

STATE  
versus  
ALEC KAMUMVURI

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 21, 23 & 24 November 2017

ASSESSORS: 1. Mr Msengezi  
2. Mr Chidyausiku

### **Criminal trial**

*Ms F. Zachariah*, for the State  
*P. Marava*, for the accused

TSANGA J: This case has its roots in domestic violence and shows the fatal consequences that can result from it for innocent children. The accused who was charged with murder pleaded not guilty to murder and tendered a limited plea of guilty to culpable homicide. The agreed statement of facts as presented to the court were as follows:

1. The accused is a male adult aged 31 and resided at Chitsiga Village Chief Mangwende, Murewa.
2. Deceased person is Praise Ajida who was born on 15 August 2015 and was a year and a month old at the time of her death.
3. The deceased was the accused's step daughter and was residing with him and her mother Shamiso Makosa at their matrimonial home.
4. On 4 October 2016, accused and his wife Shamiso Makosa had marital problems which problems prompted her to vacate the matrimonial home leaving her belongings behind.
5. On the morrow she returned to the matrimonial home to collect her belongings and the accused refused. She then left and headed to Musami Police Post to make a report.
6. The accused followed her and persuaded her from reporting the matter and convinced her to return home.

7. On the way back the two started arguing and in trying to frighten her and to stop argument, accused picked a fist size stone which was near him and threw it and struck Shamiso on the head.
8. Shamiso then fell down by her side as she was carrying her baby on her back. The baby fell as well and hit her head on a rock.
9. Shamiso lost consciousness and the baby died on the spot.
10. Accused then left the scene and proceeded to Murewa police post where he handed himself to Murewa police.
11. A post mortem was conducted on the remains of the deceased by Dr Mauricio Gonzalez who concluded that death was due to epidural haematoma, compound skull fracture and head trauma secondary to assault.
12. Accused person denies having the intention to kill the now deceased person or having realised that there was a real risk or possibility that his conduct might cause death and then continued to have engaged in that conduct despite the risk or possibility. The accused person tenders a plea of guilty to culpable homicide as defined in s 49 of the Criminal law (Codification and Reform) Act [*Chapter 9:23*]

The post mortem report was tendered as exhibit one and confirmed the cause of death as captured in the above statement of facts. Defence counsel confirmed that the essential elements of culpable homicide had been explained to the accused and that he had understood them. On the basis of these agreed facts, the court and its assessors accepted the plea of guilty of culpable homicide and returned a verdict accordingly.

In mitigation it was highlighted that the accused is 31 years old and is a family man with two wives and two minor children aged 9 and 4 years. As such, it was argued that a long period of incarceration would result in hardship for his family. His own plea of guilty was also emphasised as having saved the court's time. It was further argued by his counsel that his moral blameworthiness was low as his intention had been to frighten Shamiso who should have kept quiet. This is how his counsel put across this aspect in his written closing submissions:

“From the agreed statement of facts it is clear that the accused's motive was to frighten Shamiso Makosa from making further argument with him which led to the fateful event. It is saddening to note that life was lost simply over marriage disputes. The mother to the deceased could have avoided this by simply keeping quiet and avoid quarrelling with her husband (the accused person). Accused's moral blameworthiness is very low.” This court could not disagree more on this aspect. The accused attacked the deceased

who was carrying a child on a back at a time when she had made a choice to leave him. It was this decision that the accused deemed unacceptable. Time and time again, particular in criminal

matters with gender dimensions, the court is confronted with cultural stereotypes voiced by lawyers which are in fact harmful to the client's case in that they tend to suggest a lack of remorse. Using tradition and culture, these remarks erode the legal framework of our Constitution regarding the elimination of violence at the hands of private actors. They further erode principles such as the right to non-discrimination, the right to life, and that right to bodily integrity. Additionally Zimbabwe being a party to CEDAW, is to be guided by the various recommendations made by the Committee monitoring the implementation of CEDAW. In 2017 the committee issued **General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19**. It gives States further guidance aimed at accelerating the elimination of gender based violence. Paragraph 19 of General Recommendation No. 35 observes as follows:

“The Committee regards gender-based violence against women to be rooted in gender-related factors such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour. These factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered as a private matter, and to the widespread impunity for it.”

At the judicial level, in addressing actions by non state actors, para 26 (c) General Recommendation No.35 calls upon the courts to:

“.. Strictly apply all criminal law provisions punishing this violence, ensuring all legal procedures in cases involving allegations of gender-based violence against women are impartial and fair, and unaffected by gender stereotypes or discriminatory interpretation of legal provisions, including international law”.

Furthermore, it equally observes that:

“The application of preconceived and stereotyped notions of what constitutes gender-based violence against women, **what women's responses to such violence should be** and the standard of proof required to substantiate its occurrence can affect women's right to the enjoyment of equality before the law, fair trial and the right to an effective remedy established in articles 2 and 15 of the Convention”.

Lawyers are not immune to socially pervasive gender stereotypes and patriarchal attitudes. In adjudicating cases involving gender based violence it is therefore necessary for courts to call out in condemnation harmful cultural stereotypes that are often used as a

justification for violence against women thereby further contributing to continued discrimination against women. It is in this light that I called out what I perceived to be stereotypical beliefs impacting on gender violence in this instance.

In mitigation it was argued that the accused having been convicted of attempted murder in the Magistrate's Court and sentenced to six years, that the term of imprisonment in this case for culpable homicide should run concurrently with the sentence imposed by the Murewa Magistrate Court in case no. 150/16. In particular, s 343 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which deals with cumulative or concurrent sentences was drawn upon. It states as follows:

“(1) When a person is convicted at one trial of two or more different offences or when a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence, as the case may be, as the court is competent to impose. (2) When sentencing any person to punishments in terms of subsection (1), the court may direct the order in which the sentences shall be served or that such sentences shall run concurrently.”

This court was in agreement that the offences were closely linked in point of time and were similar in nature. Though the offence of culpable homicide justified its own sentence this court agreed with both counsel that it ought to run concurrently with the sentence being served for attempted murder. (On general principles of sentencing in such instances see *S v Banda* 1984 (1) ZLR 96 (H); *S v Chawasarira* 1991 (1) ZLR 66 (H); *S v Chayiswa* 2004 ZLR (1) 80 (H); and *S v Talent Makonora* HH42-11.

In arriving at an appropriate sentence this court took into consideration his personal circumstances as a family man. Whilst the accused pleaded guilty and had indeed saved the court a lot of time, his negligence in using violence was gross. It resulted in the unwarranted loss of life in its very infancy. In the circumstances, this court imposed a 10 year term of imprisonment of which 2 years is suspended for five years on condition accused is not during that time, convicted of an offence of which violence is an element for which he is sentenced to a term of imprisonment without the option of a fine. The effective 8 years imprisonment is to run concurrently with the 6 year term of imprisonment imposed by the Murehwa Magistrate court in CRB 160/16.

*National Prosecuting Authority, State's legal practitioners*  
*Nyawo Ruzive Legal Practice, Accused's Legal Practitioner*