

THE STATE  
versus  
GORDEN MHLANGA

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE, 12 March 2019, 14 March 2019

### **Criminal Trial**

ASSESORS: 1. Dr Sana  
2. Mr Chipere

*Mrs J Matsikidze*, for the State  
*Ms F Maroko*, for the accused

MUZENDA J: The accused is charged with murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It is alleged that on 20 May 2018 and at Chikware Village, Chief Musikavanhu accused unlawfully caused the death of Anzilla Mhlanga by striking her on the head with a machete, intending to kill Anzilla Mhlanga or realising that there was a real risk or possibility that his conduct might cause death and continued to engage on the conduct despite the risk or possibility resulting in injuries from which Anzilla Mhlanga died. The accused pleaded guilty. However a plea of not guilty was entered.

Accused in his defence outline annexure B denies the charge. He states that he neither formulated any intention to kill the deceased nor did he foresee that the assault that occurred between him and his erstwhile wife's family members would lead to the death of the deceased. He incorporates the confirmed warned and cautioned statement which he made to the police dated 4 June 2018 where the accused stated that he was sorry for what happened. When he struck his wife Tendai Sithole, he did not know that she was carrying Anzilla Mhlanga on her back. He only had a grudge with his wife. He heard through rumours that she was engaging in extra marital affairs. He did not intend to kill Tendai Sithole. He only wanted to injure her. The confirmed warned and cautioned statement is exh 4. He added that if anything he tried to defend

himself from being assaulted and was only using the machete as a defence weapon. He prayed that he be found not guilty

The accused is the biological father of the deceased who was only seventeen months old. The accused had sired this baby and two others with Tendai Sithole. Both accused and Tendai Sithole originate in the same village and had long standing marital problems. As a result of the marital disputes, Tendai Sithole, would often flee from the accused's to her maiden home. In May 2018 she again fled to her father's home together with the deceased. On 20 May 2018 at around 2000 hours she was at her father's homestead along with the other family members. She was sitting around the fire. The accused crept out of the darkness armed with a machete. Upon arrival he did not announce his arrival but used the machete to discriminately strike the Sithole family members including Tendai Sithole his wife who was carrying deceased on her back. In attacking Tendai Sithole, with the machete, one of the blows struck the deceased on the head. The accused then fled from the scene upon noticing an approaching motor vehicle. The same vehicle rushed the injured to St Peter's Mission Hospital where the deceased succumbed to the injuries.

The post mortem shows that there was laceration on the temporal occipital region about 10 centimetres long and 4 centimetres deep, visible fractured scalp and on the date of examination by Dr Stephen Mbiri, the deceased was actively bleeding. The deceased developed meningitis and had possible subdural hematoma. The doctor concluded that the cause of death was very severe head injury secondary to assault with a sharp object. The post mortem was admitted as evidence by consent and marked as exh 1.

The machete used by the accused to attack the Sithole family as well as the deceased was produced in court and accepted as evidence and marked as exh 2. Exh 3 was the weight certificate which shows that the machete weighs 600 grams the length of the handle is 15cm, the length of the blade is 45 cm and overall length of the machete is 60 cm. Exh 4 is the confirmed warned and cautioned statement already alluded to hereinabove. Exh 5 is the sketch plan. In terms of s 314 of the Criminal Procedure and Evidence Act, the evidence of the following witnesses was admitted by the defence and the witnesses' testimony was disposed with. Alpha Sithole, Morelife Mabhoko, Happyson Komichi Sithole, Hlekulani Magodho, Sam Mafuta, William Mazarura, Edmore Faya and Dr Stephen Mbiri.

To prove its case, the State called Tendai Sithole to testify. Accused is her husband since 2009 but currently they do not stay together. After marrying the accused, the witness told the court that accused sojourned to Johannesburg, South Africa. When he returned, he told

Tendai Sithole that whilst in Johannesburg he had a dream where his wife, Tendai was indulging in illicit affairs with a man. When Tendai asked the accused to identify that paramour, accused assaulted Tendai and he used a stick to assault Tendai. Accused instructed Tendai to pack all her belongings and go to her parental home. Tendai refused to go but the accused produced an okapi knife, dragged her, and left her at her parent's homestead. Tendai Sithole went to stay with her parents.

On 20 May 2018, she was at her parents' home around 8pm whilst Tendai was seated around the fire with her mother and 2 brothers. Her grandmother and father had retired already. Deceased was strapped at the back of Tendai. Whilst seated by the fire she heard a sharp scream. Upon checking she realised it was coming from her mother. She then identified the accused as the perpetrator. All of a sudden she pronounced that the intruder or attacker was Rod's father. Accused jumped the fire to reach where Tendai was. Tendai tried to run away but accused caught up with her and struck her on the shoulder and she fell. She recovered and stood up to resume the attempt to flee but the accused pursued her and struck Tendai for the second time, that second blow landed on Anzilla, the child and badly injured the child's head.

The rest of the Sithole members had ran indoors and secured their doors, Tendai and her mother were outside. When the blows were delivered by the accused the witness Tendai was running and accused pursuing. Accused also struck Tendai's mother on the leg and she fell. Tendai then ran into the house where her father was to inform him that Anzilla had died.

There was mayhem at Sithole's homestead, the grandmother who had retired emerged from the house screaming and Tendai's mother was yelling for help. A motor vehicle approached the homestead and upon its sight accused escaped into the darkness. The witness identified the machete, exh 2, as the one they as husband and wife used to use at the homestead. Accused did not render assistance to these people who had been injured. She denied that the Sithole family assaulted nor threatened to assault the accused. Tendai does not know what triggered the assault, accused did not say anything before, during or after the attacks.

The deceased sustained injuries on the head and one could see the inside of the skull of the child. Tendai disputed that she had been unfaithful to the accused. Tendai Sithole was cross-examined by the defence counsel but she maintained her story throughout. Her evidence fell in line with that of Alpha Sithole, Morelife Mabhoko, Happyson Komichi Sithole, Hlekulani Magodho whose evidence had already been admitted as common cause by both the State and defence. All in all five people were injured by the accused using the machete.

After the State had closed its case, the accused testified. He adopted his defence outline which included his extra curial statement to the police which was confirmed by a Magistrate. He repeated that there was bad blood between him and the Sithole family. He suspected that his wife Tendai was having extra marital affair with some man. Tendai's parents supported Tendai and Tendai's father was not happy with accused because he had paid very little money towards lobola.

On 20 May 2018, the fateful day, he had gone to the Sithole family to reconcile with Tendai. When he arrived at the Sithole homestead he started to fight them and according to accused, the Sithole family retaliated and one of them struck accused with a log on the back of the head. However, he was not examined by the doctor. At the homestead he discovered that he was surrounded by the Sithole family so he used the machete to defend himself in order to find his way out. He initially armed himself with a machete because it was dark but did not intend to use it because his mission towards the Sithole family was for discussion. He struck the deceased by mistake. He did not realise that Tendai had a baby strapped on her back. He only knew that Anzilla had been injured through the papers taken to him by the police. He denied intending to kill the Sithole family. He only wanted to injure Tendai.

The accused under cross-examination by the State counsel admitted that the machete was a dangerous and lethal weapon, he went to the Sithole residence under cover of darkness and he used the machete on five different people. He struck the wife on the shoulder, he does not recall how the child was struck. He also admitted that he had no defence to the charge of murder.

The following issues are common cause. Accused and Tendai Sithole's marital relationship has been deteriorating since accused travelled to South Africa. Attempts to restore normal relationship had failed. Accused had been assaulting and abusing Tendai on more than one occasion Tendai had gone back to stay with her parents and that was the position on 20 May 2018. Accused armed with a machete decided to leave his home and attack Sithole family at night. He surreptitiously crept to the homestead of Sithole and randomly assaulted all in all five people who sustained serious injuries, the most serious one being sustained by Anzilla who succumbed to death leading to these proceedings:

However what remains to be determined given the foregoing evidence is whether or not the accused with actual or constructive intention caused the death of the deceased Anzilla Mhlanga, that is to decide the accused's liability in light of the fact that he struck deceased who was strapped at her mother's back. All the actions of the accused were actions of intention to ensure that death ensued.

The question as formulated in *S v Ncube* SC 194/04 is whether or not it was accused's unwavering intention to bring about the deceased's demise. If the accused intended not to kill and thought that the victim would remain alive, death is not his intended objective. In this matter, it is our finding that on 20 May 2018, the accused physically and mentally planned to go and attack Sithole's family. He sharpened the machete and carried it to the scene. He conveniently chose a night time to avoid immediate identification and surreptitiously crept silently like a leopard to the Sithole homestead to launch a surprise attack and he managed to do that.

Upon arrival he did not announce his presence but pounced on the unsuspecting mother in law, Tendai's mother, Mrs Alpha Sithole. When Tendai identified accused and yelled out that it was Rod's father, accused went for her. He leapt over the hearth launching his attack onto Tendai. He went on to pursue Tendai without uttering any word to anyone. He attacked Tendai Sithole not once but twice and did so directing his blows on very life threatening portions of the body, worse so using an extremely lethal weapon well sharpened.

Accused pursued Tendai from behind and we are satisfied beyond doubt that accused clearly saw that deceased was secured by Tendai at the latter's back. When accused lodged the machete he was aware of Anzilla, hence accused intentionally attacked Tendai with an intention to kill Tendai. Even when he attacked other members of the Sithole family he had the requisite intention to kill them. We wonder why the accused was not charged with their attempted murder.

The accused set out to kill deceased's mother and was at all material times very conscious that at the time he struck Tendai she was carrying the seventeen month old Anzilla but nonetheless struck Tendai with a machete and hitting deceased on her head thereby causing her death. It has also been established by the State that accused while pursuing another objective of killing Tendai foresaw the death of Anzilla carried by Tendai as substantially certain a result to that activity but proceeded regardless. See *S v Mugwanda* 2002 (1) ZLR 374.

Accused deliberately pre-planned the whole onslaught. The mental element in this case is clear. This court will reject accused's argument that his motive to go to the Sithole family on the night in question was peacefully intended. Why would one carry a weapon at his back if all was well? The evidence clearly shows that accused upon arriving at Sithole homestead went berserk assaulting the occupants. It is fortuitous that only Anzilla perished. We also do not agree with Ms *Maroko*, counsel for accused that the accused should be found guilty of culpable homicide. On the other hand, we are convinced by Mrs *Matsikidze*, for the State, that s 57 (b) (ii) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] applies; it provides that a person shall be guilty of "murder or infanticide as the case may be, if he or she realised that his or her conduct involved a real risk or possibility of causing death of someone other than his intended victim."

We agree with the State that accused intended to kill Tendai Sithole but then fully aware of Anzilla he delivered a fatal blow on her and the blow caused the death of Anzilla Mhlanga.

Accordingly, accused is found guilty of murder with actual intent.

### **Sentence**

In reaching out an appropriate sentence, we have taken into account all mitigatory and aggravatory factors advanced in your favour by your legal practitioner Mr *Muraicho*, standing in for Ms *Maroko*. You are 37 years of age, first offender, and have 2 children who need your support. You are sorry for causing the death of your own daughter thus experienced self-loath. However you stand convicted of a serious offence of murder which may attract capital punishment, this is in tandem with sanctity of life principles. You killed an innocent seventeen month child who would ordinarily expect to be protected by you, you killed her during an act of domestic violence.

You subjected deceased's mother to routine beating to the extent that she had to leave the matrimonial home and in this case you accused her of infidelity which she denied. The deceased died a painful death even during post mortem she was still bleeding. It was an excruciating experience for her age and after 5 days of such unimaginable suffering she succumbed to death.

On the day in question you exposed the entire family to the jaws of death just because you felt that they were supporting their daughter. In our modern society you should resort to peaceful means of resolution of disputes than to use violence, worse against vulnerable people

like your wife and minor children. Obviously you will experience general abhorrence from the community you come from and society at large.

Accordingly, you are sentenced as follows:

25 years imprisonment.

*National Prosecuting Authority, State's legal practitioners*  
*Mugadza Chinzamba & Partners, accused's legal practitioners*