

THE STATE
versus
MAXWELL NYAMHURI

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 28, 29 November 2016, 6, 7, 8 March 2017,
& 26 May 2017

ASSESSORS : 1. Chivanda
2. Msengezi

Criminal Trial

M. Manhamo, for the State
H. Bhaureni, for the accused

PHIRI J: The accused was charged with

1. Murder as defined in s 47 of the Criminal Law (Codification and Reform) Act
[*Chapter 9:23*]
2. Defeating or obstructing the course of justice as defined in s 184 (1) (a) of the
Criminal (Codification and Reform) Act [*Chapter 9:23*]

OR

Alternatively

3. ARSON

The allegations by the State were that the accused, at house number 9 Mateyaunga Street, Rimuka, Kadoma, unlawfully and with intent to kill, murdered RUDO MANDIZHA or realising that there was a real risk or possibility that death might result, assaulted the deceased with fists and open hands all over the body and a hoe on the head several times thereby killing the said RUDO MANDIZHA instantly.

In respect of count 2 of the State alleged that on 12th day of February, 2016 and at house number 9 Mateyaunga Street, Rimuka Kadoma, the accused with intent to cause judicial proceedings to be defeated or obstructed, set the house on fire in which RUDO MANDIZHA the deceased was in, and escaped to Harare.

In respect of the charge of ARSON it was alleged that the accused set on fire a house, House Number 9 Mateyaunga Street, Rimuka, Kadoma, in which he and the now deceased RUDO MANDIZHA used to reside.

It must be stated from the outset that in the conduct of its case, and indeed in its closing arguments, the State concentrated mostly on the first count of Murder and accordingly this court takes judicial notice and holds that the State chose not to pursue count 2 (defeating or obstructing the course of justice) and count 3 (ARSON).

The State lined up twelve witnesses to prove its case. The State sought formal admission, of the following witnesses' evidence and the defence consented to its admission, that is:

- (i) TARET MANDIZHA
- (ii) WINNIE SAVERI and
- (iii) NYASHA CHIVENGA

TABETH MANDIZHA

Her evidence was to the effect that she was a sister to the deceased, RUDO MANDIZHA, and that on 12 February, 2016 and at around 0120 hours she was asleep and received a phone call from the accused informing her that he had killed her young sister the deceased.

His exact words were;

“Munin’ina wenyu ndamuuraya. Ndapedza izvezvi uye ini ndakuenda kuno zviuraya.”

Meaning that he had killed the deceased and was now going to commit suicide.

WINNIE SAVERI

Her evidence was to the effect that she resides at 3568B Rimuka Infill, Kadoma. Accused is her brother. On 12 February 2016 and around 0200hrs she was asleep when Wilson Nyamhuri arrived with her brother and sister. She learnt from him what had happened to the deceased and that the accused had accompanied them to Mupedzanyota Bar and told them to proceed to their grandmother’s house. On the following morning police arrived looking for accused and later left. She accompanied Wilson Nyamhuri to Zimbabwe Republic Police Rimuka for the recording of his statement and later to the scene of the crime for indicators.

NYASHA CHIVENGA

Testified that he is a duly attested member of the Zimbabwe Republic Police attached to the Criminal Investigations Department Studios, Harare.

He was on duty on 16 February when he was requested to attend to post-mortem examination at Parirenyatwa Hospital, on the remains of the deceased. He observed that the deceased had a swollen face and some head injuries. He took some photographs during the examination as per the doctor's directives.

MIRIAM CHEMHERE

Testified in court. She was a tenant at 9 Mateyaunga Street, Rimuka, Kadoma at the material time. This was the matrimonial home of the accused and the deceased.

On 12 February, 2016 at around 0100hrs to 0200hrs she was awoken by cries for help.

She heard that a person was being assaulted by a switch or belt. The sound was coming from the landlord's bedroom which was almost opposite hers.

She heard someone saying;

"I want to kill you today because if I don't kill you I will end up in jail."

The voice was that of the deceased. The deceased was pleading with the accused to solve their differences but the accused person was insisting he was going to kill her.

After that there was some silence.

Subsequently she established that accused and deceased's son WILSON NYAMHURI was trying to unlock the door. Wilson then knocked on her (the witnesses door) door and asked the witness and her husband, Nelson Musendekwa, to help him unlock his parents door.

Wilson was a student of the witness at Mupamombe Primary School, Kadoma.

The witness did not respond to the knocks. The accused indicated that if he was going to kill the witness if she came out to render any assistance. She heard Wilson and his sibling crying and also heard the deceased crying in low tones.

She then heard accused person saying;

"You are still alive I am going to strike you with a hoe."

Wilson was crying and she heard accused person's voice saying he had killed the mother and would do the same to him.

Accused asked for the keys to the main door leading to the passage. She then heard the sound of a window or bottle being smashed. She then heard accused's voice saying "give me the child."

She heard the sound of something burning. She opened her door and heard as if there were some electric sparks.

She proceeded to her friend's bedroom. This was Farai Dorcas Bonde's bedroom and knocked thereat, and, the two decided to escape through the window which had been broken. They managed to escape and proceeded to the Police Station. The house was on fire.

When they came back from the Police Station the Fire Brigade had arrived.

NELSON MUSENDEKWA

Gave evidence he resided at No. 9 Mateyaunga Street where he stayed with his wife, MIRIAM CHEMHERE

At around 0100hrs he heard accused arriving to argue with the deceased. He then heard accused and deceased's child crying. He came and knocked at their door but both him and Miriam Chemhere were afraid to get out as accused and deceased were fighting. The witness did not want to be caught up in the fight.

He subsequently heard accused shouting;

"You are still alive. I will finish you up with a hoe."

He also heard accused saying to his son Wilson;

"Come see your mother I have killed her."

The witness then observed smoke coming into their room. He was inhaling the smoke and when he tried to escape through a broken window, he was assaulted by the accused.

The witness asked the accused why accused wanted to kill him and the accused said the witness and "all" will die inside the house.

His wife was the first to escape and the witness then also made his escape through the window. They ran to Rimuka Police Station.

FADZAI DORCAS BONDE

Testified that she was a tenant at 9 Mateyaunga Street Rimuka Kadoma on 12 February 2016 and at around 0100 hours she heard accused quarrelling with the deceased. She was awake and studying as she was a student.

She initially heard a conversation pertaining to maintenance. She could tell there was a misunderstanding between accused and deceased. She heard noises emanating from their

room indicating someone was being assaulted and that there was some fighting. She heard deceased pleading with the accused to stop.

She heard deceased crying and it seemed her voice faded. She heard accused mentioning a hoe and accused indicated that he wanted to now strike the deceased with a hoe.

She then heard accused mentioning that he was going to burn the deceased in the house. She heard deceased. She heard accused sending his son, Wilson to collect keys from Miriam Chemhere.

Wilson came and knocked at the witnesses door and she asked him to ask Miriam Chemhere, his teacher, but, when Wilson knocked on their door there was no response.

When the child informed accused that he had not been given the keys accused came into the passage and said he could kill them as they were refusing with the keys she heard the sound of something being broken and smashed in the dining room. It sounded like a window. There was some silence and Nelson Musendeka came out of his room was assaulted by the accused person as he, Nelson went to the window. She heard accused telling Nelson to remain in the house.

She spoke to Miriam and thereafter realised there were flames in the house then she managed to escape through the broken window.

Two of the accused or deceased's children were crying. She actually persuaded them to cry, in the passage, so that someone could hear them.

WILSON NYAMHURI

Led evidence. He is aged 11 years old. He is a son to the accused and deceased.

He testified that on the fateful day he was asleep when he was awakened by some noise in the bedroom. He heard his mother crying. He went to the bedroom to establish what was taking place.

He tried to unlock the door and hit it until it unlocked. He went into the bedroom and discovered that the father was holding the mother by the neck and beating her with fists. The accused asked him to leave the room but he started hitting his father with fists. The deceased was not saying anything.

He left for the dining room where his brother was. He went there crying. He went back to the bedroom and found that he could not open the door. He retired to bed but later on went to the kitchen to collect a knife which he tried to use to unlock the door but failed to do so.

His father subsequently came out of the bedroom and instructed him to collect keys from one of his teachers. He went and knocked at his teacher's door but it was locked. The teacher did not respond. He went back and found that the father damaged the window and they got out through that window. He was directed by the accused to go to the gate. The father went back to the house. He saw some fire from the house and went to the gate running. The father came out of the house through the window.

The father then made them jump out the gate. The father instructed them not to look back. The accused then left him and his siblings at a place called Mupenzanhamo, a beer hall. He ordered the children to go to their grandmother's house.

Instead the children went to their Aunt's place.

ANDREW MUKWENA

He testified that he is employed as a fire fighter at Kadoma Fire Brigade. On 12 February, 2016 he was on night duty when he received a distress call that there was a fire at 9 Mateyaunge Street, Rimuka, Kadoma. He drove to the address and managed to put out the fire after putting the "horse" through the window.

There were police officers present. Some people reported that there was someone inside the burning house. He got inside the house and found the deceased lying motionless facing downwards. Some two police officers went into the room and were satisfied that the deceased had passed on.

He observed two burnt wounds on the left arm and left leg. They were two wounds close to deceased's head. The wound was from the forehead to the ear. The wounds were present wounds as blood was coming out.

The wounds depicted short cuts which could not have been caused by the fire but presumably a sharp object was used.

He ascertained the possible cause of the fire. There was a paraffin container in the bedroom which he concluded was the possible cause of the fire. The fire had burnt blankets and some clothes. It had also damaged asbestos sheets. He also observed broken window panes.

PONTIUS MUCHEZE

He is a duly attested member of the Zimbabwe Republic Police stationed at Southerton Police Station.

On 13 February, 2016 at 12.09 hours he was on duty at Southerton Police when an informant advised him that the accused was hiding in Kambuzuma 5 at number 1887 for an offence which had been committed in Rimuka, Kadoma.

In the company of other officers they raided the said house and arrested the accused.

NAISON NAISON

Led evidence that he is a duly attested member of the Zimbabwe Republic Police with 18 years' experience. On 13 February, 2016 he received a report that there was a house on fire. He attended the scene of the crime and was present when the fire fighters arrived and put out the fire.

Some neighbours to the house reported that there was somebody inside the house. He requested the fire brigade to enter inside the house and they reported that there was a lifeless body in the house.

He later took with him other police officers and photographers to the crime scene.

When he went inside the house he discovered that the deceased was in a room lying facing downwards. On close inspection he discovered that deceased had blood all over, and, had burns on her body.

There was disorder in the room and the walls were black because of smoke. There were clothes scattered everywhere.

On close inspection of the deceased he discovered she had wounds inflicted on her forehead and left cheek and there were bruises on her body, her hands and lower limbs. On close inspection of the wounds he discovered that wounds were caused by fire and also a sharp object.

He observed some debris and burnt clothes. The fire brigade team assessed that the fire may have started near the part of the bed that was slotted just behind the entrance to the bedroom and on top of the bed base.

He also noticed that there was a wooden hoe which was located where the deceased's legs were, and, it was blood stained on its triangular edge. The hoe was admitted as evidence. The deceased's sister Tabeth Mandizha identified the body thereafter the body was ferried to Parirenyatwa Hospital where a post mortem was carried out by doctor Mauricio Gonzales who handed the post mortem report to the witness.

The post mortem report was marked as exhibit number one and admitted as evidence. Doctor Gonzales observed multiple bruises and injuries on the head, some superficial and deep burns on both lower limbs and back. He concluded that death was as a result of "marked

brain oedema and head trauma due to assault. The doctor explained that brain oedema is on enlargement of the brain when someone is traumatised and is caused by assault.

The witness testified that information was passed on to other police stations and the social media in an effort to locate the accused. Accused was subsequently arrested in Harare.

Some warned and cautioned statements were recorded and accused made indications.

When accused was questioned as to where he was on 12 February 2016, he stated that he had gone to socialise with some friends but he did not disclose any further information as regards his whereabouts. Accused further refused to say anything as regards the hoe.

INNOCENT KARO

Testified that he is duty arrested member of the Zimbabwe Republic Police and was at the material time attested to CID Kadoma.

He was part of the team that visited that scene of the crime on the morning of 12 February 2016. He captured several photos of the scene of the crime and the deceased's body. He also captured the caption of the hoe (Exhibit 1) and its cutting edge which had blood stains. The hoe had been left lying on the floor of the room where deceased was.

The photographs were admitted as Evidence and marked as Exhibit No 3.

In Essence that was the state case.

DEFENCE CASE

The accused testified before this court.

He testified that the deceased was his wife and that they had matrimonial problems. The marital problems worsened to the point that the deceased stopped washing or cooking for him.

He stated that the deceased was also in the habit of verbally assaulting him, and that, whenever she conducted her prayers the deceased usually mentioned his name and asked that the accused be cursed in her prayers.

He testified that on the fateful day he had been drinking with his friend at Rumwe shops. His friend bought him 3 quarts of beer. He said that he was sought of drunk when he proceeded home. He testified that he arrived at home after 10 pm.

Upon arrival, at home he found the gate locked and then scale over the gate. He proceeded to the bedroom window and knocked for about twenty minutes, and, she was ignoring him. He peeped through the curtain window and he saw her playing with the phone.

As he subsequently was lying on his bed looking upwards she was shouting on top of her voice. He advised her it was time to rest but she ignored him and continued praying.

He was surprised when he was awoken and slapped on the face. He asked her why she was doing this and she said to him;

“you are a law officer you can do whatever you want and you can die in jail.”

She then slapped him on his face. He got angry and they started fighting. He used his hands. She would fight back and sometimes she would fall on the ground. They fought for about ten minutes and she called him by his name and asked for forgiveness.

He stated that when they were fighting he had taken her hand and put it under his armpit and pinning her. He was hitting her on her face and her head.

He testified that when she pleaded for forgiveness he did not release her. She could not stand on her own. She lied down and fell on her stomach.

He called her three times and she could not respond.

He then took her right hand with the intention of feeling her pulse and he found that he heart was beating. He left her lying on the ground and went outside.

The children were crying in the dining room. He called his son Wilson and sent him to go and collect keys to the main entrance but Miriam Chemhere ignored the son. He then sent him to collect the knife in the kitchen. He then used the knife to break the window.

He took his children with him with the intention to taking him to his grandmother but he then took them to his sister's place.

He said two ideas came to him mind. His wife had applied for maintenance and they were supposed to appear in court on 23 February and he thought of going to collect his current pay slip. He travelled that night from Kadoma to Harare.

The second thought he had was that he was thinking about his wife he had left at home.

He however thought it was better for him to go to his work place. When he went to Harare he proceeded to attend a church service at PHD Ministries.

After the church service he failed to secure transport to his workplace which was about 40 kilometres away. He thought it was better to spend the night in Kambuzuma.

He was awoken by police officers who subsequently arrested him.

On being asked what had caused injuries on the deceased he testified that there was limited space and a cot-bed and a push-tray and when they were fighting deceased was hitting herself on some of these properties.

ANALYSIS OF THE EVIDENCE

The court has given a detailed account of the evidence led by both the state and the defence witnesses.

It is quite apparent that the evidence led by the state witnesses was never challenged in its material respects.

The accused admitted to have assaulted the deceased and that he had used excessive force at the time he assaulted the deceased.

In fact, under cross examination he admitted that, he is trained as an expert in combat as he is a member of the Special Force and Parachute Regiment.

He admitted that he used excessive force resulting in deceased sustaining injuries.

He also admitted, under examination by the court, that he was reckless in his conduct and that such conduct caused the death of the deceased.

Although he denied and avoided the issue of the use of the hoe, it is very clear from the photograph submitted as evidence in this court (Exhibit 3) that the deceased suffered lacerations which were consistent with the use of sharp object.

Observations by Doctor Mauricio Gonzales show that deceased suffered multiple bruises and injuries on the head and death was as a result of “marked brain oedema and head trauma due to assault.”

The court finds that the state succeeded in proving that the accused assaulted the deceased and also used the hoe. The evidence of the state witnesses clearly corroborates the fact that the accused had threatened the accused with the use of the hoe.

The accused, under both cross examination, and, examination by the court, made several admissions including the fact that he had not taken any steps to guard against the death of the deceased and was reckless in his conduct.

This court also finds and accepts that even if it was to be accepted that there may have been some provocation from the deceased, the accused overreacted to that minor assault that may have been perpetrated upon him by the deceased.

This court finds that the state has proved that accused had the intention to kill the deceased.

In the case of *S v Sigwalu* 1967 (4) SA at 570 B – C HOLMES JA made the following remarks;

“The expression intention to kill does not in law, necessarily require that the accused should have applied his mind to compassing the death of the deceased. It is sufficient if the accused subjectively fore-saw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis* as distinct from *dolus directus*.”

This court also places reliance in its own decision in the case of *State v Meddas Hamadziripi* HH 220/17 wherein at p 3 of the cyclostyled judgment it referred to principles establishing criminal liability as enunciated in the case of *Director of Public Prosecutions v Pistorius Oscar Lenard Cark* 96/2015 – ZASCA at 204

This court accepts submissions made by the State that accused accepted that he had acted both recklessly and unreasonable in causing the death of the deceased.

Against this background this court find and holds accused guilty of contravention of s 47 (1) (b) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]

Sentence

In considering sentence this court has taken into consideration what has been adduced for and on behalf of the accused in mitigation and in aggravation.

The court has taken into account the fact that the accused is aged forty years and is a father of three children aged eleven, six and two respectively.

He is a first offender and has been in custody for approximately one year and two months.

In aggravation this court has taken in to account the following factors;

1. It is very clear that the deceased experienced a very painful death. This is ascertained from the nature of injuries sustained and from the fact that the house in which deceased died was also set up in fire. The court has already described the photographs and the scene of the crime as depicting “a war zone”. There is no doubt that the deceased experienced a brutal assault given the fact that accused boasted that he was trained as an expert in combat and was a member of the special forces and parachute regiment” in the Zimbabwe National Army.

At some stage during the assault of the accused was heard to say the following;

“You are still alive? I am going to strike you with a hoe”

Accused admitted that he acted recklessly.

2. The accused did not show any remorse or contrition.

He did not render any assistance whatsoever to the deceased.

He threatened to kill his tenants. He assaulted one of them. He exposed his tenants and minor children to danger. He totally disregarded pleas from his minor child, Wilson Nyamhuri, who was pleading with him to stop assaulting the deceased.

After the commission of the offence he showed total disregard for those he left behind the burning house, and, abandoned his children in the middle of the night.

Accused showed total disregard for human life.

This court has on multiple occasions repeatedly emphasized the sanctity of human life. This court must invariably, in cases of this nature, impose sentences that drive home the clear message that life is precious and sacrosanct and the accused, and like minded people, must respect the sanctity of life.

The deceased had a right to life. This right is protected in s 48 (1) of the Constitution of Zimbabwe.

3. Her minor children were also entitled to the right to have their motherly love. The accused deprived them of that love.

4. Accused chose to go into hiding after the commission of the offence.

He deliberately set in motion a series of events which demonstrated a total disregard of the fate of the deceased, his tenants and his minor children.

He left for Harare, thought to going to Church, PHD Ministries and or his work place which was about 40 kilometers from Harare. He was subsequently arrested in Harare where clearly he had elected to go into hiding.

5. Although, the accused referred to the fact that he had been provoked by the deceased this court rejects the fact that his actions justify the provocation so alleged. In fact this court rejects that there was any provocation. If the deceased was praying loudly for the accused to be cursed, the tenants in the house could have easily have heard her. If he also was slapped it was “disproportionate” to use excessive force in the circumstances.

This court accepts submissions made by the State in respect of observations by MAKONESE J, in the case of *The State v Nobert Moyo* HB 113/15 where, in sentencing the accused in that case observed, on p 7 of the cyclostyled judgment that;

“He was to some extent provoked by the deceased. His reaction was however disproportionate, and was excessive in the circumstances. The court notes that the accused acted rather foolishly and there was a high degree of thought-less on his part.”

Those observations apply with full force in the present matter.

6. The accused was employed as a member of the Zimbabwe National Army. He was a member of the disciplined forces. His conduct in this case has put the name of the Defence Forces into disrepute. He clearly was not entitled to take the law into his own hands.
7. The use of violence and or dangerous weapons has gone out of hand as observed by MAKONESE J in the aforementioned case of *State v Nobert Moyo (supra)*. The Learned Judge also observed that courts have a duty to pass appropriate sentences that reflect the sanctity of human life.

It is also not possible to replace the life of the deceased in this present matter.

The court holds that the loss of one life is the loss of one too many. Life is precious and irreplaceable. Three minor children have been deprived of a normal life with their mother.

This court has considered the sentencing guidelines provided in the Constitution, the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

In terms of s 47 (2) of the Criminal Law (Codification and Reform Act) [*Chapter 9:3*]

“Subject to sections 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] a person convicted of murder shall be sentenced to death unless –

- a) The convicted person is under the age of eighteen years at the time of the commission of the offence or
- b) The court is of the opinion that there are extenuating circumstances in which event the convicted person shall be liable to be sentenced to death or to imprisonment for life or for a shorter period.”

The court has also considered the general guidelines provided for in the General Laws Amendment Act No. 23 of 2016, and in particular subsection 4 thereof which states that:

“(4) A person convicted of murder shall be liable –

- a) to section 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:02*] to death imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3) or
- b) In any other case to imprisonment for any definite period.”

In light of the aggravating circumstances and observations made in respect of this matter, and, in light of the fact that the accused has been convicted of murder with constructive intent, this court reiterates that a different sentence is called for.

Accordingly in the result the appropriate sentence is as follows;

“Accused is sentenced to imprisonment for life.”

National Prosecuting Authority, State's legal practitioners
Chivore and Partners, accused's legal practitioners