (now 33 years old) will be rehabilitated and reintegrated into society. Further, it is hoped that he will be deterred from committing crimes in future and that other would be offenders in our society will also be deterred. Human life was unnecessarily lost in cruel circumstances, and what is painful is that no amount of punishment can bring back the life of the deceased. In other words, no matter how severe the punishment is, it cannot undo the loss of life of Moreblessing Ali.

Accordingly, the accused is sentenced to 30 years' imprisonment.

*National Prosecuting Authority, the State's legal practitioners
Mhishi Nkomo legal practice, accused's legal practitioners*