

CASE NO. 31/97

IN THE MATTER BETWEEN:

REX

VS

VONI NDLOVU

CORAM

S.B. MAPHALALA - AJ

**FOR CROWN
FOR DEFENCE**

**MR D. WACHIRA
MR E. THWALA**

JUDGEMENT

The accused person is charged with the crime of murder. It is alleged by the crown that on or about the 26th September, 1996 at or near Vusweni area in the Hhohho District, the said accused did unlawfully and intentionally kill Vusimuzi Dlamini. The accused person pleaded not guilty to the offence.

At the inception of the proceedings the post-mortem report compiled by the Government Pathologist Dr R.M. Reddy was entered by consent as exhibit "A". The doctor stated the cause of death as "Haemorrhage as a result of stab injury to the left lung".

The evidence of PW2 (according to the summary of evidence) Macobane Dlamini who identified the body of the deceased was entered by consent.

The crown then called its first witness PW1 Jackson Jeke Nhlengethwa who told the court that on the day in question he was going to a Mtsetfwa homestead when along the way he saw the accused behind him. The accused was running and he thought that he was rushing to catch up with him. Then the deceased also came in front of him and they passed each other. Thereafter he heard some noise and when he turned he saw the accused stabbing the deceased on the neck. He then raised an alarm. At that time the deceased was bowing but had not fallen down. Many people then came to the scene. The accused then ran away. Police were called to the scene and the deceased body was taken by the police.

He told the court that where the stabbing took place it was 25 paces away from where he was.

He said he saw the accused stabbing the deceased but he did not see what instrument was used. He did not see them fight.

The witness was cross-examined at some length by the defence.

The crown then called PW2 Shobalengongoni Madonsela who is the chief's runner in the area. He told the court that on the 27th September, 1996 at about 0400 hrs he arrested the accused at the homestead of Magalazi Mpila. He recovered a knife from him which he handed over to the police.

The crown then called PW3 Themba Sicacaza Shabangu. The effect of PW3's testimony is that on the 26th September, 1996 at about 1600hrs he was together with the accused and the deceased at the homestead of Mahhova Mthethwa. While there, the accused and the deceased had a fist fight and the accused was losing it when they were separated. This witness went to fetch his donkeys and came later on and found the deceased had already left. On his way home he passed via the homestead of Absalom Nhlengethwa and found him there. After he had left the two together, one Johannes Nhlengethwa came running saying that the accused had stabbed the deceased to death with a knife. He went to the scene and found the deceased standing but bleeding from the neck

The crown then called PW4 Jeremia Khumalo who is the investigating officer in this case. He told the court that he went to the scene of crime on the 27th September, 1996 and found the body of the deceased. He had a stab wound on the neck. Accused was brought to the police station by the chief's runner and a knife was also handed in as an exhibit. He cautioned the accused in terms of the Judges Rules. He also interviewed PW1 who told him that he saw the accused stabbing the deceased. The deceased at the scene did not have any weapon and there was no baton at the scene. He then recorded a statement from the accused of what took place.

He was cross-examined at length by the defence suggesting that by the time the officer came to the scene an interested party might have removed the baton and he answered on the affirmative.

The crown then called Johannes Nhlengethwa who witnessed the initial fight between the accused and the deceased at Mahhova's homestead where traditional beer was being consumed. He said the two fighters were separated and then they both sat down together. The accused then left and came back later after having changed his clothes. They then sat together. Afterwards they went to Sicacaza's place. The deceased was left there as he was too drunk. Thereafter he heard about the death of the deceased.

This witness was also cross-examined at length by the defence but it emerged from the

cross-examination that he did not witness the stabbing of the deceased by the accused but he was told after the fact by his father Jackson. The witness denied under cross-examination by the defence that the deceased provoked the accused when he was requesting for snuff from him. The deceased provoked him and later slapped him with an open hand and the accused fell down.

At this stage the crown closed its case. The accused gave evidence under oath being led by his legal representative Advocate Thwala. He gave a lengthy account on what transpired that day. He told the court that he had gone to thatch a roof for a client and after he had done that he was going home and was called by Mahhova for a drink. He found a number of people participating in the drinking of the brew as there was a workers party - "Lilima" at Mahhova's homestead. He said he found Sicacaza and the accused. He drank once and then he moved outside. Johannes was outside and he asked for tobacco from him. Johannes was with Vusimuzi Dlamini. The accused said he was annoying him. He did not respond to this remark and went home. Johannes stopped him to offer him the snuff. The deceased came to him and assaulted him for no apparent reason. He assaulted him with an open hand. He fell and the deceased throttled him. He struggled to free himself some people came and separated them. There was then calm. After he freed himself he ran away home. As he crossed a small stream he saw Nhlengethwa (PW1). He was following him running. He did not catch up with the old man. As he was about to catch up with him, the deceased emerged from the bush. When deceased emerged he was shocked because he had left him behind. The accused was carrying a baton which belonged to Johannes Nhlengethwa. He hit him with the baton three times and he fell down and then he throttled him. He felt weak at that stage and there was no one to help him. At that point he remembered that he had a knife in his possession which he used in his thatching enterprise. He took out the knife and stabbed the deceased in self defence and he then ran home. He then heard the voices of Johannes and others. They burnt his hut.

He then went to seek refuge at a Mpila homestead where he related to them the whole saga. He was then arrested the following day and told that he had killed the deceased. He related to the police what he had told the court and it was reduced to writing. He was thereafter taken to a Magistrate at Piggs Peak to make a confession on what he had told the police.

This is about the extent of the accused testimony. He was cross-examined at length by the crown as represented by Mr Wachira.

The court then entertained submissions from the crown and from the defence.

The view taken by the crown is that the accused be found guilty of murder. He contended that the crown has discharged the onus of disproving self defence through the evidence of Nhlengethwa who saw the accused stabbing the deceased. That the accused was an evasive

witness. He gave three different versions on one thing. The question of the bad blood between

him and Nhlengethwa was not put to Nhlengethwa under cross-examination by his Attorney. The crown pointed a number discrepancies in the accused's testimony.

On the other hand Mr Thwala for the accused gave a very impressive submission on behalf of his client. The defence of the accused according to Mr Thwala is two-pronged. It is the defence of self defence and that of provocation. Mr Thwala furnished to the court an array of decided cases in support of these defences.

These are the facts confronting me. I have considered the evidence for and against the crown in its totality. I have also scrutinized the cases cited by Mr Thwala which I found useful in the determination of this case.

It is common cause that the accused and the deceased were involved in an altercation prior to the fatal stabbing. There are differing versions as to who cause the fight and why. All the crown witnesses who were in situ at the drinking place did not hear or know what caused the fracas. This is surprising when one look at the scenario that here are a group of men huddled together over a beer after a "lilima", not a single one hears the cause of the fight. It is only the accused who told the court what the cause was. Obviously the deceased would not for no apparent reason assault the accused such that they be separated. It is also common cause that it is only the accused and PW1 who can tell us how the deceased was killed. The latter might not even have seen what exactly took place.

The facts of the matter as they appear to me are that the accused was being pursued by the deceased and he ran for his dear life. There is no suggestion that the accused from the evidence pre-planned the stabbing. The knife he carried was a pen knife he used in his thatching business. There is strong evidence that the deceased was the aggressor. The evidence is fifty-fifty split between that of the accused and Nhlengethwa the old man. I am unable from the facts of the case to find that the accused had specific intent to kill that day. A verdict of murder cannot be in the circumstances of the case be sustained. However, as it is common cause that the accused stabbed the deceased and the deceased died as a result of the stab wound inflicted by the accused more appropriate verdict will be that of culpable homicide.

I thus return a verdict of culpable homicide on the accused.

SENTENCE

Five (5) years imprisonment 3 years of which suspended for a period of three years on condition that the accused is not convicted on an offence in which an assault on another human being is an element committed during the period of suspension. The sentence backdated to the 27/09/96.

S.B. MAPHALALA
ACTING JUDGE