

THE STATE
versus
WILSON MPAKATA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 9 November 2017

Criminal Trial

T Kasema, for the State
L Rubaya, for the accused

ASSESSORS: 1. Mr Shenje
2. Mr Gonzo

CHIGUMBA J: The accused is facing a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23], it being alleged, that on 8 October 2014, at Charu homestead, he unlawfully and with intent to kill, or realising that there was a real risk or possibility that his conduct might cause death struck Chiki Charu on the back of the head with an axe thereby causing him injuries from which he died.

The accused pleaded not guilty. A statement of agreed facts was admitted by consent. It states that the accused and the deceased were distantly related and that accused consulted a tradition healer (Tsikamutanda) about evil spirits in the family on 8 October 2014. It is common cause that accused was advised by the traditional healer that the deceased was responsible for his misfortunes and that a clay pot full of blood and goblins was removed from accused's residence which had allegedly been placed there by deceased to bewitch him and his family. It is common cause that the accused struck the deceased with an axe around 7pm on the day in question several times on the head.

It is common cause that the deceased died from a cut to the head injury two degree axe assault (in terms of the post mortem report) exhibit 2.

It is common cause that accused admitted to the charge of murdering the deceased in the confirmed warned and cautioned statement (exhibit 5). His explanation for his conduct was that he "...got possessed by evil spirits when I came from a traditional healer (Tsikamutanda) only known to me 'as Gurajena'. I got to my normal senses after I had killed Chiku Charu. That was when I realised that I actually committed a crime and that is when I took the axe handle and threw it into the ashes to destroy evidence. I also realised that I had no bad feelings with deceased person...". All the exhibits were admitted into evidence by consent, the axe, the post mortem report; the confirmed warned and cautioned statement, the sketch plan. All the witnesses' statements which appear in the outline of the state case were admitted into evidence by consent except for the first paragraph which reads as follows:-

"On 8 October 2014, the accused consulted a traditional healer called Tsikamutanda about suspected evil spirits in the family which were causing some illnesses. He was told that the deceased was responsible. When the accused returned to his homestead, he planned to kill the deceased for bewitching him."

The evidence of the state witnesses was admitted by consent, in terms of s 314 Criminal Procedure and Evidence Act [*Chapter 9:07*]. The state closed its case and advised the court that the issue which arose for consideration was whether or not the accused killed the deceased intentionally after planning a revenge killing.

The defence outline was admitted into evidence. The accused denied planning to kill the deceased or intending to kill him. He averred that the faith healer forced him to go through some rituals and to smoke traditional medicines which he had never before done in his life, and contrary to his Christian beliefs and Zion Church doctrine, where he was an evangelist. He averred that he regrets the events of 8 October 2014. It was submitted on behalf of the state, in its closing submissions, that the accused raised a defence of diminished responsibility, that, at the material time, when he committed the offence, he was laboring under a sickness of the mind. It is trite that the defence of insanity and mental instability at the time of the commission of the offence has a strict liability requirement that the person who seeks to rely on them be declared insane into s 29 (2) of the Mental Health Act which provides that:-

"If a judge or magistrate presiding over a criminal trial is satisfied, from evidence, including medical evidence given at the trial, that the accused person did the act constituting the offence charged or any other offence..."

I am not persuaded by the submission made on behalf of the state that only medical evidence will suffice for purposes of establishing this defence. Section 29 (2) my reading of that section is that any evidence will suffice as long as it satisfies the presiding officer. Unfortunately for the accused, such evidence must establish the state of mind of accused at the time of the commission of the offence. The *viva voce* evidence of the accused is inconsistent with

(a) His warned and continued statement

- He had the presence of mind to throw the axe in the fire. It destroys evidence yet he claimed in evidence in chief that he only became aware of what he was doing the next morning.

(b) Accused claimed to have used the axe handle as a walking stick which is inconsistent with the cause of death (a cut to the head not a blow, blunt force trauma)

- The axe handle was too short to be used by accused as a walking stick to support a broken leg since it is curved and too short for accused's height.

(c) Accused stated he was reluctant to consult a faith healer and stayed at home yet in his warned and consistent statement and in the agreed statement of agreed facts, he admits to doing so.

I accept the submissions made on behalf of the state, that, once a court rejects insanity in terms of s 29 (2) Mental Health Act as a defence, the only option open is to consider whether diminished responsibility may operate in mitigation, Part III [*Chapter XIV*] of the Code provides in s 218 (2) as follows:

“If the acute mental and emotional stress, or partial mental disorder or defect is brought about though the person's own fault a court may regard such person's responsibility as not having diminished.”

It was submitted that accused took the faith healer's concoction voluntarily of his own accord when he could have refused therefore he should be precluded from relying on it as the cause of any diminished mental capacity that may have subsequently afflicted him. We agree s 218 (4) of the Code indicates that mental disorder negates a person's mental capacity rather than diminish it. This means that diminished responsibility does not affect a person's capacity to formulate an intention to kill. Accused has no history of mental disorder as he admitted through cross examination. His family has no history of insanity. See *State v Mukombe* 1991 (1) ZLR 738

SC. We find that accused was not insane at the time of the commission of the offence. His actions constitute intention as envisaged by s 47 (1) (a) of the Code. He used an axe to hit the deceased not once, but 3 times on a delicate part of the body (the head). He clearly foresaw the possibility of death due to his actions.

Faith healer (traditional healers such or Tsikamutandas or others, have caused a lot of harm in our society where traditional beliefs and in some instances African Traditional Religion (ATR) is still practiced by the average Zimbabwean. African Traditional Religion practitioners actually frown on the use or reliance on Tsikamutandas who in most cases are connen looking to deprive villagers of their livestock. The practice of allowing headmen to coerce villagers to participate in Tsikamutanda cleaning ceremonies is discouraged by the Traditional Medical Practitioners Council, which works hand in glove with the Ministry of Health.

Accused could have reported to the police if he was forced to participate in unsavory rituals beyond his comprehension. Instead he chose to kill the deceased based on allegations of witchcraft which he cannot prove. Society should be discouraged from participating in these rituals especially from unregistered faith healers who are not accountable to anyone.

Accused is found guilty of murder and with actual intent contravening s 47 (1) (a) of the Code.

National Prosecuting Authority, applicant's legal practitioners
Mukome & Associates, accused's legal practitioners