

THE STATE

versus

EUPHARASIA NETSAI MASIKINYE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 28 MAY 2014

T. Mupariwa for the state
L. Mavhondo for the accused

Criminal Trial

MAKONESE J: This is one of those sad cases of domestic violence. The 50 year old female accused was initially charged with murder. The allegations being that on the 8th of January 2007 the accused unlawfully and intentionally caused the death of her husband Christopher Mamhiwa by striking him with a log on the head several times.

The state conceded that on the facts on record a plea of guilty with respect to culpable homicide was appropriate. The court indeed accepted the limited plea and acquitted the accused on the main charge of murder and convicted accused on a charge of culpable homicide.

The facts surrounding this matter as set out in the statement of agreed facts are as follows:-

The accused Eupharasia Masikinye was aged 41 at the time of the commission of the offence. The deceased was aged 49 years at the time he met his death. The deceased was married to the accused and they were staying together as husband and wife. On the 8th of January 2007 the accused person in the company of her son, Washington Mamhiwa, one Clara Sinyoro, and Helen Muraga were going to a neighbouring farm to perform some odd jobs. On their way the deceased caught up with them and told the accused that Washington was supposed to return home and herd cattle. The accused then informed the deceased that she had already made alternative arrangements with one Jacob Mutema to herd the cattle on their behalf. The accused person then left and went away. After working at the farm, the accused person returned home in the evening. After having supper, the deceased asked the accused as to why she had defied his orders but the

accused did not respond. The deceased then proceeded to his bedroom and emerged with a whip. The deceased started assaulting the accused all over the body with the whip telling the accused person to leave his home and go back to her maiden home. The accused person then fled to Clara Sinyoro's homestead. While narrating her ordeal to Clara Sinyoro's mother, deceased person arrived. The deceased then grabbed the accused by the neck and continued assaulting her with the whip. Clara Sinyoro then emerged from another hut and ordered the two to leave her homestead. The deceased person then turned upon Clara Sinyoro and slapped her on the face with an open hand. In response, Clara Sinyoro picked up a stick and assaulted the deceased on the back. Accused person then picked up a log and struck the deceased on the head several times. The deceased fell to the ground. The two (accused and Clara Sinyoro) started to apply first aid on the deceased and walked him back to his home. The deceased's condition, however, did not improve and he died on the way to the hospital. On the 19th of January 2007, Dr Chigangacha examined the remains of the deceased and concluded that the cause of death was extensive skull fracture with intracranial injury, consistent with assault with a blunt object.

It is on these facts that the accused has been convicted of culpable homicide, in that she negligently caused the death of the deceased.

Mrs *Mavhondo* appearing for the accused person has highlighted the mitigating features of the case, namely that the accused has led a blameless life for the past 40 years and that the attack upon the deceased was not premeditated but spontaneous. She also indicated that there has been an inordinate delay in the finalisation of the case caused by the failure by the state to locate witnesses. In addition the accused spent a period of 9 months before being granted bail pending trial. Accused has paid compensation in the form of 2 herd of cattle to the deceased person as a form of avenging the spirits of the deceased. We have been referred to the case of *S v Ncube* SC 14/87, wherein MCNALLY JA indicated that emotional stress in marriages should be taken into consideration in dealing with cases related to domestic violence. We accept in principle that in the present case the accused did endure emotional and physical stress at the hands of the deceased. We also take into consideration that deceased subjected the accused to a brutal and persistent assault using a whip. The deceased even expelled the accused from their matrimonial home and told her to go back to her maiden home. We accept that this treatment was not only abusive but humiliating and demeaning on the part of the accused person. When she sought

refuge with neighbours she was followed by the deceased who continued with his assaults and even assaulted Clara Sinyoro the neighbour.

Mr *Mpariwa*, appearing for the state while conceding that this was a bad case of domestic violence, pointed out that the court should balance the interests of society as against those of the accused person. He argued that a custodial sentence was called for and did not agree with defence counsel who pleaded for a sentence of community service.

The principles of sentencing are ever evolving and the courts, though guided by legal precedent, must and should consider each and every case on its own merits. There has been an upsurge in cases of domestic violence in this jurisdiction. Sadly, the violence is not only perpetrated by man against their wives but even by wives against their husbands. Any form of violence which results in the death of another person, whether committed by a wife against a husband or *vice versa* should be treated seriously. The courts must uphold the sanctity of human life. The courts must apply equal justice to all citizens and the message that ought to be sent to society is that violence is not tolerated as a means of dispute resolution.

In *casu*, the peculiarity of the case is that the accused was physically abused and chased away by the deceased from the matrimonial home. At the critical time, when accused decided to pick up the log and struck the deceased, she acted at the spur of the moment. Her conduct is however inexcusable. She repeatedly struck the deceased on the head realising that death was a possibility. It is the manner of striking of the deceased, the nature of the weapon used and the part of the body aimed at that makes this case a bad case. This was not an accidental killing where one blow has delivered. The accused acted rather recklessly. The post-mortem report reflects that the cause of death was extensive skull fracture and intracranial injury. The blows to the head were severe and fatal.

The court has to strike a delicate balance between the interests of the accused person, and the expectations of society. The sentence must fit the offender and should not be seen to reward the offender.

It is our view that a non-custodial sentence would trivialise this offence and send the wrong signal to society, and encourage persons in similar circumstances to take the law into their own hands.

In the circumstances, and accordingly, the accused person is sentenced as follows:-

“3 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused is not within that period convicted of an offence which violence is an element and for which she is sentenced to imprisonment without the option of a fine.

Effective sentence 12 months imprisonment.”

*Criminal Division, Prosecutor General's Office, state's legal practitioners
Mvura-Mavhondo and Associates, accused's legal practitioners*