

IN THE HIGH COURT OF SWAZILAND

CRIMINAL TRIAL NO.90/96

In the matter between:

REX

VS

SIPHO MAVELA MAHLALELA

CORAM : MATSEBULA J

FOR THE DEFENCE : MR. D. WACHIRA

FOR THE CROWN : MR. M. MDLULI

JUDGMENT

6/2/97

The accused charged in one count of murder and one of assault with intention to do a grievous bodily harm. The allegation being that on the first count that he did on or about 25th February 1996 and at or near Timbutini in the Lubombo District he unlawfully and intentionally kill Majabula. Mahlalela. On count two the allegation being that he did on the same date, time and place assaulted Ntombi Mahlalela by stabbing her with a knife with intention to cause grievous bodily harm. The accused pleaded not guilty to both counts and was represented throughout the trial by Mr. Mdluli.

Mr. Wachira for the Crown stated at the commencement of the

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trial that the following had been agreed upon between the Crown and defence:

1. The identity of the deceased was not in dispute and the witness who was to give evidence in support thereof was dispensed with;
2. Medical evidence relating to the injuries sustained by the deceased on count one and complainant on count 2 were not in dispute and that RSP88 detailing injuries suffered by the deceased was to be handed in by consent;
3. The post mortem report examination on the body of the deceased was to be handed in as exhibit 'A' and what was reflected in the RSP88 respectively will also be handed in by consent.

The Crown then led the evidence of Qalembili Mahlalela who gave evidence and stated that accused was her son and the deceased was also her son and also the complainant on count two Ntombi Mahlalela is her daughter. It was her evidence that the accused arrived on the 25th February 1996 and found her busy clearing and removing vegetative growth on her yard using a hoe. Accused asked her why she was using his wife's hoe and grabbed hold of the hoe but the witness resisted and the accused let go of it. PW2 Ntombi arrived almost at the same time PW3 Gabile Mhlalela did. PW3 informed PW2 and deceased of the incident involving PW1 and the accused about the hoe. Deceased then remonstrated with the accused who took exception to such and picked up a stone and threw it at deceased but missed him. Deceased who had been sitting stood up and asked accused if he was

fighting. Accused ran into his room and came out and PW1 admonished the two not to fight. PW1 stated that the accused

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threatened to stab the deceased. PW1 then saw the deceased on the ground. She had not seen the accused stab him. She screamed and immediately went away in search of transport to convey deceased to hospital as he had been injured. Deceased had not been armed and she saw no apparent reason why accused stabbed the deceased. She stated that she does not know if accused was under the influence of liquor or not. Deceased later died on his way to hospital.

Under cross-examination PW1 being the mother of all the people involved in the incident, blamed PW3 her sister for having informed them about the hoe incident. She denied that PW2 the daughter had also joined in the scuffle between the deceased and accused.

PW2's evidence Ntombi Mahlalela is basically corroborative of PW1 in material respect. She adds that when deceased invited the accused to talk about the incident accused had rejected the invitation and said he would not speak to a baboon instead he threatened to stab the deceased. She had admonished the deceased not to stab a person who was not fighting. She too had seen the deceased on the ground apparently having been stabbed. When she tried to come to his rescue she was also stabbed.

The Crown led the evidence of PW3 Gabile Mahlalela who told the court that she was doing her washing when accused grabbed hold of the hoe from PW1. She had also seen accused throw a stone at the deceased but missing him. Also she had heard accused threaten to stab the deceased and suddenly saw deceased covered in blood. Accused then disappeared.

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Accused also gave evidence in his own defence. He admits the incident of the hoe but says he had politely asked his mother PW1 to allow him to use the hoe when she was through using it. He denied that there had been exchange of words because of his request for the hoe. He stated that his mother had handed the hoe to him but before he started using it the deceased had arrived and asked him what was he talking to his mother about. He stated that the deceased had proceeded to challenge him to a fight. He declined accepting the challenge and went behind his hut. He then heard a noise, the deceased was banging against the door of his hut. He protested about this and deceased picked up a stone and struck him with it on the cheek bone. He said he had fallen down and immediately set upon by PW2 the complainant on count 2. PW2 had started throttling him and deceased was kicking him all over the body. As this was going on the deceased had slipped and fell and the accused at that time when deceased fell managed to pull a clasp knife and opened it and was holding it between the thumb and index finger pointing upwards.

He explained that the reason her own mother gave evidence in support of PW2 and PW3 was because her second husband who is a ' ngena consort' do not see eye to eye with him. He stated that the reason PW2 her sister gave unfavourable evidence against him is because he does not allow her to bring boyfriends to their parental homestead. Accused denied that he had entered the house to fetch the knife because he had a knife with him in order to mend his shoes. He had managed to pull out a knife in his pocket whilst PW2 was throttling him and the deceased kicking him. He had held the knife between his thumb and index finger of his right hand facing upwards

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when deceased fell on it and injured himself. As for the injury on the arm he said the deceased had

also leaned on the knife and sustained injury. He said that he had not intended to injure the sister PW2 he only wanted to frighten her so that she let go of the throttling. He confirmed that PW2 had dispossessed him of the knife and stabbed him causing an injury which needed treatment.

Accused made a very poor impression as a witness. There was exhibit 'C' handed in, a statement he made to the police of how he had stabbed the deceased. He stated that he had stabbed deceased twice on the chest and stabbed his sister PW2. In the witness stand he first denied having said so in exhibit 'C' but immediately corrected that and admitted he had said so. When he gave evidence before court he gave a totally different story of how deceased sustained the fatal injury.

I have not the slightest doubt in my mind that accused is lying and that his instructions have placed his counsel in a very difficult predicament; where the counsel has advanced private defence using two diametrically opposed version from the accused. In R VS MAGUNGWANE SHONGWE & OTHERS 1982-1986 SLR @427 the accused had raised an alibi which was to enforce the court that such alibi is a factor which a court takes into account in assessing the credibility of the accused. Similarly in casu, this court is going to draw an adverse inference from the fact that accused has made two opposed versions of the circumstances how he had stabbed the deceased. This inference does not however amount to 'because the accused has lied he is a criminal'. The lie by the accused weighed together with other evidence in the

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trial and then draws the adverse inference. See in this respect R VS NEL 1937 CPD 337 @330.

The fact that the accused has made two conflicting accounts of how he had stabbed the deceased this court can draw an

inference as if he had not given an explanation at all. The court refers to TUMAHOLE BERENG VS REX 1949AC 253. The court can infer that accused is lying because he wishes to hide something and hitherto neutral facts may then be taken into account to the detriment of the accused. In this instance the court has consulted the case of S VS RAMA 1966(2) SA395A. Considering all the above circumstances the court is satisfied that accused is guilty on both counts that is the murder of the deceased in count one and the assault on PW2 causing grievous bodily harm and he is so convicted.

JUGMENT ON EXTENUATING CIRCUMSTANCES

You have been convicted of a very serious that is of murder on count one and assault with intention to do grievous bodily harm on count two. After your conviction the matter was postponed to enable Mr. Mdluli who is representing you to lead evidence in order to establish extenuating circumstances.

He has called you to the witness stand and you have now stated there has been animosity between your mother, your brother and your sister and your uncle who is ngena consort to your mother. The cause of this animosity is because you have objected to your uncle staying permanently at your homestead when he is supposed to come occasionally as your

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mother is not his wife but he is merely a 'ngena consort'. You said this infuriated your mother, brother and your sister because they said you could not have confronted your uncle about this because it does not concern you. You said because of that there has always been against you.

The question of extenuating circumstances are basically divided into two parts. One is morale blame worthiness and the other being factors which can bring about certain action on your mind at the time

of commission of this offence which will then reduce the morale blame worthiness. Subjectively viewed the fact that you were against your uncle staying permanently at your homestead he being a 'ngena consort' he was supposed to come occasionally and stay at his homestead. Subjectively viewed and taking into account the relationship between yourself with your mother, brother and sister the court accepts that had a bearing on the way you behaved towards the deceased just prior to the commission of this offence. You say your brother the deceased was favouring the person you did not want to stay permanently at the homestead. The second factor which, in my view goes a long way towards extenuation is the fact that you had been drinking marula beer and we do not know the effect the intoxicant had on you. You stated that you drank the marula from a 25 litre container and you do not know how much you drank. Because that has been accepted and not challenged by the Crown the court is placed in a position where it does not know to what extent did the intoxicant affected your mind.

For that reason the court finds that extenuating circumstances have been established.

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Mr. Mdluli has already addressed me on matters which hitches on mitigating factors, amongst others that you have one child and you are remorseful you having brought about the death of your own brother and that this will have to remain in the care of its grandmother. That you were the sole provider for the child. Granted that those are factors, the court has also a duty towards the members of the public. It is often said that people should think about the consequences before they commit crimes and then shield behind their children once they have been convicted.

Considering all these factors the court is going to pass a sentence taking into account that you are a member of the family of the deceased and the relatives and that this is going to be a punishment even after you leave jail. The court passes the following sentence:

You will be sentenced to nine years' imprisonment backdated to the 26th February 1996. Both counts will be taken together for the purposes of sentence.

J. M. Matsebula

JUDGE