

THE STATE  
versus  
CLAYTON DEKAURENDO

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUTARE, 1 and 17 October 2019 and 13 November 2019

### **Criminal Trial**

ASSESORS: 1. Mr Rajah  
2. Mr Magorokosho

*Ms T. L katsiru*, for the State  
*K. G Muraicho*, for the accused

MWAYERA J: The accused pleaded guilty to two counts of murder as defined in s 47 (1) of the criminal law (Codification and Reform) Act [*Chapter 9:23*] hereinafter referred as criminal Code. The state alleges that on 8 September 2018 and at Rori Village, Headman Samanga, Chief Mutasa, Honde Valley the accused person unlawfully caused the death of Regina Chibate and Walter Nyagano intending to kill them or realising that there was a possibility that his conduct might cause their death and continued to engaged in that conduct despite the risk or possibility by striking the two deceased persons on their heads with an axe handle thereby causing injuries from which the said Regina Chibate and Walter Nyagano died.

The brief facts forming the basis of the allegation are as follows. On the fateful day 8 September 2018, the accused saw Jeremiah Dekauendo who had visited his mother at the latter's homestead. The accused approached and ordered Jeremiah Dekauendo to leave his mother's homestead which order Jeremiah Dekauendo did not comply with. The accused went to his own father's residence and came back armed with a wooden axe handle. He charged towards Jeremiah Dekauendo who fled and despite the chase accused failed to catch up with him. The accused then came across Regina Chibate who was carrying Walter Nyagano on her back and he struck the two on their heads with the wooden handle. The accused assaulted the deceased with a wooden handle thereby causing injuries on the head from which the two deceased died. A post-mortem report compiled by Dr Capetilla Gomex after the examination of the remains of Regina Chibate was tendered as exh 3 by consent. The doctor concluded that the cause of death was right parieto occipital subarachnoid

haemorrhage, multiple skull bone fracture and severe head injuries. Doctor Cephas Fante also, on certifying the two bodies dead observed, the two deceased had sustained skull fractures.

The accused in his defence outline denied ever having an intention to kill the deceased persons. He stated that he had an altercation with his uncle which was triggered by a long standing and underlying dispute concerning his family. He was so enraged and overcome by emotions and anger resulting in him losing his mind and thus in a fit of rage and unbeknown to him he struck the deceased persons.

The state relied on evidence of 12 witnesses one of whom gave oral evidence while the others' evidence was formerly admitted as it appear on the summary of the state case in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The state also tendered the axe handle used to assault the deceased as exh 1 and certificate of weight of same showing the handle weighed 1kg exh 4. Accused's warned and cautioned statement exh 2 and the sketch plan drawn by the police per indications from accused exh 5. All exhibits were tendered by consent. The defence in turn also relied on evidence of the accused as the only witness who testified in the defence case. Worth noting is accused's confirmed, warned and cautioned statement wherein just like in his defence the accused admitted assaulting the two deceased on the head with no intention to kill as he was unaware of what he was doing but just following voices commanding him to murder these people as they were witches.

The state witness who gave oral evidence one Pamela Ferembu recounted events of the day in question as follows. She was in her kitchen hut when her attention was roused by screams she heard from the road. She rushed to the scene and found the accused whom she was well known to assaulting a woman who was strapping a baby on her back. She observed accused strike the now deceased with an axe handle and when she questioned the accused why he was assaulting the deceased the accused turned and said she was actually the person he was after. She further inquired if accused knew her and he identified her by name as mother "mother of Sauma" she observed that the accused's face was fierce as he assaulted the mother and child who were at that time on the ground. The witness raised alarm for help and it was then that the accused's aunt one Moleen Sibanda came and restrained the accused from further assaulting the now deceased persons. Upon the intervention of his aunt Moleen Sipanda, the accused dropped the axe handle and walked away in the direction of his home. The witness maintained that the accused knew what he was doing when he assaulted the deceased persons as he on being confronted by the witness had no difficulty identifying her.

The witness's evidence was straight forward and we viewed her as a candid witness. She did not seek to speculate on what triggered the assault but confined her evidence to her observations at the scene. She generally was viewed as an honest witness. Moleen Sipanda's evidence tallied with Pamela Ferembu's evidence on material aspects. The witness's evidence was formerly admitted. She heard screams from the road while at a distance of about 50 meters she observed accused striking the two deceased who were now lying motionless on the ground. The witness drew close and restrained the accused from further assaulting the deceased who were lying motionless in a pool of blood.

Tafadzwa Mandeya is the mother of accused. Her evidence was also on common cause aspects and it was formerly admitted. Her son confronted his uncle Jeremiah Dekarendo over land boundary and the two did not agree culminating in accused arming himself with a wooden handle. The accused used this handle to assault the deceased persons upon failing to apprehend his uncle. Jeremiah Dekarendo's evidence was basically a confirmation of his confrontation by the accused who armed himself and threatened to kill him. When the witness hid the accused then targeted the two deceased who were at the road. The witness's evidence was not contentious and it was admitted. Also admitted was the evidence of Maud Dekarendo the grandmother and mother of accused and Jeremiah respectively. Her evidence essentially confirmed Jeremiah's account on the altercation which ended up with the demise of the deceased. The accused's father John Dekarendo also confirmed the issue of bad blood between himself and his brother. He learnt on the day in question that the accused his son struck deceased after having a misunderstanding with his uncle Jeremiah. The evidence of the other witnesses police details and post office official was on common cause aspects hence it was also formerly admitted.

The accused was the only witness in the defence case. His evidence was essentially that on the day in question he had an altercation over land dispute with his uncle for about 25 minutes. His uncle had come to his mother's place and the accused was not amused by this visit as he was not sure of his uncle Jeremiah's intentions. When his uncle resisted his orders to vacate the grandmother's homestead the accused then armed himself with an axe handle and threatened to attack. Upon pursuing and failing to get his uncle the accused came across the two now deceased and he assaulted them out of anger. On another breadth the accused's statement was that he did not know what happened, this is despite him giving an account of events of the day in question. On being asked to explain how he got details of how he assaulted the deceased he explained that his parents narrated to him what had happened.

Absurdly his parents did not witness the altercation and the actual physical attack of the deceased. This means accused narrated events according to his own observations and participation. When he sought to portray that he did not know what happened he exposed himself as not being genuine with the court. The accused saw the deceased persons passing by. The woman and baby did not in any manner resemble his uncle Jeremiah such that there is no basis for assaulting thinking he was striking his uncle. The accused also came up with another explanation of being angry and that with his emotions having been triggered by his uncle thus leading him to act in a fit of rage. The accused could however not place before the court any utterances or actions by the uncle Jeremiah which could have occasioned extensive provocation leading to momentary loss of self-control. The thinly veiled reliance on the defence of provocation cannot be sustained in the circumstances for the obvious reason the requirement cannot be met. Section 239 of the Criminal Law Code recognises provocation as a partial defence to murder charges in circumstances where provocation is found to exist in such a manner as to negate intention thus reducing liability to culpable homicide.

The accused in this case saw his uncle at his mother's house and he sought to take it upon himself to chase him away but the verbal attack did not cause Jeremiah Dekauendo to leave. The accused had time to consider going to his father's home from where he brought an axe handle with which he threatened the uncle Jeremiah who then ran away. There is no evidence to show that the accused acted on the spur of the moment and in a fit of rage when he struck the deceased. The attack was not spontaneous. In the circumstances accused cannot be said to have lacked the requisite intention. The uncle ran and hid and accused in clear observation of the two deceased mercilessly struck them. When the witness Pamela Ferembu intervened he turned against her despite identifying her and only stopped when his aunt Moleen Sibanda intervened. The accused in his defence did not maintain a single version as he shifted from saying he was provoked and thus attacked the deceased in a fit of rage to saying he saw the deceased person at a gate as they were passing by and he struck them in compliance with a voice which ordered him to kill the deceased persons as they were witches. Even if it was to be accepted that the accused had strong beliefs in witchcraft it is not a defence since the belief does not vitiate the mental capacity of an individual to formulate intention. See *Kundai Tsaura and Another v The State* HMT 2/20 and *S v Tsechu and Others* HH 271/15. Also see *S v Hamunakwadi* ZLR (1) 2015 at 392. Section 101 of the criminal Law (Codification and Reform) Act [*Chapter 9:23*] is instructive. it states:

“It shall not be a defence to murder, assault or any crime that the accused was actuated by a genuine belief that the victim was a witch or wizard, but a court convicting such a person may take such belief into account when imposing sentence upon him or her for the crime.”

It is apparent therefore that the belief in witchcraft cannot be sustained as a defence.

In summation, the accused denied intentionally killing the deceased proffering explanations ranging from not knowing what he was doing to being provoked to an extent of losing self-control and finally to being compelled or ordered by some voice to kill the witches. These varied versions exposed the accused as a man trying his luck and taking a gamble in face of overwhelming evidence on common cause aspects. Generally we did not hold the accused as a candid witness. It is common cause the accused struck the deceased using an axe handle resulting in the fatal consequences. It is not in dispute that the assault on the deceased persons was unprovoked as the accused just came across the deceased after his uncle had evaded him.

The offence which the accused is facing requires proof beyond reasonable doubt of both the *actus reas* and *mens rea*. That the accused unlawfully assaulted the deceased has been clearly established from the state witnesses and accused’s version. Intention has been defined as falling under two parameters namely actual intention which is clear that when one set out to act knowingly with an aim or desire to bring about death and bring about the death they have the requisite actual intention. The second situation is where one sets out with a conduct with the realisation that such conduct may cause death but despite the realisations proceeds with the conduct. In the latter scenario the law can infer intention from the circumstances and manner of commission of the offence. See *S v Zorodzai Moyo* HMA 16/17 and *S v Lovemore Kurangana* HH 267/17.

In the present case whereas the accused cannot be said to have set out with an aim to kill the deceased persons and killed them he certainly cannot escape liability for realisation that by striking the deceased persons with an axe handle weighing 1kg in the head repeatedly death would occur. The accused conscious of what he was doing subjected the deceased persons to severe assault despite realising that his conduct would cause death if he persisted with his conduct. The accused is accordingly found guilty of murder with constructive intention as defined in s 47 (1) (b) of the Criminal Law Code.

### Sentence

In passing sentence we have considered all mitigatory factors in your favour as advanced by Mr *Muraicho*. You are a young first offender who committed a grave offence at the age of 18. You have been in custody since September 2018 that means you have been in for more than a year. The trauma of the pre-trial incarceration coupled with the trauma

brought about by the suspense of not knowing the outcome of the matter cannot be underestimated. You will for the rest of your life live with the stigma of having killed two human beings. It is humane to consider customarily appeasing the bereaved family, however clearly no amount of compensation will bring back the needlessly lost precious human life.

In aggravation as advanced by the state counsel Ms *Katsiru* is the fact that your moral blameworthiness is high. Passers-by lost their life for no reason. You displayed hooliganism of the worst kind by attacking a 31 year old woman strapping a 3 year old toddler on her back. There was no provocation or retaliation but you mercilessly and in an unrelenting manner struck the deceased severally and severely on the head thereby causing death. You displayed no sense of responsibility and respect for elders as evidenced by you taking it upon yourself to attack your uncle who is older than your father. It is accepted there was a family feud but you as a child had no business in trying to resolve brothers' issue. Your uncle was at his mother's house and you had no business chasing him away. The matter besides being criminal shows the moral decadence which is now rampant among youths in their lack of respect for elders. Such indiscipline based on bragging on physical prowess cannot go unpunished. No one has a right to take away another's precious human life. The right to life is a God given and constitutionally enshrined right. Violence should never be resorted to for dispute resolution. The courts should express their displeasure in the much increasing loss of life due to violence by passing appropriate sentence. In seeking to match the offence to the offender while at the same time ensuring that the societal interests are met we will temper justice with mercy in due recognition of your age. It is hoped that during the time you will spend at Correctional Services you will be rehabilitated and moulded into a more responsible citizen. You are sentenced as follows:

18 years imprisonment.

*National Prosecuting Authority*, state's legal practitioners  
*Mugadza, Chinzamba & Partners*, accused's legal practitioners