

THE STATE

Versus

KHULEKANI NDLOVU

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mr Sobantu & Mr Ndlovu
HWANGE CIRCUIT COURT 6 MARCH 2018

Criminal Trial

Mrs C. Gorerino for the state
N. Ndlovu for the accused

MAKONESE J: The accused has been arraigned in this court on a charge of murder. The allegation being that on 31st May 2017 and at Mzizi Mine stand number 1 Village 7, Stone Acre, Inyathi the accused assaulted Busani Ndlovu on the head once with a stone intending to cause his death or realising that there is a real risk or possibility that his conduct may cause the death of the deceased.

The accused tendered a plea of not guilty to the murder charge and offered a limited plea of guilty with respect to culpable homicide. The state has conceded that on the facts of the case the plea of guilty to the lesser charge of culpable homicide is appropriate. A statement of agreed facts tendered into the record has been marked as exhibit 1. The brief facts of the matter are that at the material time accused and the deceased were workmates at Emerly Ngwenya's mine, known as Mzizi Mine, Stone Acre, Inyathi. On the 29th May 2017 the accused, deceased. Fanuel Ndlovu, Mduduzi Ndlovu, Precent Maphosa and Talent Moyo had been engaged by Emerly Ngwenya to work at her mine. On 31 May 2017 and at around 11:00 hours the group proceeded to the mine to start their respective duties. While they were preparing their mining tools and equipment, an argument erupted between deceased and accused over a blanket they were sharing. The argument degenerated into a fight and deceased picked up a log and struck the accused once upon the head. Fanuel Ndlovu and Mduduzi Ndlovu intervened and restrained the accused and deceased from fighting. The group then proceeded to the mine shaft whilst walking

in a single file, with the accused walking behind the deceased. Whilst they were on their way to the mine, the argument over the “shared blanket” resumed. The accused lost his temper and picked up a stone, struck the deceased once on the head. The deceased sustained serious injuries and fell to the ground. An attempt was made to administer first aid upon the deceased by his workmates. The deceased later died on his way to Mpilo Hospital as a result of the injuries sustained in the attack.

The state has tendered into the record a post mortem report compiled by Dr S. Pesanai at United Bulawayo Hospitals on 5th June 2017, following an examination of the remains of the deceased. The cause of death is listed in the post mortem report as:

- (a) Subdural haematoma
- (b) Depressed skull fracture
- (c) Head injury
- (d) Assault

On marks of violence the post mortem report reveals that the deceased had a saturated wound on the right parietal region.

From the evidence that has been adduced in court we are satisfied that the accused negligently caused the death of the deceased. There is no evidence to prove that accused had the requisite intention (*mens rea*), whether actual or constructive to cause the death of the deceased. In the result, accused is found not guilty and acquitted on the murder charge. Accused is however found guilty of culpable homicide.

Reasons for sentence

In assessing an appropriate sentence the court takes into account all the mitigating features of the case as outlined by the accused’s defence counsel. Accused is aged 27. He is married with 2 children. The youngest child is aged 2 years. The accused is the breadwinner for his family. At the time of the offence accused was employed at a mine. His income was however no disclosed. The court was advised that the accused was earning a commission based

on the production at the mine. The accused was provoked by the deceased who assaulted him on the head with a log following a misunderstanding regarding a blanket the two were sharing. The deceased rendered first aid upon the deceased at the scene. Accused has admitted committing the offence thus indicating a certain measure of remorse and contrition. In spite of these weighty mitigating features of the case the court notes that the accused delivered one fatal blow upon the head of the deceased. The degree of force used must have been excessive. Although accused was provoked, this did not warrant the form of retaliation which was totally disproportionate to the initial attack. The post mortem report reveals that the deceased died as a result of (a) subdural haemotoma; (b) depressed skull fracture; (c) head injury. This was evidently a serious assault. The courts have stated on countless occasions that violence will not be tolerated as a form of dispute resolution. These courts have a duty to protect the sanctity of human life. The only appropriate sentence in this matter is a term of imprisonment. The court thus imposes the following sentence:

“Accused is sentenced to 6 years imprisonment of which 1 year is suspended for 5 years on condition accused is not within that period convicted of an offence involving violence and for which upon conviction accused is sentenced to a term of imprisonment without the option of a fine.

Effective sentence 5 years.”

*National Prosecuting Authority, state’s legal practitioners
Ndove, Museta & Partners, accused’s legal practitioners*