

THE STATE
versus
LOVEMORE MBESA
and
JAMES MARICHO (aka PATRICK MAFAKA)

HIGH COURT OF ZIMBABWE
MANDAZA J
HARARE ;18 December 2024

Sentencing Judgement

Assessors: *Mr Jemwa*
Mr Chimonyo

M Manhamo, for the state
CT Manyani for the first accused
C Chigwere for the second accused

MANDAZA J: On the evening of 18 August 2024, a young life was lost in harrowing circumstances. The deceased, Cleopatra Muchisi, a young lady aged only 27 years old went looking for transport to take her to Harare Central Business District from Makoni shops in Chitungwiza. She was accompanied to the road by her dear friend Prisca Maburutse. As fate would have it, she was offered transport by the two accused persons who pretended they were going to Harare Central Business District. The first accused person was on the driver's seat whilst the second accused person was on the passenger's seat.

Along the way, the two accused persons diverted the route and turned into Borshoff Road towards Ardbernie Mbare. The two accused went on to rob the deceased and after robbing her, threw her out of their moving vehicle. They remained with her possessions. The deceased was run over by two vehicles which were following the car being driven by the accused persons. After throwing her out of the vehicle, the two accused persons did not stop. The deceased's body was conveyed to Sally Mugabe Hospital for post-mortem examination which concluded that the cause of death was '*polytrauma secondary to road traffic accident*'.

As fate would have it, on 28 September 2024, Elvis Mugoni was arrested in Epworth for armed robbery and a CZ pistol with serial number **ZRP1865** was recovered from him upon being questioned he implicated the two accused persons as his accomplices in a robbery case in which they had robbed Persuade Chikwanha, a police officer of his service pistol. The police followed-up and arrested the two accused over the matter. Upon being interviewed about the case, the two accused persons confessed to the present matter. They then followed up the confessions with indications in which they described in detail how they had offered the deceased transport up until she involuntarily exited their vehicle leading to her death. The two accused tried to play the card that their confessions were not freely and voluntarily made, however, we rejected that because their confession had led to the opening of the present case which had been treated as a traffic matter by Mbare police station. In their confession, they stated that they were not aware of what happened to the deceased after pushing her out of their vehicle. Had they not confessed, the circumstances leading to the death of the deceased would have remained a mystery.

We also upheld that their confessions had been made freely and voluntarily because the confessions were not elicited by force but voluntarily as the police stated that they were very co-operative and as such no undue force was applied to them. Paul Chivhuro, a police officer who testified stated they never assaulted them because they were cooperative. They had even apologised to the deceased's mother at the police station. They had confessed to the offence during the interviews. After the confession, Mbare traffic police were contacted and confirmed that an incident of such a nature had happened but the culprit/s were still to be accounted for. Until their confession, the matter had remained a cold case.

The accused were subsequently arraigned before this court facing a charge of murder as defined in s47 of the *Criminal Law (Codification and Reform) Act [Ch 9:23]*. They pleaded not guilty to the charge of murder. In his defence outline, the first accused person denied causing the death of the deceased in the manner alleged or in any other manner. On the day in question, he claimed that he was at his home at House Number 8518, Unik K, Seke in Chitungwiza. He also stated that he was never at the scene of the crime when the deceased was allegedly murdered. He claimed that the police officers had forced him to admit to the murder. In his defence outline, the second accused also denied committing the offence. At the material time, he was home in Manyame Park in St Marys in Chitungwiza. He also claimed that he was forced to admit to the charge of murder by the police. Both accused persons stated that the police had written for them a note to implicate themselves during the indications. We rejected

that assertion because their testimonies were materially different. During the indications where saw the accused persons implicating each other. There was no evidence that they were forced to make the indications.

Currently, the presumptive penalty for a murder committed in aggravating circumstances is 20 years. There is no difference between the minimum mandatory sentence prescribed for murder committed in aggravating circumstances and the presumptive penalty stated in the sentencing guidelines.

The Law

The initial stage in evaluating sentences in murder cases involves the court determining if the murder was committed in aggravating circumstances. Thus, there is no room for generalised submissions in mitigation. Only if the court does not find that the murder was committed in aggravating circumstances will the general aspects of mitigation come into play. Section 47(4) of the Code provides as follows:

A person convicted of murder shall be liable-

- (a) Subject to sections 337 and 338 of the *Criminal Procedure and Evidence Act [Ch 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.

It follows therefore that the court's discretion is limited in its sentencing discretion in cases where it finds that the killing was committed in aggravating circumstances. The decision on which sentence to impose is largely influenced by the strength of the mitigating and aggravatory factors submitted by the defence and the State respectively.

Personal circumstances

We were informed that the first accused person is a family man aged 44 years old. He is married and has three children of which two are minors aged 17 and 11 years old. He is also a director of Qouratech Investments P/L which specialises in selling spare parts and repairing motorbikes. He has five other dependants who are children of his late brother Evans Mbesa. He also suffers from asthma and his right leg needs to go under surgery. We were not told why he needs to undergo surgery.

The defence submitted that due weight should be placed on the fact that the first accused person cooperated with the police and the offence was uncovered due to his cooperation with the police. Without his co-operation, the murder would have remained a mystery. Further, it

was submitted on his behalf that he has suffered pre-trial incarceration; however, the accused is already serving a long imprisonment term of more than 24 years for robbery. We were told during the trial that other robbery charges are still being preferred against him. In that regard, this court was referred to the case of *S v Mutakwa 2000(1) ZLR 393 (H)*. The defence submitted that a sentence of 20 years imprisonment would meet the justice of the case.

Concerning the second accused person, we were told that he is 34 years old and is married. He has four minor children aged 14,10, 6 and 1 year and 4 months old. The accused has suffered pre-trial incarceration since he has been in prison since November 2023. He also suffers from chronic acid reflux which requires him to take medication. (He can always take this medication in prison like he has always does). A sentence of 20 years imprisonment would thus meet the justice of the case.

In aggravation, Mr Manhamo for the State submitted that the murder was committed in aggravating circumstances. To that end, the State quoted the Supreme Court case of *Emmanuel Ncube v. The State SC219/95* where MUCHECHETERE JA held that “The law in cases where murder is committed in the course of a robbery is to the effect that the death sentence will be imposed unless there are weighty extenuating circumstances”. In the case of *The State v Lovemore Katayamaoko and Another HH158/20* Bhunu J (As he then was) ruled that a death penalty was inescapable where murder had been committed under aggravating circumstances such as during a robbery and where there was evidence of premeditation on the part of the accused persons. The State however conceded that there was no evidence of pre-meditation by the accused but that does not lessen their moral blameworthiness. The accused does not deserve a severe penalty.

The State further submitted that the accused persons are currently serving 24 years imprisonment for robbery. Two (2) years were suspended on condition of restitution. They were sentenced on 30 August 2024. The State conceded that the death penalty might seem harsh, however, life imprisonment or a sentence in the region of 35 years will meet the justice of the case.

In her Victim Impact Statement, the deceased’s mother, Josephine Kaiyo stated that the deceased played a big role in her life as she helped her to pay rent, buy food and look after her as she is diabetic and hypertensive. She also brought to the fore the fact that the deceased was in her final year of studies at Madziwa Teachers College and was getting married in December 2024.

In the final analysis and considering all the factors presented in mitigation by the offender and the aggravating factors in this case, it is clear that the aggravation outweighs the mitigation. The murder was committed in the course of a robbery and the deceased died a painful death. After being robbed, she was then thrown out of the vehicle and was thereafter run over by two vehicles. She did not deserve to die this way nobody does. Her life was cut short and her bright future was thrown away by a single act of greed by the accused persons. We have considered strongly against the first accused that he is a director of a company. As such the offence was not motivated by need but by greed.

We have also strongly considered the fact that the act of throwing out the deceased after robbing her was a callous act motivated more by greed than need. Her belongings were never found and the accused remained with her property. We have also considered against the accused that after throwing her out of the motor vehicle they did not stop but continued driving regardless. They did not care what happened to her.

We have however considered for the accused that their confession helped solve this offence. Had they not confessed, this matter would have remained a cold case. Their confession led to closure for the relatives of the deceased. We have also considered in their favour the fact that the murder was not premeditated.

However, the murder was carried out callously. We also considered the Victim Impact Statement submitted by the victim's mother. She lost a child who looked after her and she was looking forward to her marriage this December. On top of that, she was in her final year of study at a teacher's college. She painted a picture of a distraught mom.

The act of murdering someone is a heinous act. There is no doubt that the death of the deceased caused emotional distress to her family and her best friend Prisca Farai Maburutse who broke down several times during her testimony. Human life was lost in cruel circumstances. The act of robbing and then throwing the deceased out of a vehicle increases the accused person's moral blameworthiness. No amount of punishment can bring the deceased back. The murder was committed in aggravating circumstances since it was committed in the course of a robbery. That increases the accused person's moral blameworthiness. See the *Criminal Procedure (Sentencing Guidelines) Regulations 2023*. In the case of *S v Mlambo HH351/15*, the court held that, "Our courts have always expressed the view that murder committed in the furtherance of other crimes such as robbery amounts to murder committed in aggravating circumstances". In the matter of *S v Madya ZWSC 110/22*, the Supreme Court per MAVANGIRA JA held that murder committed in the course of a robbery has always been viewed

by our courts as murder committed in aggravating circumstances as well. In that case, the appeal against sentence and conviction were dismissed. We therefore find that the murder was committed in aggravating circumstances. In *casu*, the surrounding circumstances of the robbery committed by the accused aggravated than diminished the moral blameworthiness of the accused persons. See *S v Milanzi and Ors HH398/17*.

The issue of pre-sentence incarceration has been raised by the accused. They claim that they have been in pre-trial detention since November 2023. There has been a delay of one year. There is, however, no indication that they asserted their rights to a speedy trial. We have also considered that they are serving prison time for a crime of robbery. Pre-trial incarceration is a relevant factor to be taken into account in assessing sentence, the circumstances of every case and the reasons for the delays as well as the attempts made by the accused to have their case dealt with is a relevant consideration. There is no evidence that the accused asserted their right to have the matter heard. See *S v Banga 1995(2) ZLR 297 (S)* and *In re Mlambo 1991 (1) ZLR 399 (S)*. The court will however take into account the delay of one year in assessing the sentence.

The accused persons are co-perpetrators and they must receive the same penalty. They drove the motor vehicle a Honda CRV and offered the deceased transport to Harare Central Business District determined to commit a robbery. They had a common purpose or they were acting in common purpose. During the indications, the second accused person stated that he was given a signal by the first accused to commence the robbery. In terms of s196 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], the conduct of one co-perpetrator is deemed to be the conduct of each and every other co-perpetrator in the absence of proof of dissociation by the co-perpetrator who seeks to be excused from liability for the actions of a co-perpetrator. It was not argued that either of the accused dissociated himself from the actions of the other nor sought to dissuade the other from what happened in that vehicle. The accused acted in common purpose throughout. See *S v Jaure 2001 (2) ZLR 393* and *S v Warosi 2011 (1) ZLR 215*. The accused persons never showed remorse throughout the trial. They remained adamant throughout. We have also strongly considered against the accused persons that they are serving a sentence of 24 years imprisonment for robbery. Robbery is a crime of ultra-violence. They are unrepentant criminals who deserve to be taken out of the society. Society is a better place without them.

Having considered the aggravatory and mitigatory factors and the circumstances of the commission of the offence; it is our considered view that a sentence of **35 years imprisonment** for each accused person will suit the instance of justice in this case.

National Prosecuting Authority, the State's legal practitioners.
TH Chitapi and Associates, first accused's legal practitioners
TK Hove and Parteners, second accused's legal practitioners