

THE STATE
versus
LAWRENCE NYAGADZI

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE: 26 September & 7 November 2024

Criminal Trial

Assessors: *Mr Barwa*
Mr Mhandu

C Mutimusakwa, for the State
A Zvoutete, for the Accused

MUCHAWA J: The accused was arraigned before this court on a charge of murder as defined in S 47 (1) of the Criminal Law (Codification and Reform) act [*Chapter 9:23*]. It being alleged that on the 13th of June 2023 and at Nyambiri Village, Mandley Farm, Epworth, the accused person with intent to kill or realizing that there was a real risk or possibility that his conduct might cause death and continuing to engage in that conduct despite the risk or possibility struck Dubekhile Imbayago on the lower chest with a farm brick resulting in certain injuries from which Dubekhile Imbayago died. The charge was accepted as annexure A.

The accused pleaded not guilty to the charge of murder and tendered a plea of guilty to the lesser offence of culpable homicide which is a competent verdict on a charge of murder. The state accepted the tendered alternative plea and tendered into the record of proceedings a statement of agreed facts, which is before the court as annexure B. The statement reads as follows.

1. The accused was aged 23 at the time of commission of the offence and resided at 72 Nyambiri Village, Epworth Harare.
2. The deceased was aged 40 at the time he met his death.
3. The deceased and accused were neighbours and had a cordial relationship to the extent that the deceased was the go between during accused's marriage ceremony.

4. On the 13th of June 2023 the accused person was drunk and had a misunderstanding with his wife Rutendo Mhlanga when she refused to prepare food for him.
5. Beauty Saujeni heard the noise and called the deceased to resolve the dispute between the accused and his wife. The accused approached his wife and the deceased who had been invited to mediate, intervened and assaulted the accused with open hands on the cheeks several times. The accused then ran away, and the deceased followed in pursuit.
6. The accused upon noticing that the deceased was following him picked up a farm brick and threw it towards the deceased who was hit on the lower chest and the brick disintegrated on impact. The accused fell down to the ground and died.
7. An autopsy report compiled by Doctor Kahoba concluded that the cause of death was blunt chest trauma due to assault.
8. The accused alleges that he did not have the intention to kill the deceased but he was only negligent in that:
 - a. He did not pay regard to the force of the farm brick he threw at the deceased.
 - b. He failed to realize that part of the deceased's body which he targeted was a vulnerable one and would result in the death of the deceased.

The following exhibits were tendered by the state - a post mortem report compiled by Doctor K Kahoba, a medical practitioner who is stationed at Chitungwiza General Hospital. He conducted the post mortem report on 16 June 2023. The findings in the report list the cause of death as blunt chest trauma due to assault after observing that the deceased suffered chest bruises, fractured 3rd to 6th ribs on the left side and blunt lung contusions.

The facts show that the injuries sustained by the deceased were caused by the accused. The postmortem report shows that the injuries inflicted by the accused caused the death of the deceased. In accepting a limited plea of guilty to culpable homicide, the state is conceding that the accused neither had the requisite intention to kill the deceased, nor realized that there was a real risk or possibility that his conduct may cause death. The facts of this case show that the accused, who was visibly drunk was assaulted by the deceased with open hands on the cheeks several times and he ran away. The deceased pursued him and in order to deter him, the accused picked up a farm brick and threw it towards the deceased. The brick hit the deceased on the lower chest and disintegrated on impact. The deceased fell to the ground and subsequently died.

By assaulting the deceased in the manner he did, the accused negligently failed to realize that death may result from his conduct, particularly in his drunken state. If he realized that eventuality he negligently failed to guard against that possibility.

In the circumstances, we are satisfied that the state's concession was properly made, and it accords with the facts of this case and the law. On the facts of this case, it cannot be said that the accused is guilty of murder. In the result, the accused is accordingly found not guilty of murder and found guilty of the lesser crime of culpable homicide.

Sentence

The accused has been convicted of the crime of culpable homicide. This court must now decide what sentence is appropriate for the offence for which accused has been found guilty.

The Law

In terms of s 49 of the Criminal Law Code, a person convicted of culpable homicide is liable to imprisonment for life or any shorter period or a fine up to or exceeding level fourteen or both.

According to the sentencing guidelines provided for in SI 146/23 the presumptive penalty is set at 5 years imprisonment where there are aggravating factors such as a high degree of negligence, multiple deaths and cruel and inhuman treatment of the deceased. The minimum presumptive penalty where there are mitigating factors such as the contributory negligence of the deceased, compensation paid and rendering assistance to the deceased is 3 years imprisonment.

According to MUREMBA J in the case of *S v Pias Mukandi Alias Jamba* CRB 103/23, HH 666/23 HH 13/24,

“A presumptive penalty is the starting point for the judicial officer to determine the sentence of the offender. It is the sentence that the court is expected to pronounce or pass if there are no reasons justifying departure from the presumptive penalty. Presumptive penalties are meant to provide consistent and predictable sentences in criminal offences. They aim to reduce disparities in sentencing and ensure similar crimes receive similar punishments. They also aim to increase transparency in the criminal justice system by making the sentencing process more open and accessible to the public. However, in terms of s 5 of the sentencing guidelines, judicial officers are allowed to depart from the presumptive penalties. However, it is important to note that s 5 of the sentencing guidelines demands that a judicial officer gives reasons for departing from a presumptive penalty. What this means is that a judicial officer should only depart from a presumptive penalty when there are substantial and compelling aggravating or mitigating

circumstances or factors. When a judicial officer departs from presumptive penalty when there are substantial and compelling aggravating or mitigating circumstances or factors. When a judicial officer departs from a presumptive penalty, they may impose any sentence authorized by law.”

The normal range of sentences

We start by noting that the defence prayed for a non – custodial sentence in the form of community service or a fine or both. On the other hand, the state prayed for a sentence of 4 years imprisonment and 2 years being suspended on condition of good behaviour. In its submissions, the State avers that for a conviction of culpable homicide the punishment ranges from a fine to life imprisonment.

In *S v Karadzangare* HH 794/16, CHITAPI J reasoned as follows:

“The court has been referred to several cases by counsel and been urged to use the cases as guide. The cases have been considered but they deal with different circumstantial scenarios. The court’s view is that there is no straight jacket formula for sentencing a convicted person for an offence like culpable homicide. This is why the legislature provided a range which however prescribes a maximum penalty being imprisonment for life. The conventional or comparative approach to sentence does not in cases of this nature provide a useful guide. The court is of the view that the comparative approach is more suited to offences of dishonesty like theft, frauds and kindred offences where value of loss is quantifiable.”

In *S v Tatenda Migeri & Cornius Kamutongo* 868/22, MUNGWARI J opines on the sentencing trend in matters of this nature. She says:

“A reading of many other decided cases in our jurisdiction shows that the predominant sentencing trend is imprisonment even where the accused has been found guilty of culpable homicide. It represents a sign of the court’s revulsion at the unnecessary loss of life.”

The mitigatory factors

The accused is a 24-year-old first offender. He was 23 years old at the time of the offence. He is married to a 20-year-old wife, and they have a two-year-old child. He is the breadwinner for his family as well as his mother. Prior to the commission of the offence, he was employed at PLZ (Pvt) Ltd Arcturus as a heavy equipment operator. He lost his job as a result of the offence and since his admission to bail, he depends on doing menial part time jobs to provide for his family and realizes about US \$ 100 per month.

It is submitted that the accused is in his prime years and can work and look after his family.

Another mitigatory factor pointed to, is that the accused was highly intoxicated at the time of commission of the offence as affirmed by all the witnesses including the deceased too and this diminished his self-control. The court was urged to take this into account as per the case of *S v Makuchete & Anor* HMA/10/18.

The accused pleaded guilty and saved the court's time and financial resources by avoiding a full-blown trial. See *S v Buka* 1995 (2) ZLR 130 (S).

The plea of guilty also signifies the offender's genuine remorse and contrition. As a sign of his remorse, the accused joined the others in rendering first aid to the deceased after he had fallen down by rubbing salt and pouring cold water on him in an attempt to resuscitate him. It is further submitted that the offender had even offered to hire a motor vehicle, at his own cost to ferry the deceased to the nearest clinic for medical attention. There was, however, no car available for hire to the nearest clinic which is about 14km away.

The family of the deceased also prioritized spiritual intervention first as the deceased was a member of the white garment apostolic sects. They therefore prayed, rubbed salt and poured water on the deceased.

Furthermore, the offender's family assisted at the funeral of the deceased by contributing firewood, food stuff and also towards the coffin. They bravely attended the funeral in the face of heightened emotions. The offender who was already in custody, could not attend the funeral. After his release from bail, the offender tried to assist the deceased's wife and children by sending his mother with provisions. These were initially accepted but now spurned.

In support of a non-custodial sentence, it was submitted that the offender cooperated with the police and never tried to resist arrest or run away. A custodial sentence is criticized as likely to turn the offender into a hard-core criminal. Positive and good prospects of rehabilitation and restoration are said to belong with a non-custodial sentence.

It is pointed out too, that the deceased was actually the one who provoked the offender by generally being aggressive, insulting him demeaning him by calling him a drunkard and slapping him and chasing him in hot pursuit. The case of *S v Fundakubi* 1948(3) SA 810 (A) was referred to where diminished responsibility due to intoxication and provocation were considered as mitigatory in assessing the appropriate sentence. The deceased is alleged to have played a significant role in the commission of the offence.

The offender's running away is said to point to someone who wanted to avoid fighting with the deceased who due to his age and role as go-between was a father figure to the offender.

The offender says he is willing to retribute but the deceased's family are putting in extremely tough conditions for nay engagement to occur. The offender and his family remain committed to retribute and to compensate the deceased's family in terms of Shona customs.

The aggravating factors

The offender's guilty plea is noted as valuable in contributing towards effective and efficient administration of justice. It was noted however, that this does not absolve the offender from the wrong he did. It is conceded that by pleading guilty, the offender has shown remorse.

It is however pointed out that culpable homicide is inherently a serious offence because life is sacrosanct and human blood is precious. The courts are expected to uphold the sanctity of human life. It is submitted that the right to life is both God-given and guaranteed in s 48 of the Constitution and no one has the right to take another person's life for whatever reason.

It was considered aggravatory that the offender caused the death of a 40- year- old man who was in the prime of his life and had been invited to mediate between the accused and his wife after other neighbours had failed as he was the go between at their marriage.

The widow's victim impact statement shows that the deceased had four minor children for whom he was the sole breadwinner.

Whilst noting that the offender was intoxicated, this was said to be no excuse for rowdy behaviour. See *S v Gunde & Anor* HH 481/23.

The victim's impact statement sets out that the loss of the deceased has been emotionally crippling making it difficult to concentrate, sleep or find joy.

She further points out that it has been financially challenging for her to sustain the family with the four minor children all looking up to her.

As a result of the demise of her husband, the widow says she has been socially isolated and is struggling to connect with friends as her in laws sent her away and she feels lost and alone.

Physically the widow feels drained and states that anxiety and depression have taken a toll on her health.

She urges the court to consider the severity of the offender's actions and how they have taken a toll on her life which has been turned upside down. She cries out for justice for her husband's murder whilst noting that nothing will bring him back but she wants to find some closure.

The sentence

In considering sentence, the court took note of both the mitigatory, and aggravating factors presented by both counsel as well as the victim impact assessment statement.

The contributory negligence by the deceased who was the aggressor towards the offender, insulting and slapping him several times and hotly pursuing him when he tried to flee is not lost to the court. It is a weighty mitigatory factor.

It is noteworthy too that the offender was drunk and not in full control of his faculties, a factor remarked on by the deceased who even said he could not talk to him as he was drunk.

The offender did not flee upon commission of the offence but rushed to render first aid and was prepared to ferry the deceased for medical attention had it not been for the lack of a vehicle to hire and the religious beliefs of the deceased's family.

Though compensation has not yet been paid, the offender's family have initiated discussions for this.

The offender's guilty plea should be rewarded too as the court's time and resources were saved. Whilst it is noted that the offender was the primary breadwinner for his wife and four minor children, it is sometimes unavoidable for dependants to suffer as a consequence of commission of an offence.

It is the court's considered view however that this is not a case where a fine or community service or a wholly suspended sentence can be imposed. In the circumstances of this case, this would result in the society losing confidence in the justice delivery system. A custodial sentence with part suspended on appropriate conditions is called for. As per CHITAPI J in *S v Karadzangare* HH 749/16:

“a proper sentence for culpable homicide depending on the circumstances of each case must not be unduly lenient nor unduly harsh. It must mirror the society's abhorrence or disapproval of the accused's conduct. The sentence should be one that reflects that negligent transgression in the conduct of members of society gets punished adequately.”

In casu, the degree of negligence cannot be classified as gross, however the sentence should send a clear message to would be offenders that one will not escape consequences because they were drunk. The mitigatory factors outweigh those in aggravation. The offender escapes the statutory penalty of life imprisonment and the maximum presumptive penalty of 5 years imprisonment.

The accused is sentenced to 4 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition that the accused does not commit within that period any offence involving the use of violence upon the person of another for which accused is sentenced to a term of imprisonment without the option of a fine.

MUCHAWA J:

C Mutimusakwa, for the State
T Pfigu Attorney, accused's legal practitioners