THE STATE
versus
SAMSON MUHWATI
and
TICHAONA PETRO

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 18 JUNE 2024

**Assessors:** Mr Mhandu
Mr Gwatiringa

**Criminal Trial – Sentencing Judgment**

*D H Chesa*, for the State
*V Vhera*, for the 1st accused
*M S Katsande*, for the 2nd accused

MUTEVEDZI J: The deceased Aldrin Chinorwadza, though indirectly, was another fatality from gender-based violence. He died trying to protect his sisters from abuse by their husbands. The case also illustrates that when domestic violence is reported no matter how trivial the police may think it is, it ought to be investigated and the issues resolved. In this case, the deceased's family had made reports to the police that the offenders, Samson Muhwati (offender one) and Tichaona Petro (the second offender) were abusing their wives. The reports had for inexplicable reasons, not been acted upon. The deceased, possibly spurred by the courage gained from the alcohol he had consumed on that day decided to take matters into his own hands. He approached the residences of his brothers-in-law with the intention of dealing with the matters once and for all. After failing to locate the second offender at his residence, he proceeded to that of the first offender. Both offenders were not there. He chose to wait for them there. They arrived later. A fist fight broke out from which he came out worse. He was stabbed with a knife which he had thrown at the first offender who had in turn thrown it back at him randomly. Unfortunately, it pierced the deceased in the chest. The wound was fatal.

[1] When they were arraigned on charges of murder, both accused pleaded not guilty but admitted that they had been negligent in causing the deceased's death. The prosecutor

accepted their limited plea. The court was persuaded that the prosecutor's concession was advisedly made. The two offenders had no intention to kill the deceased. They were simply negligent. The court therefore acquitted them of the charge of murder but convicted them of culpable homicide in terms of s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] on their own pleas of guilty.

[2] In mitigation of sentence, counsel for Samson Muhwati submitted that the first offender is a youthful man at only age twenty-two years. He is the eldest of the three siblings in his family. He grew up in a broken family because his parents divorced when he was only five years. He only started living with his father at age fifteen after the grandfather he was staying with had passed on. He possibly did not have proper parental guidance as he grew up. He said he is married and has two very young children. The separation of his parents may equally explain why he constantly behaved violently towards his own spouse. He only went as far as grade six before dropping out of school due to financial constraints. He survives on peasant farming and engaging in other menial jobs.

[3] Counsel for both offenders further submitted that the possibility of their clients reoffending is next to nothing given that these are their first brushes with the law. In addition, as a sign of remorse the offenders' families paid their in-laws a cow and an unstated number of goats at the burial of the deceased. They also helped with footing other funeral expenses. The court accepts that these are signs of genuine contrition on their part. Our law has always recognised that where such efforts are made, an offender may benefit from undertaking such overtures. In the case of *S* v *Lamola* HB 144-2015 this court held as follows:

> "Further, we will take into account that your family and yourself voluntarily agreed to perform some cultural or traditional rituals wherein you paid seven cattle and 5 goats to the Deceased's family. Also, you contributed towards funeral expenses in the form of food and transport. This, in our view, shows that you are contrite and that contrition extends to your family as well."

In *S* v *Mabonga* HMA-4-2018, the same sentiments were expressed in the following terms:

> "It is a mitigatory factor that the accused persons paid two head of cattle and a goat as compensation to the now deceased person's family. While this cannot be equated to the value of the precious life which was needlessly lost, it is nonetheless in line with our African Custom and practices."

[4] Both offenders are quite youthful. Their behaviour on the day in question was possibly driven by the buoyance and sometimes rank irrationality of men of that age.

[5] We also stated in the introductory paragraph that the deceased confronted the offenders at their homesteads. That if anything amounts to provocation. The deceased and the offenders were engaged in a fist fight which had clearly been provoked by the deceased.

[6] Further both offenders spend over a year in pretrial detention after having been arrested on 18 May 2023. They were denied bail and have been in detention ever since. The court must include that period in whatever sentence it will impose on them.

**The second offender**

[7] Like the first offender he is youthful. He is only twenty-two years old. He is a teetotaller and of the Christian faith. He alleges to be taking care of his wife. We are however not sure to what extent given the allegations of gender-based violence which directly led to the deceased's demise. His marriage to the deceased's sister was blessed with a son. He also takes care of his younger sibling aged ten and an aged grandmother whose age the second offender is not aware of but is certain to be above sixty years. He survives on farming. He sincerely regrets the death of his brother-in-law.

[8] The second offender readily admitted the charge. It demonstrates his contrition and genuine regret at negligently causing the deceased's death. By and large, the deceased was the aggressor. Further, the second offender's role in the commission of the offence was somewhat limited. He will for the entirety of his life be stigmatised as a person who caused the death of his wife's brother.

[9] On the other hand, the deceased was a health man at the time he met his demise. He was a family man with a wife and a young child. He was the sole bread winner for the young family. The prosecutor secured a victim impact statement from the deceased's brother Dickson Chinorwadza. We are not sure why a statement from the widow was not preferred. Nonetheless the brother painted a miserable picture of the family. They are devastated up to now. The death was a shocker to them.

[10] In the case of *S* v *Aaron Tom* HH 540-21 this court held that:

> "Whilst sentencing is not about retribution, there can be no adequate balance unless if the impact of the loss of a breadwinner is referred to. Witness impact statements enable a court to adequately weigh the mitigatory and aggravating factors and reach an appropriate sentence. Often the state counsels proceed to address the court in aggravation without interviewing the affected family and often what they submit to the court is their own perception of the case. There certainly is need to introduce a

> paradigm shift from the conceptualisation of crime as a violation against the state alone and not individuals against whom the crimes would have been committed."

[11] A life lost can never be replaced. The Constitution of Zimbabwe in s 48 emphasises the sacredness and inviolability of human life. Noone is allowed to take the life of another. The deceased's family will never feel the same about life. It is not possible. Socially, the emptiness may take long to fill whilst the loss of economic support may be equally catastrophic.

**Generally**

[12] The crime of culpable homicide is predicated on negligence. It is the reason why it differs from murder where the offender is convicted on the basis of intention. A sentencing court must therefore always assess an offender's degree of negligence. It speaks to his/her moral blameworthiness. We could not put it in any better way than it was stated in the case of *S* v *Wankie* HH 831-15 which proposed that the more severe form of negligence there is the greater the penalty must be.

[13] In this case, the offenders were engaged in a fist fight with the deceased. The deceased threw the knife at the first offender first. He was clearly the aggressor. Instead of running away or seeking some other means to avert the danger, the first offender with the admitted aid of the second offender threw back the knife at the deceased. It struck him. The offenders' degree of negligence is not by any means taken out of the ordinary category by that random act. It was at night and in darkness when this occurred.

[14] The Sentencing guidelines provide for a presumptive penalty of five years imprisonment in circumstances where aggravation outweighs mitigation. In this case there appears to be aggravation and mitigation in equal measure. It gives this court enough reason to start from the presumptive five years imprisonment suggested in the guideline but scale it down to accommodate the numerous factors stated in mitigation.

[15] Against the above background, the court initially was of the view that a sentence of five years imprisonment would be appropriate in the circumstances. We will however subtract the one year that the offenders have already spend in custody and another year on condition of future good behaviour.

As such each offender is sentenced to **5 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the offender does not within that period commit any offence involving violence on the person of another or involving the**

**negligent killing of another for which he is sentenced to imprisonment without the option of a fine.**

*National Prosecuting Authority,* State's legal practitioners
*Tamuka Moyo Attorneys,* first accused's legal practitioners
*Tanyanyiwa & Associates,* second accused's legal practitioners