

THE STATE  
versus  
CLEMENCE MAWIRE

HIGH COURT OF ZIMBABWE  
MAWADZE J  
MASVINGO, 16 June 2022

Assessors: 1. Mr Mutomba  
2. Mr Chikukwa

*Ms M Mutumhe*, for the state  
*Ms E Y Zvanaka*, for the accused

### **Criminal Trial - Sentence**

MAWADZE J: It is clear in this matter that the mitigating factors far out weigh the aggravating factors.

The 34-year-old accused was initially arraigned for murder involving the 28-year-old now deceased Severino Mawire. However, both counsel agreed that the proper charge in the circumstances was culpable homicide hence the accused was convicted on his own plea of guilty of the permissible verdict of contravening section 49 of the *Criminal Law Codification and Reform Act [Chapter 9:23]* which is culpable homicide.

The matter proceeded on the basis of statement of agreed facts Annexure 'A'.

The now deceased was a son to the accused's elder brother. They both resided at the same homestead in Mutero village, Chief Chimombe, Gutu in Masvingo. The accused however would not always be at home as he is in the business of dealing in scrap metal realising an income of USD\$50 per month. The now deceased stayed at home with accused's very old parents and other dependants of the accused. The now deceased's parents are deceased and the accused looked after the now deceased.

The now deceased who apparently was an alcoholic was in the habit of abusing and terrorising the accused's aged parents (the now deceased's grandparents). The now deceased would act violently towards accused's aged parents, steal from them to sustain his drinking life style and was generally a wayward child.

On 28 November 2020 the accused proceeded home to try and resolve problems being caused the now deceased to accused's aged parents. The accused had groceries in a wheel barrow for his aged parents and other dependants.

Upon arrival the now deceased rushed towards where some boys were pushing the wheel barrow and started to search for items of groceries in the wheel barrow. The accused questioned the now deceased about such conduct but the now deceased became violent and pushed away the accused. An altercation arose. The accused plucked a switch from a mulberry tree and assaulted the now deceased. The fight ensued. In the melee the now deceased fell down and hit his head on a concrete slab. The altercation was only stopped by one Tasanangurwa Svosve. Unbeknown to the accused the now deceased had been seriously injured on the head and he later died in his room that night. The accused discovered that the next morning and reported to the local Chief and police resulting in his arrest. The accused thus admits that he acted negligently causing the now deceased's death.

The post-mortem report shows the following injuries;

1. *Left facial bruising*
2. *bilateral periorbital haematomas*
3. *Lacerations/bruising on lower lip*
4. *nasal bleeding.*"

The cause of the deceased's death is said to be head injury. This should have happened when he fell and hit his head against the concrete slab as the mulberry switch weighing 320g could not have caused fatal head injuries.

It is aggravating that a young life has been lost unnecessarily. The sanctity of human life can not be over emphasised.

The accused should not have resorted to violence to solve any issues he had with the now deceased let alone to believe he could chastise or discipline a 28-year-old person. It was prudent upon the accused to find non-violent means to resolve the dispute, involve other family members and or the police.

Culpable homicide arising from violent conduct is a serious offence which invariably attracts a custodial sentence unless where there are persuasive mitigatory factors.

The accused's personal circumstances were well articulated in detail by *Ms Zvakana* for the accused. The accused carries the burden to support not only his heavily pregnant wife and their 10-year-old child but his aged parents. As a person no means his incarceration would greatly prejudice them. I saw the accused's mother in court and one can say she literally now has both feet in the grave as it were.

As a first offender the accused deserves to be treated with leniency. He pleaded guilty to the charge hence did not waste the court's precious time and state's resources in prosecuting him raising flimsy defences. The accused shall forever live with stigma that he is responsible for the death of his brother's son the now deceased.

There are also mitigating factors surrounding the commission of the offence.

As already said the now deceased was in the habit of abusing the accused's defenceless and aged parents. He had no respect of his grandparents.

The conduct of now deceased on the fateful day was improper when the accused arrived. He tried to snatch away the groceries the accused had brought for other family members including the now deceased himself. Upon being censured the now deceased became violent and was an aggressor towards the now deceased. The now deceased had the temerity to push away the accused who culturally is his "father". In addition to that he engaged in a fight with the accused. This abhorrent behaviour is shocking to say the least.

The mulberry switch could not have fatally injured now deceased. It is rather unfortunate and fortuitous that the now deceased upon falling down hit his head against a concrete slab.

A proper assessment of all these factors shows that accused's degree of negligence is very low just like his moral blameworthiness. No useful purpose would be served by incarcerating the accused in the circumstances. A deterrent non-custodial sentence would meet the justice of the case.

In the result the accused is sentenced as follows;

*"3 years imprisonment wholly suspended for 5 years on condition accused does not commit within that period an offence involving the use of violence upon one person of another and or negligently causing the death of another through violent conduct for which accused is sentenced to a term of imprisonment without the option of fine."*

*National Prosecuting Authority*, counsel for the state  
*Saratoga Makausi Law Chambers*, pro deo counsel for the accused