

THE STATE  
versus  
CLEVER MOYO

HIGH COURT OF ZIMBABWE  
MAWADZE J  
MASVINGO, 7 March 2022

Assessors: 1. Mr Chikukwa  
2. Mr Mutomba

*Mr E. Mbavarira, for the state*  
*Ms E.Y Zvanaka, for the accused*

### **Criminal Trial - Sentence**

MAWADZE J: The facts of this matter point a scenario which is commonly referred to as a deflected blow.

The 27-year-old accused was initially arraigned for murder as defined in section 47(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. However, the matter proceeded on the basis of a statement of agreed facts and the accused was convicted of culpable homicide as defined in section 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Before passing sentence the court also called the now deceased's mother Ellen Mirirai aged 26 years for her to share her thoughts on the matter.

At the material time the 25 year old accused was staying at Ngundu, Chivi, Masvingo with his wife. The accused was a fellow tenant to the deceased's mother Ellen Mirirai. Ellen Mirirai was a divorcee and a sex worker plying her trade at Ngundu business centre. She had four children and the now deceased was just 4 months old and the fourth child.

The accused proposed love to the now deceased's mother Ellen Mirirai who turned him down. However the accused's wife got wind of this and confronted the now deceased's mother Ellen Mirirai. On 26 March 2020 the accused learnt of these developments and was not amused. As a result, the accused decided to confront the now deceased's mother Ellen Mirirai resulting in an altercation.

The now deceased's mother Ellen Mirirai had the 4-month-old now deceased strapped on her back. The accused proceeded to kick Ellen Mirirai once with booted feet and picked a broom at a shop verandah measuring 56cm long and weighing 360g.

The accused proceeded to assault the now deceased's mother Ellen Mirirai with the broom. In the process Ellen Mirirai blocked the blow with her hands. The broom got broken and part of it landed on the head of the now deceased who was strapped on Ellen Mirirai's back. The accused fled from the scene after being restrained.

The now deceased's mother Ellen Mirirai took the now deceased to Neshuro hospital for treatment. Unfortunately, the now deceased passed on 26 March 2020.

On 28 March 2020 Dr Zimbwa carried out a post mortem on the remains of the now deceased and observed the following;

*"Haematoma left temporal area with underlying depressed skull fracture. "*

The cause of the now deceased's death was head injury arising from blunt trauma.

It is clear that the accused did not have the intention to kill the now deceased [even the now deceased's mother Ellen Mirirai]. The fact of the matter is that the blow with the broom aimed at the now deceased's mother Ellen Mirirai deflected and ended up hitting the now deceased child who was being carried by Ellen Mirirai on her back. Indeed the accused negligently caused the now deceased's death.

The offence of culpable homicide resulting from violent conduct remains a serious offence. A young and innocent life was needlessly lost. The sanctity of human life can not be over emphasised.

It is disheartening that the accused decided to resort to such violence against a defenceless woman Ellen Mirirai who had the now deceased strapped on her back.

There was absolutely no need for the accused to resort to violence. This was a minor dispute which could be resolved. The fact that Ellen Mirirai had the now deceased toddler strapped on her

back did not deter the accused. Instead the accused even decided to use a broom to attack the now deceased's mother.

It is clear that the accused used a lot of force. This is so because the now deceased's skull was fractured. The accused's degree of negligence is therefore quite high. This elevates his moral blameworthiness.

Be that as it may the accused's personal circumstances call for some degree of leniency.

The accused is married with one minor child. His source of livelihood in vending selling second hands clothes. The absence of the accused would adversely affect his young family more so as his neither have savings nor assets.

The accused deserves some measure of leniency as a first offender. Despite initially fleeing from the police the accused upon his arrest owned up to his wrong doing. In court the accused pleaded guilty to the offence he was convicted of without wasting time and resources.

The accused suffered from pre-trial incarceration of one year and eight months. In fact, he has been in custody from the time his arrest to date.

While the accused is being punished for his negligence the fact remains that this was a case of a deflected blow.

The following sentence would therefore meet the justice of the case;

*"4 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition the accused does not commit within that period any offence involving the use of violence upon the person of another and or involving negligently causing the death of another through violent conduct and for which the accused is sentenced to a term of imprisonment without the option of a fine.*

*Effective sentence: 3 years imprisonment"*