

VUSUMUZI NYONI  
V  
THE STATE

**SUPREME COURT OF ZIMBABWE  
ZIYAMBI JA, GARWE JA & NDOU AJA  
BULAWAYO, AUGUST 1, 2012**

*C Bhebhe*, for the appellant  
*N Ndlovu*, for the respondent

ZIYAMBI JA: The appellant was convicted by the High Court sitting at Hwange of murder with actual intent and sentenced to death.

It was alleged that on 14 April 2006 at about 7.30a.m. he struck Kwanele Ndlovu on the head with a log and an axe resulting in her death. The deceased was aged 21 years and the appellant 39 years at the time of the offence.

The facts, as found by the court *a quo*, are that the appellant and the deceased had been lovers and the relationship had either been terminated by the deceased or was frosty. On the day in question, the appellant arrived at the deceased's homestead intending to persuade her to revive the relationship but was snubbed. The appellant did not take

kindly to this. He went back to the gate and picked up an axe which he had left there saying: "today you will talk". He then returned to the hut where the deceased was, forcibly opened the hut and entered it.

Realising that a dangerous situation had arisen, the deceased grabbed the axe and grappled with the appellant for it assisted by her younger sister Senzeni.

In the course of the struggle, the appellant pulled the deceased outside where he picked up a log with which he struck the deceased on the head causing her to fall on the ground. As she lay on the ground, the appellant picked up the axe and struck her once with it at the base of her skull resulting in her death.

The Post mortem examination revealed that the deceased sustained an occipital fracture with brain tissue oozing and that the cervical cord had been severed. The cause of death was found to be fractured base of skull.

The court *a quo* rejected the defence of provocation raised by the appellant's claim that he had been insulted by the deceased to the effect that he, the appellant wanted to

infect her with the AIDS virus and that she had referred to his mother's private parts.

In his grounds of appeal the appellant has submitted that the court erred in returning a verdict of murder with actual intent. He submitted that the evidence showed it was the first and not the subsequent blow which caused the deceased's death; that the appellant's intention in striking the first blow was to disarm, not to kill the deceased; and that the court ought to have returned a verdict of murder with constructive intent.

We find no misdirection by the court *a quo* in its finding that death was caused by the second blow inflicted at the base of the skull with the axe and which resulted in a fracture - a fact confirmed by the post-mortem report.

In the circumstances we find no basis upon which the findings of the court *a quo* can be impugned. The appeal against conviction for murder with actual intent must fail.

Regarding the question of extenuation, the appellant submitted that the court *a quo* should have taken into account that this was a murder committed as a result of a quarrel between two persons who were involved in a love relationship. Further, that the court *a quo* had ignored evidence by the

appellant suggesting severe mental and emotional stress caused by the death of his wife and child within 1 year preceding the offence as well as the fact that his hut had been burnt down prior to the death of his wife. The appellant, so it was alleged, also had the stress of responsibility of raising seven children.

It is trite that the *onus* is on the appellant to prove extenuating circumstances. None of these submissions were raised by the appellant in the enquiry as to the existence of extenuating circumstances.

The finding of the court *a quo* that there were no extenuating circumstances cannot therefore be faulted. Indeed, the appellant's legal practitioner in the High Court conceded that once the defence of provocation was rejected there were no other circumstances justifying a finding of extenuating circumstances.

The evidence of the appellant relating to the death of his wife and child and his responsibility for care and upkeep of the seven surviving children was repeated during the allocutus as mitigation.

Counsel for the appellant submitted that the court should *mero motu* have reopened the enquiry into extenuating circumstances.

These were clearly factors urged in mitigation. The appellant had been given the opportunity to establish extenuating circumstances and had not mentioned these facts. The court *a quo* cannot be faulted for not considering what was not placed before it.

In any event, we do not consider that the totality of mitigatory factors alleged including the alleged emotional stress would warrant a finding of extenuating circumstances.

Accordingly, the appeal lacks merit and is dismissed.

**GARWE JA:** I agree

**NDOU AJA:** I agree

*Coghlan & Welsh*, appellant's legal practitioners

*The Attorney General's Office*, respondent's legal  
practitioners