

THE STATE

vs

LIVISON MBITI

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 23 January, 2020

Criminal Trial - Sentence

Assessors

- 1. Mr Mushuku**
- 2. Mr Chikukwa**

T. Chikwati for the State

J. Ruvengo for the accused

MAWADZE J: The tragic events in this matter are rather saddening.

The 29 year old accused who hails from Matya Village, Chief Murinye, Masvingo tragically caused the death of his 69 year old father on 12th June, 2019.

Initially the accused was charged of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. However the state and the accused's *pro deo* counsel found each other and agreed that the proper charge is contravening section 49 of the Criminal

Law (Codification and Reform) Act [*Cap 9:23*] which relates to culpable homicide. The matter therefore proceeded on the basis of a statement of agreed facts.

The agreed facts in brief are that on 12 June 2019 the accused and the now deceased his late father Cephas Mbiti decided to enjoy themselves drinking beer. They started drinking traditionally brewed beer at home after which they proceeded later in the day to Dikitiki business centred for more beer drinking at Muzorori bottle store.

At around 2000 hrs the accused had a misunderstanding with one patron called Trust Gono which culminated in them shoving each other outside the bottle store. The now deceased intervened and stopped this quarrel.

The accused was not yet done it would seem as he soon picked another misunderstanding with other patrons inside the bottled store. Apparently the accused realised he could be assaulted and fled from the bar. As he fled the accused picked a stone which he threw into the crowd of merry making patrons. Fortuitously the stone hit the accused's father, the now deceased, on the head causing him to fall down and became unconscious. The now deceased was immediately ferried to Morgenster hospital in that state where he passed on the following day.

As per the post mortem report the now deceased sustained a head injury described as "*occipital area bruising with a large underlying haematoma.*" It is further said the now deceased lost "*large amount of blood from mouth and nostrils*". The cause of death is head injury.

These are the agreed facts upon which a proper sentence should be assessed.

In mitigation we have considered that the accused is married with a very young family of 5 children, the eldest being 9 years and the youngest 1 year 5 months. Three of his children are attending school. The accused's family solely relies on his manual labour as he is not employed and raises about RTGs\$200 to \$500 per month. The accused has no meaningful assets.

By tendering a plea of guilt the accused shows that he is contrite.

In fact the accused was consistently co-operative in this matter. After realising that his father the now deceased has been seriously injured he assisted in ferrying him to hospital. Upon his arrest the accused was very candid with the police and truthfully disclosed all what he did. This is clear from his confirmed warned and cautioned statement Exhibit 2. In court the accused did not waste the court's time or resources in having his matter prosecuted. The accused made a clean breath of what transpired and we finalised this matter in the shortest possible period

without calling any witnesses. The accused should therefore be rewarded for all this. We have not lost sight of the fact that this is the accused's first conviction. In that regard he should therefore be treated with some measure of leniency.

It is mitigatory that the accused will forever live with the fact that he caused the death of his father. The general public make no distinction between murder and culpable homicide. That is the luxury of those who know the law. The accused would simply be viewed as a murderer and this stigma will not only haunt the accused for life but is punishment on its own. Thus the blood of his father will always be in his hands.

We have not placed much weight on the fact that the accused suffered from a pre-trial incarceration period of about 3 months.

As already said the circumstances of this case are rather unfortunate. The accused had no issues with his father at all. The stone he blindly threw towards a crowd fortuitously fatally hit his father the now deceased.

Be that as it may this court is worried about cases involving abuse of alcohol leading to unfortunate loss of life. Human blood is sacred. The sanctity of human life cannot be over emphasised and it matters not at the end of the day how such life is lost.

What aggravates the accused's conduct and therefore elevates his moral blameworthiness is not only that he was a nuisance on that day but exhibited violent behaviour. The accused who seemed to have partaken copious amount of all types of alcohol ended up quarrelling with all and sundry. This court should remind those who decide to drink alcohol that they should not in the process take leave of their senses, worse still causing loss of life. This is precisely why in terms of s 221(2) of the Criminal Law (Codification and Reform) Act, [Cap 9:23] voluntarily intoxication is not a mitigatory factor where one is convicted of culpable homicide.

It is saddening that the accused decided to behave in this violent manner not only in the presence of his father but even after his father restrained him at some point.

While we accept that the degree of accused's negligence in this case is not very high the accused nonetheless deserve censure and some measure of punishment lest harmful and wrongful signals are not only sent to him but to the general public. In our view a fine is not appropriate and neither is community service. Equally so a wholly suspended prison term is too lenient. The accused deserves to be incarcerated for minimal prison term.

In the result the following sentence would meet the justice of the case;

“3 years imprisonment of which 1 ½ years imprisonment is suspended for 5 years on condition accused does not commit with that period any offence involving the use of violence upon the person of another for which the accused is sentenced to a term of imprisonment without the option of a fine.

Effective sentence is 1 ½ years imprisonment.”

*National Prosecuting Authority, counsel for the state
Ruvengo, Maboke & Company, pro deo counsel for the accused*