

THE STATE

Versus

MTHANDAZO NDLOVU

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr. Ndubiwa and Mr. Ndlovu

HWANGE 8 March 2024

Criminal trial

Ms. Musaka for the State

Ms. A. Kunda for the accused

DUBE-BANDA J:

[1] The accused is appearing before this court charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that 23 September 2023 he unlawfully caused the death of Happy Ncube referred to as the deceased by stabbing him with an okapi knife once on the chest intending to kill him or realising that there was a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused pleaded not guilty to the crime of murder and offered a plea of guilty to the lesser crime of culpable homicide. The State accepted the plea of guilty to the crime of culpable homicide. The State tendered into the record of proceedings a statement of agreed facts, which is before court and marked Annexure "A". The statement reads as follows:

- i. The accused was aged 51 years of age at the time of the commission of the offence and he resides at Jena Masuku's homestead, Zinyangeni Village, Chief Nkalakatha.
- ii. The deceased was aged 29 years at the time he met his death. He used to reside Mveliswa Ncube's homestead, Matshuzula Village, Chief Nkalakatha, Nkayi.
- iii. On the 23rd of September at 2000 hours, the accused and deceased were attending a traditional ceremony at Kholisani Tshuma's homestead, Matshuzula Village. The accused was in the company of his nephew Mbuso Ngwenya. The accused was playing the drums for the dancers.

- iv. At around 0200 hours the deceased approached Mbuso Ngwenya and asked him to hand over accused's two satchels and radio, but Mbuso refused to hand over the property.
- v. The deceased held Mbuso by the belt, dragged him to the gate and produced a press button knife from his pocket and threatened him with it. Deceased forcibly took the property and disappeared into the crowd. Mbuso reported the robbery to accused.
- vi. Accused and Mbuso looked for deceased but failed to locate him. At around 0430 hours Mbuso saw deceased amongst a crowd and identified him to accused.
- vii. The two approached deceased and accused asked deceased why he had robbed Mbuso but deceased did not respond. The deceased was still holding the knife he had used to rob Mbuso.
- viii. The deceased slapped Mbuso on the cheek causing him to fall down. Accused then disarmed the deceased of the knife and stabbed him on the chest. Deceased died on the spot.
- ix. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death of the deceased.

[4] The State tendered the following exhibits: a post mortem report No. 1171/892/23 exhibit 1. The post mortem report was compiled by Dr. Maibelys Gavila Acosta who concluded that the cause of death was hypovolemic shock; heart laceration and hemothorax 2000ML; and stab wound. The second is a press button knife exhibit 2 with the following measurements: length of handle 13.5cm; width of handle 2.5cm; length of blade 11cm; width of blade at wide end 2.5cm; width of blade at its tip 3mm; and weight 160g. This is the knife that was used to stab the deceased.

[5] The totality of the facts and the evidence adduced in this trial show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased.

[6] The facts show that the deceased was the aggressor. First, he robbed he robbed Mbuso of two satchels and a radio belonging to the accused. When Mbuso and the accused located him, he became violent, still armed with his knife slapped Mbuso on the cheek causing him to fall down. It was at that point that the accused disarmed him of the knife and stabbed him on the

chest. The facts show that accused stabbed the deceased in defence of Mbuso. In terms of the law in this jurisdiction the defence of defence of another person has been codified in s 253 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In respect of the attack, it is required that the attack must be unlawful, must have commenced or was imminent, while the defensive act must be directed against the attacker and necessary to avert the attack. It is further required that the means used must be necessary in the circumstances. The attack on Mbuso was unlawful and had commenced. The accused was entitled to take immediate action in defence of Mbuso. The only problem is that he used excessive force which was disproportional with the attack. He stabbed the deceased once on the chest. This was disproportional to the attack on Mbuso. Again, the deceased had been disarmed of the knife. In stabbing the deceased in the manner he did, i.e. in the chest, a reasonable man placed in the same circumstances as the accused would have foreseen the possibility of death and would have guarded against it. The conduct of the accused shows that he fell below the reasonable person standard. The accused ought, as a reasonable man, to have foreseen the death of the deceased and guarded against it. The accused was negligent and it was his negligence that led to the death of the deceased. On the basis of the facts and the evidence of this case, the court is satisfied that the State's concession was properly taken.

In the result: the accused is found not guilty of murder and found guilty of the lesser crime of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

[7] Mr. Ndlovu, this Court found you guilty of the crime of culpable homicide. It is now the task of this court to sentence you. In determining an appropriate sentence this court must consider the applicable sentencing principles, taking into account the specific circumstances of this case. A consideration of the well-known triad of sentence consisting of the crime, the offender and the interests of the offender, is necessary. Again, the court will factor into the equation the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[8] The personal circumstances of the accused are these: you are 51 years old; married with five children and four are minors; you were employed as a miller at a grinding mill earning

USD\$80.00; and you are the sole provider of your family. The court will further take into account that you are a first offender, pleaded guilty to the crime of culpable homicide; and that you have been in pre-trial custody for six months. Again, the deceased was the aggressor. He provoked you and assaulted Mbuso in your presence.

[9] On the other hand human life was lost. After you had managed to disarm him of the knife you then proceeded to stab him. You used a lethal weapon on a delicate part of the human body, i.e. the chest. You used so much force that the knife perforated the heart of the deceased. At the moment the deceased was stabbed he was not armed. A sentence of direct imprisonment is warranted. In the circumstances, the following sentence will meet the justice of this case.

The accused is sentenced to 3 years imprisonment of which 1 year is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

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