

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 96/02

HELD IN MBABANE

In the matter between:

REX

VERSUS

MSUKELWA SIMON NHLEKO

CORAM

SHABANG AJ

FOR THE CROWN

MS N. LUKHELE

FOR THE DEFENCE

MR J. KUNENE

JUDGEMENT 8th JUNE, 2004

The accused, one Msukelwa Simon Nhleko is charged with murder wherein it is alleged that upon or about 6th September 2000 at or near Ncandweni Area, Lubombo region, the said accused person did unlawfully and intentionally kill one France Kunene.

In support of the charge the crown led the evidence, inter alia, of the first crown witness called one Abednego Makhundu Mngomezulu, The witness testified that between 8.30 p.m. and 9.00 p.m he heard a big noise which came from what sounded like an altercation. On hearing the noise he dressed up, took his torch and went outside to

2

investigate what was happening. On reaching a certain Malinga homestead he met with Mr Malinga and asked him as to where the noise which had died down had come from. The said Mr Malinga answered that the noise appeared to come from the homestead of his brother in law. His brother in law was the deceased, France Kunene. As they were talking, two children named Bongekile Masulai and Thokozani Nhleko came from the direction of the deceased's homestead. Both children who were Mr Malingas grandchildren reported that they had just seen a person lying in a pool of blood facing upwards. The children led both Mr Malinga and the witness Abednego Makhundu Mngomezulu to the spot where they had seen the person. The children stopped at a distance however. This witness says he lit his torch and saw the person. Mr Malinga was still with him. The witness says he realised that the person had a slit throat. On seeing this the witness directed his torch light to the tree whereupon he heard the accused speaking. The accused had a bush knife in his hand. The witness asked him why he had killed the person. The accused is said by this witness to have responded by saying that the deceased's next of kin should be called to take the body away and that he (accused) would answer the question asked the next day. The witness described himself as being a relative of the accused in that he was the maternal uncle of the accused. On being asked by this witness how he had killed the dead person, the answer from the accused was that he had used the bush knife he had in his hand. At that point the accused is said to have thrown the bush knife to the ground. The accused further informed this witness in the presence of Mr Malinga that he first hit the deceased on the back of the head whereupon the deceased fell facing down. He turned him over on realising that he was no longer breathing and proceeded to cut his throat with the bush knife. The accused stated further to this witness that the deceased had insulted him by saying that he had stolen his (deceased's) chickens. Much of the evidence of this witness was not challenged or disputed during cross-examination including the admission which the accused allegedly made to this witness. The accused was driven to the Lubulini Police Station in a tractor. He was co-operative, according to the

evidence. It was because of this undisputed admission that I refused an application at the close of the crown case for the acquittal and discharge of the accused.

3

In his defence the accused took the witness stand and explained that he and the deceased had an altercation earlier that day, when the deceased had accused him of stealing his chickens. He says he hit the deceased once who fell and then left him there. The deceased is said have threatened that he would return and kill the accused that night. The accused then says that after about 8.00 p.m. whilst he (the accused) was about to retire into sleep, that he heard stones being thrown at the roof of his house. The deceased eventually managed to get into the house by breaking the door open. At this stage the deceased who was allegedly carrying a stone on his hand was threatening to hit the accused with the stone. The accused says at this stage he could not see what it was that the accused had in his hand. The accused says he kept on ducking to avoid being hit until he managed to escape through the door of his house whereupon he took possession of his bush knife which was at the door. He says they both threatened to hit each other until they reached the spot where the deceased was later found dead. He describes vaguely how he hit the deceased with a bush knife whilst trying to avoid being hit by him. He appears to suggest that he was trying to stop the deceased from advancing towards him when the deceased was hit in the process. The doctors medical report which was admitted by agreement of the parties describes the cause of death as being "due to cut throat injury" involving blood vessels, vertebra, trachea and oesophagus. The injuries on the deceased are described as follows by the doctor

"The following Antemortem Injuries were seen:-

- 1) Contused abrasions over left forehead, cheek present 9,2cm area.
- 2) Cut wound over right ear to mastoid process 4x1 cm muscle deep.
- 3) Cut injury over next front horizontally side to side 12 x 3.5 cm vertebral deep. It involved muscles, nerves, carotid arteries, trachea, oesophagus, vertebral surface, edges cut clean angle sharp, front to back effusion blood in soft tissues. "

The nature of the injuries which are described above appear to indicate that considerable force was used in inflicting them. The injuries are not consistent with the description given by the accused as to how he inflicted the injuries on the deceased. The injury to the throat, the depth thereof and the involvement of the muscles, nerves, carotid arteries, trachea, and oesophagus, are all consistent with the version and the admission made by the accused to the crown's main witness, the said Abednego Makhundu Mngomezulu. From the force that was used, the nature of the weapon used, the part of the body upon which the injuries were inflicted it seems that the accused foresaw the death of the

4

deceased as a real possibility and consequence of Ms actions but was reckless as to whether such possibility materialised or not. Mr Kunene who appeared for the accused submitted that I should find that the accused acted in self-defence. There is no basis upon which that defence can be sustained having regard to the vague description by the accused of what happened. In any event once the accused had hit the deceased and the latter had fallen no purpose in self-defence could be served by cutting his throat after having subdued the deceased. In the circumstances I am unable to find that the accused acted in self-defence in inflicting the fatal wound.

In the premises and on the basis of the foregoing I find the accused guilty of murder.

ALEX S. SHABATOU

ACTING JUDGE