

THE STATE
versus
ARISHETI KAZUNGA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 10 November 2017

Criminal Trial

T Kasema, for the State
Mukome, for the accused

ASSESSORS: 1. Mr Barwa
2. Mr Gweme

CHIGUMBA J: The test to be applied where the defence of provocation is raised to a charge of murder is this - Did the accused actually lose his self-control, and not necessarily his capacity to intend to kill? The second part of the test is for the court to ask itself whether, in the circumstances before it an ordinary man would have lost his self-control and acted as the accused did. Domestic violence is now supurating sore, a cancer on the fabric of our society and moral wellbeing. Both sexes have proved capable of taking away the life of a spouse or partner using violent methods. Could it be that our society needs to go back to traditional cultural ways of intervening in domestic disputes? The uncles, aunts *sahwira/rafiki*/friend of the family led counselling to prevent the pot from boiling over, a person to 'snap' and kill / harm the object of their affection.

The accused was charged with the crime of murder, as defined in s 47 of the Criminal Law (Codification and Reform) Act (the CODE) [*Chapter 9:23*] it being alleged that, on 23 December 2015, at 2200 hours, at Skande Village, Mbire, he, knowing that bodily harm may result, stabbed

Janet Kembo (the deceased) with a knife once on the left side of the neck and twice on the chest, thereby causing injuries from which deceased died.

The accused pleaded not guilty. The evidence of three state witnesses

- a) Dr S Pesanai
- b) Grace Chizora
- c) Valentine Murawa

was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] with the consent of both counsel. The State called Anyway Daira as its first witness. He told the court that he had known the deceased since she was a young girl. The two began a love relationship in December 2015 and on the fateful day, 25 December 2015 they were together. He said that deceased had told him that the accused was her boyfriend and that the homestead where she resided belonged to her dead husband. On the fateful day he found the deceased in a state of high inebriation at a village beer drink. She invited him home and they walked there around eleven o'clock at night.

They were both sitting outside near a maize stack when the accused approached them with a knife in his hand and demanded to know who he was and what he was doing. He replied that he was visiting his girlfriend. He ran for his life with accused in hot pursuit and managed to get away and hide behind a bushel.

He heard the deceased's cries of pain from ten metres away. After the accused left he lit his phone torch and went back. He saw a pool of blood. He denied that he and the deceased had had a long running love relationship. During cross examination he denied that the two then had been caught in *flag rante delictio* by the accused on the day in question. He had said that he had been inebriated but denied being intoxicated.

The witness denied that he knew that the deceased was the accused's wife. He denied that he had gone to the deceased's homestead to search for her around 7.30pm that day. The state closed its case.

The accused testified and told the court that the deceased was his second wife of 61/2 years whom he had paid lobola for. On the day in question he travelled to Skande village from the farm where his compound with his first wife was. He knew that the deceased had gone for a beer drink. He hid himself in some bushes intending to waylay her because he had been told that his wife was

having an adulterous relationship with Anyway Daira. Daira had come looking for the deceased around 7.30pm. He observed his movements from his hiding place. He returned around 11pm with the deceased. He was holding her around the waist in an intimate manner. There was a full moon so the parties could be seen clearly.

The deceased and Daira went under the maize stack where people in that area usually sat to avoid the heat because it is a very hot area. When accused approached the two they were engaged in sexual intercourse in the missionary position. He saw them clearly from twenty metres away. He got very angry. He was holding a knife. Daira ran away when he saw the knife. He chased him and couldn't catch him. When he came back and asked the deceased who Daira was she shouted at him and told him that he was 'stupid' and 'a dog'. He got angrier and stabbed her on the chest and twice on the neck. He was very angry and aggrieved.

The knife was something that he always carried in a bag when he was travelling to use in self defence. During cross examination when asked how he felt knowing that he had killed his wife, the accused replied that he was still aggrieved by her conduct. He said he had not engaged his in laws or performed any traditional cultural rites to appease the spirit of the deceased. Accused said he took out the knife from the bag with the intention of stabbing Daira not the deceased. He denied being intoxicated on the day in question and admitted that when he left his farm and went to Skanda Village, he had an objective to catch the deceased and Daira in action. On being questioned as to how Daira could see him approach with a knife in her hand as he was on top of the deceased having sexual intercourse with her his answer was 'I don't know'.

He said he stabbed the deceased because she refused to admit that Daira was her boyfriend and insulted him instead. The State in its closing submissions dealt with the defence of provocation which the accused sought to rely on. Section 239 of the code provides that:-

“if after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or committed, as the case may be, with the intention or realization referred to in s 47 shall be guilty of culpable homicide if as a result of the provocation.

- a) He or she does not have the intention or realization referred to in s 47.
- b) He or she has the intention referred to in s 47 but has completely, lost his or her self control.

The State contended that the accused committed the offence intentionally and that it was premeditated. It was submitted on behalf of the state that the accused stalked his victims Anyway Daira and the deceased. He admitted that he wanted to stab Anyway Daira with his knife during cross examination. It was contested that the number of blows struck to the deceased and the delicate part of the body to which the accused directed his knife all go towards proving that he intended to kill the deceased. The state argued that the accused did not show when or how he lost control in his evidence, that he had a cooling off time between chasing Anyway Daira and walking back to where the deceased was. It was argued further, that if accused had really lost his self-control to would have just stabbed the deceased instead of trying to talk to her. The last point raised by the state is that accused had prior knowledge of the alleged affair. He could not have “snapped” or lost control like a person who was shocked or surprised. It was submitted on behalf of the accused that the state not only failed to prove its case beyond a reasonable doubt, the defence of provocation had been properly established and accused should be convicted of culpable homicide. It was contended on behalf of the accused that Anyway Daira was not a credible witness because he gave contradictory versions of the events of the fateful day. The court was referred to the case of *S v Hangani* 1982 (1) ZLR 150 (SC) in which the Supreme Court overturned a conviction of murder on appeal to culpable homicide and said the following:

- (a) the mental element accompanying the killing has to be established.
- (b) provocation can, in appropriate circumstances have the effect of excusing or reducing an intentional killing, at least to the point of reducing murder to culpable homicide even where the killing is intentional. See *Tanganyika v R* 1958 (RC M 228) FSC
- (c) provocation must be such as to have actually caused the accused to have lost his self-control, though not necessarily his capacity to intend to kill. It must be such that, in the circumstances an ordinary man would have lost his self-control and acted as the accused did.

The court was further referred to the case of *S v Nangani* in what the Supreme Court referred to the case of *R v Mabaso* 1944 OPD 192 and held that the factual and not the formal position of the marriage had to be examined. The accused in that case was convicted of culpable homicide for killing a person whom he had find committing adultery with his wife whom he was customarily married to. See *S v Dzaro* 1996 (1) 24 585 HC. This court finds that, based on the

evidence of Anyway Daira and Grace Chizora, Valentine Murau admitted by consent in terms of the Criminal Procedure Evidence Act, the accused clearly intended to kill the deceased. Valentine Murau's summary of evidence is to the effect that the accused wrote letters to his family indicating his intention to kill the deceased. The delicate parts of the body (chest and neck) and the number of blows struck clearly give rise to a reasonable inference that accused intended to kill the deceased. Accused was visibly angry and shaking as he gave his testimony. He still harbors resentment towards the deceased. He has not bothered to perform any bridge building exercises with the family of the deceased. The court finds that the accused was not customarily married to the deceased let alone for six years as he claimed.

No evidence to that effect exists. If Mbire is a remote area whose people adhere to traditional cultural practices, then, married woman of 6 years standing would not have openly cavorted with Anyway Daira at a local beer drink, let alone invite him to her homestead, the home of her husband. Accused did not tell the truth when he said he found the two having sexual intercourse, with Daira on top. He could not explain how Daira could see him approach, holding a knife as he simultaneously had sexual intercourse with the deceased whilst lying down. The probabilities support Daira's version that the two were still sitting and not engaged in sexual activity. If accused was just another of deceased's boyfriends, he had no moral right to behave like a cuckold. One can only be cuckolded if one is recognised as a husband, customarily or otherwise.

Accused's own description of the deceased's reaction to being questioned about Daira supports this conclusion. No self-respecting woman from Mbire district would dare to insult her husband after being caught red handed with her lover, in her husband's compound. It is more likely than not that deceased told the accused that he had no right to question her in that manner. It is part of the statement of agreed facts that the accused found the deceased and Daira sitting underneath an overhead maize stack. Accused 'created' the sexual activity to justify his jealous reaction to his love rival Daira being in the company of the deceased. He calculatingly waited hidden in the bushes. He brought a knife intending to kill both Daira and deceased. Deceased was to intoxicated to run away like Daira. Accused struck her with a knife as if he intended to behead a chicken. When he was testifying he seemed to be reliving the events of that day and remembering him righteous anger. He clearly appeared visibly angry and agitated in the witness stand. He was aggrieved that deceased had another lover. He did not lose his self-control. He killed her in cold

blood and left her outside without covering her body with a blanket. Yet he had the presence of mind to find deceased's cousin and tell her what he had done. His control was such that he even wrote letters explaining that he had killed the deceased and why he had done so. He wanted to punish the deceased by humiliating her for having the audacity to take another lover. He is still aggrieved. His anger is still palpable. He is a cold blooded killer who killed the deceased intentionally in terms of r 47 (1) (1) of the Code.

Here is a novel idea. In assessing the sentence of an accused person who has been committed of murder in terms of s 47 (1) (a) of the Code (intentional killing) should the fact that the murder was committed in circumstances of domestic violence be considered on aggravating circumstance for purposes of item 8, Part XX, Criminal Law (Codification and Reform) Act [*Chapter 9:23*], General Laws Amendment Bill 2015 item 8 (5a)?

Item 8 (6) of the General Laws Amendment provides that the aggravating circumstances enumerated in subs (3) and (4) are not exhaustive, and that for purposes of assessing the following sentencing options:

- (a) death
- (b) imprisonment for life
- (c) imprisonment for any definite period of not less than 20 years

a court has the discretion to consider the circumstances in which the murder was committed in any individual case before it, as aggravatory. It is my considered view that an intentional killing committed in domestic violence circumstances ought to be taken as murder committed in aggravating circumstances in order to deter other would be offenders, and to show that such murders are taken seriously by the justice system.

SENTENCE

The accused was found guilty of contravening s 47 (1) (a) of the CODE [*Chapter 9:23*], i.e. Murder after his defence of provocation was rejected by the court. It was found that the evidence supported a premeditated calculated and intentional killing of Juliet Kombo.

In assessing sentence, the court was urged to have regard to the provisions of s 47 (1) (a) of the CODE which are that :-

- “47. Any person who caused the death of another person-
- (a) Intending to kill the other person or

- (b) Realising that there is a real risk or possibility that may cause death, and continues to engage in that conduct despite the risk or possibility shall be guilty of murder.”

Section 47 (2) provides that:- subject to s 337 of the Criminal procedure and Evidence Act [Chapter 9:07] a person conviction of murder shall be sentenced to death unless-

- (a) The convicted person is under the age of eighteen years at the time of the commission of the crime; or
- (b) The court is of the opinion that there are extenuating circumstances-
in which event the convicted person shall be liable to imprisonment for any shorter period. Section 337 of the CPEA provides that:-
- (1) Subject to s 338 the High court may pass sentence of death upon an offender convicted by it of murder of it finds that the murder was committed in aggravatory circumstances.
- (2) In any cases where a person is convicted of murder without the presence of aggravating circumstances, or the person is one referred to in s 338 (a) (b), O-C, the court may impose a sentence of imprisonment for life, or any sentence other than the death sentence other than the death sentence or imprisonment for life provided by law if the court considers such a sentence appropriate in the circumstances of the case.

Section 338 provides for persons upon whom the death sentence may not be passed. It states:-

- “The High Court shall not pass sentence of death upon an offender who-
- (a) was less than twenty one years old when the offence was committed; or
- (b) is more than 70 years old;
- or
- (c) is a woman.”

Aggravating circumstances have been defined in the General Laws Amendment Act Bill 2015 which amended s 47 of the CODE to provide that the death penalty for murder is competent only where the crime is committed in certain aggravating circumstances. It must be noted that despite this amendment the court has s discretion to impose a sentence of imprisonment for life or a prison sentence of at least 20 years.

Sections (2) and (3) to s 47 of the CODE (which appear above) were reflected by the General Laws Amendment Bill 2015 is Part XX, item 8, as follows:-

- (3) in determining an appropriate sentence to be imposed a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as aggravating circumstances if-
- (a) the murder was committed by the accused in the course or in connection with, or as a result of the following crimes, or of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime-
 - (i) an act of insurgency, mandatory, sabotage or terrorism;
 - (ii) the rape or other sexual assault of the victim:- or
 - (iii) kidnapping or illegal detention, robbery, hick jacking, piracy or escaping from lawful custody or
 - (iv) unlawful entry into a dwelling house, or malicious damage to property of the property in question was a dwelling house and the damage was effected by use of fire or explosions:-
or
 - (b) the murder was one of two or more murders committed by the accused during the same episode, or was one of a series of two or more murders committed by the accused over any period of time:- or the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim:- or
 - (c) the victim was murdered in a public place or in an aircraft, public passenger transport vehicle or vessels, railway car or other public conveyance by the use of means such as (fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to by standers.
- (4) A court may also, in the absence of other circumstances of mitigating nature, or together with other circumstances of an aggravating nature regards as an aggravatory circumstance the fact that-
- (a) The murder was premeditated:- or
 - (b) The murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or over the age of 7 years, or was physically disabled.
- (5) A person convicted of murder shall be liable-

- (a) Subject to s 337 and 338 of the CPEA, to death, imprisonment for life or imprisonment for any definite period of not less than 20 years. If the crime was committed in aggravatory circumstances as provided in subsections (3) and (4) :_ or
 - (b) In any other case imprisonment for a definite period.
- (6) For the avoidance of doubt, it is declared that the circumstances enumerated in subsections (3) and (4) or being aggravatory are not exhaustive and that a court may find other circumstances in which murder is committed to be aggravating for purposes of subsection 5 (a). The other sentencing guideline is to be found in Constitution of Zimbabwe Amendment (No. 20) Act 2013 (the new Constitution) whose s 3 sets out the founding values and principles which are respected by Zimbabweans. Section 3 (1) (j) recognises the inherent dignity and of each human being.

The declaration of rights, which appeared in Chapter 4, Part 1 of the Constitution, in s 48 declares that every person has the right to life, and that:-

Section 48 (2) A law may permit the death penalty to be imposed only on a person convicted of murder in aggravating circumstances, and-

- (a) The law must permit the court a discretion whether or not to impose the penalty (See item 8, (6) of the General Laws Amendment Bill 2015 s 48 (2)
- (b) The penalty must be carried out only in accordance with a final judgment of a competent court (see s 337 CPEA)
- (c) The penalty must not be imposed on a person-
 - (i) Who is less than twenty one years old when the offence was committed
 - (ii) Who is more than seventy years old.
- (d) The penalty must not be imposed on a woman and (see s 337/388 CPEA)-
- (e) The person sentence must have a right to seek pardon or commutation of the penalty from the President. See s 340 as read s 342 (CPEA)

A question has arisen as to whether s 48 (2) of the new Constitution which stipulated that “..... a law may permit the death penalty to be imposed only on a person convicted of murder on aggravating circumstances.....” has been complied with by the provisions of [s 337/338/340 and other CPEA] as read with [s 47 of the CODE], as read with item 8 (3) –(6) of the General Laws

Amendments Bill 2015. The question is do the provisions of the Code, the CPEA, item 8 collectively constitute ‘a law’ which permits the death penalty for purposes of s 48 (2) of the new Constitution. My opinion is that, item 8, which amends s 47 of the CODE as read with ss 337 and 338, 339, 340, 341, 342 of the Criminal Procedure and Evidence Act, fulfil this Constitutional requirement. Having laid out the relevant law, and weighed in or the legal conundrum of compliance to s 48 (2) of the new Constitution it is now time to consider the circumstances, of the case before the court. We must ask ourselves whether:-

- (a) there are any aggravatory circumstances
- (b) there are any extenuating circumstances
- (c) there are any mitigating factors

The state conceded that there are no aggravating circumstances in this case which warrant the imposition of the death penalty. The concession was based on the fact that the accused is 69 years old, a year shy of the mandatory maximum age after which the death penalty may not be imposed. He is excluded from the death penalty by virtue of his age. The second premise of the concession by the State is based on s 239 of the CODE which provides that:

“If after being provoked, a person does, ommits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realisation referred to in s 47 the person shall be guilty of Culpable Homicide if, as a result of the provocation

- (a) he or she does not have the intention or realisation referred to in s 47; or
- (b) he or she has the intention or realisation referred to in s 47 but has completely lost his or her self-control.”

It was submitted that the court take the element of provocation into account, as mitigatory, since it had rejected the defence of provocation in the circumstances accused did not completely lose his self-control or look intention and or realisation as referred to in s 47.

The State conceded that once the court accept that the provocation in the circumstances of this case is mitigatory, then the question of aggravatory circumstances could fall away, as these may only be found in the absence of mitigatory factors. The State urged the court to consider that accused committed acts of domestic violence. He stalked the deceased and her lover Anyway Daira. He laid an ambush for them and hid in the bushes. He brandished a knife and stabbed the deceased callously 3 times on the neck and chest because she was too drunk to run away. He

subjected the deceased to verbal, mental and psychological torture to get her to admit that Anyway Daira was her lover before killing her when he failed to get the answer he wanted. Accused knew about the relationship between deceased and Anyway Daira because he had heard rumours. He intended to kill his love rival by his own admission. He did not attempt to resolve the issue amicably. He took the case into his own hands. The court was urged to have regard to the case of *S v Fortunate Musoro* HH 190-16 in which stalking was involved and accused was convicted of Culpable Homicide and sentenced to 1 year imprisonment.

On murder with actual intent, the court was referred to the case of *S v Robert Mugwando* SC 19-2002 in which different sentences were imposed on the accused depending on their actions during the commission of the crime. The court was urged by counsel for the accused to take judicial notice of the State commission that there are no aggravatory circumstances, in this case. It was submitted that the global approach to the death penalty is that most jurisdictions are moving away from it and that Zimbabwe must not lag behind on the human rights band-wagon. With all due respect to counsel for the accused in 2013 Zimbabwe promulgated a new Constitution after wide consultation country wide. The people of Zimbabwe wanted the death penalty to stay as part of their law. If in my respectful view it is not the will of the people, but up to Parliament to change the law in accordance with the will of its subvert Constituents. There is no void or *locuna* in the law, or failure to comply to s 48 (2) of the Constitution after item 8 of the General Law Amendment Bill 2015 was promulgated.

The submission which the court found persuasive was that the offence in question was committed in December 2015, before the General Laws Amendment Bill 2015 came into effect in 2016. We agree that, in the circumstances of this case, the accused cannot be sentenced to death because at the time he committed the offence there was no law as referred to s 48 (2) of the Constitution to provide for the death penalty.

We are further persuaded that, the death penalty would be inappropriate in this case because the accused is close to 70 years old, which is an age where it is excluded by the Constitution, by item 8 of the General Laws Amendment Act 2015, and s 337 and 338 of the Criminal Procedure and Evidence Act. It was submitted by counsel for the accused that this is a crime of passion. Unfortunately the court was not impressed with the analogy that the accused was an “Alpha male” who sought to impose his dominion over his woman’ and his ‘love rival’ in a law of the jungle

survival of the fittest type of contest. This stereotyping of male aggression is responsible for a lot of societal prejudice and acceptance of ‘macho’ sexist behaviour which results in the unadulterated use of physical force and violence usually with fatal consequences.

It is not mitigatory at all to say that accused’s male pride was hurt and he behaved in a typical manner. Behaviour is learned. It can be unlearned. It is high time violent behaviour was unlearned whether it is practised by men or by women. The court noted that accused is a family man of 12 children, a communal farmer who realised five hundred dollars a year who has no assets of value or savings. The accused be and is hereby sentenced to 20 years imprisonment.

National Prosecuting Authority, applicant’s legal practitioners
M C Mukome, accused’s legal practitioners