

THE STATE

versus

ZORODZAI MOYO

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 31 January, 2 February, 6 & 17 March, 2017

Assessors

1. Mr S. Mutomba
2. Mr P.N. Dauramanzi

Criminal Trial

E. Chavarika for the State
J. Maweni, for the accused

MAWADZE J: The accused is facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*].

The charge is that on 4 December 2015 at Maluzo Village, Chief Mazetese, Mwenezi in Masvingo the accused unlawfully caused the death of Nyashadzashe Moyo by stabbing him with an okapi knife once on the left side of the abdomen and once at the back.

The accused and the 21-year-old deceased lived in neighbouring villages and were well known to each other. Apparently they also once worked together at Mkwashi Ranch in

Gwanda. The now deceased was once employed at Mkwashi ranch as a grinding mill attendant and when he left employment the accused took over that job. The now deceased stayed with his grandmother Violet Moyo and his siblings.

The allegations against the accused are that on 4 December 2015 the accused and the now deceased met along a foot path from Kabhora shops and that they had an unspecified misunderstanding. The accused is alleged to have produced an okapi knife and stabbed the now deceased on the left side of the abdomen thereby eviscerating the small bowel. As the now deceased tried to flee he was allegedly chased after and stabbed for the second time on the left side of the back near the midline. The now deceased is said to have trudged home and managed to make a report to his grandmother Violet Moyo. The accused is said to have proceeded to his workplace at Mkwashi ranch. The now deceased was ferried to Masase Mission hospital but died on admission. The post mortem conducted by Doctor Pesanai revealed the cause of death as haemorrhage shock and perforated left illiac vessel due to stabbing.

The accused denies attacking the now deceased in the manner alleged or in any manner.

In his defence outline the accused said the now deceased harboured a grudge against the accused as the now deceased alleged that the accused had caused the now deceased to be dismissed from employment as a grinding mill attendant and went further to take that job. The accused said as a result whenever he met the now deceased accused would be threatened with assault. The accused went further to state that on 2 November 2015 he met the now deceased and was assaulted resulting in accusing losing his tooth.

Turning to the events of the day in question on 4 December 2015 the accused said he left his workplace going to Kabhora business centre where he found the now deceased present. The accused said the now deceased threatened to kill the accused forcing the accused to flee back to his workplace. At his workplace accused said he advised his supervisor one Mpilo Ndlovu about the now deceased's threats. The accused said he was surprised the next day on 5 December 2015 when police arrested him on the allegations that he had killed the now deceased. The accused said he protested his innocence to the police despite being severely assaulted by the police. The accused said he never assaulted or stabbed the now deceased.

In support of its case the State led evidence from Violet Moyo, Lovemore Zhou, Mpilo Ndlovu, Cornelius Moyo and Sgt. Hilda Grace Chitemere. The evidence of Dr Pesanai was admitted in terms of s 314 of the Criminal Procedure and Evidence, Act [Cap 9:07].

The accused gave evidence and did not call any witnesses.

Two exhibits were produced by consent and they are;

Exhibit 1: - This is an okapi knife which weighs 0.06 kgs, is 23.5 cm long with a blade measuring 10.2 cm and the handle is 13.3 cm long. The accused admits that the okapi knife belongs to him and that it was recovered at accused's homestead after his arrest. The accused however denies using this okapi knife to fatally stab the now deceased. The State alleges that this okapi knife is the murder weapon.

Exhibit2: - This is a post mortem report compiled by Dr Pesanai on 7 December 2015 after carrying out an autopsy of deceased's body. The following material observations and findings were made by Dr. Pesanai.

- (a) the now deceased had a stab wound on the left abdomen measuring 4 x 2 cm situated 5 cm from the midline and 8 cm from the pubic bone with evisceration of the small bowel
- (b) a stab wound on the left side of the back measuring 5 x 2 cm situated 5 cm from iliac crest and 5 cm from the midline at the back
- (c) perforated illiac vessel
- (d) retroperitoneal haematoma (the membrane covering the bowel) with about 500 ml of blood and blood clots in the abdomen containing about 250 ml of blood
- (e) the doctor concluded that the cause of death was haemorrhagic shock and perforated left illiac vessel arising from the stab wounds.

The contents of the post mortem are not in issue. Our view is that the nature of the injuries on the now deceased are consistent with the use of a knife or a sharp object, which is inherently a dangerous weapon. The injuries clearly reflect that the attack was grisly, brutal and savage. The blows were clearly directed at the vulnerable parts of the human anatomy. Even the dimensions of the wounds inflicted reflect the severity of the attack. The small +intestines were disembowelled. This is consistent with use of or application of sever force. It may well be that the injury or stab wound at the back was inflicted as the now deceased tried

to flee. The intention of the person who inflicted these injuries on the now deceased in our view is clear. It was to kill or cause death. This can be inferred from the nature of the weapon used, the part of the body the stab wounds were inflicted, the number of blows delivered and the sheer intensity and viciousness of the attack.

We are therefore inclined to conclude and make a finding that whoever inflicted those injuries on the now deceased desired death to result or did foresee the death of the now deceased as substantially certain in the circumstances but nonetheless inflicted those injuries.

The question this court has to resolve is who inflicted those injuries on the now deceased. This is a factual rather than a legal issue.

In order to resolve this question, we turn to the evidence placed before us by both the State and the defence.

THE STATE CASE

1. Dr Pesanai

The evidence of Dr Pesanai is simply to the effect that he examined the now deceased's body and compiled the post mortem report. This evidence is not contested.

We turn to *viva voce* evidence.

2. Violet Moyo

Violet Moyo (Violet) is the grandmother of the now deceased and a very elderly woman. She stayed with the now deceased.

Violet told the court that the now deceased left employment at Mkwashi ranch in Gwanda in November 2015 and briefly left for South Africa but later returned home. She said the now deceased had worked as a grinding mill attendant at Mkwashi ranch, a job later taken up by the accused after the now deceased left employment. She is well known to the accused.

Violet testified that she was unaware of the nature of the relations between the accused and the now deceased except that she recalled one day when the accused passed by her homestead and called out at the now deceased after which the two

left walking together. She described the now deceased as a decent young man of sober habits who also did not smoke and took care of his siblings.

Turning to the events of 4 December 2015 Violet said she came from the fields with the now deceased after which they had their lunch. The now deceased then left home around 2 – 3 pm as she was doing her laundry. At around 3 pm the now deceased came home crying saying that he had been stabbed by the accused whom he described as “Zoro the grinding mill attendant employed at Siziba’s plot.” She said the now deceased was in severe pain and was unable to give further details of the attack.

Violet said when the now deceased arrived home crying he was holding his bowels which were protruding. She said the sight of the now deceased was ghastly and life threatening as the sadza the now deceased had just consumed was coming out of the protruding bowels. The now deceased was virtually soaked in blood and evidently in severe pain. Upon examining the now deceased she observed two stab wounds, one on the abdomen and the other on the back. She said the now deceased was not able to give her the cause of the attack but could only say he had been stabbed by the accused and not that he had fought with the accused. In view of the now deceased’s critical condition she called for help and the now deceased was ferried to Masase Mission hospital where they arrived at about 7 pm and by then the now deceased had passed on.

Violet gave her evidence well and very few questions were put to her. The importance of her evidence relates to the injuries the now deceased sustained and how the now deceased identified his assailant to her. We assess her as a truthful witness.

3. **Lovemore Zhou**

Lovemore Zhou (Lovemore) is known to both the now deceased and the accused. The now deceased was his neighbour. He was not able to comment on the nature of the relations between the accused and the now deceased although at odd times he once saw them walking together.

Lovemore said on 4 December 2015 the now deceased, at about 3 pm, passed by his homestead from the direction of the business centre crying with a group of anxious people following at a distance shouting that the now deceased had been

injured. As a good neighbour he followed the now deceased to the now deceased's homestead and found out that the now deceased had collapsed. He noted that the now deceased was soaked in blood and had two stab wounds, one on the abdomen and another more to the back. He said the injury at the back seemed more severe as the now deceased's bowels were protruding with food coming out of the bowels or intestines. Lovemore said the now deceased identified his assailant as one "Zoro", referring to the accused as accused is the only person in the area known by that name and that the now deceased did not know why the accused had stabbed him. Lovemore assisted in having the now deceased ferried to hospital.

No useful or material questions were put to Lovemore and his evidence remained largely unchallenged.

4. **Mpilo Ndlovu**

Mpilo Ndlovu (Mpilo) is employed at Mkwashi ranch as a supervisor. The accused is a grinding mill attendant at his workplace and the now deceased used to work under him as a grinding mill attendant before the now deceased left employment in October 2015 and that job was taken up by the accused.

Mpilo said on the day in question 4 December 2015 the accused asked for permission from him to go to the shops across the river in the area where the now deceased stayed which shops are about 3 – 4km away. He granted the accused permission and accused left around at 14.00 hrs. Mpilo said upon his return at about 15.00 hrs the accused who appeared not to be himself reported to Mpilo that, he, the accused, had injured one Nyasha, the now deceased by stabbing him with a knife. The accused went further to say he had stabbed the now deceased as the two fought and the now deceased had chased after him. He said the accused did not however disclose the exact nature of the injuries he had inflicted on the now deceased. Mpilo said he excused the accused from work and told accused to proceed to his home to advice his parents what he had done. The accused left the workplace the next day 5 December 2015 but did not return as he had been arrested in connection with deceased's death.

Under cross examination Mpilo said he was not aware of any animosity between the accused and the now deceased. He insisted that it is him who advised accused to go to his home and advise his parents about the injuries accused had reported he had inflicted on the now deceased. Mpilo identified Exhibit 1 the okapi knife as similar to a knife accused possessed.

Again Mpilo's evidence was largely unchallenged and we accept his testimony.

5. **Cornelius Moyo**

Cornelius Moyo (Cornelius) is accused's mother. She confirmed that on 5 December 2015 the accused came home from his work place but she said accused did not disclose the purpose of his visit. She assumed accused had just visited his wife. She however said accused was arrested by the police the same day on murder allegations and taken away. Later she said accused returned with the police looking for an okapi knife Exhibit 1. The accused had disclosed to the police that he had put the knife in a playing drum (ngoma in Shona). Cornelius said she had discovered the knife in the playing drum and was unaware as to who had put it there. She said she suspected her enemies had done so hence she had removed the knife and buried it in her yard. She then retrieved it and gave it to the police who were with the accused. Cornelius denied that accused had reported to her on arrival home that he had injured the or fought with the now deceased but that she only learnt that from the police at the time of the accused's arrest. No material questions were put to her in cross examination.

All we can say that is that accused's mother was a guarded witness. She disputed the contents of her statement to the police about the report accused made to her upon his arrival from his work place. We do not believe that she is truthful witness in that regard. We find her explanation of hiding the okapi knife Exhibit 1 to be incredible. Indeed, she found herself between the proverbial hard rock and hard surface. Be that as it may it remains a fact that Exhibit 1 the okapi knife belongs to the accused.

6. **Sgt. Hilda Grace Chitemere**

Sgt. Hilda Grace Chitemere (Sgt Chitemere) is based at ZRP Mberengwa police station and is the officer who initially investigated this case. She later handed it

over to ZRP Mwenezi as the scene of crime fell outside Mberengwa District but in Mwenezi, Masvingo. She explained the initial investigations she carried out.

Sgt Chitemere said after being assigned to the case on 4 December 2015 she and other details proceeded to the scene of crime on 5 December 2015 at Kabhora business centre. As a result of investigations she gathered that the accused was the now deceased's assailant and accused was arrested at his home the same day. Upon accused's arrest she warned and cautioned accused of the charge explaining his rights. Sgt Chitemere said accused offered to explain to her what had happened. Sgt Chitemere said accused offered to take the police to the scene of crime where she observed signs of a struggle and trail of blood. On inquiring from accused what had happened at this place accused disclosed that he had stabbed the now deceased with a knife twice on the abdomen and the back. The trail of blood indeed was from the scene of crime to now deceased's homestead and it was clear to her the now deceased had lost a lot of blood. She said she inquired from accused where the knife he had used to stab the now deceased was and accused said he had thrown it into a dam. As a result, she did not recover Exhibit 1.

Sgt. Chitemere said accused further explained to her that he, accused, had met the now deceased along a path as they were going in different directions and that the now deceased had without cause assaulted the accused and that the now deceased is the one who was in possession of the knife which he, the now deceased tried to use to stab the accused but accused apparently dispossessed him and stabbed the now deceased in the stomach and the back as they struggled after which accused left the scene with the now deceased struggling to walk. Accused also revealed to her that accused had made a report to accused's supervisor one Mpilo Ndlovu. Sgt Chitemere said she believe details from ZRP Mwenezi later recovered the knife, Exhibit 1. According to Sgt Chitemere the injuries she observed on the now deceased's body were consistent with accused's explanation to her. She observed that the stab wound on now deceased's back was more deep.

Under cross examination Sgt Chitemere denied that she assaulted the accused. She said that accused's disclosure of allegedly throwing the murder weapon, the knife, into the dam was made to her by accused voluntarily and that she had believed the accused.

We do not share the view that Sgt Chitemere was an untruthful witness. The version she said the accused told her sought to blame the now deceased for the cause of the altercation between accused and the now deceased. She accepted accused's version that he had thrown away the knife into a dam. This is hardly the evidence of a witness who sought to falsely incriminate the accused.

The accused's evidence

The accused maintained that he enjoyed bad relations with the now deceased because the now deceased who had been dismissed from work blamed the accused moreso as accused later took over the same job.

Turning to the events of the day in issue accused in his evidence said as he was coming out of the shop at Kabhora business centre the now deceased waylaid him by the doorway and slapped him once saying accused should leave his employment. The accused said he fled from the shops without fighting back in any manner. Accused denied stabbing the now deceased.

The accused admitted that the knife Exhibit 1 belong to him and that he had put it in a drum on account of a dream he had had well before his incident. The accused said Mpilo Ndlovu his supervisor lied in evidence because they once dated the same woman. The accused said police assaulted him forcing him to admit to the offence.

Under cross examination accused said despite being attacked by the now deceased on the first occasion in October 2015 and losing 2 teeth he did not report to police as he was not aware such an attack was unlawful. Instead he said he reported to Mpilo Ndlovu about the first attack, and was advised to leave the now deceased. Unfortunately, this was never put to Mpilo Ndlovu in cross examination.

The accused said he did not again report to the police the attack on 4 December 2015 when the now deceased slapped him at the shops but simply fled and made a report to Mpilo Ndlovu. The accused disputed the nature of the report he made to Mpilo Ndlovu. Accused alleged Mpilo Ndlovu falsified his evidence on account of the fact that they dated the same woman. However, this was not put to Mpilo Ndlovu in cross examination and accused said he unfortunately forgot to advise his counsel of this material evidence. The accused insisted that he did not know who fatally injure the now deceased.

ANALYSIS OF EVIDENCE

There are indeed differences between the accused's defence outline and his evidence in chief (or under cross examination). While in the defence outline the accused said the now deceased assaulted him on the first occasion and caused accused to lose one tooth, in his evidence he said he lost two teeth. It is difficult to appreciate how accused can be mistaken as to the number of teeth he lost when the now deceased allegedly first attacked him either in October or November 2015. We find it to be incredible that accused would simply decide not to report such a serious attack to the police after he had lost either one tooth or two teeth. If such an attack was reported to Mpilo Ndlovu surely this should have been put to Mpilo Ndlovu who told the court that he was not aware of any bad blood between accused and the now deceased.

The version accused gave on what happened when he met the now deceased on 4 December 2015 is different in his defence outline and in his evidence. In his defence accused said when he met the now deceased at Kabhora business centre on 4 December 2015 the now deceased threatened to kill the accused and that accused fled from the business centre going to his workplace where he advised Mpilo Ndlovu of the threats. In his evidence accused was now heard to say when he met the now deceased at Kabhora business centre on 4 December 2015 the now deceased way laid him by the door of the shop and slapped him once. The accused cannot be confused as to whether the now deceased merely threatened to kill him or slapped him.

We are also not convinced by accused's belated explanation which only emerged in accused's evidence that accused and Mpilo dated the same woman. Mpilo Ndlovu was clear in his evidence that he enjoyed good relations with the accused and not motive was put to him as to why he would falsely incriminate the accused. Indeed, accused could not have failed to advise his counsel of such a crucial and material aspect of Mpilo Ndlovu's evidence. The only inference we can draw is that this issue of dating the same woman with Mpilo Ndlovu is an afterthought.

The explanation by the accused on why he put the knife Exhibit 1 in a drum is at most bizarre if not incredible. It is a muddled up explanation steeped in the superstitious spiritual world and does not make sense. This is further made worse by the fact that accused mother after accused's arrest decided to bury the same knife in the yard. The simple clear explanation

is that the accused decided rationally to hide the knife he had used to stab the now deceased and upon his arrest his mother also decided to dispose of it.

There is indeed no eye witness to the attack of the now deceased but our view is that the circumstantial evidence placed before us point to the accused as the assailant. There a number of factors which point to this finding and they are as follows;

- (a) the now deceased made a dying declaration to Violet and Lovemore that he had been fatally stabbed by the accused. When the now deceased identified accused as his assailant he was on his deathbed. A dying declaration is admissible in our law see *Criminal Procedure in Zimbabwe* by John Reid Rowland at 18 – 21
- (b) the accused admits that he indeed met the now deceased on the fateful day on 4 December 2015 and that he had an altercation with the now deceased. It cannot be just coincidental that the now deceased thereafter is seen with severe and fatal injuries
- (c) the accused made a report to Mpilo Ndlovu that he had seriously injured the now deceased. Mpilo Ndlovu cannot be mistaken as to the nature of the report accused made to him to the extent of excusing accused from work to go to his rural home
- (d) the murder weapon, the okapi knife Exhibit 1 belong to the accused. Worse still the accused initially lied to the police where it was and had concealed it in a drum at his rural home
- (e) the accused's own evidence is riddled with inconsistencies and falsehoods.

All these factors taken together lead to the only one inference which point to accused as the assailant. The accused's guilt is beyond reasonable doubt.

We cannot take seriously *Mr Maweni's* submissions in his closing written submissions that the accused acted in self-defence. This is new evidence which was never led in court at any stage by the accused. It is unfortunate that *Mr Maweni* believes accused can plead in the alternative as if these were civil proceedings. The sum total of accused's defence taken to its logical conclusion would imply that accused is saying;

“I did not stab the now deceased at all, but in the alternative if I indeed stabbed him I did so in self-defence!”

This is not only untenable but shockingly unprofessional for the defence counsel to do more so in closing written submissions.

We are satisfied beyond reasonable doubt that it is the accused who fatally stabbed the now deceased. From the evidence before us his intention was to kill the now deceased.

VERDICT:

Guilty of murder as defined in s 47(i)(a) of the Criminal Law (Codification and Reform) Act, [Cap 9:23]: Murder with actual intent.

SENTENCE

The accused person’s moral blameworthiness in this case is further compounded by his lack of contrition. It is saddening to note that throughout the investigations and the trial of this matter the accused was simply unwilling to disclose and be truthful as to what happened between him and the now deceased. In fact, the accused has been happy to hide the truth giving out different versions of what possible happened on that fateful day.

Cases of murder are very prevalent in Masvingo province and this trend should be worrying to every law abiding person who respects the sanctity of human life. Many young persons resort to the use of dangerous weapons like knives at the slightest provocation.

The manner in which the accused killed the now deceased was brutal and savage. The now deceased went through a harrowing experience to which he predictably succumbed. The cruelty the accused exhibited is beyond belief. The reasons for accused’s callousness shall forever remain stored in his mind as accused has been totally unwilling to explain truthfully what exactly transpired. The stab wounds were inflicted with such force that the now deceased’s bowels were exposed. The life of a 21-year-old was needlessly lost.

It is difficult to find any meaningful mitigatory factors in this case. Suffice to state that the accused is a first offender who is married with no children. Currently the accused is not employed and survive on piece jobs earning about R200 per month. The accused possesses neither savings nor assets.

We have noted that the accused suffered from pre-trial incarceration of about 8 to 9 months. Beyond this we are not able to find anything which is favourable to the accused. While the accused's counsel alleges that the accused was provoked, we are not able to seriously consider this as a mitigatory factor due to accused's inability to truthfully explain what happened.

In our view a lengthy custodial sentence is appropriate.

Accordingly, the accused is sentenced to 25 years imprisonment.

National Prosecution Authority, counsel for the State

Mutendi, Mudisi and Shumba, pro deo counsel for the accused.