

STATE
versus
PANGANAI MUTINHIMA

IN THE HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 25, 27, 30 & 31 October 2017

Criminal Trial

Mrs J Matsikidze, for the state
B. Mungure, for the accused

HUNGWE J: The accused faced a charge of murder it being alleged that on the 3rd of November 2016 at village A1 Mutanda Resettlement, Odzi, the accused with actual intent or realising that there was a real risk or possibility of death, stabbed Silas Magara with an okapi knife once on the left rib, there by inflicting injuries from which the said Silas Magara died. He pleaded not guilty.

Most of the facts in this case were common cause and these maybe set out as follows; The accused is a juvenile who is aged 17. The deceased was aged 20 years. On the day in question, both went to attend a church service at a place near their villages. During that service, the deceased's phone rang out certain ringing tones. The accused then approached the deceased whilst in the church over that issue about the ringing tones. He admonished the deceased. After service on their way home, the deceased asked one Clayton Mugari ("Clayton") to keep him company. Clayton obliged. The accused then came up to the deceased and confronted the deceased over why he was attending to his phone during the church service. An altercation ensued with the deceased asking the accused what concern of him it was about his phone in church. Clayton then restrained the two from fighting warning them of the dangers of resorting to fighting at night. They walked on.

There were two people ahead of Clayton. These are the accused and the deceased. Two other two people behind them. Soon afterwards there was a second scuffle between the accused and the deceased. By that time those people walking behind them had caught up with them. They helped Clayton to restrain the two from fighting. Amongst those two people who came

up to them was one Lameck Mugorosa (“Lameck”). Although he was the eldest in the crowd that had formed around the two, he suggested that the two, that is the accused and the deceased, should fight it out. He then provided light from his mobile phone handset’s torch as the two began to slag it out. As the two youngsters fought, they moved away from the lit area. At some point the deceased shouted that the accused wielded a knife. Lameck countered that the deceased was not telling the truth on the issue about the knife. Soon afterwards, however, the deceased shouted that he had been stabbed. At that stage he came back into the light up area.

In order to prove that he was not lying about the knife, the deceased pulled up his shirt to show everyone present his injury. Upon seeing the bleeding wound, Lameck fled from the scene. Everyone else around the deceased left him. The deceased then collapsed and died on his way home. The witness who gave evidence first, Clayton, also left the deceased to his own devices. Clayton told the court that at no time was the accused over-powered or brought down by the deceased. He testified that as the combat proceeded, both combatants were in a standing position. This was up to the time the deceased shouted that he had been stabbed. He went on to tell the court that the deceased only fell to the ground after announcing that he had been stabbed by the accused. By then, he had already displayed his mortal wound to those that were present.

Foreman Sengamayi (“Foreman”) to a large extent corroborated the last witness’ Clayton Mugari’s evidence. He arrived just before Lameck encouraged the two to fight it out. At that stage, Clayton was busy trying to separate the accused from the deceased. According to Foreman, Lameck suggested that the two must fight it out. He confirmed that Lameck then lit his cell-phone torch in order to allow the two accused to proceed with the fight. He too, just like the last witness did, testified that as the two combatants left the lit up area, the deceased suddenly shouted that he had been stabbed. Before the deceased shouted about the stabbing, none of them had fallen to the ground, according to this witness. The fight was evenly matched. In his view, no one between the two appeared to have an upper hand over the other. This witness also confirmed that he saw the deceased’s wound after the deceased had lifted up his shirt. The rest of the State witnesses gave formal evidence regarding what happened after the stabbing.

The accused person’s defence was that he acted in self-defence. That being so the issue becomes whether on the facts of this case, the defence of private defence can succeed. According to the accused, it was the deceased who was the aggressor in that he poked his finger into his face when he confronted him about what he had been up to during the church service.

He told the court that when he did so, the deceased had slapped him. This led the confrontation to degenerate into a fight. He avers that during the fight, the deceased had felled him down. The deceased had then proceeded to sit on his abdomen as he continued to rain fist cuffs on his person. The accused stated that he also retaliated in the process. As the fight progressed, the accused stated that at some stage, a knife fell out of the deceased's jacket pocket. Using his left hand, he somehow picked it from the ground. He then used it to stab the deceased in order to stop the deceased from further assaulting him.

In our assessment of the witnesses' credibility, we are satisfied that the State witnesses who gave evidence did so in a forthright and truthful manner. They remained unshaken during cross-examination. We prefer their version where it sits in contradiction with that of the defence. They did not seem to be given to exaggeration. Those witnesses admitted that the scene was mobile and that it was dark. Therefore, they could not see exactly how the stabbing occurred although they were very close to the scene. The two witnesses who gave evidence also testified that they could not tell where the knife came from or whose knife it was. They both agreed that the fight took less than four minutes before the deceased announced that he had been stabbed. In our view the witnesses deserve the credibility that we accorded them.

Their evidence established that the knife was an okapi knife and that the accused used it to stab the deceased as they fought. The evidence on the record also shows that the stab wound penetrated the chest cavity and perforated the deceased's heart. Although he was able to show his wound to those who were present, he collapsed and died soon afterwards. This appears to be consistent with a deep stabbing wound. In our view, the accused's version does not sound true. We hold this finding for the following reasons.

The accused claimed that he saw a knife fall out of the deceased's pocket. How he was able to see it fall out of the pocket raises eyebrows. One would have expected that he would merely have observed the knife fall from the other person but not to be so observant as to see from where it was falling out. He also gives an unlikely description of how he managed to pick the same knife when the deceased was sitting on his chest assaulting him. According to the accused, he was able to parry away the blows from the deceased and, at the same time, be able to pick up a knife that had fallen over to his left side. We assume that usually a knife is kept in the pocket in its closed state. Being an okapi knife, normally it would have needed both his hands to open it before he could use it. In our view, it is incredible that he was able to pick it up whilst on the other hand fighting the deceased, open it and stab the deceased. He did not explain with any degree of conviction, the sequence of events the basis upon which we could

be moved to believe him. The version he gave to us is highly improbable. We therefore dismiss it as false. He could not have, in the heat of the moment noticed a brown knife in its folded state fall out of an opponent's pocket into the dark. It is highly unlikely that he would have reached for it, open it using one hand and stab the deceased whom he was still fighting. In our view, the accused was less than honest as to what transpired or how he came into possession of the knife.

There was evidence however, which evidence we believe to be true. It is that during the earlier part of that day, his employer had seen him sharpening that knife and had asked him what he wanted to do with the knife. It is clear that the accused was unable to explain to his employer what he wanted to do with the knife. In all probability, the accused possessed this knife throughout that day. He was intent on using it. When the deceased shouted that the accused had a knife, accused did not deny this to those present at the time. Instead, the deceased shouted shortly thereafter that he had been stabbed. Clearly, the accused was armed with a knife before the fight. The deceased shouted out because he saw the accused pull it out and open it. Unfortunately, when he shouted about this sudden turn of events to those present, Lameck shouted back that it was not true.

It is clear from the evidence that the accused was the aggressor from the outset. We say this because the accused called the deceased whilst in church when his authority for doing remained obscure. He was neither the pastor nor the overseer in that church yet he arrogated himself power to supervise other congregants. In our view, his subsequent confrontation with the deceased was a continuation of his overbearing behaviour towards the deceased. We say this because twice he had accosted the deceased and twice they had been restrained from escalating their disputation into a physical fight. The reason why the accused so cockily and persistently challenged the deceased was that he was properly armed for a fight. When he was asked by his employer why he was sharpening the knife earlier that day, he did not explain his motivation for such an action. As the two witnesses testified, no one fell as they fought. No one appeared to be losing the fight in the brief encounter which took less than four minutes.

The requirements for the defence of self defence to be a complete defence to a charge of murder are set out in section 253 of the Criminal Law Codification and Reform Act [Chapter 9:23]. Whilst the attack on his person may have been unlawful, the facts show however that he had persistently been itching for a fight with the deceased. We do not find that the use of a knife in a fist fight with someone whom he had persistently provoked for a fight was in any way necessary to avert the attack on his person. He clearly could have averted this predicament

by heeding the refrain from Clayton Mugari and others not to squabble with the deceased. It follows that his use of the knife was not in all the circumstances of this case reasonable resort to fend off an unlawful attack. To us it would appear that the accused prepared the knife by sharpening it earlier in the day. He was itching to use it and he did so with fatal consequences. In our view, a person who plunges an okapi knife into the left side of his victim's chest, cannot claim that he acted in self-defence or that he did not intend to kill his victim.

The knife handle measured 10cm, its blade measured 14cm therefore all in all this knife measured 24cm. At its widest the knife blade is 2cm wide and it weighed 55g. This knife was also used against the victim without the victim having been warned by the accused. And as fate would have it, the knife found its mark in the heart of the victim.

In our view, the accused intended to kill his victim when he resorted to using the knife in the fist fight. We are therefore satisfied that the State has proved the charge against the accused. As such he ought to be **found guilty of murder** as defined in section 47(1) (a) of the Criminal Law Codification and Reform Act [Chapter 9:23].

MRS MATSIKIDZE: There is no record against the accused person my lord and gentleman assessors.

SENTENCE

In assessing your sentence I will take into account that this crime was committed during at a time when you were still a minor aged 16 going to 17 years. As such immaturity might have played a big role in this matter. That is however the only factor that I find in your favour. I say this because you stand convicted of a very serious crime, murder. This crime appears to us to have been quite premeditated. We are satisfied that the truth has not been told to us by you. You maintained a web of lies from the moment that you were arrested until the moment you were convicted.

A young person who acts in that fashion invites society not to treat him with the usual lenience that is extended to other juveniles who find themselves in conflict with the law. This is especially so when such a young person has committed a heinous crime like murder. In other words you emancipate yourself by conduct, especially when you are probably 18 years of age by the time you are being sentenced by persisting in lies. You persisted in this dishonest fashion even after you have committed a serious crime. You have not shown any remorse at all. The crime itself was brutal in the sense that a huge knife was

used to stab a person virtually in his heart. This was done without any warning and when the victim least expected it.

I have perused the recommendations of the social welfare or probation officer who states that in her view a suspended sentence ought to be passed on you. I am in respectful disagreement with that recommendation because such a recommendation usually applies to those offences associated with youthfulness certainly murder is not one of those crimes. You are a bad apple and a bad example to other youths of your age. There is need to send an appropriate message that youths who commit serious crimes cannot escape the long arm of the law by virtue of their youthfulness. I am sure that you deserve what you are about to get. And you are sentenced as follows:

“Nine (9) years imprisonment.”

National Prosecuting Authority, legal practitioners for the State

Makombe & Associates, legal practitioners for the accused