

THE STATE
versus
PATRICK CHIMBUYA
and
NORMAN CHIMBUYA
and
ELIZABETH CHIMBUYA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 19, 29 & 23 June 2017

Assessors: 1. Mr Magorokosho
2. Mr Chipere

Criminal Trial

M Musarurwa, for the State
J. Fusire, for the 1st accused
V. Chinzamba, for the 2nd accused
F. Matinhure, for the 3rd accused

HUNGWE J: All three accused pleaded not guilty to a charge of murder involved their brother Oscar Chimbuya (“the deceased”). The undisputed facts are as follows. 1st accused pulled down the tombstones erected by the deceased on their father’s grave. He took the stones and placed them in a dish. He placed this dish with the said tombstones, inside the deceased’s kitchen hut. Upon learning that the 1st accused was behind this abomination, the deceased reported the matter to their village head. The village head then set up a team which included the deceased. This team was to approach the 1st accused and bring him to his presence to deliberate on this incident.

On the day in question the team assembled. It decided to approach first accused’s residence from different directions to close all escape routes. They arrived at his residence at supper time. It was a moon-lit night. 1st accused was inside the hut. They called him to come out. 1st accused demanded to know why he should comply with their demands. As they tried

to talk sense into him, the 1st accused emerged welding a knife and charged at the assembled group.

What followed is a matter of some dispute. However, in the melee that followed, the deceased was stabbed with a knife. He had also been assaulted, as had been the rest of the team. His team, which had been dispatched to summon the deceased to the headman's place, took a forced retreat. The 1st accused was charged together with his other siblings Norman Chimbuya ("the 2nd accused") ("or Norman") and Elizabeth Chimbuya ("the 3rd accused") ("or 3rd accused"). They all pleaded not guilty to the charge.

At the close of the State's case Norman Chimbuya was found to have no case to answer and was discharged. The principal reason for his discharge was that none of the witnesses who were present during the scuffle in which the deceased was stabbed, implicated him in any way. In fact Shadreck Masakara ("Shadreck") told the court that when he saw Norman approach the scene at a distance, he advanced towards him. Norman backtracked and never set foot onto the scene. This was the nearest Norman was placed. When Shadreck decided to return to the scuffling group he met the deceased. The deceased warned Shadreck to be wary of 1st accused who had stabbed him with a knife.

It was on that basis that we found that Norman had no case to answer and acquitted him at the close of the State case.

The evidence by Masakara places Elizabeth at the heart of melee. When 1st accused was shouting from the hut in a heated exchange with deceased, someone alerted Elizabeth and Edna, their late mother, about the deceased's presence. The two women made a quick advance to the scene. Elizabeth grabbed the deceased from the back and pulled his genitals. She announced as much at the time. Exploiting the opportunity created by his sister, 1st accused came from behind the deceased. He stabbed him below the right ear with a knife. Prior to attacking the deceased with the knife, 1st accused had chased John Kufakureva away from the scuffle.

In making this finding we are aware that the scene was fluid and mobile, the scene was only moon-lit. It was a tense and emotionally charged encounter in which siblings were literally at each other's throats. However these people were well-known to each other. They would recognise each other a distance away, even in the darkness of the night. They could tell each other's voices. We are also keenly aware that where events happen quickly it is impossible to get accounts of those events without minor inconsistencies between the various versions creeping in.

Even then, this court was able to get a good picture of what really took place from the evidence given especially by Shadreck Masakara and John Kufakunesu. As for Sarah Chengu, the fact that her husband was directly responsible for the death of the deceased tainted the evidence she gave in court to a point where she was unable to remain composed. In the end her evidence did not give a clear picture of what she observed especially when she was subjected to cross-examination.

We rejected the defence given by the 1st accused. In essence he told the court that the deceased must have stabbed himself after the door to the hut which he had pushed to escape from an imminent attack fell on him. How such an event would result in a stabbing of the sport below the right ear of his victim remained a mystery to us. He gave a version in court which we found to be palpably false. His guilt is further demonstrated by his subsequent flight to Chipinge without attending his sibling victim's burial. In any event, in his statement to police he admitted to the murder of his brother who he said he killed with a knife. If, as he said in court, this was an accidental and unfortunate death; how did he know that a knife was used to kill the deceased?

In the court's view, his extra-curial statement correctly reflects his role in this tragedy. His subsequent twisting of the events in the statement is an attempt at falsifying the events. In the end we had no difficulty in rejecting his evidence as false.

Elizabeth Chimbuya was summoned to Patrick's residence in order to quell the scuffle which was developing. She teamed with her late mother Edna Tarambiwa and pounced on the unsuspecting deceased and his team. Elizabeth grabbed deceased from the back; reached for his stomach and pulled his genitals. Patrick, then pounced with the knife and stabbed the deceased. When Shadreck Masakara grabbed the 1st accused, 3rd accused then put the hoe handle to good use by striking Shadreck on the head. Edna was promising bloodshed as she menacingly approached the scene. Those in Shadreck's team failed to subdue the 1st accused as there was pandemonium. He decided to call off the fight in light of the fatal stabbing of the deceased and the deteriorating security situation. They left.

Clearly, the fact that the 3rd accused had come to the aid of the actual perpetrator is established on the facts. As such, both must be found guilty of murder as defined in s 47 (1) (b) of the Criminal Law (codification and Reform) Act, [*Chapter 9:23*].

Both have no previous convictions.

REASONS FOR SENTENCE

In assessing sentence I take into account the fact that both of you are first offenders. You have the usual family responsibilities. Your legal practitioners asked the court to blend sentence with mercy on the basis that the killing of your sibling will be a permanent stigma which you shall carry for the rest of your life. Mr Matinhure asked that the court treats Elizabeth more leniently since she is a female.

Both of you have been convicted of a serious offence. You killed your brother in an unnecessary orgy of violence over an issue which could have been resolved amicably. So serious is the crime for which you have been convicted that in appropriate circumstances, the death penalty is justified. The present circumstances do not call for that penalty as you had not planned that you were going to kill the deceased. It would appear that the aim and object was merely to punish the deceased for a perceived misconduct. Because you resorted to violence, you got carried away and used a most lethal array of weapons in the process which included a knife and a hoe handle. The result was an unnecessary loss of life.

In my view the role played by Elizabeth excludes her from being assessed differently. I say this because she encouraged the assault and brought the hoe handle to the scene which was used to assault the deceased. She must face the consequences of her actions on an equal footing with her brother and comrade-in-arms.

In my view the following sentence meets the justice of this case.

Each: 15 years imprisonment

National Prosecuting Authority, legal practitioners for the State
Legal Aid Directorate, legal practitioners for the 1st accused
Mugadza Chinzamba & Partners, legal practitioners for the 2nd accused
Gonese & Ndlovu, legal practitioners for the 3rd accused