THE STATE

Versus

FELISTAS MPOFU

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
GWERU, 20 MAY 2025

B.E. Matose for the state
E. Gonese for the accused

Criminal trial sentencing judgment

MUTEVEDZI J: This case makes sad reading. In one way or another, many people and institutions appear culpable for the death of Talitakumi Mangena, an infant aged only seven months and the subsequent charges of murder against Felistas Mpofu (the offender) who was its mother. The offender grew up as an orphan. Both her parents died when she knew nothing. She said she was then raised by her mother's brother. She dropped out of school at form two presumably because the uncle could not afford her tuition. She sought employment and became a shopkeeper at a business centre called Mberengwa Turn Off. She was nineteen then. In a never-ending cycle of misfortunes, she found herself in a relationship with or rather was duped by a married man who lied that he loved her. She fell pregnant. That was the passport to the hell where she finds herself currently in.

[1] Once she became pregnant, the deadbeat lover disappeared. The offender's employer no longer had any use for her. She lost her job. Cornered and feeling lost, she trekked back to her communal home at a place called Danga under Chief Mposi in Mberengwa. She hoped for better luck but she was wrong. Once she gave birth, her maternal uncle who worked a job that the offender said she was not sure of at Dove Mine said he could not afford to feed an extra mouth at his homestead. He wanted her and her baby out. She took a bus to Zvishavane which is the closest town from Mberengwa. She was not going there for any particular reason but just hoped to escape the demons which seemed to follow her

everywhere. Unfortunately, the fiends were unforgiving. They pursued her. When she arrived in Zvishavane, she was tired of her sorrows which in her fatigued brain, included the infant. She bought rat poison from a vendor which she immediately laced onto the infant's milk in a bottle drink. She fed her and in no time the baby was wailing and writhing in agony. It was around 1900 hours. She wondered around the locations of Zvishavane until she got to Mandava suburb. There she met a Good Samaritan by the name of Florence Dhaka, who took her and the baby in. She enquired from the offender what the challenge was. The offender sold her a dummy but Florence insisted that they take the baby to hospital. Unfortunately, the baby was pronounced dead upon arrival at hospital round 0300 hours.

[2] The nurses redirected the offender to the police to report the death. At that time Florence proceeded home. On arrival, she was greeted by a pungent smell from where the offender had placed her pitiful possessions. The smell was so putrid that Florence decided to check. She discovered that the fetid smell emanated from the bottle drink containing the baby's milk. It was then that it occurred to her that the offender had possibly poisoned the child. She dashed to the police and disclosed her discovery. The offender was still there and did not attempt to hide her crime. She confessed to the murder. She was arrested. That was in March 2023. It beat us that from then until May 2025, no one thought about bringing her to trial despite that she was admitting to everything. When she was finally arraigned before us, she barely denied the charge. In fact, she only pleaded not guilty because of the erroneous presumption that a court cannot enter a plea of guilty in a charge of murder.

[3] My reading of the law is that a court may enter a plea of guilty to a charge of murder. The contrary views, so I think, have largely been informed by a wrong interpretation of s 271(1) of the Criminal Procedure and evidence Act [Chapter 9:07] ("the CPEA") which is couched in the following terms:

> **271 Procedure on plea of guilty**
> (1) Where a person arraigned before the High Court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea, the court may, if the accused has pleaded guilty to any offence **other than murder,**

> **convict and sentence** him for that offence **without hearing any evidence.** (bolding is my emphasis.)

[4] The above provision does not make any reference to the acceptance or otherwise of an accused's plea of guilty to a murder charge. In fact, the word accept is only used in reference to a prosecutor in cases where an accused pleads guilty to a lesser crime than that charged and the prosecutor is required to give his/her agreement for a court to proceed and convict that accused on the lesser charge. There is nowhere where a court is proscribed from entering a plea of guilty to a charge of murder. What is prohibited and which a court cannot do, is to accept an accused's plea of guilty to a charge of murder and proceed to convict and sentence the accused without hearing evidence. The logical corollary to that interpretation is that, a court where an accused pleads guilty to murder, may enter a plea of guilty but must then proceed to hear evidence before pronouncing the verdict of guilty and sentencing the accused person. That evidence may be called even where an accused has pleaded guilty must be obvious and is supported by subsection (4) (a) of s271 which provides that where a court proceeds in terms of the guilty plea, it may call upon the prosecutor to present evidence on any aspect of the charge.

[5] The adduction of evidence is never cast in one form. There is a variety of methods through which prosecutors may lead evidence in a criminal trial. One prosecutor may choose to present it through viva voce testimonies. Another may present it through affidavit. It is equally permissible to submit evidence through formal admissions in terms of s 314 of the CPEA.

[6] In this case, the prosecutor chose to present his evidence by way of seeking formal admissions. He got the complete agreement of counsel for the offender. In her defence case, the offender chose to use that opportunity to mitigate her moral blameworthiness by narrating to the court the circumstances which led her to committing the murder and apologizing to everyone involved.

[7] Yet it must be clear from the above that whilst I appear to make these remarks somewhat forcefully, I simply do so in passing for three reasons. First, I did not get the benefit of full argument for me to authoritatively debate the issues. Second, although the offender in this case admitted to everything including that she deliberately fed the baby poison with the sole intention of killing her, the court still entered a plea of not guilty in line with existing practice. The debate was therefore not necessary for the verdict that the court entered. Third, I make these remarks at sentencing stage. The argument is therefore not necessarily about conviction but speaks to the disadvantages at sentencing stage, that a person who literally admits to murder is subjected to, when a plea of not guilty is entered on his/her behalf. Such person cannot benefit from entering a plea of guilty yet that plea has, in our law, become an increasingly significant aspect of mitigation which has seen offenders rewarded with significant discounts from their punishments. My view is that time has come for this court to revisit its decisions regarding entering pleas of guilty in murder cases, a task which in the moment, I leave for another day.

[8] Reverting to the task at hand, the sentencing of persons convicted of murder necessarily starts from a determination by the court of whether or not the crime was committed in aggravating circumstances. Where the murder was aggravated, the court is confined to two options. It can sentence the offender either to life imprisonment or to a determinate term of imprisonment of not less than 20 years. Where the murder was not aggravated, the court's hands are untied and its sentencing discretion somewhat fully restored. We state somewhat, because even then the discretion is limited to determining the duration of imprisonment only. There is no room in murder cases for sentencing an offender to anything other than effective imprisonment no matter how compelling the circumstances may be. Section 47(4) of the CODE provides that:

> (4) A person convicted of murder shall be liable—
> (*a*) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], 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.

[9] Clearly, a court which has convicted an offender of murder must imprison him/her. When it does so, the offender cannot benefit from the suspension of the whole or any part of the prison sentence because that course is not permitted by section 358 (2) as read with the 8th schedule to the CPEA which provides as follows

> (2) When a person is convicted by any court of any offence **other than an offence specified in the Eighth Schedule**, it may—
> (*a*) postpone for a period not exceeding five years the passing of sentence and release the offender on such conditions as the court may specify in the order; or
> (*b*) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order;

The 8th schedule in turn provides that:

> **EIGHTH SCHEDULE (Section 358)**
> OFFENCES IN RELATION TO WHICH POSTPONEMENT OR SUSPENSION OF SENTENCE, OR DISCHARGE WITH CAUTION OR REPRIMAND, IS NOT PERMITTED
> 1. **Murder,** other than the murder by a woman of her newly born child.
> 2. Any conspiracy or incitement to commit murder.
> 3. Any offence in respect of which any enactment imposes a minimum sentence and any conspiracy, incitement
> or attempt to commit any such offence.(bolding is my emphasis.)

[10] In this case, the prosecutor argued that the murder was aggravated. First that the offender premeditated its commission and second that the murder victim was an infant. Those factors are listed as additional aggravating circumstances in subsection (3) of section 47 of the CODE. It provides that:

> (3)A court may also, **in the absence of other circumstances of a mitigating nature,** or together with other circumstances of an aggravating nature, regard as an aggravating circumstance the fact that—
> (*a*) the murder was premeditated; or
> (*b*) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or over the age of seventy years, or was physically disabled.

[11] My reading of the above provision is therefore that a mere demonstration that the offender premeditated the crime and that his/her victim was a minor standing alone may not be regarded as aggravating the offence. To rely on them, the prosecutor must show that such factors exist in an instance where nothing seriously mitigates the circumstances of an offender. The factors under subsection (3) are entirely different from those listed under subsection (2) whose mere presence must be taken as overriding whatever mitigation may be there. *S v Kamupiro* (242 of 2024) [2024] ZWHHC 246; *State v Chaira* (99 of 2024)

[2024] ZWHHC 99; and *S v Katsande* (263 of 2024) [2024] ZWHHC 263 for that proposition.

[12] In this case, we have described the circumstances which mitigate the offender's plight and reduce her moral blameworthiness. The offender is herself, a victim of circumstances. But even more compelling is that she killed her baby only seven months after giving birth. The law accommodates women who kill their babies within six months of giving birth. Those women are deemed to be incapable of murdering their babies. If they kill their infants, they commit the crime of infanticide. The reasoning behind distinguishing that crime from murder is that a woman who has just given birth is afflicted with mental instability associated with challenges arising from pregnancy and child birth. Those challenges include conditions such as postpartum psychosis and depression. See the case of *State v Duduzile Ngwenya* HB 9/2004.[1]

[13] Admittedly the fixing of six months after giving birth as the timeline within which a woman who has given birth must suffer from such conditions is arbitrary in my view. It however remains the law. The offender in this case fell outside the category of such women by barely a month. Had she killed her baby a month earlier she could have benefited and would have been charged with infanticide. If it is admitted that at six months after giving birth a woman may be suffering from the mental conditions which come with child birth which may cause her to kill her infant, it is difficult to imagine that at seven months those conditions would have completely been cured. I agree that the offender could not have escaped a murder conviction but she cannot be sentenced to a punishment that is totally disproportionate to those ordinarily imposed on women convicted of infanticide which for all intents and purposes is simply euphemism for murder.

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[1] In that case CHEDA J referred to the work of authors Pomer and Selwood, *Criminal Law and Psychiatry* 1987 Kulwer Law Publishers page 140, where then described infanticide as a mental condition which occurs within three months of delivery. The learned authors stated that:

> "*Puerperal psychosis* is usually preceded by a lucid interval of three or four days after delivery. The on-set may be acute and accompanied by clouding of consciousness with delusional and/or hallucinatory experiences. A woman may kill her child in a state of *puerperal* depression or *schzophrenia* and have genuine amnesia for the material time of the child's death when the crime would be reduced from murder to manslaughter on the basis of the Infanticide Act 1938" (South African Act)

[14] The offender was let down by society. She was let down by the married man who preyed on her when she was hardly an adult and abandoned her when she got pregnant. She was discriminated against by her employer who dismissed her from work for simply being pregnant. She was forsaken by her relatives who could not accommodate her when she fell pregnant and returned home. She became disenchanted when she could not find support from anywhere. She wandered from place to place looking for a shoulder to lean on. She was hung and left to dry by the administration of justice system which for over two years did not bother to bring her case to court and afford her closure. This court, being the offender's last bastion of protection, cannot therefore let itself perpetuate all those ills by accepting the argument that she must be sentenced like a man who murdered his victim during a robbery.

[15] In addition, it must be accepted as discussed above, that in reality this offender pleaded guilty. The plea of not guilty entered by the court was recorded for technical reasons. The court must therefore recognize her admission of guilty for what it was worth. There is no point in failing to treat the offender in the same way and accord her the discounts from sentence which ordinarily accrue to offenders who plead guilty to crimes other than murder.

[16] The above however is not to condone what the offender did. First it is not like she was still a child at the time that she got into a relationship with the man who got her pregnant. She was nineteen and ought to have known better. A person of that age surely knows that engaging in unprotected sexual intercourse will likely lead to pregnancy and that it puts her at the risk of contracting sexually transmitted infections including HIV and AIDS. So, from another perspective, getting pregnant was a choice that the offender consciously made. Even after getting pregnant, the offender still had choices at her disposal. The first and easiest one was to dump the baby without killing her. It is not uncommon to hear of stories of women who take such course. The number of childless people who seek to adopt children is unbelievably high. There are equally numerous avenues by which a woman who wants to relinquish her motherhood may get her baby

adopted by those who need children. And needless to state, there are many children's homes in Zimbabwe which cater for children in need of care.

[17] We state all the above in an effort to show that the decision which the offender took was certainly ill advised and, in more ways, than one callous. The baby was no less a human being than the offender herself. At a time when our society has embraced the ideal that no one, not even the state itself has the right to take another's life, a mother who ordinarily is the root of human life must be the last person to kill a child.

[18] The lesson to every other young woman who may be equally vulnerable is simple. Whilst the majority of men are capable of making a woman pregnant, a very significant number of such men are averse to responsibilities. Do not fall headlong for tricks of predatory men who will disappear from your life at the faintest whisper of an obligation coming their way.

[19] Against the above background the court will not impose a sentence that will seem like a slap on the wrist for the offender. Juxtaposing the circumstances that aggravate the crime against those that mitigate the offender's moral blameworthiness it is apparent to us that the mitigation weighs heavier than the aggravation. And having found that this was a murder which was not committed in aggravating circumstance as stated above, the court is at liberty to depart from imposing the mandatory penalties of life imprisonment or imprisonment for not less than 20 years stipulated by statute.

[20] **In the circumstances, the offender is sentenced to seven (7) years imprisonment.**

MUTEVEDZI J…….

National Prosecuting Authority, State's legal practitioners
Mhaka Attorneys, accused' legal practitioners