

THE STATE  
versus  
WELLINGTON GWANYANYA MABHUNU

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 3 July 2015 & 2 August 2017

### **Criminal Trial**

**Assessors:**           1. Mr Barwa  
                              2. Mr Gweme

Miss *P Chikangaise*, for the State  
Mr *A Chikomo*, for the accused

ZHOU J: The accused is being charged with the offence of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations against him are that on 27 February 2008 at about 2100 hours at Rimuka Westview Road, Kadoma, the accused person together with one Stanford Manomano who is at large unlawfully and with intent to kill or realizing that there was a real risk or possibility that their conduct might cause death, murdered the now deceased Notice Chidangwaira by assaulting him on the head using unknown objects thereby inflicting injuries from which he died. The accused pleaded not guilty to the charge and tendered a defence outline.

The prosecution relied on the evidence of five witnesses. Three witnesses, namely, Chenjerai Sibangani, Lovemore Zakeyo, and Owen Ruwiza gave their evidence orally. The evidence of Desmond Malaulo and Gilbert Mavhako was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The postmortem report prepared by

Doctor Madziva was produced in evidence by consent. In the postmortem report the Doctor concluded that the deceased died as a result of severe head injuries caused by assault. The report also records some injuries observed by the doctor which were consistent with assault having been perpetrated upon the deceased. These included bruising and abrasions on the right lower leg and left frontal scalp. The bruises under the scalp were extensive according to the report.

Desmond Malaulo was the first person to see the deceased person after he had been attacked. Gilbert Mavhako witnessed the recovery of a white cap from the accused person who was at Kadoma Prison at the time that the cap was recovered.

The first witness to testify in court was Chenjerai Sibangani, a resident of Rimuka Township in Kadoma. He knew the deceased person during his life time. He did not know the accused. He and the deceased were employed by one person. The witness was a gardener while the deceased was employed as a driver of a commuter omnibus then. His evidence was that he sold a Nokia 8210 mobile phone/handset to the deceased. The phone had a blue cover at the time that he sold it to the deceased. He could identify the phone in question by a scratch mark on the battery, as well as by the fact that the letter "C" was missing, having been erased, from the word "Code" which was inscribed on the battery. He had possessed the phone for two months before he sold it to the deceased. The witness could not identify the phone which was produced in court as the one which he sold to the deceased because it did not have a blue cover. Also, the battery was not scratched while the letter "C" on the phone which was shown to him in court was quite visible. The witness told the court that it was possible to change the cover and battery of the phone. He stated that he believed that the phone produced in court was the one that he sold to the deceased. His evidence was that when the deceased died it was not long after he had purchased the phone from the witness.

Lovemore Zakeyo knew the accused but not the deceased. The accused and one Brian Hotera approached him on a date that he could not remember but in 2008, and advised him that they were selling a mobile phone. He knew Brian Hotera as he stayed in his neighbourhood. That was the first time that he met the accused. He purchased the phone in question. It was a Nokia 8210 model, brown in colour. The witness identified the phone which he purchased from the accused person in court. He stated that he knew that Brian Hotera was in the business of

repairing cellphones in Kadoma. A few days later the accused came to him in the company of police officers who informed him that the phone sold to him was stolen property.

Owen Ruwiza is employed by the Zimbabwe Republic Police and is in the Criminal Investigations Department. He is the investigating officer in this matter. He is also the one who arrested the accused. He was assigned to investigate the case involving the attack upon the deceased in Westview, Kadoma. As a result of information received from informers, the witness and other police officers went and requested the accused and Stanford Manomano who were already detained at Kadoma Remand Prison. They took them to Kadoma Central Police station where they questioned the two. Both admitted to having attacked the deceased. Warned and cautioned statements were recorded from the accused and Stanford Manomano by the witness. After that the two separately led the police to the place in Westview where they had attacked the deceased. The full text of the Shona version of the warned and cautioned statement was read and interpreted in court. The warned and cautioned statement was confirmed by the Magistrate at Kadoma on 9 March 2008. During the indications the accused told the witness and the other officers that he had taken the deceased's cap and had it at Kadoma Prison. Accused told them that he and his accomplice had sold the phones stolen from the deceased to Lovemore Zakeyo, and that they had thrown away the deceased's wallet at TM Supermarket in Kadoma. The accused also said he and his accomplice had searched and found some money which they took away from the deceased during the attack. The witness and the other officers went back to Kadoma Prison and asked to search the accused's bag. They recovered the white cap from that bag in the presence of Gilbert Mavhako. The witness identified the cap in court, and it was produced as exh. 3. On the same day the accused led the witness to Lovemore Zakeyo where a cellphone, a Nokia 8210, was recovered. The witness identified the phone, which was produced as exh. 4. It is brown in colour. The witness stated that when he interviewed Stanford Manomano and the accused the two were accusing each other of having thrown the stone that hit the deceased.

The accused person gave evidence on his behalf. His evidence was that on the day in question he connived with his accomplice Stanford Manomano to ambush people and dispossess them of their property. They saw the deceased on the road when he was illuminated by lights of a motor vehicle. They were hiding. When the deceased came close he walked to him and asked

for some light for a cigarette. He was then surprised by the actions of his accomplice when he suddenly picked a stone and struck the deceased who then fell down. His accomplice got hold of the deceased by the throat while the accused searched the deceased's pockets. He took a phone, a wallet and a cap. The accused and his accomplice then ran away leaving the deceased where they had dispossessed him of his property. They were arrested when they were already in prison in connection with a different matter. He states that he became aware of the deceased's death through the police a week after the attack. He stated that his intention was to rob the deceased and not to kill him. He acknowledged that the phone which was produced as exh. 4 was sold by him with the assistance of Brian Hotera.

The facts which are common cause from the evidence led are as follows. On 27 February 2008 the deceased was attacked by the accused person and his accomplice while walking along the Rimuka Westview Road. He sustained injuries as a consequence of the attack. Following the attack the accused and his accomplice made away with the deceased's property, which included a cap, a mobile phone, and a wallet. The deceased died on 1 March 2008 of the severe head injuries which he sustained during the attack by the accused person and his accomplice.

The accused's defence is that the stone which struck the deceased was thrown by his accomplice. The investigating officer says during the investigations he discovered that the said accomplice was also suggesting that the stone was thrown by the accused. Nothing turns on the issue of who between the two threw the stone that struck the deceased. The evidence clearly establishes that the two were acting in common purpose as, according to the accused's evidence, they set out to commit robbery. By its nature the offence of robbery involves the use of violence to subdue the victim. The position of the law in relation to the application of the doctrine of common purpose is aptly summed by Jonathan Burchell in *Principles of Criminal Law 5<sup>th</sup> Ed.*, p. 478 as follows:

“So, for instance, an accused who agreed, as a member of a criminal syndicate, to commit (or participate in the commission of) housebreaking with intent to commit a crime or robbery would be liable for murder if the resultant death was foreseen as a possibility of engaging in the agreed crime. As was said in *Madlala*:

‘An accused may be convicted of murder if the killing was unlawful and there is proof . . . that he was party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted reckless of such fatal consequence, and it occurred’.”

See also *S v Chauke & Anor* 2000 (2) ZLR 494(S) at 497A-B; *S v Mubaiwa & Anor* 1992 (2) ZLR 362 (S) at 370 F-H.

In this case the accused confirms that the deceased was immobilized by the stone when he was struck. The accused at no time withdrew from the design to commit the robbery. According to his evidence, he actually furthered the enterprise in that he went on to search the deceased and dispossess him of his property while his accomplice held the deceased by the throat.

The question of the intention to kill is established by the fact that the stone was targeted at the head of the deceased. It instantly collapsed the victim, which means that the force applied was quite severe. It is irrelevant that this was the first time that the accused and his accomplice had killed a person in the course of robbery. For that reason, this court finds that beyond reasonable doubt the accused unlawfully and intentionally caused the death of the deceased. In terms of s 47(1) of the Criminal Law (Codification and Reform) Act:

“Any person who causes the death of another person –  
(a) Intending to kill the other person; . . .  
shall be guilty of murder.”

In the result, the accused is found guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

*National Prosecuting Authority*, legal practitioners for the State  
*Mupanga & Bhatasara*, accused’s legal practitioners