

STATE  
versus  
LLOYD MUKUKUZI  
and  
HARDLIFE CHIMOKO SITHOLE

HIGH COURT OF ZIMBABWE  
HUNGWE J  
MUTARE, 15, 19 & 22 June 2017

ASSESSORS: 1. Mr *Magorokosho*  
2. Mr *Chipere*

*J Chingwinyiso*, for the State  
*T.G Nenzou*, for the 1<sup>st</sup> accused  
*Miss T Gutuza*, for the 2<sup>nd</sup> accused

### **Criminal Trial**

HUNGWE J: The two accused are cousins in that their mothers are sisters. The deceased, Siyahamba Mukukuzi, (“the deceased”) was the elder brother of the second accused and a cousin to 1<sup>st</sup> accused. Their father had seven wives when he passed on. At the centre of this tragedy is their father’s youngest wife, Juliet Mukeketi. The events leading to the death of the deceased are not in dispute. The two accused were charged with the murder of their brother, Siyahamba Makakazi the deceased. They both headed pleaded not guilty.

The undisputed facts may be summarised as follows.

On 5 June 2015 both accused proceeded to a beer drink in a nearby village where they joined other villagers. Amongst those present at this beer drink was Juliet Mukeketi, 1<sup>st</sup> accused’s mother and the deceased. First to leave was Juliet Mukeketi who left around 19h00. She must have taken her time because when she got near Dakati River, along the way, the deceased caught up with her. They walked together. As they approached Save River both accused caught up with the pair. What happened thereafter is a matter of some dispute between the accused and 1<sup>st</sup> accused’s mother. The two accused had reason to confront the pair. 1st accused says that he asked the deceased what he was doing with his mother. The

deceased retorted that he was doing nothing. The two accused were not happy with this response since it was obvious to both of them that they were being intimate.

Both accused proceeded to manhandle the deceased. They assaulted him and using several switches after each broke up. At one stage they lay him down on his back and tied both his legs using his trousers belt. They then proceeded to deliver body blows all over his body especially the lower abdomen and thighs. 1<sup>st</sup> accused then pulled his testicles and only desisted when 2<sup>nd</sup> accused cautioned him against. It was expressly stated by 2<sup>nd</sup> accused that this might cause the deceased's death. When their mother tried to intervene, she got her share of the violence. She left the scene. After the two felt they had punished the deceased enough, they helped him to stand up. He struggled to comply with this order. They then ordered him to go home. The deceased tried to walk but failed. He sat down. The two accused left the deceased to his own devices and went to their village.

The next day the lifeless body of the deceased was spotted by school boys on their way to school. The grisly discovery led to the arrest of the two accused. When invited to give statements by the Police, both accused gave detailed statements about how they had been to the beer drunk; how their mother left and how the deceased left before their mother did. They gave the impression that they assaulted the deceased because he refused to confirm something they suspected he had done. It is only in their defence outlines that they say they saw deceased engaging in sexual activity with their mother. This had infuriated them hence, they assaulted him for conducting an incestuous relationship with their mother.

This act of sexual intercourse is vehemently rejected by Juliet Mukeketi who expressed surprise as to how they would make such an allegation when they caught up with them on the pathway. She could have chosen a better place if she were inclined to have sex with the deceased.

Whether these two adults engaged in sexual activity, in our view, does not alter the finding of this court in respect of the defence of provocation raised by the accused. In our view, even accepting their version that they found the deceased and the accused engaged in sexual intercourse, which did not constitute such an act of provocation such as to constitute a defence to a charge of murder.

Counsel for 1<sup>st</sup> accused, Mr *Nenzou* correctly abandoned this defence and submitted that on the admitted facts as appearing in the confirmed warned and cautioned statement, the 1<sup>st</sup> accused cannot escape a conviction for murder. The question, however, is whether, when the accused assaulted the deceased using several switches around the abdomen and pulling

his testicles, they had formed an intention to kill as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*], (“the Criminal Law Code”). If they did not have the relevant intention to kill the deceased, the question becomes whether they realised that in assaulting the deceased in that manner, there was a real risk or possibility of death occurring but notwithstanding such a realization, they continued to engage in that conduct which then was fulfilled in death. Mr *Nenzou*, on behalf of the 1<sup>st</sup> accused, submitted that since their expressed intention was merely to punish the deceased, the 1<sup>st</sup> accused did not realise that death could result.

On the other hand Ms *Gutuza*, for the 2<sup>nd</sup> accused, contended that due to their level of intoxication, coupled with misplaced anger, the 2<sup>nd</sup> accused failed to appreciate that death may result from an assault using the kind of switches that they employed to the lower abdomen and backside of the deceased. As such, she urged the court to find that they exceeded the normal boundaries of reprimand and must therefore be acquitted on the charge of murder. She however did not cite any authority for this contention on the facts such as the court was seized with.

Mr *Chingwizo*, for the State, argued that 1<sup>st</sup> accused delivered the fatal blow when he pulled the deceased’s testicles. Whilst this is not improbable, there is, however, no reliable or categorical evidence that indeed, the pulling of testicles killed the deceased. As such, this court was unable to apportion the resulting death to a particular action by a particular accused. Instead, the court chose to rely on the evidence that both accused assaulted the deceased who died as a result of the assault by the two men.

Exhibit 7 the post mortem report shows that the deceased sustained injuries consistent with the actions of the two accused persons in assaulting him and pulling the testicles. Section 196 (2) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] raises presumptions in favour of the State. Where two or more people are charged with a crime, by s 196 (2), where the State has established that two or more accused persons were associating together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged, or engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged, and they were present at or in the vicinity of the scene of crime in circumstances which implicate them directly or indirectly in the commission of the crime, then it shall be presumed, unless the contrary is shown, that they knowingly associated with each other for a criminal purpose and the crime actually committed was the crime the commission of which they associated with each other, or was, if

not the specific crime for the commission of which they associated with each other, or was, if not the specific crime for the commission of which they associated with each other, a crime whose commission they realised was a real risk or possibility.

As I understand, in respect to the respective arguments by both counsel, where accused persons act together to commit an assault but they realise that there is a risk that the assault may result in the death of their victim, they both are culpably liable. It is the reckless disregard of the risk associated with their conduct which provides the necessary *mens rea* in the case of a specific crime like murder. In the present case both accused specifically admit to the roles they played in assaulting the deceased. They each associated with the other to subdue the deceased. They each inflicted a physical assault upon the person of the deceased. For good measure 1<sup>st</sup> accused pulled the deceased's testicles at which point 2<sup>nd</sup> accused expressly cautioned him not to do so as that act carried with it a risk to deceased's death. Put differently, 2<sup>nd</sup> accused realised that the assault they meted out onto the deceased carried with it a real risk or possibility of death. They took this risk into their bargain as part of the punishment which they believed the deceased deserved.

The caution against pulling deceased's testicles merely aggravated that risk as it may quicken the deceased's death. Put in another way from their own words and conduct both accused adverted to the risk which their conduct carried. They decided to minimise the risk of death by limiting the nature and scope of the assault; the type of switches used as well as the body area to which they directed their blows. In trying to minimize risk of the death of the deceased, they did not realise that death was a possibility but they did not care if death resulted. It was a consequence they could live with, so to speak, hence they left the deceased to his own devices when he failed to walk at the end of the whole exercise.

In these circumstances we are of the view that both accused cannot escape a verdict of guilty of murder as defined in s 47 (1) (b) of the Criminal Law Code.

## **REASONS FOR THE SENTENCE**

In assessing sentence, I take into account the personal circumstances which were ably highlighted by counsel. Particularly mitigating the commission of the offence was the belief that it was wrong for the deceased to have been engaging in sexual relations with their mother. I also take into account the fact that the two accused persons are relatively youthful first offenders who expressed remorse over the unfortunate killing of their relative. The stigma of having killed their relative will clearly continue to haunt them for life. They will have to endure humiliation by the community which suffered the terrible effects of losing one of its own who was his family's bread-winner. In any event, it is clear too, that both accused had partaken of intoxicating beverages which must have affected their sense of judgment.

Murder is a serious crime which in aggravated situations attracts the death penalty. It is a crime through which there is senseless loss of human life. In the present case what I find to be aggravating is the fact that you decided to punish the deceased who had not committed any known criminal offence. His only misdemeanour was to be seen in a dark place with your mother thereby raising suspicion that the two had indulged in sexual intercourse. Even assuming this to have occurred, and that you found this occurrence offensive, it was not for you to mete out any punishment. You could have taken the issue with your elders or other local community structures so that the matter is properly ventilated and resort to self-help is avoided. Taking the matters into your hands may have spawned revenge attacks against you in the future from the deceased's family members thereby becoming a source of future conflict. The attack on the deceased was brutal and persistent. He must have endured a lot of pain before his demise. After the assault you left him at the scene when it was all too clear that he needed medical attention if he were to survive. You decided to leave him instead of helping him. In my view your moral blameworthiness is high as, morally, you should have come to his assistance rather than leave him to die after severely assaulting him. Such conduct must be deprecated in the strongest terms.

Consequently, I consider that taking all these factors into account, the following sentence is appropriate.

Each Accused: 15 years imprisonment.

*National Prosecuting Authority*, legal practitioners for the State  
*Chibaya & Partners*, legal practitioners for the 1<sup>st</sup> Accused  
*Bere Brothers*, legal practitioners for the 2<sup>nd</sup> Accused