

THE STATE
versus
TATENDA MANYANI

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 15 March, 7 & 13 June 2023

Criminal Trial

Assessors: Mr *Barwa*
Mrs *Chitsiga*

K Chigweder, for the State
T Munodawafa, for the accused

MUNGWARI J: On 6 February 2022, *Tatenda Manyani* a twenty-two year old young man, (herein after referred to as “the accused”), allegedly brutally attacked *Emmanuel Choponyera* (herein after referred to as “the deceased) at Cornerstone Junior school in Nyatsime Chitungwiza. The accused is alleged to have used booted feet and other unknown objects to indiscriminately assault the deceased. He also dragged him along a paved road. The assault resulted in fatal injuries. Following that violence, *Tatenda Manyani* was dragged before us, to answer to a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] (hereinafter referred to as “the Code”)

Prosecution’s case was that on the morning of the incident, the accused and his accomplice *Michael Chiridzo* (Michael), who is on the run, had a disagreement with the deceased over a missing cellphone. They believed the deceased had stolen it. Despite the deceased’s protestations of innocence, the accused and his colleague became enraged and repeatedly assaulted him with booted feet and other objects. The attack continued at Cornerstone Junior School as they dragged the deceased along a macadamized road up to where the deceased resided. Upon arrival at the residence, the deceased’s father expressed concern about his son’s critical health condition. He immediately directed both the accused and the deceased to the police station and lodged a formal report against the accused for assaulting his son. Due to the severity of the injuries sustained, the deceased was taken to Chitungwiza hospital, where he passed on a few hours after arrival. An autopsy was conducted on the

deceased's remains. It concluded that the cause of death was due to intracranial hypertension and serious head trauma.

The accused pleaded not guilty to the charge and denied acting in common purpose with *Michael Chiridzo* his alleged accomplice in the assault of the deceased. In contrast to the state's allegations, the accused stated that the deceased was apprehended and assaulted by a mob including *Michael* at Cornerstone rugby pitch. He said the deceased had stolen cellphones belonging to both himself and *Michael*. The accused denied dragging the deceased along a tarred road. Instead he claimed that he was merely aiding him to walk to his place of residence after being directed there by *Shem Makomichi*.

State Case

Prosecution opened its case by applying to produce the autopsy report compiled by Doctor *Yoandry Olay Mayedo* a pathologist at Parirenyatwa Hospital. The doctor examined the remains of the deceased on 10 February 2022. He observed multiple surface wounds and injuries on the body including, a right cheek ecchymosis, multiple ecchymosis on the trunk line, left hip to buttock abrasion and ecchymosis, haematoma and both shins abrasion. He also noted, multiple left knee abrasion, left thigh ecchymosis and multiple ecchymosis and abrasions on the back. Significantly, the doctor also observed that all the injuries had a lineal pattern. In addition, the doctor also noted other injuries which he described as head injuries on the left temporal parietal, occipital subdural haematoma like light parietal vessel congestion. Ultimately, he concluded that the cause of death was due to intracranial hypertension, left *parieto temporo* occipital subdural haematoma and severe head trauma. With the consent of the defence the postmortem report was admitted into evidence as exhibit no 1. The cause of the deceased's death was not disputed. The report provided crucial evidence for the state's case as it established the cause of death and the extent of the deceased's injuries.

The state also applied to tender the accused's confirmed, warned and cautioned statement which was recorded from him at ZRP in Chitungwiza on 7 February 2022. It was confirmed by a magistrate sitting at Chitungwiza on 26 May 2022 and the defence consented to its admission. The statement was admitted as exhibit no 2.

In the statement the accused denied the charges against him and stated that he and his friend *Michael Chiridzo* had taken the deceased from a mob that was assaulting him after he had stolen their cellphones. They intended to take him to the police station but met a male adult who claimed to know where the deceased's parents lived. They then took the deceased

to his parents' house where they met his father and brother. Together with the deceased they proceeded to *Zengeza 5* base where the father was issued with a request for a medical form. The father took the deceased to the hospital while the accused and *Michael* remained behind. Later they were taken to *St Mary's* police station where a certain police officer told them that the person they were alleged to have assaulted had passed away.

The evidence of *Stanley Makunda* a duly attested member of the Zimbabwe Republic Police, was formally admitted in accordance with s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as it appeared in the state's summary of evidence. He investigated the matter and recorded the accused's warned and cautioned statement in accordance with the law. His evidence did not contribute to the resolution of the issue at hand. It was common cause.

Common cause issues

The following issues are not in dispute in this trial:

1. There was a disagreement between the accused and the deceased on the day in question regarding the accused's cellphones. The accused suspected the deceased of theft of the cellphones.
2. The deceased was subsequently attacked and severely assaulted by one or more individuals.
3. The injuries sustained by the deceased were severe enough to cause his death which occurred later that day while he was seeking medical attention.

Issue for determination

This case turns on the facts. The only issue for determination based on the state's allegations, the defence's arguments and the common cause issues outlined above is whether or not the accused participated in the assault of the deceased. Our analysis of the documentary and other evidence already submitted and the oral testimonies of the witnesses, their credibility on one hand and that of the accused on the other would be key in that determination.

Oral Evidence

The State led *viva voce evidence* from three witnesses namely *Gregory Ben*, *Stephen Muchenje* and *Shem Makomichi*. On the other hand the accused was the sole witness for the defence.

Gregory Ben (Gregory)

Gregory, a resident of Zengeza 3 Chitungwiza, testified that he was a former school mate and neighbour of the deceased. On the night of 5 February 2022, he met the accused at a bar called *Slay Walkers* where they spent the night revelling. At around 6 am, Gregory heard his friend *Brendon Sithole*, shouting that the deceased, commonly known as *Stumwa* was not a thief. Out of curiosity, Gregory went outside to investigate. He saw the accused, *Michael* and the deceased. The deceased who appeared terrified, approached Gregory and asked him to tell the two men that he was not a thief. The deceased explained to him that the accused and his accomplice *Michael* had accused him of stealing their mobile phones and wanted to assault him. Gregory obliged and told the accused that the deceased was not a thief. However the accused and *Michael* were in a belligerent mood and did not want to compromise. They became aggressive towards Gregory when he tried to defend the deceased. The accused declared that they were taking the deceased to the police station. The last that Gregory recalls of the deceased was when he saw him with the accused and *Michael* on either side of him. One was holding his hand and the other was pulling him by the trousers. They walked in the direction of the police station.

Gregory did not witness the accused assaulting the deceased but said he was certain that this was the beginning of the deceased's problems. The accused and his accomplice were determined to recover their phones and threatened to assault the deceased if he did not give them. The accused's body language as he left the scene with the deceased left him in no doubt that the deceased would face the two's wrath if he failed to produce the phones. It was evident to the witness that the accused was terrified of the threats of assault. He noted however that the deceased appeared to be in good health as he walked away tucked in between the angry accused and *Michael*.

The witnesses' evidence was not disputed. The defence only asked him one question, whether he had seen the accused assaulting the deceased to which he reiterated his earlier position. Because the witness's evidence was undisputed, there was no basis to doubt it, and we accepted it as the truth of what he witnessed.

Stephen Muchenje (Stephen)

The witness, a male adult resident of Zengeza 3 and a neighbour of the deceased testified that he did not know the accused person prior to the commission of the offense. On 6 February 2022 at approximately 7.30 am he was standing about forty meters away from the

deceased's residence when he saw the accused person and Michael dragging the deceased along *Kabvumbi* Street. He also noticed a group of people following the trio. The followers were mere spectators who did nothing to intervene. The witness saw *Michael* holding the deceased who appeared to be in a sitting position and was resisting to walk. As result of the resistance, he was being dragged. Michael was big in stature. He held the deceased tightly by the collar as the deceased sat on the pavement with his buttocks in contact with the worn out tarred road. It had more patches of gravel than tar. The deceased was facing the opposite direction of where the heavily built *Michael* was heading and staring straight into the eyes of the accused who was mercilessly kicking him with booted feet.

The witness said he saw the accused repeatedly aim for the deceased's thighs as he ordered him to stop pretending to be drunk and walk. The witness approached the parties and noticed that the deceased had been severely assaulted and his face was swollen with abrasions on his finger and back. He tried to talk to the deceased but it was apparent to him that the deceased was unable to communicate and could only stare at him sorrowfully. This sorry state of the deceased moved the witness to ask the accused what was going on. *Michael* informed him that the deceased had stolen their cell phones. Stephen suggested to the accused that they report the matter to the police instead of taking the law into their own hands. The accused refused stating that he feared corrupt officials at the nearby *Zengeza 5* police base or *St Mary's* would mishandle his case. Stephen insisted that the accused report the matter at the police but was then threatened by the accused and told to desist from giving him advice. The accused continued to drag the deceased who was unable to walk. When asked how the accused dragged the deceased, the witness demonstrated the vicious manner of dragging with the assistance of court officials. He saw the deceased being dragged for a distance of about twenty-five meters. He attributed the abrasions on the deceased's back to the manner in which the accused and his accomplice dragged him.

Stephen then went on to detail how he teamed up with the deceased's father and brother and took the accused and the deceased to *Zengeza 5* police station. The deceased's father made a report of assault since the deceased was unable to make the report himself. At the police station he referred to the accused as the light skinned boy as his name was not known to him.

During cross examination, Stephen confirmed he did not witness what occurred at Cornerstone Junior School as he was not there. He only witnessed the events from a distance of approximately forty meters from the deceased's house. However he was unwavering in his testimony that he saw the accused assaulting the deceased and was clear about the sequence of

events. He also noted that a sizeable crowd of about twenty people followed the accused and the deceased. In the mob were two men who told him that they had been following the accused from as far as *Zengeza 5* turn off. The others were neighbours who were curious onlookers, sympathetic passers-by and others who were torn between believing that the deceased could have stolen the cell phones or was innocent. No one from the mob assaulted the deceased in any way. In fact, when he suggested to them that the accused should take the deceased to the police station the mob agreed to this and even suggested that the accused should not go anywhere until the police arrived. From the conversations he overheard from the mob, he concluded that it was not an angry or aggressive mob.

The witnesses' testimony was important. He was an eyewitness to the assault of the deceased by the accused and his accomplice. Critically he expressly excluded any participation in the assault by the mob. He provided a detailed account of the accused's role in the attack. According to the witness, the accused displayed aggression towards anyone who interfered with his mission. The witness himself almost bore that brunt when the accused suspected him of sympathizing with the deceased.

The defence missed an opportunity to cross examine the witness meaningfully and as a result left his evidence standing firm. The witness was very credible. The court believed his evidence.

Shem Makomichi (Shem)

On 6 February 2022 at approximately 8:00 am, the witness, who is a neighbour of the deceased was walking along *Kubvumbi* Street, which is about eighty to hundred metres away from the deceased's residence. He observed the accused person and *Michael* dragging the deceased. The witness saw four men initially with two of them holding the deceased by the legs and the other two by the arms. As the accused and *Michael* dragged the deceased his buttocks scraped along the ground. One of his arms was held by the accused and the other by *Michael*. As the incident unfolded two of the men who were holding the deceased let go and disappeared. It left only the accused and *Michael* dragging the deceased. The two men so the witness stated, did not do anything to the deceased except to hold him by the legs. He saw the deceased being kicked by the accused and his accomplice as they demanded to know where he resided. The witness said he asked the accused why they were dragging the deceased and was told that he was a robber who preyed on people in the maize fields. The accused and his colleague then began kicking the deceased with booted feet in the ribs ordering him to get up.

Shem tried to intervene but was kicked on the arm by Michael. He observed that the deceased had bruises all over his body, was bleeding from the mouth, had blood on the side of his face and abrasions on his back. The witness noticed that the deceased was not showing any signs of life. When he called out the deceased's name he fleetingly opened his eyes which had become red but failed to utter a word before closing them again. It was evident, so he said, that the accused was the one in charge, while his accomplice followed his every instruction and direction. He formed that opinion because it was the accused who responded whenever the witness spoke to them. When he realized that the accused was becoming violent even towards him, the witness said he directed them to the deceased's residence. At that point neighbours and passers-by began to gather around the three men but none of them did anything to harm the deceased.

The witness was adamant that the accused assaulted the deceased. According to him, the accused displayed visible hostility and unbridled anger towards the deceased. He viciously kicked him and loudly instructed the deceased to get up and to stop pretending. The witness was certain that the accused had been assaulting the deceased for a prolonged period of time, up until the moment he witnessed the incident because the deceased was in a sorry state. He refuted the accused's claim that he was assisting the accused to walk because he had observed that the deceased was unable to walk or speak. The accused had spoken to him harshly and continued to drag him demanding that he stand up and walk despite his obvious inability to do so.

Under cross examination the witness stated that he could not dispute that the deceased had been assaulted by multiple individuals prior to his arrival at the scene because he had not witnessed the events leading up to the incident. He was however adamant that when he got to the scene he did not see anyone from the mob assaulting the deceased. Instead, he testified that the accused was the mastermind behind all the assaults and that he played a crucial role in causing the deceased's demise by personally participating in the assault. The witness's testimony suggested that the accused was not only responsible for orchestrating the attack, but also actively participated in the violent assault of the deceased.

Shem's evidence corroborated that of *Stephen*. Whilst he had observed the assaults from approximately one hundred metres away from the deceased's house, *Stephen* had observed the violence from about forty metres. The mob did not participate in any way other than to spectate curiously and follow the trio. With this corroboration we found this witness's

evidence believable. He was not known to the accused and therefore had no motive to lie against him.

The defence case- Tatenda Manyani

In his evidence in chief the accused reiterated the story he had presented in his defence outline, but with some additional details. He confirmed that he had been in the company of *Michael Chiridzo* when he encountered the deceased at around 5 am on the day in question. They were walking home when the deceased approached him and grabbed the bottle he was holding and attempted to distract him, while two other individuals took his two cell phones and fled into the maize field. The accused shouted “thief!” The deceased tried to run away but was tripped by an elderly man who appeared from Cornerstone where the accused was heading. It was at this point that the deceased was apprehended and assaulted by a mob. Some of the people had actually scaled a precast wall to join in the assault of the alleged thief.

The accused maintained that he was not part of the group that assaulted the deceased. Instead he was conversing with an elderly man at the scene who instructed him to take the deceased to the police station. He claimed to have stopped the angry mob from assaulting the deceased but they continued to attack him while he tried to ward them off. In contrast *Michael Chiridzo* joined the attackers and was also assaulting the deceased. The accused stated that he had retrieved the deceased from the hands of the mob with the intention of taking him to the police station to recover his stolen cell phones. Along the way he encountered a man who claimed to know the deceased and suggested that they take the deceased to his father’s house which was nearby. The man called out the deceased’s name but he was unresponsive. The accused alleged that they carried the deceased to his house. He denied kicking the deceased or dragging him.

However, during cross-examination, he confirmed that he was at the bar but claimed that he did not meet the deceased there. He denied that anything happened between them at the bar. The accused seemed to have forgotten that Gregory Ben’s evidence was undisputed. When reminded of Gregory’s testimony in which he stated that the accused had displayed aggression towards the deceased at the bar the accused appeared confused. Gregory had testified that the deceased’s troubles began at the bar not after the deceased had given chase and the deceased had been tripped by an elderly man as he claimed. The state counsel reminded the accused that Gregory had seen him, his accomplice Michael and the deceased leave his sight as they headed towards the police station. Despite this reminder the accused failed to

explain the discrepancy in his evidence against the undisputed evidence of Gregory. We concluded that the reason for his failure was that he was not telling the truth.

During cross examination, the accused also admitted that he had custody of the deceased from 5 am to 8 am that morning a period of about three hours. He also acknowledged that when he first encountered the deceased he was walking and appeared to be in good health. Later in the cross-examination he conceded that it would be reasonable to infer that someone who takes a person who is in good health from one place and arrives with them in a badly injured state at another would have caused the harm to that person.

The accused admitted to feeling pain and indignation when his phones were stolen. He admitted chasing after the suspected thief in anger but when he caught up with the deceased he claimed to have stood aside. When asked why he did that and how his anger and pain had suddenly disappeared he once more failed to provide a satisfactory explanation. He could not explain how his anger over the stolen cell phones simply disappeared particularly when the suspected thief was within his sight. In the absence of a satisfactory explanation it became apparent that as alleged by the witnesses he transferred his anger to assaulting the deceased. He believed that the deceased was the thief. His attempt to distance himself from the assault of the deceased and attribute it to a mob and *Michael Chiridzo* was unconvincing. We illustrate all this in detail to demonstrate that the accused's evidence was incomprehensible. It was filled with half -truths and outright lies, making it difficult to discern the truth.

The crucial issue is not whether the deceased was assaulted at Cornerstone School. It is not about who assaulted him there. The issue is about whether the accused participated in the assault of the deceased. It does not matter whether he did so alone, with his accomplice *Michael* or as part of a mob. The irrefutable evidence which the court has is that he followed through with his threats to assault the deceased which threats he made in Gregory Ben's presence. He detained the deceased for about three hours. He was in the company of the deceased throughout the entire incident.

As described above, he was seen by *Shem Makomichi* and *Stephen Muchenje* assaulting and dragging the deceased who appeared to be in a helpless state. The deceased was battered and bruised. By his own admission, the deceased was in good health when they met. His explanation of the multiple injuries that the deceased later sustained, the blood stained clothes he was wearing when they arrived at the deceased's house supports that he and possibly his accomplice *Michael* had brutally attacked the deceased under the guise of him being a cell phone thief. The accused's story that the mob had assaulted the deceased without his

participation is a red herring. He failed to explain to the court how that was possible given his boiling anger and resentment towards the deceased when he chased him. He was the owner of the two cell phones that the deceased had allegedly stolen.

Shem's testimony was particularly damning on the accused. It did not simply depict the accused as an ordinary participant in the assault but as the ring leader. He was in charge of the beatings and humiliation of the deceased. He failed to explain why he did not report the theft to the police and instead took matters into his own hands. He had a score to settle with the deceased betraying ludicrousness of his attempt to motivate the court to believe that he had protected the deceased from the violent mob. His actions were far from being consistent with those of someone who was trying to help the deceased. He was not a bystander. The accused's attempt to attribute the assaults to nameless members of the mob and his accomplice *Michael* who is a fugitive from justice are nothing but last ditch futile efforts to save himself from liability for the murder because they are not backed by evidence.

Even if the court were to believe that other individuals joined in the assault it would not exonerate the accused from liability. He would still be liable as a co-perpetrator of the crime in terms of s 196 of the Criminal Law Code. That provision only requires the state to prove that the accused was in the immediate vicinity of the scene of crime at the time it was committed. There is no doubt that he was in this case. Worse so, he participated actively in the assault which led to the deceased's death. The mob, we were advised wanted the deceased handed over to the police if he had committed any offence. The accused did not want that route. He wanted his own justice. It is equally unlikely that a mob would suddenly attack a person whom the accused was walking with peacefully.

Medical evidence

The post mortem report depicts the cause of deceased's death as intracranial hypertension and serious head trauma. The state presented evidence that the deceased was assaulted all over his body and dragged along the tarred road. The most significant aspect of the report, was the doctor's comment that all the surface injuries had a lineal pattern. That observation is consistent with the allegation that the deceased was dragged along a paved road. A lineal pattern refers to a series of injuries arranged in a straight line. In this case the pathologist's observation of lineal patterned injuries corroborates the state witnesses' evidence that for a considerable distance the accused dragged the deceased along the pavement.

Stephen Muchenje witnessed the accused kicking the deceased with booted feet on his thighs while *Michael* tightly held the deceased by the collar. As a result the deceased was unable to walk or talk. *Shem Makomichi* saw the deceased being kicked with booted feet on the ribs and he also observed the deceased bleeding from the mouth. The deceased had blood on the side of his swollen face and abrasions on his back. The evidence adduced by the state establishes a causal link between the cause of death and the indiscriminate blows suffered by the deceased at the hands of the accused. Because of the severity of the blows the deceased died a few hours after arrival at the hospital and before he could be treated. The accused's defence is clearly false. The court rejects it in its totality.

Disposition

In the final analysis, we have no apprehension to hold that:

- i. The accused apprehended the deceased who he suspected of having stolen his two mobile phones. He assaulted him severely from the time they all left the bar through to Cornerstone School. He only stopped assaulting the deceased once he arrived at the deceased's place of residence. He did not assist him to walk but caused the deceased more harm as he dragged him along the tarred road. The injuries meted upon the deceased resulted in his demise.
- ii. His conduct and the words he uttered during the assault leave us without a doubt as to his intention.

It is against that background that we are convinced that prosecution managed to prove the accused's guilt beyond reasonable doubt. He is accordingly found guilty of murder in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act as charged.

REASONS FOR SENTENCE

In arriving at the appropriate sentence, the court is mindful of the need to strike a balance between the offence and the offender, while also ensuring that the interests of society are considered. For this purpose the court considered all the mitigating and aggravating factors as submitted by both counsels. Both counsels addressed the court and stated that the murder was not committed in aggravating circumstances as envisaged by s 47(2) and (3) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. We agree with their submissions. None of the listed circumstances in s 47 (2) and (3) are present in this case.

It is accepted therefore that this murder was not committed in aggravating circumstances as envisaged by s (47) (2) and (3) of the Code.

In mitigation the court considered that the accused is a first offender. He is a 23-year-old unmarried student at Harare polytechnical college, studying towards a course in electrical engineering. The accused appears to have been overwhelmed by the situation he found himself in. He assumed the deceased had stolen his two cellphones and out of anger pursued him. From those intense feelings that he harboured towards the deceased at the time, he failed to restrain himself and participated in killing him. Against this background Mr *Munodawafa* counsel for the accused urged the court to impose a custodial sentence of 10 years with portions suspended on condition of good behaviour. From his submissions, Mr *Munodawafa* appeared to be oblivious to the provisions of s 358(2) of the CP&E Act which clearly states that in murder matters except for infanticide the court is expressly prohibited from suspending any portion of a sentence it will have imposed. See the case of *S v Pritchard Zimondi* (HH 179-15) for this proposition.

In aggravation, *Mrs. Chigwedere* for the state bemoaned the loss of a young life and stated that it is unsettling that violent offences committed as a means of dispute resolution continue to be on the rise. According to her, the deceased paid for a cellphone with his life, making the death senseless and meaningless and yet the accused had the opportunity to stop assaulting and harassing the deceased. He did not. She urged the court to uphold the sanctity of life by showing its disapproval through imposing a sentence of 20 years imprisonment.

Indeed the accused committed a very serious crime. He killed a person knowing that there was a real risk or possibility that his conduct may cause death and continued with the assault despite that risk. He caused the deceased to lose his life at the tender age of 32 years. Murder is a crime which the courts must always take a dim view of. Unfortunately the crime of murder is on the rise in our jurisdiction with people being killed over minor issues. It is critical for the courts to send a clear message to society that human life matters by imposing appropriate sentences.

There is no doubt that invariably the offence of murder attracts a significant term of imprisonment. There is not much justification proffered for the court to resort to a sentence as short as the 10 years suggested by counsel for the accused. The accused brutally attacked the deceased with hands, fists and booted feet. He dragged him along a macadamised road leading to linear injuries which were noted by the pathologist. The deceased died a painful death given the nature of the injuries sustained as per the post-mortem report.

The crime was made more brutal and callous given that it was committed in front of people from the deceased's neighbourhood. It is equally disconcerting to note that throughout the trial the accused did not show any signs of remorse. He was intent on trying to hoodwink the court into believing that he did not harm the deceased when eyewitness had seen him kicking and dragging the deceased in broad daylight. In the process he exposed himself for not being contrite and as someone eager to escape liability by whatever means possible.

While it is important to temper justice with mercy when passing sentence, it must be realised that unduly lenient sentences for murder offences promote lawlessness in society. If people know that they will only go to prison for a short period they will kill without hesitation. Consequently it is imperative to impose sentences that serve as deterrent to both the offenders and other would-be offenders.

Accordingly accused is sentenced to **14 years imprisonment**.

National Prosecuting Authority, states legal practitioners
Zvavanoda Law Chambers, accused's legal practitioners