THE STATE

Versus

SENZENI JIYANE

AND

LINDIWE NCUBE

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J with Assessors Mrs A Moyo and Mr M N Ndlovu
BULAWAYO 4, 5 & 6 MARCH 2020

Criminal Trial

B Gundani, for the state
Ms T F Nyathi, for the accused

MABHIKWA J: The two (2) accused persons are facing a charge of murder in contravention of section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. The accused pleaded not guilty to the charge and denied causing the death of the deceased in any way and prayed for an acquittal on the charge.

It must be stated that most of the facts in this case are common cause to the extent that the outline of the state case and the accused's defence outline are almost the same with a few variations and that the accused deny any intention to kill or negligence leading to the deceased's death.

In opening remarks, the state conceded that from the circumstances of his case, it is unlikely that the state could prove intention to kill whether actual or *dolus eventualis*. It was agreed by both counsel therefore that the issue for determination by the court is whether the accused persons negligently caused the death of the deceased. As already stated above, the accused denied causing the death at all.

The common cause facts are that the deceased **THABILE NCUBE** was 4 years six (6) months old at the time she lost her life. The 1st accused is a traditional cum faith healer who lives in Makhokhoba and conducts healing and prayer sessions from a shrine in a bushy area near Amakhosi Centre in Makhokhoba. The 2nd accused was the deceased child's mother.

It is also common cause that the child, (deceased) during her lifetime, was fit and well. She however had a disability in that she had no speech meaning she was dumb though not deaf. It is also not in dispute as stated by her mother that she was attending speech therapy at Mpilo Hospital in Bulawayo once every two (2) months.

It is also not in dispute that in between the speech therapy sessions on 5 March 2019 accused 2 took the now deceased to accused one's shrine. Accused one prayed for her. Thereafter the two accused and one Munkuli Elinah Ncube, who has not been charged, made the child drink a concoction of raw eggs, salt and water. This was repeated in different doses on the 5th, 6th and 7th March 2019. Of course the 2nd accused as the child's mother would give certain dosages of the concoction to the child at home. The court would not waste time going overdrive on the dosages administered to the child for the following five (5) reasons

(a) There appears to have been no specifically and properly prescribed dosage.
(b) There appears to have been no proper supervision by the prescriber of the muti (1st accused) to see to it that the muti is given properly as required especially since there was no written prescription as to dosage and times.
(c) The three (3) women who testified especially Mnkuli Elinah Ncube and the 1st accused seemed to testify in a manner that was calculated to minimise their culpability. This was expected. Although she testified as a state witness, Elinah Ncube revealed that she took part in preparing and administering of the concoction. I may state herein that the court had not been advised, perhaps inadvertently, that Elinah had at some stage taken part and therefore she had not been warned in terms of the Criminal Code.
(d) In any event, Doctor Jekenya tesfied that it is not so much as to what dosage exactly could or could not have caused the death but rather the negligence.
(e) Suffices to say that the 2nd accused ultimately agreed under cross-examination that in the final analysis, on the 7th of March 2019, the deceased child must have taken at the shrine about 900 ml of the concoction alone, plus wash down water, and the porridge that she had eaten just before going to the shrine.

In addition to the not so helpful evidence of Elinah Ncube, the state also relied on evidence of Doctor I Jekenya. He is a medical Doctor at Mpilo Hospital. He testified that from the facts before him and from his analysis and findings, the child was given what had been

termed a "Mpofana concoction." Although he was no so much concerned about the quantity, even 2 ½ cups of the concoction as stated by the accused, also would have been too much for the small stomach. Exhibits 3 and 6 show the contents found in the child's stomach and how the analysis was done. Exhibit 3 is the Post Mortem Report No. 66/46/2019 by Doctor I Jekenya. Exhibit 66 is the Concoction Analysis Report by the Government analyst D Zulu.

In short Doctor Jekenya's evidence was that the accused were grossly negligent in the manner they administed the Mpofana concoction. "Manner" in the sense that taking into account all the circumstances. He says that this caused the contents to go up the stomach and then backwards into the wind pipe (airways) leading to what he termed "stomach contents aspiration." The Doctor also told the court that salt on its own is very dangerous. A concoction of course salt, raw eggs and water would be more dangerous. The Doctor thus stated that it matters not that the Mpofana concoction was not found to be toxic or poisonous, but from that kind of ingestion, the child would have died anyway in her sleep.

The Doctor also admitted that there seems to have been no intention to kill but negligence occasioned by people's engagement in what they were not qualified to do or at least not well versed with. He stressed the point that whether one is a Conventional Medical Doctor or a Registered Traditional healer, it is important for anyone treating a child, to prescribe specific requirements of dosages plus times and other factors. Where one foregoes such specifications, that would qualify as negligence which to him, would be gross negligence. *In casu*, the child was dumb and therefore unable to easily and satisfactorily communicate.

The accused should have taken extra precaution. The two accused persons unfortunately did not make good witnesses. They maintained that they were innocent and spent most of the time trying to mislead the court that they did not give the child that much of the concoction. However as already stated above, the 2nd accused perhaps due to the conscience and motherly instinct, eventually admitted that the child on the 7th must have taken very close to a litre of the concoction only. Ultimately her evidence, coupled with the last part of her confirmed warned and cautioned statement corroborated the brief history and the findings in exhibit 3 and 6. They both however ultimately admitted negligence. The court has been urged to reject the evidence of a Conventional "Western" medical Doctor to explain and prescribe negligence on faith or traditional healers.

(1) This court knows not of any legally recognisable traditional healer's findings or reports that have been used in the courts. In any event, none have been produced on behalf of the accused.

(2) 2nd accused herself admitted that in their field of traditional medicine, they do not as yet have a system that can be used in the courts to prove cases of deaths such as in the case in Pathology.

In the case of *Ruzane v Paradza and Another* which dealt with a disputed chieftainship, it was held that,

> "In essence, the function of an expert is to assist the court to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable."

and also in *Tavengwa Timire v The State* HB 197/19 where this court pointed out thus:

> "From the above, it would make a mockery therefore of our legal system on expert evidence if a court were to call an expert witness, accept his expertise and hear his evidence and thereafter be persuaded by mere cross-examination of the expert witness by a lawyer who is himself not an expert in the same field, to agree that the witness was mistaken or not telling the truth in the absence of contrary evidence.
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> In short, once an assayer for example has been called to testify, and testifies that the "stuff" produced in court as exhibit is "gold" the court cannot and should not be persuaded, in the absence of a contrary assayer or assay report to hold that the stuff is in fact not gold because in so doing, the court officials would be proclaiming themselves to be experts in minerals, the same expertise they did not have, and which necessitated the calling of an assayer."

From the foregoing, the court is satisfied that the two accused persons negligently caused the death of the deceased.

Accordingly, the accused are found not guilty and acquitted of murder.

They are found guilty of Culpable Homicide.

Sentence

In assessing sentence, the court will consider that the accused persons are female first offenders. Our courts have always acknowledged that imprisonment imparts more heavily on

females than on their male counterparts. The courts have therefore tended to lean on the side of leniency where female first offenders are involved especially in cases where the offence committed is a rare type and where recidivism is unlikely.

The two accused are family women. Second accused is a 61 year old widow who is clearly of ill health. She had quite some difficulties walking her way around the courtroom. Both were very close to the deceased who they treated as a special child. Accused 1 was the deceased's biological mother. Though not a blood relative, accused 2 was almost a grandmother to her. She is a properly registered traditional healer.

Although in court they initially denied being negligent they both admitted, though belatedly that they were indeed negligent. What weighs heavily also in their favour is their intentions were for all intents and purposes good intentions. It is acknowledged by all, including the state and the child's father, who was staying with them at the time, that the desire had always been to help the child discover her speech. The court considers that the rejection and stigmatisation by society of the accused following the child's death was punishment on its own. The two doctors in this case found in their analysis that the concoction was not toxic or poisonous.

This court however, and as usual, will not condone the loss of life that was so special. Traditional healers, faith healers and prophets alike will better be warned that the courts will not look aside as they at times experiment with people's lives. Negligence that leads to the death of a human being, let alone a child will not be tolerated. *In casu*, the child could not communicate effectively as she was dumb and the accused should have taken extra precaution.

They are each sentenced to four (4) years imprisonment which is wholly suspended for 5 years on condition she is not, within that period, convicted of an offence involving the negligent killing of another person, for which upon conviction, she is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Messrs Shenje and Company, accused's legal practitioners