

THE STATE  
versus  
MEMORY MARIRA

HIGH COURT OF ZIMBABWE  
**MUNGWARI J**  
HARARE 19 NOVEMBER 2024

**Assessors:** Mr *Shenje*  
Mr *Mpofu*

### ***Sentencing Judgment***

*K Chigwedere*, for the state  
*L Sambadzai*, for the accused

MUNGWARI J: On the evening of 20 January, 2024, at no 401 Ushewekunze in Harare, a domestic dispute erupted for the umpteenth time in a household which knew no peace. This time, the argument revolved around Lovemore Tembo (the deceased)'s intention to leave the house for a beer drink with colleagues. Memory Marira, (the offender), vehemently opposed that plan. She pursued the deceased around the yard and back inside the house in a desperate attempt to prevent his departure. Once indoors, the deceased taunted the offender, challenging her to strike him and to aim accurately this time around, referencing a prior incident where she had tried to strike him but had missed. Despite the tension and the heated exchanges, neither party physically assaulted the other; instead, they engaged in a cycle of bickering, briefly annoying one another, before momentarily reconciling as they chased each other around.

[1] After a period of that cat and mouse game, the deceased relented. He announced a change of tact. He informed the offender that he would forgo the beer drink outing with friends in favour of attending a traditional beer-drinking ceremony. The offender, however still rejected that compromise. Despite her protests, the deceased prepared to leave, turning his back on her as he moved towards the exit.

[2] In a fit of rage, the offender seized an empty Coca-Cola bottle from the bedroom and hurled it at the deceased. It found its target and struck the deceased on the back of the head. The impact was severe. It caused the deceased to fall instantly. He collapsed in a

heap as he fell into the dining room. He lay there face down and was bleeding. A neighbour and friend to the deceased one Richard Chitima, was summoned for assistance. He transported the deceased to a nearby clinic. Tragically, the deceased passed away the following day at Sally Mugabe Hospital.

- [3] Subsequently, Memory was charged with the deceased's murder under s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). She pleaded not guilty to the charge. While she did not dispute assaulting the deceased, she claimed to have done so because she had been provoked by the deceased. We however threw out that defence and convicted her after a contested trial. The proved facts of the matter were as alleged by the state and outlined above.

### **The Law**

- [4] Section 47(4) of the Code provides as follows:

“(4) A person convicted of murder shall be liable—  
(a) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3); or  
(b) in any other case to imprisonment for any definite period.” (my underlining for emphasis)

- [5] Based on the aforementioned provision, it is evident that the initial step in evaluating sentences for murder cases requires the court to ascertain whether the murder occurred in aggravating circumstances. If the court concludes that the killing was indeed committed in such circumstances, its discretion in sentencing is significantly constrained. Specifically, the court's options are limited to terms of imprisonment of no less than twenty years, life imprisonment, or even the death penalty. Thereafter the choice of sentence is predominantly swayed by the weight of aggravating factors juxtaposed against mitigating factors.

- [6] In addressing the court regarding the presence of aggravating circumstances in this case, the prosecution's counsel, Mrs. *Chigwedere*, made submissions that were surprisingly misaligned with the established legal standards. Instead of articulating the aggravating circumstances, she attempted to convince the court that the offense was committed under mitigating circumstances, which stands in stark contrast to the implications of s 47(4) of the Code. That misunderstanding reflects a fundamental lack of appreciation

of the legal framework guiding the sentencing procedure in offences of murder. It forces us to restate the relevant part of her written submissions in *extenso*. It read:

“The legal issue at this stage is whether this murder was committed in aggravatory or mitigatory circumstances. It is submitted that the offender before the court committed the murder in mitigatory circumstances. As per evidence on record, she was wife to the deceased, and on this fateful day, the deceased arrived home drunk. The offender actually warmed some food and served the deceased. It is also clear on record that it is the deceased who placed the empty bottles before the offender, and ordered her to hit him with them on the head. This evidence, demonstrate that the weapon used by the offender was but an opportunistic weapon, one that was availed by the deceased himself. It is also clear that the deceased provoked the offender, to an extent that according to the witness, at the time she throw the bottle at the deceased, “she was very angry.” (sic)

It is on record that the Offender apologized to the deceased after the act, and there was a normal conversation between the spouses wherein the deceased was asking what the offender had used to assault him with. Later the offender assisted in caring the deceased to the car and taking him to a surgery. She nursed him at home and also went with him to the hospital where he later died. At the time the deceased died, the offender had gone to buy medication for him. All these factors are mitigatory in favor of the offender.” (Sic)

[7] A reading of the law shows that State counsel was not required at this stage to address the court in mitigation. Given the specifics of the case, she needed only to focus on whether this murder was committed in aggravating circumstances or not with reference to the factors outlined in s 47(2) and (3) of the Code and to assess whether those factors were present in this matter. For instance, if a robbery had occurred during the murder, that would have constituted an aggravating circumstance, in terms of S 47(2)(a)(iii) of the Code. Thus, we cannot be faulted for concluding that counsel for prosecution totally neglected to submit arguments regarding whether the murder was committed in aggravating circumstances contrary to the tenets guiding sentencing in murder cases.

[8] Needless to state, failure by one of the parties in a criminal trial to address the court on the mandatory examination of whether or not the murder was committed in aggravating circumstances does not absolve the court from making that determination. The court cannot proceed a step further without making a pronouncement on the issue.

[9] In stark contrast to the stance taken by prosecution, counsel for the offender effectively articulated the issue. She asserted that the murder was not committed in aggravating conditions. She discussed the weapon used to strike the deceased, arguing that it was an opportunistic weapon taken from a room filled with bottles. She further contended that the offense was not premeditated.

[10] A closer examination of how the offence was committed clearly vindicates counsel for the offender that the murder was not carried out in aggravating circumstances. The deceased and the offender were a couple known for their frequent quarrels. Their marriage was tumultuous to put it lightly. On this occasion, they engaged in one of their all-too-familiar altercations. During the confrontation, the deceased broke a bottle and taunted the offender. In response, the offender, half-naked, chased after him as they argued about the deceased's intention to leave the house. When the offender was unable to persuade the deceased to stay, the deceased struck him on the head with an empty Coca-Cola bottle. From that set of circumstances, it appears none of the factors listed in s47(2) and (3) are present in this case.

[11] In addition, s 47(5) of the Code stipulates that the list of aggravating circumstances outlined in s 47(2) and (3) is not exhaustive. The provision allows the court to identify additional circumstances under which a murder may be aggravated. However, in the present case, we found none even outside the statute. We equally checked the factors listed against the crime of murder in the sentencing guidelines. None fitted into the scenario at hand. We accepted therefore, that this murder was not committed in aggravating circumstances as envisaged by the law.

[12] We also highlight at this point that the defence prayed for a short custodial sentence while on the other hand, the state prayed for a sentence of ten years. To support her proposal, Ms. *Sambadza*, informed us that the offender is a thirty-six-year-old female. She is a first offender with no previous convictions and who has always upheld family values, providing care and support to her family, including her stepdaughter, whom she raised from the age of four (4) years and treated as her own child. In addition, she is a mother of three (3) girl children. They are all dependent on her. The firstborn is eleven (11) years, the middle one is eight (8) years whilst the last born is only five (5) years. She directed us to the case of *S v Katsaura* 1997 (2) ZLR 102 for that proposition.

[13] Additionally, counsel implored the court to find that the accused was provoked thus reducing her blameworthiness. She also stated that there was no chance of her re-offending considering the remorse she exhibited soon after the offence was committed and that she rendered first aid to the deceased.

[14] The sentencing guidelines SI 146/23 constitute a legitimate source from which aggravating as well as mitigating factors may be obtained. It directs a court to

consider as mitigation, factors such as provocation, or that one acted out of passion, or that the offender assisted the victim when imposing a sentence in cases where the minimum mandatory sentences do not apply. An examination of the circumstances in which this murder occurred reveals that indeed it cannot be denied that the offender may have been provoked although that provocation was insufficient to reach the threshold necessary to accord the offender the partial defence of provocation which would have reduced the crime to culpable homicide. The court is still obliged to consider it as lessening her moral blameworthiness. The provocation related to the deceased's drunkenness, his taunts as well as his insistence on leaving the house even when he was already inebriated. Arising out of that we give it to the offender that the crime indeed has undertones of provocation.

[15] Further that the offender attempted to assist the deceased in one way or the other is not in doubt. It appears however that the assistance was too little and too late because the victim had already been mortally injured. The offender rendered first aid by pouring water on the deceased. She also dressed the head injury with a cloth. She accompanied the deceased to hospital. All that is evidence of the fact that she indeed sought to render assistance to the deceased. It illustrates her regret at committing the fatal assault. We do not doubt that she judged herself and that it may for along time haunt her that she killed her own husband and the father of her children.

[16] We also agree that the probability of this offender reoffending is almost non-existent. That fact is assessed on the basis of various factors which include past convictions and an offender's age. They may indicate an offender's predisposition to reoffend. *In casu* the offender does not have any past convictions and demonstrated genuine remorse. Immediately after the incident she apologized to the deceased and rendered first aid. Given that this is also her first conviction, our conclusion is that she is less likely to reoffend.

[17] On the other hand, the state lamented the loss of life which once lost can never be replaced. Mrs *Chigwedere*, despite earlier having heavily mitigated on behalf of the offender, furnished the court with a victim impact statement authored by Miriam Malunga the deceased's sister. She explained that she has been affected psychologically and socially by the loss of her brother. She regretted that she had not been able to say her goodbyes to him before he died. She lamented that she had been saddled with

medical bills after the deceased's demise. She prayed that the court impose a just sentence on the offender.

[18] We also find it aggravating that the offender was violent towards the deceased from the time he expressed an intention to leave the house to the time she hit him with the empty bottle on the head. Whatever disputes the two had could not have been resolved through violent acts. As fate would have it a life was eventually lost before the offender had learnt that violence does not breed peace. It is the duty of the courts to uphold the sanctity of human life and to protect and foster the family institution as mandated by the Constitution of Zimbabwe, 2013 in sections 48 and 25 respectively. In particular s 25 provides that:

“The state and all institutions and agencies of government at every level must protect and foster the institution of the family and in particular must endeavour within the limits of the resources available to them, to adopt measures for-

(a) the prevention of domestic violence”

[19] The court equally notes with concern, the increasing number of women who perpetrate violence against their partners. The worrying trend should be nipped in the bud through the imposition of appropriate sentences which will send the correct signals to other would be offenders.

[20] Not least is the fact that this murder could rightly be branded as a senseless one. There was no justification for the severity of the assault inflicted upon the deceased. The circumstances surrounding the offense leaves us in no doubt that the deceased died a painful death at the hands of someone he could be forgiven to regard as his protector. The blow was brutal. It split open the deceased's skull. The autopsy revealed extensive and severe head injuries with the deceased's cranial vault said to have collapsed and the skull being fractured. The medical pathologist concluded that death resulted from severe brain oedema, skull fracture, and pronounced cranio-thoracic trauma.

[21] In a case where the court's discretion to assess the sentence is unrestrained, it is tasked with weighing the general mitigating factors against the aggravating ones. The situation in this case calls for the court to balance the objectives of sentencing. While it must unequivocally express its disapproval of those who violate the sanctity of human life, it is also important to state that the offender is someone deserving of a second chance. A sentence that facilitates rehabilitation would thus be appropriate. At just thirty-six years old, the offender still has the potential to serve her time and subsequently lead a productive life in society. Unfortunately, the ten-year sentence

proposed by the state counsel is neither justified nor supported by modern sentencing trends. Such a sentence could convey an erroneous message and potentially foster an atmosphere of anarchy within society. Conversely, the defence counsel merely recommended a "short custodial sentence," the specifics of which remain unclear. We are unable to comment on the suitability of the suggested sentence therefore.

[22] The sentencing guidelines outlined indicate a sentence of 15 years' as the presumptive penalty in instances where a murder is not committed in aggravating circumstances and where mitigating factors, such as those discussed herein, are present. There is no justification for us to impose a sentence that less than or higher than the presumptive penalty suggested in the guidelines.

[23] In the circumstance the offender is sentenced to **fifteen (15) years imprisonment.**

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

*National Prosecuting Authority, the State's legal practitioners  
Jaricha & Partners, accused's legal practitioners*