THE STATE
versus
ERIC KAGORO
and
BRIAN KAGORO

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 26 June 2024

Assessors: *Mr Gweme*
Mr Gwatiringa

Criminal Trial – Murder-sentencing judgment

D.H. Chesa, for the state
C. Tachiona, for the first offender
G. Hoyi, for the second offender

MUTEVEDZI J: This is a family tragedy of epic proportions. A father who died at the hands of his two eldest sons who on their part are likely to spend the rest of their more productive ages in prison.

[1] The probability of being sentenced to imprisonment following conviction on a charge of murder is very high because a court's options are limited even before it starts assessing a suitable penalty. The Criminal Procedure (Sentencing Guidelines) Regulations, 2023 (the sentencing guidelines) pitch the presumptive penalty for murder at twenty (20) years imprisonment. An offender is therefore expected to move mountains in order to persuade a court to climb down from that summit to impose a non-custodial penalty.

[2] In essence, the crime of murder carries a minimum mandatory sentence of twenty years imprisonment (not to be confused with the presumptive penalty) unless a court finds that the murder was not committed in aggravating circumstances. That is so because the sentencing of murder convicts shifted drastically with the advent of the Constitution of Zimbabwe, 2013 and the amendment of s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code) by Act No. 3 of 2016 which introduced the

concept of aggravating circumstances. The new regime also changed the onus that was borne by the offender and the prosecutor. Previously, the offender was required to show the existence of extenuating circumstances in order for him/her to escape the sentence of death. In turn, the prosecution's duty was, where it deemed it so, to show the absence of any such extenuation and therefore that the case warranted the imposition of the punishment of death on the offender.

[3] As stated above, the new practice ushered in the concept of aggravating circumstances, where prosecution is expected to do no more than point to the existence of one or more predetermined factors which are called aggravating circumstances. Although the law says a court can find more on its own initiative, several of those factors are listed in s 47(2) and (3) of the Code. The prosecutor's task is therefore to simply rummage through the list, find the aggravating circumstances that relate to the case before the court and direct the court's eyes to it. Plainly put, and as can be noted from the statutory list already referred to, aggravating circumstances simply refer to those factors which serve to increase the severity of a criminal act or the culpability or moral blameworthiness of an offender. They are the direct opposite of what used to be called extenuating circumstances.

[4] For the above reason, this court has said that it is not possible for any court to assess an appropriate sentence in cases of murder without a prior determination of the existence or absence of aggravating circumstances.

[5] The two offenders in this case killed their father, Zivanai Kagoro. They accused him of favoritism. In their eyes, he loved their younger brother called Kaphas more than he loved the two of them. Things got heated on the fateful day. The two teamed up to assault the deceased by tripping him to the ground, sitting astride his chest, throttling him and banging his head to the ground. The brawl took place just after dusk. The next morning the father was rushed to hospital where he died a few days later. The assailants were charged with murder in contravention of s 47(1) of the Code. They denied the charges when their trial commenced. We were however convinced that their defences were palpably false and that the prosecution had managed to prove its case beyond reasonable doubt. We accordingly convicted them.

[6] At the pre-sentencing hearing stage, both counsel for the offenders completely neglected to deal with the question of whether or not there were aggravating factors in this murder. They both concentrated on the personal circumstances of the offenders.

Even then they omitted crucial aspects. Whilst what they stated was necessary, the provisions of the sentencing guidelines must always be borne in mind. S 12 thereof provides that prior to sentencing an offender, a court shall inquire into and investigate the characteristics of the offender including his or her social background; the characteristics of the victim(s) of the offence including the impact of the offence on the victim(s); the probability of the offender reoffending; the desirability or need to protect the victim(s) or society from the offender among other considerations. It need not be emphasised that inquiring into and investigating the issues stated is not discretionary. It is mandatory. The rationale for making the inquiry peremptory were stated by this court in *S* v *Blessed Sixpence and Others* HH 567/23

[7] Like in all cases, the investigation and the inquiry expected of the court when dealing with unrepresented litigants is different from the approach it takes where an offender is represented by a legal practitioner. In the former instance, the court takes it upon itself to exhaust the stated considerations. In the latter though, it is the legal practitioner who must present those issues to the court. We were advised that the second offender Brian has no formal education to talk of; he has no family in that he is single and has no children or any one else dependent on him. Counsel said he was very remorseful and amenable to undergo rehabilitation. The social background of the first offender Eric was not disclosed to us by counsel. It was only through the prosecutor's submissions that we learnt that he is a married man with a wife and one child. We were also told that both of them are youthful first offenders aged thirty years and twenty - seven years respectively. They were each about two years younger than that at the time the murder occurred.

[8] In utter contrast to the somewhat cursory approach taken by the legal practitioners, the prosecutor was thorough in his submissions to the court. He commenced by illustrating to the court the existence of aggravating circumstances in this case. He argued that the two offenders possibly fell into a category which a psychologist called Dr. Kathleen M. Heide, in her article, *Matricide: A Critique of the Literature,* which was quoted with approval in the case of *State* v *Patrick Mapita*, HH 113/18 at p. 3 termed the Dangerously Anti-social Child (DAC). In general, so the argument went, such children may kill their parent in furtherance of their own goals. They view the parent as an obstacle in their path to getting what they want. For instance, they may kill the parent in order to have more freedom, or to inherit money they believe is eventually coming

to them. In addition, the children run a pattern of violating the rights of others when it suits them; they defy adults, and do what they want in their own time and terms; they do not accept responsibility for their actions; may engage in criminal activities such as violence on other people or animals, and are generally deceitful. [1] The prosecutor then related these traits to the case at hand. He said both the offenders defied their father; refused to take responsibility of what they did to their parent; they accused him of favouritism; were drunks who were generally violent. Mr *Chesa* rounded his argument by saying because the law allowed us to extend the considerations listed under s 47(2) and (3) as constituting aggravation, the court in its discretion, could add situations where this kind of behaviour was present in an offender to the list of aggravating factors.

[9] We however decline the prosecutor's the invitation, tempting as it is, for two reasons. First because the argument appears to be based on psychology which happens to be a subject that is beyond the court's expertise. If he wanted it to be so, the prosecutor must have known better. He was required to have called a psychologist to explain the issues in detail and educate the court on how and why such factors must be considered as aggravating the murder. Second, besides the speculative arguments, there is virtually no evidence that the two offenders are dangerously anti-social men. For now, the court therefore says no. We opt to leave the proposition open for consideration in instances where fuller and more informed arguments may be made.

[10] In addition to the above argument, the prosecutor also procured victim impact statements from the deceased's other children namely Primrose Kagoro, Tsungirirai Kagoro and Kaphas Kagoro. Primrose, is the eldest of the children. She has naturally assumed the role of the parent and breadwinner because the deceased left a five-year-old child. In that statement Promise said although Tsungirirai and Kaphas also assist with other needs she now carries the burden of providing for the basic necessities of the child. On his part, Kaphas was forced to leave school since no one could pay for his tuition and other educational requirements. He has resorted to taking up menial jobs in order to fend for himself as well as assist in the upkeep of his younger sister. Because Primrose and Tsungirirai are married and stay with their husbands elsewhere, Kaphas stays alone at the family homestead. He suffers from loneliness. It must be unbearable

[1] [1] https://www.crimetraveller.org/2017/02/parricide-psychology-when-children-kill-parents; accessed on 25 June 2024

for a boy only seventeen years old. The above problems were all created by the two offenders' conduct. They are what are called the unintended consequences of crime.

[11] From the above however, what is clear is that nothing tangible has been proffered to put this crime into the realm of aggravated murders. We make the finding that the murder was not committed in aggravating circumstances. That conclusion restores the court's full discretion to sentence the offenders as it sees fit.

[12] We have already accepted that the offenders are youthful first timers; that both of them know they killed their father for no apparent reason. Such thoughts are likely to live with them for the rest of their natural lives. The stigma will not be easy to deal with. In addition, both of them have spent some considerable period in pre-trial incarceration. We stand ready to discount that period from the sentence we intended to initially impose.

[13] The possibility of the offenders reoffending has been heavily watered down given their circumstances. Reoffending is a phenomenon which is difficult to second guess. The factors which are usually suggestive of that danger include previous convictions, pending criminal cases and unreported but generally known criminal behaviour such as violence. The offenders do not fit that bill.

[14] In the end all parties to this trial were agreed that the offenders cannot escape imprisonment. The differences only related to the duration of the terms. The state suggested a sentence in the region of twenty-five years (25); counsel for the first offender urged the court to impose ten (10) years imprisonment with a few years suspended on conditions whilst that for the second offender suggested seven (7) years imprisonment with two years suspended on condition of future good behaviour. We are not sure what method each of them used to arrive at those figures if any. Our hope is that the suggested figures were not just plucked from nowhere and used to fulfil the obligation which counsels had.

[15] The propositions that the court suspends part of the terms of imprisonment by counsels for both offenders deserves the court's comment if not its censure. It drags us back to the position which this court previously stated as untenable in the case of *S* v *Emelda Marazani* HH 212/23 at p. 5 of the cyclostyled judgment where it remarked that:

> "Clearly therefore murder, except murder by a woman of her newly born baby which in any case has now been given the nomenclature of infanticide in our law, is one of the offences where a court is expressly prohibited from suspending any portion of a

> sentence it would have imposed. See also the case of *S* v *Pritchard Zimondi* [2] for the same proposition. It is for that reason that we are unable to follow the course taken in *Locardia Ranganai* and recommended by both the prosecutor and defence counsel."

[16] We state it once more, that in terms of s 358(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as read with the eighth schedule to the same Act, it is not permissible to suspend the whole or any portion of a sentence imposed for an offence listed in that schedule. Murder is one of those offences. As such the propositions by counsel are not lawful.

[17] Each of the offenders played an equal role in this murder. There is no need for the court to differentiate the punishments. With all the above considerations **each offender is sentenced to eighteen (18) years imprisonment.**

MUTEVEDZI J:……..

National Prosecuting Authority, state's legal practitioners
Ngwerume Attorneys at Law, first accused's legal practitioners
Nyahuma's Law Golden Stars Chambers, second accused's legal practitioners

[2] HH 179/2015