

THE STATE

Versus

TALCOT MPASI

And

AGAPE MPASI

IN THE HIGH COURT OF ZIMBABWE

KABASA J with Assessors Mrs C Baye and Mr E. Shumba

GWERU 31 January, 1 February and 5 July 2024

Criminal Trial

N. Chikuni, for the state

J. Chidawanyika, for the 1st accused

T. Militao, for the 2nd accused

KABASA J: The 2 accused are charged with two counts of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. They pleaded not guilty to both counts.

The state alleges that on 28 January 2022 the two accused had a misunderstanding with the now 2 deceased, Nqaba and Kelvin Ndlovu. Accused 1 then produced a Colombia knife and stabbed deceased one on the back. The now deceased staggered and fell to the ground. Accused 2 stomped on his body whilst the now deceased lay on the ground bleeding. The two accused thereafter charged at deceased two and accused 1 stabbed him with the same knife once on the left side of the chest. The now deceased staggered and fell whereupon accused 2 stomped on his body. The two accused thereafter pursued Nqaba and Kelvin who were fleeing.

The now deceased 1 and 2 were ferried to Kwekwe Hospital where they were pronounced dead on arrival.

In denying the charges accused 1 said he acted in self-defence. He did not stab the two deceased as each one was stabbed accidentally when he parried the attack on him. Deceased 1 was stabbed when one of the assailants intended to stab him (accused 1), he twisted and deceased one was stabbed instead. Deceased 2 then tried to stab him but he held his hands and

wrestled with him. They both fell whilst the deceased was holding the knife which then stabbed him on the chest. Accused 2 was not on the scene when this happened.

Accused 2 explained that he was with accused 1 earlier that night but went back home. Accused 1 later followed, ate supper and returned to the scene. He only saw him much later when he came back home injured and reported the incident which had led to him sustaining those injuries.

To prove its case the state produced the two accused's confirmed warned and cautioned statements in which they denied the allegations. The post mortem reports were also produced and the cause of death for each deceased was given as:-

Hypovolemic shock

Stab wound

The pathologist noted the following marks of violence on deceased 1:-

- a) Incise wound in the back, two, 2 cm of length and one 4 cm of length penetrating in abdominal cavity and thoracic cavity.
- b) Excoriations in frontal region
- c) Laceration of pulmonary vessels and laceration of left lung in the back

Deceased 2 had the following injuries:-

- 1) Incise wound 7 cm of length located in left side of thorax under clavicle. Another in right gluteal region
- 2) Excoriations in left side of the face
- 3) Laceration of left atrium and laceration of cardiac and pulmonary vessels
- 4) Laceration of superior lobe of left lung.

The knife which caused these injuries was also produced and had the following measurements:

| | |
|--------|----------|
| Weight | 0, 43 kg |
| Length | 34, 8 cm |

Blade 16 cm

Blade width 3 cm

The blade and handle were in two pieces.

The evidence of 10 witnesses was admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. These witnesses are:-

Kelvin Ndlovu

Nqaba Ndlovu

Arman Maphosa

Dumisani Ngwazani

Emmanuel Nyathi

Doctor Presten Nyoni

Talent Dodzo

Phinias Nyasha Gandiwa

Shingirirai Tamanikwa and

Doctor Juan Rodriguez Gregory

Kelvin and Nqaba Ndlovu were at the scene on the night in question. Kelvin was at a distance from deceased 1 and 2 when accused 1 approached him armed with a knife. He tried to flee but accused 1 stabbed him on the left shoulder whilst accused 2 hit him once on the left knee using a stone. He managed to flee from the scene. Nqaba was also stabbed by accused 1 on the chest whilst accused 2 struck him at the back with stones. He then fell unconscious.

Arman Maphosa was called to the scene after the stabbing and found deceased 1 lying face up and deceased 2 was lying face upwards with a deep stab wound on the left side of the chest. Deceased 2 was about 10 metres from deceased 1. He also observed the stab wound on Nqaba's chest. He ferried deceased 2 who was his nephew and Nqaba to hospital where deceased 2 was declared dead on arrival.

Dumisani Ngwazani also arrived at the scene after the incident and found deceased 1 lying on the ground bleeding from a stab wound. He rushed him to hospital where he was also pronounced dead on arrival.

The rest of the witnesses whose evidence was admitted got involved after the event. The witnesses include the police officers who took the accused for indications, recorded and witnessed the recording of their warned and cautioned statements and ferried the deceased's bodies to hospital for post mortem examination.

Doctors Nyoni and Gregori are the ones who certified the deceased dead and conducted the post mortem, respectively.

Evidence was thereafter led from four state witnesses. Passmore Ncube was the first witness. The gist of his evidence was that he was at Cross Roads Business Centre which is illuminated by electrical light bulbs. The 2 accused, Kelvin, Nqaba and the 2 deceased had a misunderstanding. He went to check what it was all about and observed accused 1 producing a knife from his pocket and stabbed deceased 1 on the back resulting in the deceased collapsing. Accused 2 started trampling on deceased 1's body. Accused 1 thereafter ran towards deceased 2 and stabbed him on the left side of the chest. He did not see accused 2 doing anything to deceased 2. He was able to see as the place was well lit and he was about a metre away when deceased 1 was stabbed and 6 – 7 m away when deceased 2 was stabbed.

We must say this witness is one of those who cannot narrate a story sequentially. His narration was pre-supposing that the people he was narrating to were aware of what happened. He was not the easiest of witnesses to lead evidence from. This is by no means suggesting that he was not a credible witness. He knew what he was talking about but lacked clear articulation.

This witness knew accused 1 as a fellow artisanal miner who also played social soccer. He was therefore not seeing him for the first time on this day. He was however seeing accused 2 for the first time.

Asked on the apparent inconsistencies regarding deceased 2's presence where the others were arguing he explained that he told the police that deceased 2 approached with one Thulani whilst the others were arguing but was not part of it. He was adamant it was accused 1 who stabbed both deceased with accused 2's participation revolving on stomping deceased 1 after he had fallen to the ground.

The distances stated by the witness were not far to hinder proper observation. The visibility was also good and nothing militated against proper observation.

The discrepancy on whether he wanted to buy eggs from the last witness or not is not of any consequence. Reference to the issue of who wanted to buy eggs and when has no bearing on the events leading to the murder.

He was not the only witness who witnessed the incident. The material detail involving the stabbing was corroborated by the other witnesses.

With nothing militating against good observation we found nothing to fault this witness's testimony. It is important to note that his identification of accused 1 and 2 was corroborated by witnesses whose evidence was not disputed and was accordingly admitted.

Section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07 provides that:-

“(1) In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact.”

It follows therefore that the admission of the witnesses' evidence was sufficient evidence of the fact relating to accused 1 and 2's presence at the scene. The knife which the witness identified having been produced as exhibit 5 was placed in accused 1's hands by not only this witness but the witnesses whose evidence was admitted. This can only serve to lend credence to the evidence of Passmore.

The second witness was Thulani Msipha. He is the one who was in the company of deceased 2 on the night in question.

He too knew accused 1 as an artisanal miner and social soccer player. The first deceased was his neighbour whilst the second deceased was his cousin.

His evidence was clear, short and to the point. The gist of it was that he was in the company of deceased 2 on their way from Gwandu shop proceeding home. He then saw the 2 accused and there was a misunderstanding between them, deceased 1, Nqaba and Kelvin. He stepped aside to take a call and then went back in an effort to ascertain what the problem was. He then saw accused 1 produce a knife from his trousers and proceeded to stab deceased 1 on the back. After deceased 1 fell accused 2 trampled over his body. Accused 1 then charged towards deceased 2 and stabbed him on the left side of the chest after which the deceased

staggered and fell. Accused 1 then pursued Nqaba and Kelvin. The witness then fled from the scene.

Under cross-examination he explained why he was at these shops so late at night. He had knocked off from work earlier than his cousin deceased 2 and so went to wait for him so they could go home together

Efforts to poke holes into his evidence did not achieve anything. The issue of the number of times the deceased were stabbed was consistently explained by all the witnesses who even determined how the two were stabbed. Suggestions that the post mortem referred to two stab wounds were not issues these witnesses could explain. The consistent facts were that each was stabbed once with a dragging motion and the two witnesses who ferried the two deceased to hospital observed the single stab wound on each. The post mortem made no reference to stab wounds but stab wound for each of the two deceased.

There was nothing about this witness's evidence which gave the impression that he did not know what he was talking about. The presence of Kelvin and Nqaba at the scene does not change the complexion of the matter as regards how the two deceased were stabbed. Nqaba and Kelvin were fleeing when they too were stabbed casting grave doubt on the story given by accused 1 on how the two deceased were stabbed and how he fought a group of 6 men more or less the same age as he was and managed to come out almost unscathed but with two people dead.

We were satisfied Thulani was a credible witness who was able to identify the people responsible for the attack on the 2 deceased. As already stated Nqaba and Kelvin's testimony was admitted and they both placed accused 2 at the scene.

Granted deceased 2 was his cousin but we got the distinct impression that Thulani was only relating what he knew to have happened and nothing else. He was not drunk and visibility was good. There was therefore nothing militating against his ability to observe and recall what he observed. He had every reason to show interest in what was happening and so cannot be criticised for showing that interest.

The third witness was the arresting detail. Nothing much turned on his evidence except that when he went to arrest the two accused members of the public were baying for their blood. The knife which was produced as exhibit 5 was recovered from accused 1. The two gave

warned and cautioned statements which they later recanted. He denied being told of an *alibi* by accused 2 and explained that he was not the Investigating officer.

Asked under cross-examination about accused 2's statement he explained that accused 2 had said he arrived at the scene after deceased had been stabbed by accused 1. He later changed that version.

This witness was not the one who recorded the statement and he was not the Investigating Officer. In any event if the accused recanted that statement and simply said I deny committing the offence what was there to check? What *alibi* would come from a bare denial of the charges?

Accused 2's story would have made sense had his warned and cautioned statement reflected the *alibi* he said he gave. And even if he had, he and his brother were staying on their own. Accused 1 said he had only visited so accused 2 stayed on his own. Counsel for accused 2 suggested that a neighbour could have been asked to confirm accused 2's *alibi* but what neighbour would have been aware of accused 2's movements since he said he went home and slept. Would the walls of that room have been able to confirm at what time he got home and slept?

In any event Nqaba and Kelvin's admitted evidence placed him at the scene, so did all the other witnesses. With the prevarication regarding his story as explained by the arresting detail the *alibi* story was shown to be but just a story.

It was also the arresting detail's evidence that when they got to where the accused were they had no time to tarry due to the restive crowd and so had no meaningful conversations with the 2 accused. Accused 2 therefore never mentioned the *alibi* until he gave a warned and cautioned statement which he later recanted.

We had no reason to criticise this witness's evidence. The recording detail and the witness to the confirmed warned and cautioned statements would not have served any purpose as such statements were bare denials calling for no investigation as there was nothing to investigate.

The last witness was Thembekile Simela, the lady who was selling eggs at the business centre on the night in question. The gist of her evidence was that accused 2 came and ate 4 eggs but refused to pay. She decided to move from that spot to Victor's shop to avoid further

harassment. Accused 2 then had a misunderstanding with deceased 1. Accused 1 who was behind deceased 1 then produced a knife and stabbed deceased 1 at the back. Accused 2 then stomped on him as he lay on the ground. Deceased 2 was approaching the scene when accused 1 charged at him and stabbed him on the left side of the chest with a dragging motion which tore the deceased's shirt. Accused 1 then pursued Kelvin and Nqaba who ran away.

The witness mimicked accused 2's voice as she narrated how he called out to accused 1 to come to the scene after he had refused to pay for the eggs he had taken from this witness.

This witness, like the other two before her gave a clear account of the events leading to the stabbing of the deceased. She corroborated Thulani's evidence to the effect that deceased 2 was not where the others were as accused 1 actually charged towards him and stabbed him.

Granted there was an issue of what accused 2 was wearing but the point is with the admission of Kelvin and Nqaba's evidence the presence of accused 2 at the scene was no longer an issue. The inability of the witnesses to state accused 2 was wearing is therefore of no consequence.

Three witnesses who testified identified accused 2, Nqaba and Kevin whose evidence was admitted also identified him. What are the chances of all five witnesses making an honest but mistaken identification? We would say none.

In analysing the witnesses' evidence we did not lose sight of what each of the accused had to say. We have touched on some aspects of their story as we analysed the witnesses' evidence.

We found the two accused's story to be improbable and beyond doubt false. This is why:-

Accused 1 gave this dramatic story of how he fought with 6 men and how the 2 deceased were stabbed.

His story was that the whole argument was over a lady of the night. The only lady everyone else saw but the 2 accused was Thembekile who was selling boiled eggs.

Accused 1 said 2 of these young men held him from behind whilst 2 others were in front. He kicked one of them and another produced a knife. He swerved and the knife stabbed

deceased 1. How he managed to swerve whilst being held by two people from behind remained a mystery. How deceased 1 was then stabbed with such force at the back was also a mystery.

If deceased 1 was the one in front of accused 1 he would not have been stabbed at the back. Equally if he was one of those who were holding accused 1 from behind he again would not have been stabbed at the back. His demonstrations only heightened the incredulity of his story.

Deceased 1 was stabbed first and he was seen lying about 10 m away from where deceased 2 was. Accused 1's explanation was that deceased 2 tried to stab him but he wrestled with him until he tripped and fell. He (accused1) was still holding the deceased's hands which had the knife and he (accused 1) also fell on top of the deceased whose hand no longer had power ostensibly because accused had subdued him. Somehow the deceased was then stabbed on the left side of the chest viciously as demonstrated by the injuries noted on the post mortem.

We must say we marvelled as accused 1 tried to demonstrate this incredible feat. Two people got stabbed 10 metres apart and all because accused 1 swerved on the one occasion and on the other fell on top of deceased two who had a knife on his right hand and that knife found its way to his left and plunged itself into his left side?

Accused 1 would do well if he writes fiction thriller novels. Such stories would make a good script for a thriller movie.

It is indeed correct that the accused's story need not convince the court as to its truthfulness. Whatever story he gives, even if it be improbable cannot be dismissed unless it has been shown to be not only improbable but beyond doubt false. (*R v Difford* 1937 AD 370, *S v Kurauone* HH 961-15, *S v Foster* HH 241-15)

An accused's story is however not taken in isolation. The entire evidence must be looked at. Accused 1 sought to even deny that he was known in the area as he is an artisanal miner and a social soccer player. It was evident he was lying through his teeth, seemingly creating the impression that he had only gone to this area to sell maize as he is a small scale farmer.

We also got the impression that he sought to cloud the issue by playing the tribal discrimination card. He would have us believe that the deceased and his friends took exception to his presence in that area because he is Shona.

As regards the injury he wanted to capitalise on in his attempt to peddle self-defence, the arresting detail said he said that injury was inflicted by Nqaba. Nqaba is one of the two people he pursued and stabbed. It is very possible therefore that he sustained such injury either at the hands of the members of the public who he said effected citizen's arrest or at the time he chased after Nqaba and Kelvin.

There can be no self-defence when you are the aggressor pursuing victims who are fleeing from you.

Equally there can be no self-defence when you stab a person in the back. They have their back towards you so what threat is posed in such circumstances to even talk of self-defence.

There was absolutely no truth in his stranger than fiction story and we therefore had no hesitation dismissing it as a product of his fertile imagination.

As for accused 2 we acknowledge that where an *alibi* has been raised, the police must investigate it and the prosecutor must disprove it. (*S v Magomba* HB 24-10, *S v Chibanda* HH 772-19)

However such defence must be raised. At the point of arrest it was not raised and it was raised not so much as to show where he was but that he arrived at the scene when deceased had been stabbed. (*S v Matanga* S-16-15) The defence must be disclosed fully to allow for investigations. Stating in a warned and cautioned statement that he arrived at the scene when deceased had already been stabbed and then recanting such statement to proffer a bare denial is hardly what is envisaged by stating such defence fully to allow for investigations. (*S v Chimusoro & Ors* HH 699-15)

We have already shown the accused's lack of credibility in that he seeks to raise an issue which was admitted with the admittance of Nqaba and Kelvin's evidence.

As regards his identification we have already highlighted that 5 witnesses in all identified him in conditions that allowed for a positive identification with no possibility of a mistake. (*S v Nkomo* 1989 (3) ZLR 117 (S) *S v Dhliwayo & Another* 1985 (2) ZLR 101 (3)).

The exercise of caution should never be allowed to displace the exercise of common sense. The identification of the accused cannot be dismissed as mere confidence of witnesses

who may be confident but mistaken. Each case must be looked at in accordance with its particular circumstances.

We are satisfied there was no unlawful attack and so we did not even consider section 253 of the Criminal Law Code. Whatever the source of the misunderstanding the savage attack on the two deceased who lost their lives and Nqaba and Kelvin who managed to escape but also sustained stab wounds was not warranted. This was a case of pure unmitigated aggression which scared even the onlookers as testified to by the witnesses who witnessed the incident.

We therefore dismiss the self-defence and mistaken identity stories for the reasons aforementioned.

The manner of the assault, the lethal weapon used and the part of the body the knife was plunged in both deceased's bodies can only speak to an assailant who must have realised the real risk or possibility that their conduct may cause death but continued to engage in such conduct despite the risk or possibility.

Accused 1 stabbed the first deceased and as he bled after collapsing accused 2 trampled on him. He was with accused 1 and his conduct showed he had a common purpose with accused 1.

Section 196 A of the Criminal Law Code provides that:-

“(1) If two or more persons accused of committing a crime in association with each other and the state adduces evidence to show that each of them had the requisite *mens rea* to commit the crime whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realisation of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.”

Accused 2 saw accused 1 stab deceased 1 as they argued with him. He fell bleeding and he chose to trample his body clearly associating himself with accused 1's conduct. He therefore cannot escape liability for the death of the first deceased.

However all the witnesses did not see him participate when accused 1 went on a rampage stabbing deceased 2 before pursuing Nqaba and Kelvin. The evidence does not show that he even anticipated such a rampage let alone involve himself in it.

There is therefore no evidence to join him to the second murder. If anything he appeared to have disassociated himself and understandably so because he had been having an argument with deceased 1 when second deceased approached with his cousin. Deceased 2 was therefore not at all involved in the misunderstanding. But for his brother's moment of madness deceased 2 should not have attracted attention justifying the fatal stabbing.

For these reasons therefore we are satisfied the state has proved its case beyond a reasonable doubt on the 2 counts in respect of accused 1 and one count (first count) in respect of accused 2.

Consequently accused 1 is found guilty as charged on both counts. Accused 2 is found guilty as charged on count 1 and not guilty and acquitted on count 2.

Sentence

You stand convicted of murder which occurred on 28 January 2022 following a misunderstanding with deceased 1. Deceased 2 was on his way from work when he approached the scene but lost his life when accused 1 you went for him and stabbed him on the left side of the chest, making it 2 counts of murder for you accused 1. Accused 2 you stomped on deceased 1 after accused 1 had stabbed him and you were the one who had called accused 1 to the scene.

You therefore associated yourself with deceased 1's murder by participating in the manner you did. You however did not participate in any way in deceased 2's murder. You therefore stand convicted of one count of murder and accused 1 2 counts of murder.

The presumptive penalty is 20 years where the murder is committed in aggravating circumstances whilst the statutory penalty is life imprisonment or a determinate sentence not less than 20 years.

For accused 1 the murder was committed in aggravating circumstances as it was multiple counts of murder.

For accused 1 your sentence cannot be less than 20 years. In deciding whether to impose life imprisonment or a determinate sentence of not less than 20 years we considered that you are a first offender. You have spent 26 months in pre-trial incarceration. You were 24 years old at the time the murders were committed. You are 26 years old now. You were youthful then and you are still youthful now. Youthfulness is a mitigatory factor as the immaturity of youth influences one to behave in an irrational and at times senseless manner. It

has been said that youthfulness is a factor which makes it odious to impose on such an offender the same penalty that would otherwise be appropriate for a more mature offender (See *S v Zaranyika and Others* 1995 (1) ZLR 270 (H))

You are married with a 4 year old child and you were the sole bread winner for the family. The murder was not premeditated.

In aggravation we considered that 2 young men lost their lives. Deceased 1 was 23 and deceased 2 21. They were in the prime of their life.

Deceased 1's uncle gave a victim impact statement which expressed how the deceased's death impacted on the whole family. They are still grieving and are in great pain. The deceased's father was emotionally affected and fell ill due to the stress occasioned by his son's tragic death. He passed on a year after his son's death.

You used a Columbia knife to inflict the mortal injuries on the 2 young men. The dimensions of the knife and the part of the body the knife was plunged into shows callousness and a lack of respect for the sanctity of life.

Deceased 2's mother was affected by the death of her 21 year old son who had a promising future. He had completed his "A" levels and obtained 12 points. He was due to start his studies at the University of Zimbabwe where he had already been offered a place. The mother is now hypertensive and has since suffered a stroke which has affected her left side. The family's pain is immeasurable.

As for you accused 2 you were 21 at the time and are now 23. You are also youthful. You stand convicted of one count of murder. You were looking after your grandparents and your deceased brother's two children.

You are a first offender and you have also spent 26 months in pre-trial incarceration.

The same aggravating factors that relate to accused 1 also are applicable to you, save for the fact that you stand convicted of one count. No one has a right to take another's life. The sanctity of life ought to be respected by all right thinking people. Society frowns upon the lack of respect for sanctity of life and courts must mete out sentences that reflect that.

The sentence must fit the offence you the offenders and be fair to society. (See *S v Shariwa* 2003 (1) ZLR 314).

Accused 1 since you stand convicted of 2 counts, each count has to be treated separately for purposes of sentence (*S v Damba & Another* 2004 (1) ZLR 296 (H)).

Accused 1 you are accordingly sentenced to 20 years imprisonment on each of the 2 counts. A murder sentence cannot be suspended and so the effective sentence is 40 years imprisonment.

Accused 2 you are sentenced to 15 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Chitere Chidawanyika and Partners, 1st accused's legal practitioners
Militao Law Inc., 2nd accused's legal practitioners