

THE STATE

Versus

FAINOS MLALAZI

IN THE HIGH COURT OF ZIMBABWE

MANGOTA J with Assessors Mr P. Damba and Mr J. Sobantu

BULAWAYO 20 & 21 June, 8 & 26 July, 2024

Mr Mudimu for the state

Mr Dube for the accused

JUDGMENT

MANGOTA J

The accused is charged with the crime of murder as defined in Section 47(1)(a) of the Criminal Law (Codification and Reform) Act, (Chapter 9:23). The allegations against him are that he, on 26 December 2020 and at David Nleya's Homestead, Nsubula Village, Madlambuzi, Plumtree, did assault one Nkululeko Makaba all over the latter's person with an unknown object and on his head with a plank and, in the process, he killed or caused the death of, Nkululeko Makaba ("the deceased"). The State alleges further that, when the accused assaulted the deceased in the above-described manner, he intended to kill, or cause the death of, his victim. He, it alleges, realized a real risk or possibility that his conduct may cause the death of the deceased and, the realization of the real risk or possibility notwithstanding, the accused continued to engage in the undesirable conduct.

The accused pleaded not guilty to the charge. He raises the defence of the alibi. He claims that he was not at the scene of the crime where the deceased was found lying on the ground dead. He denies having ever seen let alone assaulted the deceased with a plank on the day in question. He denies having ever had an altercation with the deceased. He claims that he spent the greater part of night which led into the early morning of 26 December, 2020 at a beerhall which is about 300 meters from the place where the deceased died. He states that he was drinking beer with one Phoso Ncube with whom he parted ways in the early hours of 26 December, 2020. He claims that, as he walked his way home, a mob apprehended him alleging that he had killed the deceased. The mob tied him to a tree waiting for the police to come and take the deceased and him away to the police station. He denies having ever been involved in

any manner in the death of the deceased. He moves us to acquit him of the charge of murder which the State preferred against him.

At close of the case for the defence, Mr Mudimu, counsel for the State, committed himself to filing, as well as serving upon the accused's counsel, his closing submissions in written form on or before 12 July, 2024. In a similar fashion, Mr Dube, for the accused, advised that he would file, and serve upon Mr Mudimu, the defence's written submissions on or before 16 July, 2024. With commitments from counsel for either side of the divide, we reserved judgment in the case to be handed down on 26 July, 2024.

It is with some disquiet that we observe that Mr Mudimu did not file with the court nor serve upon counsel for the accused his written submissions. He, it would appear, did not even prepare his submissions as he had made us to understand. It is upon him that the onus to prove the guilt of the accused rests. He, all things being equal, should have done all he can or could to show us the manner in which the State is alleging that the accused killed the deceased. The duty to prove the stated matter rests upon no one else but on him. It does not lie upon the accused who, at law, may even go about lying on the circumstances of the charge which is being preferred against him.

Apart from the post-mortem report which shows some semblance of consistency with regard to the cause of the death of the deceased, the rest of the evidence of the witnesses for the State leaves a lot to be desired. It is riddled with inconsistencies, contradictions and/or improbabilities in regard to material aspects of it. One cannot make any head or tail of what it is driving home to, so to speak.

Davidson Nleya and Elvis Nleya who gave *vica voce* evidence against the accused are father and son respectively. They, for instance, state that the fight or assault of the deceased by the accused took place within the parameters of, and not outside, their homestead. The accused, it is a fact, was arrested outside their homestead. The accused's statement is to an equal effect. None of them was able to explain how the accused who allegedly killed the deceased from within their homestead was able to be arrested from outside the precincts of their homestead. None of them ever stated that the accused made an effort to run away from the scene after the event. The fact that he was arrested from outside the homestead of the two witnesses seems to confirm the allegation of the accused. The allegation is to the effect that he was arrested by a group of people when he was coming from the beerhall *en route* to his own home. If he had

killed the deceased within the premises of the homestead of Davidson Nleya as the latter would have us believe, Elvis Nleya and him would not have allowed him to leave the scene of crime. They would have apprehended him at the scene and kept him at the same until the arrival of the police to their homestead.

The accused's assertion is that a group of people arrested him as he was on his way to his own home. Elvis and Davidson do not come out clearly on who between them arrested the accused, if ever he did. Elvis states that he, with the help of his younger brother one Johanne and two other people apprehended the accused after the latter had struck the deceased twice on the head with the plank. Davidson's evidence, on the same point, is that one Bafana assisted Elvis to apprehend the accused after he had dealt the fatal blow on the deceased's head with the plank. None of them commented on the allegations of the accused which are to the effect that a group of persons, and not them, apprehended him from outside the parameters of their homestead.

The State, for reasons which are known to itself, did not call Johanne nor Bafana to come and shed light on what actually happened with regard to:

- a) the position from where the accused was apprehended;
- b) whether or not the apprehension occurred from within, or from without, the premises of the witnesses and, if from without
- c) what had occurred for him to be arrested away from the scene of crime- and/or
- d) the persons who apprehended the accused.

Such material evidence would have exonerated the accused altogether or nailed him to the cross, so to speak. The prosecution which is dominus litis should have weighed its bag to realize that more evidence was required to secure the conviction of the accused. Its choice of leaving out of the equation evidence which would have assisted it to prove the guilt of the accused remains a blame which lies at the door-step of no one else but itself.

Elvis who claims to have been the eye-witness to the alleged assault of the deceased by the accused states that he observed the accused striking the deceased twice on the head with the plank. He was able to observe him do that with the assistance of the moonlight which was shining, according to him. Davidson who is Elvis's father and who was present at the time of the alleged assault of the deceased by the accused states to the contrary. He asserts that there

was no moonlight at the time that the assault occurred. He states, under cross-examination, that the place was dark when the assault occurred. He, in short, asserts that there was no source of light at all at the scene of crime when the alleged assault of the deceased by the accused took place.

One cannot tell, with any degree of certainty, as to who between the two of the witnesses for the State is telling the truth on this crucial aspect of the evidence of the State. The truth of the matter is that the two witnesses who were at one and the same place at one and the same time are telling conflicting statements on such a matter as relates to the identity of the person who caused the death of the deceased. The conflict of their statements remain in sync with the defence of the accused who asserts that both of them were/are mistaken as to the identity of the person who assaulted or killed the deceased. If they are not mistaken as they would have us believe, they would not have had such glaring inconsistencies as are showing even to our naked eyes.

A lot leaves to be desired regarding the manner in which one John Mhumhi, the investigation officer, investigated the case the charge of which the State preferred against the accused. The accused, it is a fact, raised the defence of the alibi. Mr Mhumhi did not take the trouble to establish the veracity or otherwise of the defence which the accused raised. When the same is read together with the place from where the accused was apprehended, the accused's defence of the alibi becomes more probable than it is fanciful.

The testimony of the investigation officer is to the effect that he recovered two pieces of a broken plank near the place where the deceased was lying down. One of them, he states, had blood-stains on it and the other one had hair strands on it, according to him. The two pieces are, in all probability, the murder weapon which the assailant-whomever it is-employed to deal a fatal blow onto the deceased. Mr Mhumhi, for reasons best known to himself, did not see the wisdom of having the plank taken to court as evidence of the murder of the deceased. Nor did he take the trouble to having the two pieces which, according to him, were one plank broken into two, weighed to ascertain the weight of the same. Least of all, he did not see the wisdom of having fingerprints which might have been on any part of the plank taken with a view to having them compared with those of the accused person whom he had arrested as the suspect in the murder of the deceased. A comparison of the fingerprints on the plank with those of the accused would either have let the accused going scot-free or nailed him to the cross, so to speak.

The net effect of the above-analysed matters is that there is, in short, nothing which ties accused to the offence. He, on his part, remained consistent with his statement. His statement is that a group of persons apprehended him when he was on his way to his home from the beerhall and tied him to a tree which was outside the homestead of Davidson Nleya alleging that he had killed the deceased. He repeated the same statement to the arresting detail Mr Mhumhi, in his warned and cautioned statement, in his defence outline as well as in his evidence-in-chief.

The State, it is our considered view, failed to prove the essential elements of the crime of murder against the accused person. It proved neither the *actus reus* nor the *mens-rea* of the offence. We, in the final analysis, have no option but to find the accused not guilty of the crime of murder and acquit him of the same. The accused is, accordingly, found not guilty and is acquitted of the murder of one Nkululeko Makaba.

National Prosecuting Authority, state's legal practitioners
Mweli Ndlovu & Associates, accused's legal practitioners