

THE STATE  
versus  
FARAI NYAMURENJE

HIGH COURT OF ZIMBABWE  
MUNGWARI J  
HARARE, 17 October 2023 & 7 August 2024

**Criminal Trial-Murder**

**Assessors:** *Mr Kunaka*  
*Mr Chimonyo*

*A Mupini*, for State  
*V Manyeruke*, for the accused

**MUNGWARI J:** On 31 August 2012 the murder of two-year-old Tatenda Nyamurenje (the deceased) sent shockwaves within the community of Katsamudanga village in Mutoko. Not least that the child had been murdered, but that he had been murdered by his own father Farai Nyamurenje (the accused). The facts of the matter are common cause and they are that on the fateful night when the family had retired to bed, the accused returned home from a beer drink. He went to the kitchen hut where the deceased and his mother Estere Matinyanya Nyamurenje were asleep. He demanded to take his son but Estere resisted the demand because it was late in the evening. Despite the objections, the accused overpowered her and forcibly took the deceased with him to Nyanguruve river. There he laid the deceased on the ground, held the back of his head and pressed his face hard on the sandy surface till he died. The accused then dug a shallow grave on the banks of the river and buried the deceased. After completing the horrifying act, the accused surrendered himself to the police. He led the police to the shallow grave where the body was exhumed and referred to the hospital for a post mortem examination. The post mortem established that the cause of death was asphyxia.

- [1] The accused was indicted in this court three years later on a charge of murder. The trial encountered a setback because the accused initially appeared unfit to stand trial. Consequently, a psychiatric evaluation was ordered to assess if the accused was fit to stand trial. The reports compiled by Drs Ncube and Kyawo suggested that the accused exhibited second person hallucinations and episodes of visual and tactile hallucinations. Additionally, the reports indicated that the accused may have been attempting to simulate certain psychotic symptoms. Dr Moses Kyawo concluded that the mental disorder might have been induced by substance abuse and alcohol consumption. It is crucial to highlight that the reports revealed that the accused displayed signs of mental instability in early 2015.
- [2] On 17 November 2015, Dr Mhaka a psychiatrist, conducted a further mental examination of the accused. He deposed to an affidavit that was certified on 30 November 2015 and stated the following:
- “Farai has no signs of illness. But he is exhibiting malingering (faking mental illness). He has no symptoms that can be grouped together to come up with a diagnosis of mental illness. On the day of the offence, he was intoxicated from alcohol and was not suffering from mental illness. Due to malingering he makes himself unfit to stand trial by giving strange responses. In my opinion at the time of the alleged crime the accused was intoxicated from alcohol and was not suffering from a mental disorder. The accused is fit to stand trial”
- [3] Regardless of the above finding, the trial did not commence as the accused was admitted at Chikurubi Psychiatric Unit. Following his release from the psychiatric unit in 2021, he was encouraged by fellow inmates, to pen a letter requesting a trial after a prolonged period without facing charges, leading to the initiation of the current proceedings.
- [4] Subsequently in the year 2023 he was arraigned before this court on a charge of the murder of the deceased. He denied the charge and stated that on the fateful day, eleven years prior he was sober but could not recall the alleged conversation or altercation with his mother. Additionally, he said he was unable to confirm or deny the charge of causing his son’s death due to a lack of recollection. He only remembered voluntarily reporting himself to the police at his relatives’ behest but has no memory of the events. He emphasized that he has endured nearly twelve years of pre-trial detention and had mistakenly believed he was serving a sentence for his child’s death.
- [5] A careful analysis of the accused’s defence outline indicates that although he pleaded not guilty, he claimed to have experienced a blackout at the material time as he has no

recollection of anything that happened save to admit that he reported himself to the police.

#### **State case**

- [6] With the consent of the defence, the state opened its case by tendering the autopsy which was sworn to by a registered medical practitioner, Dr Tonderai Mugwagwa on 3 September 2012. Dr Mugwagwa examined the remains of the deceased and observed that the body had sand in the mouth, throat and nose. He concluded that death was due to “Asphyxia” The post mortem report was tendered with defence’s consent and marked as Exhibit 1.
- [7] The state also applied to tender Dr Mhaka, Drs Ncube and Kyawo’s medical affidavits in terms of s278 of the Criminal Procedure and Evidence Act(the CPEA). The contents of the affidavits were as already discussed above. The state aimed to refute any claims of mental illness on the part of the accused given his history of interactions with mental health institutions. The defence did not object and the medical affidavits were tendered and marked Exhibit 2.
- [8] The prosecutor then sought the formal admission of the evidence of Kingstone Temberere (Kingstone) a police officer and Joyce Kapfuurutsa (Joyce) the accused’s brother’s wife as it appeared in the state’s summary of evidence in terms of section 314 of the CPEA. Kingstone’s testimony was that he was led to the crime scene by the accused where he found the body of the deceased and exhumed it. The body was wrapped in a towel and had sand on the face and head. Joyce on the other hand witnessed the accused confessing to the killing of the deceased and being escorted by his brother, her husband to the police station. The witnesses’ testimonies did not have much value because the accused had already admitted in his defence outline, that he had reported himself to the police. The issues that the witnesses testified to were therefore common cause. In addition, the state called for oral evidence from two witnesses namely Estere Matinyanya Nyamurenje and Richard Nyamurenje. That evidence is summarised below.

#### **Estere Matinyanya Nyamurenje(Estere)**

- [9] Estere, who is the accused’s mother and the deceased’s grandmother, weighed additional information regarding the accused’s violent conduct on the fateful day. She further narrated the deceased’s difficult and short life. She informed the court that the

deceased's mother had passed away shortly after giving birth to him. As a result, the child had been passed from one relative to another, living with various family members including the mother's sister and eventually staying with her. Due to the unfortunate circumstances of the deceased's upbringing, the witness cherished the child deeply and nurtured him, even sharing a bed with him. She remarked that it was unprecedented for the accused to demand his son at such an odd and inappropriate hour. As she watched the accused storm off with the deceased in hand, she remained behind, filled with a premonition that something bad was going to happen. Out of abundance of caution she quickly notified her eldest son Richard Nyamurenje of the incident and instructed him to follow up on the accused. In her heart she hoped the accused would take the child to his sister's place as he had done before.

[10] Later that day she observed the accused arriving home alongside his brother Richard. She was taken aback when the accused admitted to the murder of the deceased but noticed that he seemed disoriented and mentally unstable. His confession was vague and he was crying inconsolably. Notably, Estere testified that the accused occasionally displayed behaviour indicative of someone possessed during which he would behave erratically. Each time he was 'possessed' he would fall into a trance-like state and lose awareness. These episodes had begun in his childhood, but as a widow with limited financial resources, she could only seek assistance from faith healers instead of medical professionals. According to Estere, the twice-divorced accused resided with her at her homestead due to his inability to live independently.

**Richard Nyamurenje(Richard)**

[11] The witness, is the accused's elder brother. His testimony was that he received information that the accused had forcibly taken the deceased away from the house on the fateful morning. At approximately 6 pm the same day, he arrived at his mother's homestead and when he did not find the accused, decided to visit the location where ritual activities were being held for his father-in-law. At that place, he learned that the accused had left for his brother-in-law's residence. Following the directions provided, he managed to locate the accused walking alone. He noticed that the accused was panicky and reeked of alcohol confirming that he had consumed some alcohol. Just how much alcohol he had partaken of and where he drank it from, he could not tell as he

was not present when the accused did so. Richard attempted to inquire from the accused about the deceased's whereabouts, but received no response.

[12] Upon returning to their mother's compound and questioning the accused again, the accused attempted to physically attack him. The witness observed the accused behaving jittery and disoriented, leading him to believe that the accused was not in his right state of mind. He however continued to press the accused for information on the deceased's whereabouts. Instead of telling him, the accused grabbed a short stick and began behaving as though possessed, stating he wished to prophesy about future events. Without disclosing the deceased's location, the accused then retreated to his room, purportedly to rest. Hoping the accused would eventually reveal the deceased's whereabouts, the witness returned to his own homestead. However, from there he heard his mother wailing loudly and sensed a problem as he had left the accused in a distressed state. He hastened back to his mother's homestead and upon arrival, he questioned the accused about the issue, to which the accused tearfully confessed to killing the deceased. The accused then made reference to their father's suicide and expressed a desire to keep people away from the house as he wielded a weapon.

[13] When the accused calmed down, he attempted to recount what had happened to the deceased. Richard heard him say that he did not remember much of what had occurred, but he noted that the accused seemed to be in a rush to go and hand himself over to the police. He accompanied the accused to the police station and once there he heard the accused state the same story that he had informed them. He was present when the accused then led the police to the place where he had buried the deceased in a shallow grave by the river. Richard stated that all this confused and overwhelmed him as the accused loved his child dearly and there was no apparent reason for him to have killed him. He could not pin point any motive that the accused might have had, other than the possibility that the accused must have been out of his mind when he did so.

[14] Richards's evidence corroborated that of Estere and to some extent the accused's. Significantly, he narrated the accused's personal predisposition in detail. He said it was common knowledge that the accused suffered from a mental illness and it was not the first time he had witnessed the accused in such a frenzied state. He recounted a past incident where the accused suffered a serious fall and that since then the accused claimed that a violent impulse would overtake him, leading to memory loss

afterward. He explained that this memory loss consistently coincided with episodes of violence. The witness disclosed that Estere and his sister had sought treatment for this issue through both traditional and prophetic healing methods but to no avail.

**The defence case -Farai Nyamurenje**

[15] The accused chose to adhere to his defence outline and added that he could not recall his whereabouts before he returned home to pick up the deceased on the fateful day. His memory of the events on August 31, 2012, is limited to going gold panning and later attending a traditional ceremony involving spirits appeasement. At the gathering, he consumed alcohol and likely experienced a blackout, as he does not remember how he made it home. He recollects requesting the child from his mother to sleep with, but is unsure of what he did with him from then onwards. He however remembered himself roaming around the forest in a trance-like state as he stumbled and fell multiple times, unaware of the deceased's condition as he held the child close to his chest. Suddenly, he awakened from his daze to find himself in the forest with the deceased. He described the moment of clarity as transitioning from darkness to light. Feeling perplexed about taking the child from his mother, he sat down, lit a cigarette, and pondered this. He got up and continued to wonder in the forest and eventually, ended up in the river. He lit another cigarette, only then realizing that the deceased had passed away. Overwhelmed by emotion he reflected on the child's untimely passing and grappled with the realization. He was consumed with anxiety and distress over the events.

[16] As his mental clarity gradually returned, he made a spontaneous decision to leave the body of the deceased in a shallow pit that had previously been excavated by artisanal miners. The weight of facing his concerned mother and her inevitable inquiries about the child's whereabouts pushed him to take this drastic action. After dumping the deceased, he yet again aimlessly paced through the forest and eventually emerged at Katsimudanga homestead where the occupants alarmed by his late-night visit questioned where he was coming from. They kindly offered him a place to rest for the night. The following morning his brother retrieved him and took him back home. Only after sometime did he muster the courage to disclose the fate of the deceased. His brother Richard and a brother-in-law decided that it was risky to allow him to go alone

to the police station and accompanied him there. At the station he gave the same narrative. He led the police to the forest area where he had left the deceased but it took them sometime to locate the body as he could not remember which of the open pits he had left it in.

[17] When questioned about the circumstances of deceased's demise, the accused professed ignorance, suggesting that the death might have occurred during his stumbling and falling episodes in the dense, vegetation-filled forest. He speculated that he may have inadvertently caused harm to the child as he struggled and lost his balance in the darkness.

[18] During cross-examination, the accused informed the court that he was unable to recall the reactions of the deceased prior to and during the incident, as he was not fully present at the time. Although he acknowledged committing the offense, he asserted that he was mentally distressed and lacked awareness of his actions at the time. The accused emphasized that the deceased, whom he held in high regard and hoped would care for him in the future, was an innocent child. He recounted how his mental health struggles had contributed to the dissolution of his two marriages and stated that amidst the challenges, he retained fragments of recollection from periods when he was not afflicted by mental episodes.

[19] Thereafter, the defence case closed and we postponed the matter to 20 October 2023 for judgment.

[20] Presented with this history of mental illness we agonized over whether the accused had the requisite *mens rea* when he caused the death of the deceased. The circumstances surrounding the death coupled with the seemingly motiveless nature of the murder, raised questions about the mental state of the accused. The act of killing his beloved two-year old son, combined with the perceived senselessness of the crime, pointed towards a potential underlying mental disorder. It was evident that the accused had behaved out of the ordinary. While a report from a psychiatrist doctor hinted at a possible pretence of mental disturbance by the accused, his actions during the incident revealed otherwise.

[21] In her closing submissions, state counsel Ms *Mupini* advocated for the conviction of the accused on a murder charge. However, it appeared she encountered challenges in compiling her submission as there were apparent contradictions in it. Ms

*Mupini* highlighted that evidence adduced during the trial showed that the accused suffered from mental illness at the time of the offense and lacked a recollection of the events leading to the deceased's death. She emphasized the abnormal and suspicious behaviour displayed by the accused, particularly in forcefully seizing the child from the grandmother, prompting Estere to request Richard to locate him. She then made an about turn and stated that based on the lack of documentary evidence from a psychiatrist supporting these claims, Estere and Richard's evidence was nothing but biased testimony due to their relation to the accused. Ms *Mupini* concluded by asserting that the accused intentionally killed the deceased, citing his actions of burying the body in a shallow grave and devising a plan to conceal the remains. She argued that his subsequent decision to avoid returning home to his mother, combined with being found at Katsamudanga homestead by his brother Richard, indicated premeditation and intent in his actions. She suggested that the accused might have fabricated mental illness, as suggested by Dr Mhaka in his psychiatrist evaluation report of 2015.

[22] On the contrary the defence counsel Mr *Manyeruke* sought a verdict of not guilty by reason of insanity for the accused, which came as a surprise since the accused had not initially pleaded insanity. It is crucial to note that the defence of insanity must be raised at the commencement of the trial by the accused because the burden of proof lies with him to establish the defence on a balance of probabilities. During the trial the accused must present evidence including medical evidence to substantiate the claim. The defence of insanity cannot be introduced spontaneously during the trial but must be part of the defence outline. In this case the accused neither pleaded insanity nor included it as a defence in his defence outline. Moreover, the defence failed to place any medical evidence before the court to demonstrate that the accused was suffering from mental illness at the time of committing the offence.

[23] Nevertheless, although the defence failed to properly raise the defence of insanity, the court harboured doubts concerning the accused's mental state at the moment he caused the death of the deceased by suffocation. In the interests of justice, we directed that there be an additional psychiatric evaluation conducted by another psychiatrist to determine the accused's mental state at the time he killed the deceased.



[24] On 2 and 9 February, 2024, a psychiatrist doctor, Dr MFS Mazhandu examined the accused and submitted a report. In the evaluation report, Dr Mazhandu stated the following:

“Farai Nyamurenje has a positive family history of mental illness. Farai Nyamurenje has had auditory and visual hallucinations (sees and hear things that are not there) For more than ten years and has had them currently. Farai Nyamurenje believes he has super powers (grandiose delusions) and paranoid delusions. Farai Nyamurenje has a mental disorder. Farai Nyamurenje is currently not mentally stable and not fit to stand trial”

[25] Clearly, Dr Mazhandu misunderstood the scope of the evaluation. The order specifically requested an assessment of the accused's mental state at the time of the offense. Contrary to the report's findings, the trial had already concluded in October 2023, during which the accused remained composed and engaged with the proceedings.

[26] In terms of s 232 of the CPEA, the court may at any stage of the trial subpoena any person as a witness or examine any person in attendance though not subpoenaed or may recall and re-examine any person already examined if their evidence appears to it essential to the just decision of the case. Dr Mazhandu’s evidence to us appeared crucial to the determination of the matter, particularly because the evaluation report that she had prepared strongly suggested that the accused had been afflicted with a mental infirmity for a long period of time. Her attendance at court as a witness was therefore necessary to explain the report's contents and her conclusions thereto. Crucially we also wanted to know whether the accused had been afflicted with a mental disorder at the time of the commission of the offence. The court required a fuller understanding of the diagnosis she had made so that it could assess this against the evidence presented by the state. In that regard, we instructed the state counsel to arrange for Dr Mazhandu to appear in court as a witness. Her testimony was as indicated below.

**Fungisai Mazhandu(Dr Mazhandu)**

[27] The psychiatric doctor testified that upon examining the accused in February 2024, she identified a positive family history of mental disorders. During the examination, the accused was clearly unwell, experiencing both auditory and visual hallucinations. Additionally, he held grandiose delusions unrelated to religious beliefs, such as believing he possessed extraordinary powers and harbouring suspicions that

community members were conspiring against him. Based on these observations, the doctor diagnosed him with a mental disorder known as seizure disorder. She explained that this condition can result from genetic predisposition, post-head injury, or any brain-damaging event, manifesting itself in episodes, such as the one he experienced during the examination.

[28] The doctor clarified that seizure disorder does not exhibit continuously, rather, it presents episodically in the brain, unlike the more common bodily convulsions associated with seizures. Symptoms can include mood changes, hallucinations, unprovoked violence, and subsequent memory loss regarding the events. Triggers for episodes may include alcohol consumption, exposure to flickering flames, water movement, or prolonged television viewing. Due to the episodic nature of the disorder, affected individuals may mistakenly believe they are cured when symptoms subside, only for the episodes to reoccur later. Treatment involves medication, but individuals with this condition sometimes turn to traditional remedies.

[29] Dr. Mazhandu further explained that while she had recommended an Electroencephalogram (EEG) test it was not performed due to the ministry's financial constraints. She emphasized that while the EEG test would have been beneficial as a supportive diagnostic tool, her clinical diagnosis was already sufficient. She also noted that feigning a seizure disorder would require a deep understanding of the condition, which the accused lacked, particularly given that the presentation of seizures in this disorder differs from the more typical convulsive seizures, making it challenging to convincingly pretend. The witness explained that her analysis and examinations align with the confirmed diagnosis, leading her to conclude that the accused was mentally disordered at the time of the commission of the offense.

[30] Following Dr. Mazhandu's testimony, both legal counsels presented supplementary closing submissions, and prayed that a special verdict of not guilty by reason of insanity under section 29(2) of the Mental Health Act [Chapter 15:12] (the Mental Health Act) be returned against the accused.

### **The Law**

[31] The defence of mental disorder at the time the crime was committed is governed by s 29 of the Mental Health Act which outlines the procedure that courts must follow.

Additionally, Part V of the Criminal Law Code establishes the substantive defence. It states that:

**“PART V**

**MENTAL DISORDER**

**226 Interpretation in Part V of Chapter XIV**

In this Part–

“mental disorder or defect” means mental illness, arrested or incomplete development of mind, psycho-pathic disorder or any other disorder or disability of the mind.

**227 Mental disorder at time of commission of crime**

(1) The fact that a person charged with a crime was suffering from a mental disorder or defect when the person did or omitted to do anything which is an essential element of the crime charged shall be a complete defence to the charge if the mental disorder or defect made him or her–

(a) incapable of appreciating the nature of his or her conduct, or that his or her conduct was unlawful, or both; or

(b) incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful, or both, of acting in accordance with such an appreciation.

(2) For the purposes of subsection (1), the cause and duration of the mental disorder or defect shall be immaterial.

(3) Subsection (1) shall not apply to a mental disorder or defect which is neither permanent nor long-lasting, suffered by a person as a result of voluntary intoxication as defined in section *two hundred and nine-teen*.”

[32] Two critical requirements for entitlement to the defence of insanity can be identified from the above. Firstly, the accused must have lacked the ability to appreciate either the nature of his conduct or its unlawfulness. Secondly, if the accused did possess the requisite appreciation, it must be demonstrated that he failed to act in accordance with that understanding. For the defence to succeed, it must be established that at the relevant time the accused’s mind was so impaired that he was unable to comprehend the nature and quality of his actions. Alternatively, if he did have such understanding it must be shown that he was incapable of acting in accordance with that appreciation.

[33] In discharging the burden of proof it is essential to adhere to the requirements of s 29(2) of the Mental Health Act which stipulates that medical evidence along with other evidence of the illness must be presented to the court. Section 29(2) of the Mental Health Act provides that;

(2) "If a judge or magistrate presiding over a criminal trial is satisfied from evidence, including medical evidence, given at the trial that the accused person did the act constituting the offence charged or any other offence of which he may be convicted on

the charge, but that when he did the act he was mentally disordered or intellectually handicapped so as to have a complete defence in terms of section 227 of the Criminal Law Code, the judge or magistrate shall return a special verdict to the effect that the accused person is not guilty because of insanity. "

[34] While courts would require guidance from specialists who possess a deeper understanding of the human brain, the disorders it can experience and the associated implications of such conditions, it is ultimately the courts' responsibility to determine whether an accused person, considering all the circumstances, truly experienced a mental condition that impeded their ability to comprehend the nature and quality of their actions or to act in accordance with that understanding. The decision is evidently informed by a synthesis of the medical and factual evidence presented before the court.

#### **Application of the law to the facts**

[35] It is crucial to recognize that many individuals with mental health conditions often find themselves in circumstances where access to medical expertise and a proper understanding of their ailments is severely limited. Consequently, it is not surprising that evaluations typically occur only after offenses have been committed. Therefore, a lack of a prior examination should not by itself, be construed as evidence that the defence of mental disorder is being investigated and or raised merely as an afterthought, particularly when independent evidence exists to substantiate the claim.

[36] In this case, the medical evidence concerning the accused's mental illness was not only presented by Dr Mazhandu but by three other doctors. The initial diagnosis by Drs Ncube and Kyawo supported the version that the accused suffered from a mental disorder. Dr Mhaka contradicted them. In the end therefore, there are three doctors who are of the view that the accused suffered from mental disorder and one who thought he was faking it. Additionally, state witnesses acknowledged that it was widely known that the accused had mental health issues long before the commission of this crime. Although the examinations by the first two doctors aimed to determine the accused's fitness to stand trial, it is significant that they indicated that the accused had a mental condition and that the symptoms exhibited by the accused may have been exacerbated by substance abuse and alcohol consumption. That finding, combined with Dr. Mazhandu's conclusions, not only sheds light on the possible origins of the accused's mental health challenges but also supports the argument that he may have been mentally disordered at the relevant time.

[37] Applying Dr Mazhandu's evidence to the facts of this case it is evident the accused's intoxication on the fateful day likely lowered his seizure threshold and made him susceptible. Furthermore, his participation in spiritual rituals, details of which remain speculative might have also added to his already deteriorating condition and potentially triggered a seizure episode. The accused also experienced memory loss, a symptom that aligns with Dr. Mazhandu's findings. According to Dr. Mazhandu, feigning such an illness would require a clever mindset, which the accused does not possess as demonstrated by his twelve years of prison life under the false belief that he was serving a sentence for the deceased's death. Additionally, in February 2024, during Dr. Mazhandu's evaluation, the accused was experiencing a seizure episode. It is unlikely that he was feigning the condition at this point, given that the trial had concluded four months earlier. All these factors when read together with the fact that the murder we are dealing with here appeared motiveless leads us to question his mental state at the time of the commission of the offence.

[38] In the end we see no justification to deviate from the conclusions drawn by Dr Mazhandu in her psychiatric evaluation, her oral testimony and the report she compiled as well as the submissions made by the two counsels. The evidence unequivocally indicates that the accused cannot be held accountable for his actions on the tragic day. The extent of the violence he displayed, resulting in the death of a child he cherished, clearly points towards a mental disturbance at the time of the incident. His actions of forcibly pressing the deceased's head into the sandy surface until death occurred underscore a departure from his usual behaviour and mind set. Based on the compelling evidence demonstrating the accused's mental disorder during the critical period we are satisfied that the accused was mentally disordered at the material time. We thus find him **not guilty because of insanity**.

[39] In determining the fate of the accused following the return of a special verdict we are mindful that as a court we should be guided by the provisions of s 29(2) of the Mental Health Act. Both counsels made submissions and agreed that the accused is not yet ready to be released and should be returned to a special unit for treatment. The accused was examined in February 2024. We are informed by Dr Mazhandu who examined him that he was unwell and was experiencing an episode which endangered him and everyone around him. The episode continued on the two days she evaluated

him. Since that time, he has not been examined. In the absence of any medical report stating otherwise we find that he is clearly dangerous not only to people around him but to himself as well. His behaviour remains unpredictable. It is not appropriate to have him discharged at this stage. Only after a proper evaluation by experts and confirmation that he no longer poses a danger, can he be released back into society.

As such it is directed that the accused shall be returned to prison for transfer to Chikurubi Psychiatric Unit for examination and or treatment in terms of s 29(2)(a) of the Mental Health Act.

**MUNGWARI J** : .....

*National Prosecuting Authority, the state's legal practitioners  
Mutambwa, Mugabe & Partners, accused's legal practitioners*