

**THE STATE**

**Versus**

**PRAYMORE SENKOSI MOYO**

IN THE HIGH COURT OF ZIMBABWE

KABASA J with Assessors Mr. Ndlovu and Mr. Maphosa  
HWANGE 16 JUNE 2021

**Criminal Trial**

*Ms. M Munsaka*, for the state

*Ms. L Mthombeni*, for the accused

**KABASA J:** The accused is charged with murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23, in that on 2<sup>nd</sup> August 2020 at Hloniphani Tapson Moyo's homestead, Denge Line in Tsholotsho, he unlawfully struck Hloniphani Tapson Moyo with a fire stand once on the head intending to kill him or realising that there was a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility.

The accused pleaded not guilty to murder but tendered a plea of guilty to culpable homicide which the state did not accept.

The allegations are these: On 2<sup>nd</sup> August 2020 the 31-year-old accused was at Denge line borehole when he had an altercation with his cousin, Nkululeko Sibanda. Nkululeko chased the accused away reprimanding him for using vulgar language. The accused in turn hit Nkululeko with a catapult, whereupon Nkululeko went to the deceased, who was accused's father, to report the assault. The accused followed and kept interjecting angering the deceased who then took a stick with which he assaulted the accused, asking him to leave his homestead. The accused fled but the deceased pursued him. The accused then picked up a fire stand and assaulted the deceased once on the head, leading to the deceased's death.

In his defence outline the accused explained that he had an altercation with Nkululeko who proceeded to assault him. He fled but Nkululeko pursued him and proceeded to poison his father against him. The deceased then took a knobkerrie and started assaulting him. He

fled but the deceased pursued him whereupon he picked up the iron cooking stand and struck the deceased on the head.

He however had no intention to kill him.

To prove its case, the state produced the accused's confirmed warned and cautioned statement which was marked Exhibit 1. In it the accused stated the following: -

"I am pleading guilty to the allegations levelled against me that I caused the now deceased's death by striking him with a fire stand. It was not my intention to cause the now deceased's death. I was defending myself. I do admit that I made a mistake which later led to the now deceased's death."

The deceased's body was examined by a forensic pathologist, Doctor Juana Rodriguez Gregori who concluded that the cause of death was: -

- a) Encephalic dislaceration
- b) Skull bones fracture
- c) Head trauma

The post-mortem was produced and marked Exhibit 2.

The iron fire or cooking stand was produced as Exhibit 3. It had the following dimensions, 4,84 kg in weight, 48 cm length, 48 cm width and 17 cm the length of the supporting legs.

The evidence of 2 witnesses, Sergeant B Makomo and Doctor Gregori was admitted into evidence in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07.

The state then led evidence from two witnesses Nkululeko and Dudu Moyo who is one of the deceased's two wives. The evidence of the two witnesses was largely not disputed.

It was clear from their evidence that each one related the events of the 2<sup>nd</sup> August 2020 in the best way they could recall them. The second witness gave her evidence so well that it literally transported the court to Hloniphani Tapson Moyo's homestead and to the day of the incident.

The following was therefore common cause: -

- 1) On 2/8/2020 the accused and his cousin Nkululeko had an altercation at the borehole and Nkululeko chided the accused for using vulgar language.
- 2) The accused who was unruly and had been drinking alcohol, consisting of traditional beer and “hot stuff” proceeded to assault Nkululeko.
- 3) Nkululeko decided to report the incident to the accused’s father and as he did so the accused who he had left behind arrived and interjected asking him to tell the truth.
- 4) The accused would not stop interjecting even after his father had told him to stop.
- 5) The deceased took a knobkerrie and intended to assault the accused with it but Nkululeko stopped him. Nkululeko subsequently left the deceased’s homestead.
- 6) The accused’s friends arrived at the deceased’s homestead and there was some commotion whereupon these friends were asked to leave.
- 7) The deceased then asked the accused to follow his friends as he no longer wanted to see him at his homestead.
- 8) The accused refused to leave whereupon the deceased picked up the knobkerrie he had intended to assault accused with before being restrained by Nkululeko and hit the accused hard on the shoulder.
- 9) The accused reached for the fire stand which was within arm’s length and used it to hit the deceased once on the head.
- 10) The deceased fell to the ground and efforts to render first aid were in vain. He subsequently died before he could be ferried to hospital.
- 11) The injuries sustained by the deceased were as a direct result of that assault and these were the injuries which he succumbed to.

Following the close of the state case, the state and defence counsel advised that they had come up with a statement of agreed facts which was informed by a realisation of the paucity of evidence to sustain a conviction on a charge of murder.

*Ms. Munsaka* for the state explained that in view of the evidence the state was now accepting the limited plea to culpable homicide.

We were of the view that the state’s concession was properly made. This is why: -

1. The evidence led showed that the accused was attacked by his father. In terms of section 253 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 the attack was unlawful and it had commenced.
2. The accused reacted on the spur of the moment and reached for the fire stand which was within arm's length.
3. The accused had been drinking alcohol and was agitated when he believed his father was listening to Nkululeko and not him. The agitation increased when his father took the knobkerrie with which he wanted to assault him but was stopped by Nkululeko.
4. After Nkululeko left the deceased took the knobkerrie and used it to assault the accused. His wife who was the second state witness described the blow as "hard."
5. The accused's reaction was spontaneous, he reached for the fire stand which was close by and hit his father with it.

He however used a weapon which can be described as lethal, given its dimensions and nature. He used it to strike the deceased on the head, albeit once, but with sufficient force to fracture the skull bones.

The second witness explained that the sound of that blow was such that a person at a distance could hear it.

The means used were therefore not reasonable in the circumstances.

In terms of section 254 of the Criminal Law Code, which states: -

"If a person accused of murder was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime, he or she shall be guilty of culpable homicide if all the requirements for defence of person specified in section two hundred and fifty-three are satisfied in the case except that the means he or she used to avert the unlawful attack were not reasonable in all the circumstances."

We are of the considered view that the accused reacted to an unlawful attack but the means he used were not reasonable in all the circumstances.

The effect of the alcohol he had consumed could have resulted in his reaction as it may have numbed his reasoning but voluntary intoxication is not a defence for a crime requiring the proof of negligence. Voluntary intoxication is equally no defence even on a

charge of murder. There is also no suggestion that the accused was so intoxicated that he would not have appreciated his actions so the issue of intoxication is a non-issue in casu.

We however also considered that there was some degree of provocation given the circumstances of this case.

That provocation and the fact that the accused was under attack negates an intention to kill.

He therefore had no requisite intention, actual or constructive to kill the now deceased.

The state's decision to accept the limited plea, coming as it did after all the evidence had been adduced demonstrated an appreciation of the facts and the law.

The accused escapes liability on a charge of murder but he was negligent in his conduct which resulted in the death of the deceased.

The accused is accordingly found not guilty of murder but guilty of culpable homicide, as defined in section 49 (a) of the Criminal Law (Codification and Reform) Act, Chapter 9:23.

### **Sentence**

The accused is a 32-year-old first offender whose plea of guilty to culpable homicide showed some measure of contrition.

The deceased's wife also testified to the effect that he had threatened to commit suicide on realising what he had done. This is indicative of a person who regretted what he had done.

He will live with the burden of the responsibility that comes with the fact that he took his own father's life. Such a burden can be a psychological imprisonment far surpassing the physical confinement which comes with the four walls of a prison cell.

Sight must not be lost however of the fact that a life was needlessly lost. At 72 the deceased had been blessed with long life and ought not to have had it snuffed out by his own son.

Courts have time without number emphasized the sanctity of life and the need for people to respect such. The taking of life is a serious offence and leaves an indelible mark on the loved ones who will endure the pain of having lost a father, husband, uncle, grandfather through the hand of a family member.

The deceased left 2 widows and they now have to contend with going on without their husband.

It is indeed taboo for a child to assault a parent and the accused must hopefully realise that beer is not for him. The witnesses testified to the fact that when sober he is a “very nice person” but drink turns him into a ‘schizophrenia’

Cases of violence after people have imbibed are disturbingly on the increase and the courts will be failing in their duty if they fail to send the message loud and clear that such will not be tolerated

The fact that accused will be stigmatised and labelled as “that one who murdered his father” will weigh heavily on him for the rest of his life.

That said, we are of the view that the following sentence will meet the justice of the case.

8 years imprisonment of which 2 years is suspended for 5 years on condition the accused does not within that period commit any offence of which an assault on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

Effective: - 6 years imprisonment.