

THE STATE
versus
FAITH GUDO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 3-5; 14 June; 10 & 31 July 2024

Criminal trial

ASSESSORS: Mr Shenje
Dr Mushonga

Ms T M Havazvidi, for the State
F M Masarirevhu, for the accused

MUREMBA J: That on the 11th of April 2022, at around 10.00 a.m. and at Plot 20, Wildbeast farm in Featherstone, the accused struck David Dube (the deceased) with a stone on the head thereby causing injuries from which the deceased died on the 20th of April 2022, is common cause. The post mortem that was produced by the State with the consent of the defence states that the cause of death was brain damage, severe head trauma and intra parenchymal hemorrhage.

The accused, who is facing a charge of murder as defined in section 47(1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (the Criminal Law Code), pleaded not guilty. He asserted that he did not intentionally cause the death of the deceased but acted in self-defence when he struck the deceased. The incident occurred in a field in the plot of the deceased's employer, Mr Pepete. The deceased, along with his wife and three small children, resided on the plot and was responsible for herding the employer's cattle. Notably, the employer and his family did not live on the plot. The accused also owns a plot and was a neighbour of the deceased's employer.

The dispute leading to the accused striking the deceased arose from the deceased's employer's cattle allegedly straying into the accused's maize field and grazing his crop, which was at a critical growth stage. Around 9 a.m., the accused arrived at the deceased's homestead, seeking the deceased. His explanation was that he intended to inform the deceased that he had

observed him around 7 a.m. of that day, driving his employer's cattle away from his maize field. When the accused arrived at the deceased's homestead, it was evident that the deceased was not at home. Present were the deceased's wife, Evernice Matikiti, and their three children. The eldest child, Runyararo, was nine years old at the time, while the other two children were aged seven and three years. Although there is no dispute that the accused informed Evernice he was looking for her husband, the disagreement arises over what the accused said next before leaving the homestead. Evernice Matikiti and her 11-year-old daughter, Runyararo, who testified as State witnesses claim that the accused made a chilling statement that if he were to encounter the deceased, either he or the deceased would die that day. Evernice said she questioned the accused about this ominous declaration, but he dismissed her inquiry as nonsensical and promptly departed.

In contrast, the accused vehemently denied making any death threats to the deceased. According to him, he simply informed Evernice that the deceased's employer's cattle had invaded his maize field. Evernice, however, reacted strongly, accusing him of repeating his story. Interestingly, it is undisputed that the deceased's employer's cattle had previously trespassed into the accused's maize field on multiple occasions. Furthermore, the accused had previously posted about one of the invasions on the community WhatsApp group. The accused said that on the fateful day, Evernice confronted him, questioning why he consistently reported the cattle invasions on the WhatsApp group. He said that he told her that he wanted the community to know what was happening. Evernice vehemently denied confronting the accused over this issue.

It is undisputed that the accused then left the deceased's homestead. His testimony indicated that he was heading to the chairman's plot, Sydney Choto to report the deceased. While still in the deceased's employer's field, the accused encountered the deceased, who was driving his employer's cattle. It was at this point that the accused struck the deceased with a stone to the head, resulting in injuries that ultimately led to the deceased's death. However, the events leading up to this assault on the deceased are fiercely contested. The State's version and the defence's version diverge significantly. Evernice Matikiti, the deceased's wife, and their child, Runyararo Dube, testified for the State, while the accused was the sole witness for his case.

The State's evidence

Evernice testified that she observed the incident from a distance of 70 metres. According to her account, the accused struck the deceased in the face with a fist, causing him to fall to the ground. The accused continued to pummel the deceased. It took Evernice approximately two minutes to reach the scene. By the time she arrived, the deceased had already lost a tooth, and the accused was still assaulting him. Evernice attempted to restrain the accused, but he turned on her, assaulting her with fists to the head. Seizing the opportunity, the deceased got back to his feet.

The accused then declared that he was going to the chairman's place to report the deceased. The deceased contested that it was his employer's cattle that had grazed the accused's maize. He said he was going to accompany the accused to present his side of the story to the chairman. As they walked, the accused led, about 4 metres ahead of the deceased. Suddenly, the accused picked up a stone and hurled it at the deceased, who managed to dodge. A second stone followed, but again the deceased evaded it. Tragically, it was the third stone that struck the deceased on the back of his head. When the accused struck the deceased, he fell to the ground. Evernice, who was approximately 40 metres away at the time, was now on her way home with her children. Upon witnessing the accused hurling stones at the deceased, she sprinted toward them. Unfortunately, the third stone thrown by the accused struck the deceased when Evernice was about 8 meters away. Rushing to her fallen husband, Evernice observed that his skull was depressed inward, and he had lost consciousness. She promptly arranged for water to be brought to the scene, and after pouring water on him, he regained consciousness. The accused then arranged for a motor vehicle to transport the deceased to Chivhu General Hospital. Subsequently, the deceased was transferred to Harare Hospital, where he eventually succumbed to his injuries on April 20, 2022.

Evernice disputed any involvement in assaulting the accused, together with her husband. She also denied asking her daughter, Runyararo, to fetch a log and a dog. According to Evernice, their dog was aggressive, and releasing it would have seriously harmed the accused. She clarified that the dog was always kept tied to the scotch cart at home. Evernice emphasized that their relationship with the accused, their neighbour, was strained even before they began working for their employer. The ongoing conflict stemmed from their employer's cattle, which frequently strayed into the accused's plot and grazed on his crops. The incident with the accused occurred during the three months they stayed at their employer's plot.

During cross-examination, Evernice recounted that while she was still at home, she witnessed the accused knocking down the deceased with a clenched fist. The deceased retaliated by landing two or three blows on the accused as Evernice arrived at the scene, attempting to restrain the accused. However, Evernice denied allegations that she hit the accused with a log or pulled his genitals while her husband held him. She also refuted the claim that her daughter had untied the dog from the scotch cart, disputing the claim that when the accused began throwing stones at the deceased, the dog was charging toward him. Furthermore, Evernice rejected the suggestion that she instructed her children to bring stones for the deceased to use against the accused.

Runyararo Dube's testimony closely mirrored her mother's account. At the time of the incident, Runyararo was nine years old and from the way she recounted the events of the fateful day it was clear that she vividly remembered the events. In addition to her mother's testimony, Runyararo revealed that she had suggested untying the dog when she realized the accused was assaulting her father. However, her mother disagreed, saying that she would not be able to fund medical treatment for the accused if he got injured. Runyararo firmly disputed any assertion that her parents assaulted the deceased. She maintained that the accused did not throw stones at her father due to the unleashed dog. She said she never witnessed her father assaulting the accused or throwing stones at him.

Future Mutandwa, a neighbour of the deceased who also testified as a State witness, arrived at the crime scene after the deceased had been struck and found him bleeding from the head. She learned from the deceased's wife that he had been injured during an encounter with the accused. Despite having no knowledge of how the deceased sustained his injuries, the witness assisted in transporting him home before he was taken by the accused to Chivhu Hospital.

Uriah Shoko, a police officer who responded to the scene on April 11, 2022, noted struggle marks near a footpath close to the deceased's homestead. He also observed blood near a Msasa tree approximately 100 meters away from the struggle marks. The rocky area contained numerous stones. Later, Shoko visited the deceased at Chivhu Hospital and observed a cut on the right side of his head and a missing tooth. The deceased was able to provide a statement, although it was not presented during the trial. This witness's evidence was formally admitted under section 314 of the Criminal Procedure and Evidence Act (CPEA) with the defence's consent.

Additionally, the evidence of the two doctors who attended to the deceased was formally admitted under section 314 of the CPEA with the defence's consent. Dr. Munyaradzi Walter Marowa treated the deceased at Sally Mugabe Hospital in Harare and noted a depressed skull. Dr. Malagon Martinez, a pathologist, examined the remains of the deceased and compiled the post-mortem report on May 4, 2022. This doctor did not observe any missing tooth.

The accused's evidence

In presenting his side of the story, the accused explained that he was incorporating his defence outline as part of his evidence. He maintained that he struck the deceased with a stone in self-defence. The accused adhered to his account that it was the deceased and his wife who were the aggressors. According to him, they severely assaulted him until he picked up the stone and struck the deceased on the head. The challenging aspect of this case lies in the absence of independent eyewitnesses to the assault. The only individuals present at the scene were the accused, the deceased's wife, and her children. Consequently, the credibility of the deceased's wife and daughter must be weighed against that of the accused to determine which witnesses provided a credible account of the events. Importantly, it should be noted that, as stated in *S v Moyo* SC 45/84, the accused has no obligation to prove the defence of self-defence. His role is simply to establish a basis for it, and the burden remains on the State to refute the defence. In the present case, we struggled to comprehend the basis of the accused person's self-defence argument. This confusion arose because the accused provided a detailed account in his defence outline, describing how the deceased and his wife assaulted him, leading to his use of the stone. However, when he testified during the defence case, he presented a significantly different version of events from what he said in his defence outline.

In the defence outline the accused said that when he met with the deceased in the field, the deceased's wife arrived at the scene when he and the deceased started quarrelling. He said both the deceased and his wife manhandled him and they both started assaulting him with open hands, fists and logs. The wife bit him on the hand causing a deep cut and the assault lasted 4 minutes as he was screaming for help. This version is different from the version that he gave in his evidence in chief during the defence case.

The following is what he said in his evidence in chief. He had known the deceased for two and a half months before the date of the incident relevant to this case. The deceased was employed by his neighbour. The accused had resided at Plot 14, Wildbeest Farm in Chivhu for well over 20 years. His relationship with the deceased was cordial. Prior to April 11, 2022, he

did not have any issues with the deceased. However, after his cattle invaded the accused's field by breaking the fence in mid-February 2022, they entered into an agreement. The agreement was that the deceased would repair the fence, but he did not do so until the day of the incident, which was April 11, 2022. On that day, the accused woke up around 7 a.m., rushing to the dip tank because he had recently purchased some cattle. On his way, he noticed the deceased driving his cattle away from his (the accused's) maize field. Due to his hurry, the accused did not speak to the deceased, who was headed toward his own homestead. When the accused arrived at the dip tank, he found the deceased absent with his cattle. Whilst there, the accused overheard a woman talking to the chairman Sydney Choto, questioning him about the whereabouts of the accused. The accused chose not to join their discussion and returned home, waiting for the chairman to return. His homestead was approximately 600 meters away from the accused's. Around 9 a.m., the accused said he proceeded to the deceased's residence to inform him that his cattle had invaded his field around 7 a.m.

When the accused arrived at the deceased's place, he encountered the deceased's wife and their three children by the roadside. Upon greeting her, the wife remained silent, standing with her arms akimbo, staring at him. The accused inquired about her husband's whereabouts, and she replied that he was not at home; he had gone to the grazing area to tend to the cattle. The accused then asked her to convey the message that his employer's cattle had invaded his field. That is when trouble began. The wife hurled insults at him, accusing him of repeating the same story. She pointed out that whenever their cattle encroached on his land, he would post about it on WhatsApp. Curious, she wanted to know why. The accused said he explained that he did so to keep other farmers informed about community happenings. He assured her that he would address the issue with Mr Pepete, the deceased's employer. Despite his reassurances, she continued berating him. After saying goodbye, the accused started walking toward the chairman's plot. While conversing with the deceased's wife, he noticed the chairman nearby and headed in that direction. He even informed the deceased's wife of his destination. As he walked approximately 40 metres toward Mr Choto's homestead, the deceased's wife continued shouting at him. Suddenly, the deceased's cattle charged toward him at high speed, closely followed by the deceased himself. The dust kicked up by the cattle forced the accused to halt until it settled.

The accused said when the dust cleared, he saw the deceased charging directly at him. The accused greeted him, but the deceased curtly replied, 'What?' The accused said he informed the deceased that his cattle had invaded his field and that he was on his way to see

the chairman. Visibly unhappy, the deceased charged toward him, blocking his path completely. Despite the accused's desire to continue his journey, the deceased persistently obstructed him. A heated quarrel ensued, lasting about a minute. Suddenly, the deceased's wife arrived, sprinting at high speed. She instructed her husband to cease negotiations with the accused, asserting that he deserved a beating. According to her, the accused had shamed them throughout the area by posting about their cattle on WhatsApp. The husband echoed her sentiments, and the wife suggested they physically assault him. At that moment, the deceased seized the accused by the shoulders, rendering him immobile. The wife proceeded to beat him relentlessly, striking the back of his neck and his back with both hands. The accused, shocked by the severity of the blows, recalled never experiencing such violence before. In addition, she bit his second finger on the left hand, leaving a visible mark. Subsequently, the accused sought treatment at Harare Central Hospital. He provided a medical affidavit, (marked as exhibit 2) with the State's consent. The accused said that the beating inflicted by the deceased's wife lasted four minutes while the deceased restrained him. The accused said that due to a long-term injury, he lacked significant strength; he had a broken bone below the ankle, sustained from a previous incident involving a ploughshare.

The accused recounted that the deceased's wife exhibited extreme violence during the incident. He said as she beat him, he repeatedly shouted for help from the chairman Mr Choto, pleading, 'Mr Choto, help me! They want to kill me.' He said his cries never ceased. In response, the deceased's wife called out to her daughter, instructing her to fetch a log. The daughter returned with a dry gumtree log, measuring 4 to 5 meters in length. The wife released the accused momentarily as she hurried toward her daughter to receive the log. Seizing the opportunity, the accused managed to break free from the deceased's grasp. He sprinted away at top speed, covering approximately 50 metres before stumbling and falling. The deceased and his wife pursued him relentlessly, hot on his heels. As he rose, the wife struck him with the log. Although he felt lighter stones hitting his back, they did not cause significant harm. Still shouting for help from Sydney Choto, the accused fled across the rocky terrain, dodging and evading. The deceased's wife continued to incite violence, urging her husband to knock the accused down. The deceased hurled a stone at the accused, who skilfully dodged it. In response, the accused threw a stone toward the deceased, attempting to scare him away. At that moment, the wife instructed her daughter to unleash their vicious dog. The deceased threw a second stone, which the accused deflected with his left palm. The stone fell harmlessly. The accused swiftly picked it up and hurled it back, hoping to deter the deceased. The accused said

when he threw the third stone, it hit the deceased. The stone struck him, despite the accused's intention to merely frighten him. At that critical juncture, the deceased's wife stood just 2 metres away from her husband, still gripping the log she intended to use on him once more. The deceased's daughter was in the process of bringing the menacing canine to the scene. She was about 100m away crossing the road running and holding the dog on a leash. The accused said that he was extremely frightened by the dog. He said that when he struck the deceased, the wife suddenly dropped the log she was holding and told the daughter to return the dog home and she complied.

The accused said that when he struck the deceased, he was shocked and he froze for a moment and then walked towards the deceased to attend to him together with his wife. He narrated how he eventually took the deceased to hospital and everything that happened right up to the day the deceased died. He said that when the deceased passed on, he was there at the hospital. During cross examination the accused said that on the 11th and before the 11th of April 2022 the deceased's employer's cattle had grazed in his maize field on several occasions. He was not able to estimate the number of times but he stated that his whole field was 2 ½ hectares and on the morning of 11 April the cattle had grazed half an acre of his maize crop which was at tussling stage. All in all, more than one hectare of his crop had been destroyed by the deceased's employer's cattle. The accused said that despite that he was not angry with the deceased when he went to his place of residence on the 11th of April 2022 as he intended to resolve the issue with the deceased's employer, Mr Pepete. The accused denied that he assaulted the deceased out of anger on the fateful day. He said that he had no reason to be angry with the deceased since he was not the owner of the cattle. The accused vehemently denied that he was the aggressor on the fateful day.

Witness called by the court mero motu

What emanated from the evidence led from the State and the defence was that it was disputed as to whether the chairman Sydney Choto witnessed the incident. The accused said that the chairman, Sydney Choto was in the vicinity and he saw everything that happened. The deceased's wife and daughter disputed that the chairman was close to the scene. This issue was difficult to resolve on the basis of the evidence led since it was just the accused's word against that of the deceased's wife and child. Whilst the deceased's wife and daughter impressively corroborated each other's accounts of how the accused assaulted the deceased, we were alive to the fact that we needed to be cautious with their evidence. Given that they are mother and

daughter, collusion to present a consistent story could not be ruled out. We realized that several issues required clarification from Mr Choto yet neither the State nor the defence called Mr Choto to testify. It was our considered view that Mr Choto, being a neighbour to both the deceased and the accused, could provide an independent account of what he witnessed on the fateful day. His testimony would ensure a fair trial. We aimed to ascertain from Mr Choto whether he saw the accused at the dip tank on the fateful day as the accused claimed, whether the deceased's cattle grazed the accused's maize crop on the day, whether he witnessed the accused being assaulted by the deceased and his wife, whether the deceased's daughter Runyararo brought the dog to the scene, whether the deceased lost a tooth on that day, who acted as the aggressor between the accused and the deceased, and why he did not intervene to rescue the accused when he cried out for help during the assault by the deceased and his wife.

Consequently, in the interest of justice, the court *mero motu* called Sydney Choto, the chairman of the committee responsible for the area to come to court to testify. In terms of s 232 of the CPEA: -

“The court—

(a) may at any stage subpoena any person as a witness or examine any person in attendance though not subpoenaed as a witness, or may recall and re-examine any person already examined;

(b) shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case.”

The provision pertains to the subpoenaing of witnesses or the examination of persons in attendance by the court. In terms of s 232 (a) the court has the authority to subpoena any person as a witness; examine any person in attendance, even if they were not initially subpoenaed as a witness; and to recall and re-examine any person who has already given evidence. In terms of s 232 (b) the court must subpoena, examine, or recall a person if their evidence is deemed essential for the just decision of the case. Section 232 therefore empowers the court to ensure that relevant witnesses provide testimony and contribute to a fair and thorough trial process. The provision significantly impacts the trial process in that the court can subpoena any person as a witness. This means that it can legally compel individuals to appear in court and provide testimony. Subpoenaed witnesses are essential for presenting evidence and establishing facts during the trial. Even if someone is not initially subpoenaed as a witness, the court has the authority to examine them if they are present. This provision ensures that relevant information is brought to light, even if not anticipated beforehand. The court can recall and re-examine any person who has already given evidence. This allows for

clarification, further questioning, or addressing inconsistencies in testimony. This ensures that critical information is considered during the trial. However, there are some limitations to consider. The court must ensure that the witness's testimony is relevant to the case. The necessity of the witness's evidence is also crucial. If their testimony does not significantly impact the case, the court may not subpoena them.

In casu Mr Choto's evidence was as follows. His plot lies between the accused's plot and that of Mr Pepete, who was the deceased's employer. On April 11, 2022, around 9 a.m., he was herding his cattle near his homestead when he noticed the accused approaching from Mr Pepete's direction. The accused called out to Mr Choto, urging him to come and witness what had transpired. Mr Choto inquired about the situation, and the accused explained that he and the deceased had fought over cattle grazing in his maize field. When Mr Choto and the accused reached the scene, the deceased lay on the ground, incoherent and barely able to speak. It seemed he had lost consciousness but regained it after water was poured on him. His clothes were wet, and his wife and children were distraught. Mr Choto questioned the deceased's wife, who confirmed that the accused and the deceased had indeed been fighting. Mr Choto observed an injury to the side of the deceased's head. When the deceased opened his mouth, Mr Choto noticed a gap where a tooth or teeth were missing, and the gums were bleeding profusely. However, he could not determine the exact number of the lost teeth.

Mr Choto emphasized that before this incident, the deceased had all his teeth intact. Contrary to claims by the accused, Mr Choto clarified that he had not witnessed the fight between the accused and the deceased on that fateful day. The scene was approximately 500 meters away from where he herded his cattle, obstructed by bushes and tall grass, preventing him from seeing or hearing the altercation. Mr Choto also stated that if someone had called out to him from the scene of crime, he would not have heard anything due to the strong wind. He emphasized that had he witnessed the accused and the deceased fighting, he would have hurried to the scene to intervene. According to Mr Choto's testimony, the crime scene was located in Mr Pepete's plot, approximately 80 meters away from the homestead. This area lay between a maize field and a rocky terrain. Mr Choto said when he arrived at the scene, he did not see Mr Pepete's dog there. No one provided him with details about the fight or mentioned anything about the dog. After spending a brief time at the scene, Mr Choto returned to attend to his unattended cattle. Upon his comeback, he discovered that the deceased had been transported to a location near the homestead. Learning that no police report had been filed, he promptly made a phone call to report the matter. The police officer he contacted instructed that the deceased

be transported by motor vehicle to Chivhu ZRP. Mr Choto then left to tend to his cattle while arrangements were underway for the deceased's transportation. He denied that he had seen the accused at the dip tank on the morning of this day. In fact, he said that he did not go to the dip tank on that day.

Analysis of evidence

During cross examination of the State witnesses and Mr Choto who was called by the court, the defence counsel took issue with a number of things that they testified to that he said were missing from their witness statements to the police. Apparently Mr Choto had also had a statement recorded from him by the police. Almost all the witnesses had one or two issues that were contained in their statements that they disputed having told the police in the manner they were recorded by the police. A witness statement is a written account given by an individual who has witnessed a crime or event. It provides details about what the witness saw, heard, or experienced and serves as crucial evidence in a criminal investigation or trial. While witnesses must aim for clarity and accuracy, it is essential to understand that missing details or inconsistencies in statements can happen. In addition, witnesses are human, and memory can be imperfect and it fades over time. This is a case that happened in April 2022, and this trial commenced more than two years later. Time delays have an impact on the recollection of events by witnesses. In any case when the court is dealing with inconsistencies it should assess the nature and extent of the inconsistencies. Minor inconsistencies that do not go to the heart of the case are insignificant, while major contradictions can undermine the witness's reliability. The court should evaluate how the inconsistencies affect the case as a whole. Significant inconsistencies can lead to a verdict of not guilty. However, if other evidence corroborates the critical aspects of the witness's account, the impact of the inconsistencies may be lessened. The court must also consider the explanation for the inconsistencies. A witness might have a valid reason for recalling events differently at various times. Trauma and stress related to the event may affect a witness' memory. In this case the deceased's wife indicated that she is illiterate and the police officer wrote the statement for her. Under the circumstances it might not be fair to penalize her for missing information in her statement as long as there is nothing that shows that she intentionally withheld critical facts.

We will not concentrate on minor inconsistencies that the defence counsel focused on because they do not go to the heart of the case. We will only refer to those inconsistencies that are significant. The defence counsel took issue with the fact that in the post mortem report it

was not indicated that the deceased had a missing tooth. He submitted that this confirmed that the accused had not assaulted the deceased on the mouth as alleged by the deceased's wife and daughter. He submitted that this was proof that their evidence on how the assault happened was just but a lie. However, we take note that Mr Choto's testimony provided crucial support for the truthfulness of the deceased's wife and daughter regarding the events of the fateful day. In doing so Mr Choto exposed the accused as an untruthful witness. The accused had falsely claimed that Mr Choto witnessed the deceased and his wife assaulting him, something Mr Choto vehemently denied. Surprisingly, the defence counsel did not challenge Mr Choto on this matter during cross-examination. It was never put to Mr Choto that he was at the scene of crime at the time of the incident. Additionally, the accused's assertion that he saw Mr Choto at the dip tank conversing with a lady on the same morning lacks credibility. When Mr Choto clarified that he did not visit the dip tank on the relevant day, the defence counsel did not contest this evidence either. The other critical aspect of Mr Choto's evidence lies in his confirmation that the deceased lost a tooth on the same day. Mr Choto said when he went to the scene of crime, he observed a gap when the deceased opened his mouth, and his gums were bleeding profusely. This corroboration was further supported by a police officer who visited the deceased at Chivhu Hospital and recorded a statement from him. The officer explicitly noted the missing tooth, and the defence did not challenge his evidence. In fact, they consented to its formal admission under section 314 of the Criminal Procedure and Evidence Act (CPEA). Regarding the non-observation of the missing tooth by the doctor who conducted the post-mortem, we attribute it to a potential focus on the fractured skull. Given the strong corroboration from the police officer who spoke to the deceased in the hospital shortly after the incident, we consider the non-observation by the doctor less significant. We are thus satisfied that four people: the deceased's wife, child, the police officer and Mr Choto could not have been mistaken that the deceased lost his tooth on the fateful day.

The fact that the deceased lost a tooth during his encounter with the accused on the day in question corroborates the story given by the deceased's wife and daughter. According to their account, the accused struck the deceased on the mouth, resulting in the tooth loss. This supports the credibility of the wife and daughter as witnesses and undermines any suggestion of collusion against the accused. Conversely, the accused's credibility is compromised. He provided two inconsistent narratives regarding his altercation with the deceased, yet in both versions, he failed to mention the tooth loss. Throughout the trial, he maintained that the deceased had all his teeth, avoiding any disclosure of how he caused the tooth loss while

allegedly defending himself. This gives credence to the evidence of the deceased's wife and daughter that when the accused encountered the deceased in the field, he acted aggressively, immediately striking the deceased. By the time they arrived at the scene, the deceased had already lost his tooth. The accused did not offer any evidence to refute this account. The deceased's wife said she only intervened to rescue her bleeding husband from the accused's attack. In contrast, the accused's claim that the deceased and his wife held and assaulted him lacks credibility. Notably, Mr Choto, whom the accused falsely claimed witnessed the incident, was not even present at the scene. Mr Choto did not support the accused's version. In fact, he corroborated the account given by the deceased's wife and daughter, affirming that he was not present at the scene. It remains unclear why Mr Choto would have refrained from restraining the deceased and his wife if he had witnessed them assaulting the deceased. His own words indicate that had he seen the accused and the deceased fighting, he would have intervened to restrain them. This is supported by the fact that when the accused called him to the scene after the deceased was injured, Mr Choto promptly attended. He took the initiative to call the police and file a report. Overall, Mr Choto left a strong impression as a credible witness who truthfully narrated what he observed on the fateful day. The accused made claims that there was bad blood between himself and Mr Choto. He said this is the reason why Mr Choto did not come to his rescue at the time he was calling out for help. He made reference to some past incidents that he said were evidence of bad blood between them. These incidents related to Mr Choto's cattle having grazed in his field as well. While Mr Choto confirmed such incidents, he said that their relationship was cordial. We believed him because if relations were bad between them, the accused would not have told the deceased that he was going to report him to the Chairman, Mr Choto. Again, after striking the deceased, the accused would not have rushed to call Mr Choto to the scene.

The foregoing shows that the accused did not tell the truth when he said that Mr Choto witnessed the incident and when he said that the deceased did not lose his tooth on the fateful day. He also did not tell the truth when he said that he had seen Mr Choto at the dip tank on the morning of that day. We have no reason to believe that he told the truth when he said that he was not angry with the deceased on the day in question when he had seen him driving away his employer's cattle from his (the accused's) field. The deceased was the person who was responsible for herding these cattle. So, how could the accused not be angry with him? In any case the employer was hardly at his plot because he was a cross-border truck driver. Besides, the deceased had reneged on his undertaking to mend the accused's fence that his cattle had

destroyed some time back in February. Under the circumstances the accused person had every reason to be angry with the deceased. Any reasonable person would be angry. It was out of anger that the accused person went to the deceased's home to confront him.

We have already taken note that the accused person contradicted himself on material issues to do with how the assault on the deceased happened. He gave two conflicting stories, one in the defence outline and another in the defence case. In the defence outline he said both the deceased and his wife assaulted him with hands, fists and logs yet in the defence case he said it was the wife who was assaulting him whilst the husband was holding him and restraining him. There is a difference between being attacked by one person and being attacked by two people. What the accused said in his evidence in chief needed to be consistent with what he said in his defence outline. His lack of consistence makes the court doubt his versions of events. It makes it difficult for the court to know which version between his two versions is the truth. This is more so in view of the fact that the accused did not seek to reconcile the two versions. The two versions cannot be both true. If one of the two versions is true, why did the accused not simply stick to it?

On the other hand, the deceased's wife and the daughter gave a consistent story and they corroborated each other on issues that are material in respect of how the accused assaulted the deceased. When two people corroborate each other and one person contradicts himself, the court is inclined to believe the evidence of the two people and to make a finding that the two people are more credible. With that, we make a finding that the deceased's wife and daughter gave a credible story than the accused. In the accused's inconsistent stories, the accused created the impression that the deceased's wife was the one who was more aggressive as she insulted him right from the time that he arrived at her home and that she is the one who initiated the assault on him. We find this to be an exaggeration because the deceased's wife was not the person who was responsible for herding the cattle. We fail to understand what would have triggered her to be that aggressive. The accused's story just did not add up.

From the evidence led, the State managed to show that the accused was not acting in self defence when he struck the deceased with stones. Right from the start he was the aggressor. He struck the deceased and caused him to lose his tooth. He lied that Mr Choto saw him being assaulted by the deceased and his wife. Mr Choto did not confirm this. He also did not confirm that the dog was in the process of being brought to the scene when the accused then struck the deceased with stones. Mr Choto also did not confirm that at the time the accused struck the deceased, the deceased was throwing stones at the accused. The accused's defence of self

defence lacks basis as it is based on two inconsistent stories about how he says the deceased and his wife attacked him. From the two inconsistent stories it is not clear what exactly he was defending himself from. He struck the deceased at a time when the two of them were now headed for the chairman and the deceased's wife and children were now headed to their home. As at that time the deceased had already lost a tooth but he was insisting that he also wanted to go to the chairman to tell his side of the story. What is clear is that as at that time the accused was an angry person. This explains why he attacked the deceased with stones. He had injured the deceased and he did not want to be followed by him. We believe the evidence of the deceased's wife and daughter that the accused was not under attack by the deceased. We also do not believe that the daughter had brought the dog to the scene as the accused wanted us to believe. It was just the accused's word which was vehemently denied by the deceased's wife and daughter.

In view of the foregoing, we find the accused guilty of murder. Whilst we cannot say that he had the actual intention to kill the deceased, what is clear from the evidence is that he must have realized that there was a real risk or possibility that his actions of throwing stones could result in the death of the deceased. He was continuing to throw stones at the deceased until he struck the deceased. We find the accused guilty of murder as defined in s 47 (1) (b) of the Criminal Law Code.

Sentencing judgment

The accused, a male person aged 52 years, was indicted on a charge of murder as defined in section 47 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*], the allegations being that on the 11th of April 2022, he unlawfully and intentionally caused the death of David Dube, by striking him with a stone on the right side of the head. The accused pleaded not guilty to the charge. He was convicted after a contested trial. The accused did not dispute that he had an altercation with the deceased over the issue of the deceased's employer's cattle having allegedly grazed the accused's maize crop. The deceased is the one who was responsible for herding these cattle. It was not disputed that pursuant to the altercation the accused then struck the deceased with a stone on the head. The head injury that the deceased sustained is the one that led to his death on the 20th of April 2022. We dismissed the defence of self-defence that the accused raised after making a finding that the accused was the aggressor and that when he struck the deceased, he (the accused) was not under attack or threat of imminent attack by the deceased. The post mortem report is the only report that was produced

during the course of the trial. It stated that the cause of death was brain damage, severe head trauma and intra parenchymal hemorrhage.

In terms of s 47(4) of the Criminal Law Code, if a murder was committed under aggravating circumstances (as defined in subsections (2) or (3)), the convicted person can be sentenced to death or life imprisonment or imprisonment for a definite period of at least 20 years. If a murder was not committed in aggravating circumstances, the convicted person can be sentenced to imprisonment for any definite period. S 47(4) therefore outlines the possible sentences for murder, with harsher penalties for cases involving aggravating circumstances. In terms of the sentencing guidelines, if a murder was committed in aggravating circumstances, the presumptive penalty is 20 years' imprisonment. In non-aggravating circumstances the presumptive penalty is 15 years' imprisonment. We therefore have to make a determination of whether the murder in the present matter was committed in aggravating or non-aggravating circumstances.

The following circumstances show that this is not a murder which was committed in aggravating circumstances. There was a high degree of provocation and the accused acted out of passion. For a long time, the deceased's employer's cattle had grazed on the accused's maize crop. At one time the deceased had offered to mend or repair the accused's fence that the cattle had destroyed, but went on to renege on that undertaking. After that the deceased's employer's cattle continued to stray into the accused's maize crop. On the fateful day the same thing had allegedly happened. The accused then had a confrontation with the deceased and assaulted him causing him to lose his tooth. After the accused was restrained by the deceased's wife who arrived at the scene, he told the deceased that he was now proceeding to the chairman's plot to report him. When the deceased indicated that he was coming with him so that he could also tell his side of the story to the chairman, the accused then lost his temper and acting in a sudden fit of intense emotion/ anger struck the deceased with stones. The evidence led showed that the accused acted impulsively in a fit of rage. The crime of murder was not premeditated as the assault on the deceased occurred spontaneously and was driven by strong emotion rather than careful planning. After realising that he had severely injured the deceased, the accused went on to render assistance to the deceased. He proceeded to call the chairman to the scene to see what had happened. Thereafter, he organised for a motor vehicle to ferry the deceased to Chivhu General Hospital. When the deceased was transferred to Sally Mugabe Hospital, Harare, the accused continued to foot the hospital expenses until the date of his death. When the deceased died, he was there at the hospital with him. The accused thus rendered help to the deceased

after injuring him. Therefore, the applicable presumptive penalty is 15 years' imprisonment. This is also the normal range of sentence for this offence.

The following was submitted in mitigation by the defence counsel. The accused is a married man with three children. He is the primary breadwinner for his family. He lives with his wife and two of their children, while the eldest is studying for a bachelor's degree in Australia, incurring monthly fees of USD 1500. Professionally, he is a Lecturer and Programme Coordinator at Midlands State University, earning USD 500 per month, and his expertise is highly valued in the academic community. Additionally, he is pursuing a PhD in his field. Beyond his academic contributions, the accused is also a significant farmer in Chivhu, owning 13 cattle and maintaining a well-irrigated plot, which is unique in his area due to his advanced boreholes and irrigation equipment. His absence will not only impact his family financially but also result in a considerable loss to both the academic and agricultural sectors. The accused showed genuine remorse from the moment the incident occurred, staying at the scene to assist the deceased and providing transport to both Chivhu and Harare Hospitals. He covered all medical expenses and was present with the deceased until his passing at Harare Hospital, demonstrating his commitment to ensuring proper care to the deceased. Additionally, the accused took responsibility for nearly all funeral expenses, spending over USD 2500 to alleviate the financial burden on the deceased's family. Despite facing financial challenges due to the COVID-19 outbreak, he ensured the deceased received a decent burial, sending family members to attend the funeral as a sign of his sorrow and respect.

After the funeral, the accused was asked by the deceased's family to compensate them for their loss. They demanded 13 bulls, and he provided 7, with the remaining 6 delayed due to cattle movement restrictions. The accused is prepared to fully compensate the family and recognizes the need to support the deceased's children, including paying their fees. He understands the impact of the incident, acknowledging that the wife lost her husband and sole breadwinner. Despite fearing that direct assistance might be seen as interference with witnesses, he is committed to helping the family as much as possible, leveraging his plot and its productivity to provide ongoing support.

It was submitted on behalf of the accused that he did not have the actual intention to kill the deceased, a finding that the court also made, distinguishing this case from premeditated murder. Evidence showed that after the initial altercation, the accused intended to report the incident to the chairman, indicating a lack of premeditation. The fatal incident occurred when the deceased followed the accused, leading to the unplanned use of a stone. Generally,

premeditated murders are considered more heinous than spontaneous killings, and the moral blameworthiness of non-premeditated murder is often less, especially when carried out under emotional circumstances. It was submitted that the court should consider that the accused, a hardworking farmer, had repeatedly suffered crop damage caused by the deceased's cattle, leading to significant financial losses and frustration. While this does not justify the actions that resulted in the loss of life, it provides context for the accused's state of mind. Additionally, the accused is a first-time accused at 52 years old, having never previously crossed paths with the law. He is a distinguished lecturer who has contributed significantly to both national and international academic communities. Given these mitigating factors, the court was encouraged to consider the shortest possible sentence, as the mitigating circumstances far outweigh the aggravating ones. However, the defence counsel did not give an indication of what he considers to be the shortest possible sentence.

The State counsel submitted several aggravating factors. The accused was the aggressor, attacking the deceased with a stone to the head, a lethal weapon targeting a delicate part of the body. This assault occurred over a matter that could have been resolved without violence. The right to life is sacrosanct and constitutionally protected, yet murder offences are rampant in this jurisdiction, often over trivial issues. The victim impact statement from the deceased's wife reveals that she and her children are still in immense pain and trauma, having witnessed the assault on the deceased. They lost their breadwinner, leading to poverty; the two older children have dropped out of school and now live with their grandmother, while the deceased's wife struggles to feed them and pay for their education. The State counsel argued for a 20-year imprisonment sentence to maintain society's confidence in the criminal justice system, citing the aggravating circumstances.

However, we determined that this murder was not committed under aggravating circumstances, making the presumptive penalty of 15 years applicable. Given that the accused helped the deceased after realizing his wrongdoing, covered funeral expenses, and paid half the compensation demanded by the deceased's family, there is no reason to deviate from the prescribed penalty. No factors justify a higher sentence, nor do any justify a lower one. A reduced sentence might send the wrong message to society, suggesting that providing assistance and compensation to the deceased's family could result in a very lenient punishment. It is crucial for society to maintain respect for human life and the decency to resolve conflicts without resorting to violence.

Accordingly, the accused is sentenced to 15 years' imprisonment.

National Prosecuting Authority, the State's legal practitioners
Tendai Biti Law, accused's legal practitioners