

THE STATE

Versus

JAPHET MPOFU

And

LIKHWI MPOFU

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Ndlovu and Mr Ndubiwa

HWANGE 15 March 2024

Criminal trial

Mrs M. Cheda for the State

Ms. C. Manyeza for the accused

DUBE-BANDA J:

[1] The two accused persons are appearing before this court charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 17 July 2023 they unlawfully caused the death of Jabulani Mpofu hereinafter referred to as deceased by striking him with a stick four times on the head, while holding him down intending to kill him or realising that there was a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused persons pleaded not guilty to the crime of murder and offered a plea of guilty to the lesser crime of culpable homicide. The State accepted the plea of guilty to the crime of culpable homicide. The State tendered into the record of proceedings a statement of agreed facts, which is before court and marked Annexure "A". The statement reads as follows:

The State and the defence are in agreement that the following issues are common cause being that:

- i. Accused 1 was 51 years of age and accused 2 was 47 years of age at the time the offence was committed.
- ii. The deceased was 55 years of age at the time of death.
- iii. The accused and the deceased were brothers and they all resided at their respective homesteads in Macala Village, Chief Sikhobokhobo, Nkayi.

- iv. On the 17th July 2023 and at 2000 hours the accused met at Hlekiwe Ndlovu's homestead, where family members were gathered.
- v. The accused confronted Simangele Nkomo (accused 1's wife) on suspicion that she had laced accused 1's food with poison.
- vi. Accused 2 grabbed Simangele Nkomo and choked her. Simangele broke free and ran to deceased's homestead which is 150 metres away from her own homestead. Simangele was calling for help.
- vii. Simangele ran into deceased's bedroom hut whose door was open. Upon entering the room the deceased closed the door.
- viii. The deceased was in the company of his wife Nomusa Sibanda in the bedroom hut.
- ix. The accused pursued Simangele to deceased's homestead where upon arrival they demanded that the deceased should open the door. Deceased opened the door and they all went outside.
- x. Accused 2 picked a stick and assaulted Nomusa once on the buttocks and she ran away from the homestead. Simangele followed Nomusa.
- xi. Accused 1 wrestled with the deceased and a fight ensued. Deceased and accused 1 fell to the ground and accused 2 hit the deceased four times on the head with a stick while accused 1 held deceased. The accused then fled from the scene.
- xii. The deceased lost consciousness and bled from the head and face which was swollen.
- xiii. The deceased sustained injuries on the head from which he died the following day on admission at Mbuma Hospital.
- xiv. The accused plead not guilty to murder but guilty to culpable homicide in that they negligently caused the death of the deceased. They were angered by deceased actions of harbouring and defending Simangele Nkomo who they suspected had laced accused 1's food with poison.

[3] The State tendered a post mortem report compiled by Dr. S. Pesanai who examined the remains of the deceased and opined that the cause of death was subarachnoid haemorrhage; blunt force trauma on the head and assault.

[4] The totality of the facts and the evidence adduced in this trial show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased.

[5] Accused 1 wrestled and fought the deceased, while accused 2 was striking him four times on the head with a stick. While he was being struck with a stick on the head accused 1 was holding him. In striking and beating up the deceased in the manner they did a reasonable man placed in the same circumstances as the accused would have foreseen the possibility of death and would have guarded against it. The conduct of the accused shows that they fell below the reasonable person standard. The accused ought, as a reasonable man, to have foreseen the death of the deceased and guarded against it. The accused were negligent and it was their negligence that led to the death of the deceased. On the basis of the facts and the evidence of this case, the court is satisfied that the State's concession was properly taken.

In the result: the accused are found not guilty of murder and found guilty of the lesser crime of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

[6] In determining an appropriate sentence, a court has regard to the personal circumstances of the accused, the nature of the crime, and the interests of society. The courts have stressed the importance of proportionality and balance between the crime, the criminal and the interests of society. It remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed. The cardinal principle that the punishment should fit the crime should not be ignored. This court must also factor into the equation the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[7] It is trite law that sentencing is about striking the correct balance between the crime, the offender and the interests of the community commonly referred to as the triad. See *S v Zinn* 1969 (2) SA 537 (A). A court should, when determining sentence, strive to

accomplish and arrive at a judicious counterpoise between these elements in order to ensure that one element is not unduly emphasised at the expense of and to the exclusion of the others. In its consideration of an appropriate sentence, the court is mindful of the need to apply the established principles of deterrence, prevention, reformation, and retribution.

[8] The personal circumstances of the accused have been conveyed to the Court by your legal representative who informed the court that accused 1 is 51 years old, married with six children. He is a communal farmer and earning US\$150. 00 per month. He paid thirteen head of cattle to his mother as compensation for the death of her son. He is now left with four goats and five donkeys. He has an injury in the left eye. Accused 2 is 47 years old, married with two children. He is a communal farmer and earns US\$100.00 per month. He paid two head of cattle to his mother as compensation. He has no assets of value.

[9] Further in considering sentence it is important to take into account that the accused are not repeat offenders, and they pleaded guilty to the offence of culpable homicide. They are remorseful for having caused the death of their brother. Again, both accused have been in pre-trial incarceration for nine months.

[10] It is stating the obvious but it bears repeating that culpable homicide is a serious crime. In wrongfully causing the death of the deceased the accused's actions have impacted on the lives of the deceased's family, relatives and friends. They must now deal with the emotional trauma that his violent and premature death has thrust on them. The sentence the court imposes must be one that will not only rehabilitate the accused but it should also serve as a deterrent to other likeminded individuals. Members of society must know that the courts will protect their rights. It is the kind of sentence which we impose that will drive ordinary members of our society either to have confidence or to lose confidence in the judicial system. The sentences that our courts impose when offences of this nature are committed, should strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would be

offenders. In our constitutional order every person is entitled to expect and insist upon the full protection of the law.

[11] The accused were the aggressors and attacked the deceased who had done them no wrong. He was in the comfort of his bedroom hut with his wife. He was for no good reason subjected to a vicious attack. He was struck on the head four times with a stick, at the same time the other accused was holding him to stall his attempt to flee and follow his wife who had fled. The post mortem report shows that the deceased had a fractured right jaw; lacerated left chin; and abrasion left shoulder and left face. He had other numerous internal injuries emanating from the attack. The attack was so vicious that the deceased lost consciousness and bleed from the head and face which was swollen. The aggravating factors in this case makes a sentence of direct imprisonment warranted and in the interest of justice. This is so because members of society depend upon the courts to protect them against the infringement of their right to safety as a symbol of an orderly society.

[12] Having taken all the factors into account, the following sentence will meet the justice of this case. In the result each offender is sentenced as follows:

“8 years imprisonment of which 2 years suspended for 5 years on condition accused does not commit within that period any offence involving the use of violence upon the person of another and or causing the death of another through violent conduct and of which if convicted the accused is sentenced to a term of imprisonment without the option of a fine.”

National Prosecuting Authority, state’s legal practitioners
Mhaka Attorneys, accused’s legal practitioners