

THE STATE
versus
SIMBARASHE MAURAYE MUYAMBO

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 11 and 13 May 2021

Criminal Trial

ASSESORS: 1. Mr Chagonda
2. Mrs Mawoneke

M. Musarurwa, for the state
S. Chikamhi, for the accused

MUZENDA J: The accused, aged 20 years is facing a charge of Murder as defined in S 47(1)(a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged by the state that on 4 May 2020 at Section 9, Tongogara Refugee Camp, Chipinge, the accused unlawfully caused the death of Dannymore Mutisi by stabbing him on the stomach with an okapi knife intending to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which Dannymore Mutisi died.

The accused pleaded guilty to the charges but a plea of not guilty was entered. In his defence outline prepared on his behalf by counsel, accused admits causing the death of the now deceased by stabbing him with a knife as alleged by the state. On the day in question accused stated in his outline that the deceased confronted him after accused had complained that the now deceased should stop talking to his wife. The now deceased tried to assault him with fists but accused dodged. The now deceased went on to grab accused and head-butted him. On realising that he had been overpowered, the accused person stabbed the now deceased. Accused added in his outline that the war background in Mozambique, his country of origin, affected his judgment which led to the commission of the offence since he had been subjected to horrific scene of people being killed.

The crucial component of accused's defence is fortified around the defence of self.

The question for decision is whether the accused stabbed the now deceased in self defence?

BACKGROUND

Both accused and deceased were and accused is still a refugee at Tongogara Refugee Camp in Chipinge, Manicaland. On 4 May 2020 the accused spotted deceased talking to Zviitiko Baipai who was in the company of Forget Chinoburukuta among other people present. Accused resolved to confront deceased whom he reprimanded for talking to Zviitiko his wife. A fight ensued, Joshua Kamba intervened restraining the two. Later the accused reengaged in the tussle with deceased, drew out an okapi knife and stabbed deceased on the stomach. After the stab, accused fled from the scene. Deceased screamed for help alerting bystanders who came to assist him. He was ferried to the hospital where he died on 5 May 2020 and the post mortem shows that the cause of death was due to exsanguination.

COMMON CAUSE ISSUES

The following facts are in-controverted:

- (i) Accused and deceased were known to each other.
- (ii) Accused used to co-habit with Zviitiko Baipai whom he considered his wife.
- (iii) Zviitiko Baipai and accused had separated and staying apart.
- (iv) On the fateful day, accused was not happy when he noticed deceased talking to Zviitiko Baipai.
- (v) Upon accused confronting deceased, a misunderstanding resulted leading to a fist fighting.
- (vi) Accused stabbed deceased on a vulnerable position of the human body which led to the death of the now deceased.

ISSUES IN DISPUTE

- (a) Whether the accused was the aggressor?
- (b) Whether the deceased was the aggressor at the time accused stabbed deceased?
- (c) Whether the accused acted in defence of self?

STATE CASE

The state called three witnesses, Forget Chinoburukuta, Joshua Kamba and Zviitiko Baipai. The majority of evidence was by consent admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The evidence of Zviitiko Baipai was very brief. She had never been in love with accused and never stayed with him, although accused would

always keep an eye on her and would follow her around, not on a single day did accused gather courage to declare his love to her. Given the evidence of both Forget and Joshua, more particularly about Zviitiko's past, we do not hesitate to conclude that accused had had a love relationship with Zviitiko Baipai and that relationship triggered the unfortunate clash between accused and deceased.

Forget Chinoburukuta told the court that on the day in question, deceased approached Zviitiko and spoke to her. Accused confronted deceased and asked the latter why he was talking to Zviitiko Baipai, deceased told accused that he was not proposing to Zviitiko. Accused started to assault deceased. Deceased retaliated and a fight ensued between the two. Accused then withdrew an okapi knife from the pocket of his trousers and stabbed deceased. From the onset, accused, according to Forget's evidence was the aggressor. Most of the evidence of Forget are in sync with the defence except on the aspect of deceased being the aggressor on the second occasion after Joshua Kamba had restrained the two. Forget gave her evidence very well, she even sobbed in court under cross-examination by defence counsel when it was put to her that she is the one who influenced Zviitiko to be in love with the deceased. She remained adamant that it was accused who was confrontational and aggressive towards the deceased. We accept her evidence as largely credible and unexaggerated.

Joshua Kamba gave evidence. He was a friend of the deceased and on that day they were together. He heard and witnessed accused and now deceased having an altercation. He saw the two fighting. He restrained them. He then left the scene going to his home which was one hundred metres from the scene. He later heard deceased screaming and upon his return he learnt that deceased had been stabbed by the accused. He saw deceased lying on the ground bleeding and in pain.

Joshua Kamba admitted in court that on the day in question he was inebriated but not very drunk. He also indicated that deceased was intoxicated. Under cross-examination he seemed to agree with defence counsel on whatever proposition that was put to him and as a result the complexion of his evidence became muddled and contradictory. However the pith of his evidence is that it was accused who was the aggressor because of Zviitiko Baipai. The court will accept his evidence in chief to the effect that after restraining the two, Joshua Kamba left the scene when the two were not fighting. Indeed when the deceased was stabbed, Joshua Kamba was not there. We reject the accused's proposal that deceased overpowered Joshua Kamba and went on to attack accused during the presence of Joshua Kamba. In any case there is no evidence led by the accused to this effect.

We are contented with the state witnesses' evidence.

DEFENCE CASE

The only witness for the defence was the accused. He stuck to his defence outline. Under cross-examination he buckled and cracked. During clarification by the bench he revealed that he was able to access his pockets, drew out the knife, opened it and plunged it into the stomach of the now deceased. He also admitted that he had an ample opportunity to flee if he had wanted, he ended up continuously apologising for what he had done. In our view the accused fared poorly on the witness box more particularly to lay a basis for his defence of self. He was not under threat from deceased who was patently drunk. On one occasion he denied that he was head butted and later when shown his defence outline he prevaricated and said he was head butted. On the other occasion he told the court that deceased was strangling him then changed the story and stated he knew that if deceased fell him to the ground, he was going to throttle him, there is no consistent version from the accused as to what led him to stab the now deceased. We found accused's story implausible and reject it in its entirety. Accused, out of jealousy confronted deceased thinking that deceased was the force behind accused's separation with Zviitiko. During the scuffle, accused drew a lethal weapon and stabbed the helpless deceased.

We have had the opportunity of looking at the closing submissions of both the state and defence. Initially the state advocated for a verdict of murder with actual intent, then cautiously shifted and submitted that accused may be convicted of murder with constructive intent. On the other hand, the defence correctly in our view, abandoned defence of self and conceded that the accused be found guilty of murder with constructive intent. What is important to note that is that the defence properly deduced that culpable homicide is not sustainable from the facts. Accused contended that he wanted to inflict pain on the deceased, he stabbed him once and left the scene. The problem before us is the weapon used and the vulnerability of the part of the body chosen by the accused. Under cross-examination by the state, accused told the court that he knew the part of the body he was stabbing. The knife is extremely lethal weapon, so sharp and dangerous on the stomach of a human being. Accused did not opt for an arm or leg of the deceased to inflict pain. He recklessly chose the stomach with a clear realisation of real risk or possibility that serious injury would occur. In our view accused was aware of possibility of death and that death was certain if an okapi knife penetrates the stomach of the deceased. At the time of stabbing, accused was at close conduct

with the deceased and given the seriousness of the injuries, notably excessive force was used by the accused.

We are satisfied that accused had the necessary *mens rea* to cause the death of the deceased. Accused is found guilty of murder with actual intent.

SENTENCE

In assessing the appropriate sentence the court will take into account the aggravating and mitigating factors submitted by both parties. Accused is of a young age and first time offender, he is unsophisticated and did not obtain rudimentary education, he has been subjected to war experience in Mozambique and actually fled from that country. At the commencement of trial, he pleaded guilty to the charge, during trial he apologised repeatedly showing contrition. He has been in prison awaiting trial for a period in excess of a year.

On the other hand the court does not lose sight that life was lost unnecessarily, worse in a situation where accused was driven by jealousy. Peaceful methods of resolving disputes should be resorted to than violence. The now deceased died a painful death due to loss of blood and his death could have been avoided. Use of lethal weapons like an okapi knife must be discouraged at all costs. Obviously the accused deserves to be treated harshly in the matter. He is quite fortunate that he is a youthful offender otherwise he was going to meet capital punishment.

Accordingly accused is sentenced as follows:

18 years imprisonment.

National Prosecuting Authority for the state.
Chikamhi Mareaanadzo Legal Practice, Counsel for the accused, pro deo