

THE STATE  
**versus**  
SOKANA NKOMO

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 8 MARCH 2018

**Criminal Trial**

*W Mabhaudhi* for the state  
*R Dzete* for the respondent

**MOYO J:** The accused person faces a charge of murder, it being alleged that on 26 November 2000 he stabbed the deceased Gamula Ndlovu, with an okapi knife resulting in deceased's death. Documentary exhibits were tendered in the form of the state summary, the defence outline and the confirmed warned and cautioned statement by the accused person. They were duly marked.

This is one of those old cases where the offence was allegedly committed about 17 years ago. The facts of this matter are that accused and deceased were rival suitors. They shared a girlfriend one Sikhathazile Tshuma who is since deceased. The accused was aged 39 years at the material time. He is now 56 years old. The accused person went to visit the girlfriend and found the girlfriend with the deceased and the first state witness. He decided to pass by and go away as he realized that the situation was potentially explosive. Deceased then followed him, asking for some tobacco and also shouting obscenities. Deceased followed him until when he (deceased) caught up with him. It is not clear as to what transpired once deceased had caught up with the accused person. However, it is clear that deceased was in an aggressive mood because he could not even follow a rival suitor asking for tobacco, when the accused was not responding. Deceased was being a nuisance on the day in question, for it appears as if he was demanding

tobacco and not requesting and why would he request for tobacco from a rival suitor anyway? His following of the accused person demanding the tobacco was grossly unreasonable and provocative because not only did he demand tobacco he also shouted obscenities.

It is not clear as to what transpired when deceased caught up with the accused person, but the accused says deceased attacked him by causing him to fall off his bicycle, and blocking him on several occasions when he attempted to flee until when he stabbed him with a knife as deceased also wielded a knife. It is unfortunate that we have no eye witness account on what transpired at his juncture, we have to bank on the accused's version. It is the only available version and therefore we just have to assess it to see if it is reasonably possibly true. The version of the accused person relating to the deceased wielding a knife is in fact the gist of his defence as he pleaded the defence of self. In relation to what transpired and as to whether the accused person is entitled to the defence of self we make the following observations and findings.

1. It is common cause that accused and deceased were rival suitors.
2. It is common cause that accused decided to walk away from Sikhathazile Tshuma's homestead on the day in question when he realized that there could be a problem, therefore the accused person chose a path of peace at the material time.
3. The deceased acted in a provocative manner, on the day in question, he demanded tobacco from a rival suitor, he pursued him, he shouted obscenities at accused.
4. It is therefore our conclusion that a fight did ensue between accused and deceased and the deceased must have been the aggressor because of his behaviour of following the accused, demanding tobacco and shouting obscenities.

Deceased was a nuisance on the day in question and he indeed acted like someone who was itching for a fight. The accused must then be telling the truth when he says when deceased got to him he accosted him in a certain manner.

5. That during the fight it is not known what the deceased or accused's contributions were.

The only problematic issue that accused has with his own version is that clearly on the aspect of deceased having been armed with a knife, this court is not persuaded on that aspect because if deceased had been armed with a knife, that knife would be the basis of accused's

defence of self in that he used a knife to counter another knife attack. However, accused does not mention this crucial point, the very basis of his self defence, in his confirmed warned and cautioned statement. This works against the accused in that he could not have left out this critical point in the confirmed warned and cautioned statement wherein he had been advised to state words that formulated his defence. Even if the offence occurred in the year 2000 and the confirmed warned and cautioned statement was recorded 17 years later, there is absolutely no reason why the accused person would not mention it in November 2016 when his statement was recorded, and only to mention it today. What he had forgotten by November last year should remain forgotten to date more so that this is the crux of his defence. He could not have forgotten the crux of his defence in November 2016 only to remember it now. It is for these reasons that we find that the knife was an afterthought and deceased never wielded a knife on the day in question. Again, the probability or possibility that the deceased did have a knife is also weakened by the nature of the altercation as described by the accused person because if deceased did have a knife as alleged, he could have stabbed the accused person on his back whilst he was still on his bike at the time that the deceased caught up with the accused. Even on the two other occasions when accused says he tried to flee to Ngalale's homestead and also to Zuluboy's homestead, opportunities presented themselves wherein the deceased could have stabbed the accused but he did not, this compliments our finding that the absence of the knife story in the confirmed warned and cautioned statement means that the deceased had no knife, for if he indeed had the knife he had ample opportunity to use it.

We say so for accused does not even say that deceased wanted to talk to him nooo, he got to accused and started fighting.

#### We then proceed to analyse the defence of self

An accused person is entitled to an acquittal if he can raises a compete defence of self. This is in terms of section 253 of the Criminal Procedure and Evidence Act [Chapter 9:23]. To raise a complete defence of self an accused must show that,

1. There was an unlawful attack, either that it had commenced or was imminent

2. That he had no other means of averting the unlawful attack.
3. That the means that he used were reasonable in the circumstances.

In this case, it is our findings that there was an unlawful attack and that the accused might have failed to flee as he alleges blockage by the deceased, although this was an open space and one fails to fathom how accused failed to escape, this court is wary of taking too an armchair approach and as a result would give the accused the benefit of the doubt in so far as his failure to flee is concerned.

However, this court has already found that there was no knife carried by the deceased for reasons already stated herein, that in essence means, the accused person introduced a knife which is a lethal weapon to the fight and therefore by so doing he exceeded the bounds of self defence. It is for these reasons that this court will find that in terms of section 254 of the Code the accused person does not have a complete defence of self and therefore he should be found guilty of culpable homicide.

The accused person is accordingly found guilty of culpable homicide.

### Sentence

The accused person is convicted of culpable homicide. He is a first offender, he is a family man with five children. He is remorseful and is aged 56 years. He has been waiting for justice for nearly 18 years through no fault of his own. The state counsel submits that he not aware as to what really transpired causing the delays in the prosecution, but clearly he does not seem to have been unavailable at the material time. He has already spent 3 years 8 months in remand prison. The deceased was also the aggressor.

Aggravating of cause is that life was unnecessarily lost in the most unfortunate of circumstances, the deceased also behaved in an unbecoming manner on the day in question pushing a man to the edge. What can a man do? When pushed to the edge, violence is likely to ensue although these courts do not condone such behaviour, this court is alive to the fact that an accused person is human and is bound to react in a certain manner when pushed to the limit. This is a very difficult matter in so far as sentencing is concerned, for on one hand, there is

weighty mitigation, and on the other hand the court has to balance the interests of society with that of the accused and also instill confidence in our justice system. If people lose confidence leaning heavily in accused's favour is the fact that he has already spend 3 years 8 months in pre-trial incarceration. If he had been tried and sentenced timeously he would have been sentenced to an effective sentence of about 5 years imprisonment.

The court has to discount the 3 years 8 months from this effective sentence. The court is also alive to the fact that sending an accused person to prison 18 years down the line for an offence where deceased was an aggressor, and he has already spent 3 years 8 months in custody, would not be in the interests of justice at all. This court has to blend the accused's circumstances with the interests of society at large. Knife cases are a problem in our midst and deterrence is a factor to be considered in such cases. In this balance, the court finds that if you knock off forty-four months from sixty months, you remain with about sixteen months. Had accused been tried 18 years ago, he would long have finished his sentence. He is now nearing the afternoon of his life. It is for these reasons that the accused person will be sentenced to 18 months imprisonment wholly suspended on condition the accused person performs 320 hours of community service at Makhulela Clinic.

*National Prosecuting Authority, state's legal practitioners*  
*Maseko Law Chambers' respondent's legal practitioners*