

THE STATE  
versus  
WELLINGTON GWASHURE

HIGH COURT OF ZIMBABWE  
**MUTEVEDZI J**  
HARARE, 5 September 2024 & 22 November 2024

**Assessors:** Mrs *Chitsiga*  
Mr *Chimonyo*

### **Criminal Trial - sentencing judgment**

*A Mupini*, for the state  
*W Nyika*, for the accused

MUTEVEDZI J: In our main judgment, we lamented the fact that all efforts to stem murders resulting from domestic violence are going to nought because the violence continues unabated. This murder is another statistic added to that list.

[1] The offender killed the deceased in cold blood. They were husband and wife. The murder resulted from a common misunderstanding between them. It resulted in the offender brandishing wooden sticks to attack the deceased. He also bashed her with booted feet and clenched fists. She fell unconscious during the assault. In a brazen show of sadism, the offender was not content with his handiwork. To complete and perfect it, he pulled the unconscious deceased's body inside the house and paraded it at the homestead's courtyard. As if what he had done was a non-issue, he casually walked to a neighbour's homestead to announce that he had assaulted his wife. He came back with the neighbour only to discover that the wife was already dead.

[2] When he appeared before us charged with that murder he raised a lukewarm defence which we threw out without hesitation and convicted him of the murder.

- [3] This court has repeatedly stated, such that there is no need to quote authorities, that the starting point in the sentencing of a murder convict is the determination whether or not the murder was committed in aggravating circumstances.
- [4] In order to assist the court, determine the question, the prosecutor argued that the matter was committed in aggravating circumstances in that this is a murder which resulted from domestic violence. She referred this court to the sentencing guidelines which she said specified domestic violence as an aggravating circumstance in murder cases. We checked the aggravating circumstances listed against the crime of murder. That it arose from domestic violence is not one of them. That reference was wrong. Not that Ms *Mupini* was precluded from raising it if she wanted. What she ought to have done was seek to persuade the court to use the power it is granted under s 47(5) to find that outside the stated factors, killing in the course of domestic violence must be held to constitute aggravation in murder cases. That way, we would have given counsel for the offender ample opportunity to also address us on the point. As it stands, we did not. We cannot therefore decide on it without the benefit of full argument.
- [5] Further Ms *Mupini* said the offender in this case used gratuitous violence in perpetrating the murder. We cannot dispute that. The offender used several switches in addition to booted feet and clenched fists on a defenceless woman. Then switches broke into pieces. The injuries which were noted on the corpse are testament to the extreme violence which he used. The deceased's scalp was lacerated, her eyes were ruptured among other injuries. He behaved like he was butchering an animal yet this was supposed to be a woman who must have sought protection from him. The prosecutor also went to town about the dim view with which violence against women must be viewed. It comes back to the argument she had earlier made about domestic violence. The law does not specify the gender of the victim of a murder as an aggravating circumstance.
- [6] On his part, counsel for the offender made weird submissions on this aspect. He quoted s 47 (2) of the Criminal Law Code as providing that:

“A person convicted of murder shall be sentenced to death unless: -

- a. The convicted person is under the age of eighteen years at the time of the commission of the crime; or

- b. The court is of the opinion that there are extenuating circumstances; in which event the convicted person shall be liable to imprisonment for life or any shorter period.”

[7] We deemed the above submissions weird because the relevant provision of the statute cited does not say what counsel alleges. We suspect counsel was quoting some repealed provision of the law. In *S v Shamba and Anor* HH 419/23 where similar transgressions had been committed by a legal practitioner, I excoriated counsel in the following manner:

“Legal practitioners must, without a choice, keep abreast of developments in the law. It may be unforgivable for a legal practitioner to appear in court and premise his/her arguments on legislation which has long been repealed. Judges and magistrates depend, for the production of well-reasoned judgments, sentences and other decisions, on the input of legal practitioners. Where that input is erroneous the danger of miscarriages of justice is heightened. In this case, the contents of both s 337 of the Criminal Procedure and Evidence Act cited by counsel for accused 1 and s 47 (2) of the Criminal Law (Codification and Reform) Act referenced by counsel for accused 2 do not exist. I did not bother to check but my suspicion is that they were part of the law before the advent of the Constitution of Zimbabwe, 2013 which necessitated various amendments to our criminal law. Such amendments included the substitution of the then s 47(2) of the Criminal Law Code and ss 337 and 338 of the Criminal Procedure and Evidence Act by Part XX of Act 3 of 2016 and by s 43 of Act 2 of 2016 respectively. As a result of that amendment, the principle of extenuating circumstances which hitherto had been the bedrock of sentencing in offences which attracted capital punishment became obsolete. It is no longer part of our law. Legal practitioners and prosecutors who deal with murder trials may do themselves, their clients and the courts a lot of good if they quickly forgot about it.”

[8] The above remarks apply with equal force in this case. Counsel missed the point. The issue is not about extenuation but about aggravation. Those two principles run diametrically opposite. One is the inverted version of the other. As a result of that misconception we had nothing meaningful from the offender’s counsel regarding whether or not the murder was committed in aggravating circumstances.

[9] In the end we cannot run away from the finding that because of the gratuitous violence which the offender resorted to; that he had the temerity to put the deceased’s toddler besides the dead body and cover it in the same blanket as the mother’s corpse; and that his acts of violence against the deceased had become a common occurrence as testified to by the witness aggravate the murder.

[10] Once we arrive at the above conclusion, our discretion is nailed to the three options which appear in s 47(4)(a) of the Criminal law Code. We can only sentence the

offender to death, life imprisonment or a determinate term of not less than twenty years imprisonment.

[11] In the determination of which one amongst the three to resort to, the court must be guided by the weight of the general mitigation and aggravation apparent from the circumstances of the case. Counsel for the offender adduced various issues in that regard. He said the offender was intoxicated. Although that inebriation was not sufficient to absolve him of liability, the court ought to take it into account as mitigation. He added that the offender throughout the trial, showed remorse and regret that this incident happened and that he paid compensation to the deceased's family. We agree that must count in his favour.

[12] The loss of human life through violence must always be frowned upon. The courts must in that regard strive to pass sentences which send the correct message to would be offenders that appropriately severe punishments will be meted out to anyone who takes the life of another.

[13] In view of the above, we do not see any rational basis for imposing anything above the presumptive penalty stipulated in the sentencing guidelines which coincidentally is also the minimum permissible where a finding of aggravation has been made. **Accordingly, the offender is sentenced to 20 years imprisonment.**

**MUTEVEDZI J:** .....

*National Prosecuting Authority, the State's legal practitioners  
Nyika and Associates, the accused's legal practitioners*