

THE STATE

Versus

MELAPHI NDLOVU

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
HWANGE HIGH COURT CIRCUIT 8 & 12 NOVEMBER 2012

K. Ndlovu assisted by Ms Munsaka state counsel
T. Mukuku defence counsel

Criminal Trial

KAMOCHA J: The 24 years accused stands accused of the crime of murder where it is alleged on 10 March 2012 at Dumeya Bottle Store at Komayanga Shopping Centre, in Nkayi he did wrongfully, unlawfully and intentionally kill and murder Phumulani Sibanda a male adult in his time therebeing.

On arrangement he stated that he understood the charge but did not admit it as he thought he was defending himself. When asked by the court if by that he was admitting stabbing the deceased in self defence he said yes. When further asked what he had stabbed him with and where on the part of his body and how many times, his reply was that he had stabbed him with a knife once and indicated the chest. A plea of not guilty was then entered which plea the defence counsel said was in accordance with his instructions.

The state outline was then read and produced as exhibit 1 and I do not propose to read it all over again. I shall, however, regurgitate what the accused said in his defence outline which reads thus:-

“Accused pleads not guilty to the charge of murder preferred against him.

1. He will state that on the day in question he was at Dumeya Bottle Store drinking beer and that he was very drunk. He asked the bar attendant to sell him matches.
2. It would appear that he had disturbed the bar attendant who was talking to the deceased.
3. The deceased asked him why he was not asking for permission from him to talk to the bar lady.
4. Accused replied that he only wanted a box of matches and did not want to talk to the bar lady.
5. Deceased then produced a knife intending to stab the accused.

6. Accused wanted to run away but deceased followed him and put him in a corner.
7. Fearing for his life accused produced his knife and stabbed deceased.
8. He will state that he was very drunk and that he believed he was acting in self defence.
9. He will state that it was not his intention to kill the deceased.
10. He feels very sorry and he is apologetic for having caused the deceased's death.

Wherefore he prays that he be found not guilty and be acquitted of the charge of murder and he offers a plea of guilty to culpable homicide."

The accused made an extra curial statement to the police which was confirmed by a resident magistrate at Nkayi on 20 June 2012 and had this to say in it:-

"I do admit to the charge. What happened was that I wanted to buy from the bottle store. The lady who was the bar lady was seated outside with one Sibanda Phumulani. Phumulani Sibanda did not take kindly my talking to the bar lady which he interpreted as a sign of despising him as he was courting the bar lady. I did not respond to his remarks. Sibanda Phumulani then drew up a knife and tried to stab me but I blocked it. I do not even understand how I did it. I then drew up my knife and stabbed him on the chest and went to buy at Mbiba. I did not know that he eventually died."

The warned and cautioned statement was made when events of what happened were still fresh in his mind. He does not mention in it that he wanted to run away but was followed by the deceased who put him in a corner. His extra curial statement varies from his defence outline wherein he stated that the deceased drew out a knife and delivered a blow with it which he miraculously blocked. He makes no mention of being followed and cornered.

The suggestion of being followed and cornered was a clear after thought. Accused would have mentioned it in his warned and cautioned statement exhibit 3 if it had taken place.

The 4th exhibit was an affidavit of Constable Nicholas Sibanda who identified the body of the deceased to Doctor Sanganai Pesanai who examined the remains of the deceased and compiled the post mortem report exhibit 5.

The doctor said the deceased had been stabbed with a knife on the chest. He observed the following signs of violence on the remains of the deceased:- swollen right frontal region; stab wound (4 x 1 x 8cm) left chest, 1cm from the nipple, 4cm from the midline and 6cm from the left clavicle.

The internal examination showed that the knife had perforated the left ventricle, cardiac tamponade. The lung was perforated in its left lower lobe resulting in left haemothorax of 600ml.

The doctor concluded that death was due to (a) haemothorax; (b) perforated heart following a (c) stab wound to the chest and opined that this was a case of homicide.

The state counsel advised the court that the knife that the accused had used to stab the deceased had been recovered but got lost while in the custody of the police.

After leading viva voce evidence from Cosmas Moyo and Venson Ncube the evidence of the following witnesses was admitted by consent as it appears in the state outline in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. Samukeliso Ncube, Isaac Rashamira, Maxwell Chiratidzo, Brian Chide, Constable Nicholas Sibanda and doctor Sanganai Pesanai.

The state counsel applied for the evidence of Sikhohlisiwe Sibanda to be expunged from the state outline as the witness was said to be living in South Africa now. The defence counsel had no objection and the evidence was accordingly expunged from the record.

Venson Ncube's evidence was that he was a member of the neighbourhood watch committee for the Kamayanga area of Nkayi since 1988. He knew both accused and deceased as locals of that area. The deceased was married to his daughter. He was a distant relative of the accused who he regarded as his son.

During the early hours of March 2012 he received the news of the death of the deceased. He led a team of people who went to effect a citizen's arrest of the accused as he was reported to have run away into the bush. The searching team went in search of him into the bush. When he was located he took to his heels but was pursued and apprehended. Some members of the search party threw stones at the accused as he was running away. One of the stones struck the accused at the back of his head and knocked him to the ground. That enabled them to apprehend him. When some people wanted to assault him with a log the witness stopped them. The witness observed that he had sustained an injury at the back of his head where he was struck with the stone and had no other injuries on him.

This witness' testimony is that he felt a distinct smell of alcohol on the accused's breath and the witness formed an opinion that the accused was drunk.

When the witness asked him why he had stabbed the deceased his reply was that it had just happened. When asked by the defence counsel if the accused had not mentioned that he was defending himself when he stabbed him the witness was emphatic that the accused had never mentioned that. All he was able to say was that it had just happened as he had taken too much alcohol. A thought had just come to him that he should stab the deceased.

The witness said he had no reason to lie against the accused. The key witness was Cosmas Moyo. He was a good friend of both the accused and deceased. On the fateful day he

went to Dumeya Bottle Store at 7pm. Both accused and deceased were there but he did not know when they had arrived but they arrived after him. Both were drinking beer. He drank with accused.

At some stage the bar lady was sitting outside the bottle store near the door with the deceased. The accused called her to go and sell him a box of matches where he was.

She stood up to go and serve him. The deceased also asked her to bring him cigarettes since she was going into the bottle store. As she was walking towards the accused he hurled some obscenities towards her swearing at her by her mother's private parts.

It was then that the deceased stood up and approached the accused and asked him why he was swearing at the bar lady. He asked the accused if he was doing so because he also had asked her to bring him some cigarettes. Accused turned the insults towards the deceased who insulted the accused back. The two got hold of each other and started pushing and shoving each other. The witness then got up and approached them and told them not to fight. He then asked them what they were fighting for.

The deceased then drew up his knife. The accused followed suit. The two threatened to stab each other as they continued to exchange a barrage of insults against each other. They, however, appeared to have heeded the witness' reprimand and seemed to stop the altercation.

The deceased closed his knife and put it into his trousers pocket. Although the quarrel seemed to have been coming to an end the accused continued to have the knife in his hand and was waving it by the door of the bottle store. The bar lady then told the witness to go and finish off his beer as she wanted to close the bottle store. She also called the deceased to go round the counter and use the back door to exit the bottle store.

The deceased heeded her advice and went to the back of the counter but did not go out through the back door. Instead, he decided to exit the bottle store through the main entrance at the front. The accused was standing by the main entrance at the front but inside the shop.

After the deceased had gone round the counter and was heading for the main entrance the accused who still had his knife in his hands met him and without saying anything stabbed him with a knife on the left side of his chest – below the breast. The deceased was not holding his knife when he was stabbed. He had folded his knife and had put it in his trousers pocket before he even went behind the counter. The accused immediately left the scene and went away.

The witness said the accused was not defending himself from anything when he stabbed the deceased as he had closed his knife and put it in his pocket. Neither was the accused cornered as he was by the door and appeared to be blocking the deceased which is the reason

why the bar lady suggested the deceased should go round the counter and exit the shop through the back door. This court makes a finding that the accused was in no danger when he stabbed the deceased. Instead the accused himself was blocking the deceased as he stood by the door way waving a knife.

This court also finds that the accused was not cornered at all when he stabbed the deceased. In fact the suggestion that he had been cornered when he stabbed the deceased was not persisted with and was abandoned when the accused gave his evidence.

Cosmas Moyo was a good witness who gave his evidence clearly and fairly. He had no reason to lie against any of his two friends. His story revealed that the accused started all the trouble by hurling a barrage of insults at the bar lady without any reason. The deceased was the first to draw out his okapi knife. He folded it and put it in his pocket when he remonstrated with both of them. His story also established that the accused was not defending himself from anything. He was in fact the aggressor as he stood by the door way waving a knife.

Venson Ncube corroborates the evidence of Cosmas Moyo in that when the accused was asked why he had stabbed the deceased he never said he had done so in self defence. He said he had been drinking and just felt like stabbing the deceased.

The accused had no witness to call but gave evidence himself. He abandoned the suggestion that he had been cornered when he stabbed the deceased. He vacillated between defending himself and admitting that the deceased did not have anything in his hands when he stabbed him. Quite clearly he was not defending himself from any danger. He in fact was the aggressor. The deceased was not posing any danger to him.

What is he guilty of? The accused started the whole trouble and did not want matters to come to a rest. He stood by the doorway blocking the deceased from going out. The bottle store was well lit. He aimed his blow at the chest which houses vital parts of the human being. He used a knife with a blade of at least 8cm long. He inflicted an injury which is 8cm deep into the chest cavity and perforated the left ventricle and perforated the left lower lobe of the lung. The blow was delivered with dexterity. He intended to kill that is why when asked why he had killed the deceased he said he just felt like doing so and did so.

In the result I propose to find him guilty of murder with actual intent.

Extenuation

State Counsel

The state counsel concedes that the accused was drinking and was drunk to a certain extent. Hence there is extenuation in this case. That is all.

Defence Counsel

I concur with my learned friend. That is all.

Ruling by court

This court finds that the accused had been drinking alcohol. The evidence of Cosmas Moyo which the court has accepted is that he drank with the accused. The two bought a total of 10 calabashes of opaque beer which is 20 litres as a calabash is 2 litres. They also drank a half jack of Nicholai Vodka. They shared the beer with other people who would join them when the beer was bought but went away when it finished only to join them again when more beer was bought.

Venson Ncube who arrested the accused the next morning said he felt a distinct smell of alcohol on the accused's breath. Cosmas Moyo rates the accused as having been moderately drunk and knew what he was doing. He did what he did through the influence of alcohol. The court finds that as an extenuating circumstance.

Sentence

The accused is aged 24 years and is a first offender. He had been in pre-trial incarceration for 4 months before he was granted bail. That is all that can be said in his favour.

The accused is in that age group which is causing a lot of trouble to our community. At the slightest provocation or no provocation people are killed using lethal knives or other dangerous weapons such as axes or logs. Both defence counsel and state counsel told the court that such crimes were regrettably on the increase at beer drinks. Both counsels called for long custodial sentences to be visited on the offenders. I agree.

The accused *in casu* was the aggressor. He hurled a barrage of obscenities at the bar lady for no good reason. He swore at her by her mother's clitoris when she was in fact going towards him to serve him. When the deceased asked why he was doing that the accused turned his wrath towards him. He insulted the deceased who returned the insult to him. Their friend Cosmas Moyo remonstrated with them. Both had drawn out knives from their pockets but when Cosmas Moyo remonstrated with them the deceased closed his knife and put it in his pocket. But the accused did not want matters to come to rest. He kept on waving his knife. His knife had a blade of at least 8cm. He wanted to have the last say.

The deceased was posing no danger to him when he was stabbed. He in fact stabbed him when the noise had been diffused. The accused did not show any remorse. He never tried to assist the deceased after he had fatally stabbed him. He just went to another shop and

bought matches and went away. He threw away the murder weapon in order to destroy evidence. The knife was, however, recovered but without his assistance.

The accused was lucky to escape capital punishment. The law provides for life imprisonment for this crime which the accused has also escaped because this court holds the view that this case does not deserve such a punishment. It deserves a long custodial sentence although the court does not agree with the sentences proposed by both counsels as that would tend to trivialize such a serious offence. Society will revolt if inadequate punishments are meted to offenders of such serious crimes.

In the result the sentence of this court is as follows:-

Thirty years imprisonment.

Criminal Division of the Attorney General's Office, counsel for the state
Maronedze, Mukuku, Ndove & Partners, legal practitioners defence counsel