

IN THE HIGH COURT OF SWAZILAND

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Rex

vs Madlimbewu Mziyako

Cri. Trial No. 65/1997

Coram S.W. Sapire A C J

For Crown Mr. Maseko

For Defence Mr. Mngometulu

JUDGMENT (16/03/98)

There are four persons before the Court. Originally there was another accused person but that accused has been discharged.

The accused are arraigned and on an indictment which alleges that upon or about 27th October 1996 and at or near Mbelebeleni in the district of Maimni the accused persons acting on common purpose did unlawfully and intentionally kill Magege Mziyako.

It is not disputed that the person named in the indictment as having been killed, to whom I will refer to as the deceased, has indeed been killed. The cause of death has been admitted as being a "head injury associated with burns". What exactly that means I am not sure. In view of the admissions the Crown did not consider it necessary to call the Doctor who performed the post mortem examination.. Clearly the plain meaning is that the cause of death was a head injury. What is meant by "associated with burns" is not so clear. Whether this is material will become apparent later in the judgment

The evidence is that accused No. 1 on the 27th October 1996 went to collect the deceased from her home to bring her before the chief. Again the evidence is not quite clear what the proceedings were before the chief but there is enough evidence to suggest that difficulty existed between accused no. 1 and the deceased. It seems that this arose from a perception held

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by accused no. 1 that the deceased was somehow involved or associated with the death of accused no. 1's son. In any event the deceased was indeed brought from her place to that of accused no. 1 and taken to the Chief's runner.

In regard to what happened thereafter there is some dispute because accused no. 1 in giving evidence says that when he handed the deceased to the chief's runner Mr. Gama that was the last he saw the deceased and she was then alive. On the other hand the crown has called a witness namely Sikelela Matsebula who has testified that he actually saw the accused no. 1 striking the deceased with a heavy stick which was at his house. The deceased was then apparently under constraint. He also at the same time saw the remaining accused persons associating themselves with the assault on the deceased by supplying paraffin, dousing the deceased body therewith and setting it alight. Matsebula explains exactly what each one did but for the purposes of this case the details are unimportant. The fact is that Matsebula claims to have seen accused 2, 3 and 4 participating in the setting alight of the deceased and this took

place almost immediately after she had been struck on the head by accused no.1 with a heavy stick.

As I have said accused no.1 denies that he assaulted the deceased in the manner described by Matsebula or at all. In cross examination and in argument it was suggested that Matsebula could not have seen what he said he saw. This argument and this line defence does not in my view disturb the clear evidence given by Matsebula of what took place.

The crown called another witness Dzelewe Matsebula who has made a statement to the Police which accorded with what Sikelela said. When she gave evidence here she did not adhere to her statement and appeared unprepared or disinclined to say anything to implicate the accused persons. It sufficient to say that no reliance either way can be placed on what she said. This a case where the crown may consider whether she be prosecuted for perjury or attempting to defeat the ends of justice

There is an obvious conflict between what accused no. 1 says and what is said by Sikelela Matsebula and the main point of difference is that accused no. 1 said that after he had taken the deceased to Ndumo Gama who is the Chief's runner he did not see her alive again. He took no part in the assault. He also claims to have paid little heed to the crowd which had assembled outside his house to watch the proceedings. As the centre of attraction was his sister now the deceased, this seems incredible.

The accused no. 1's evidence is however controverted by that of the chief's runner Ndumo Gama. He describes that after the accused had come to his house in the company of the other bringing the deceased he was going to take the deceased to another chief's runner a certain Koshi Kunene. As they proceeded the witness Dwazi Matsebula came to him and said that they should wait for accused no. 1. They waited and accused no. 1 and the person who was at one time accused no. 5 came and they took the deceased from the custody of the chief's runner and left him.

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In view of this evidence the accused no. 1 cannot be believed and I am convinced beyond reasonable doubt that the description given by Sikelela Matsebula of how the deceased came to her end is correct. I come to the inevitable conclusion that it was accused no.1 who struck the fatal blow.

As far as the three women are concerned, that is accused 2, 3 and 4, they have attempted to give innocent explanation for their presence and denied any participation in the fatal assault on the deceased. They were not impressive witnesses and the evidence given by Sikelela Matsebula of their participation in the fatal assault must be accepted.

The question of cause of death arises, because clearly the act of accused no. 1 in striking the fatal blow was his act alone. It follows that it was or may reasonably have been the blow which caused an immediate death. This in turn could meant that the accused 2, 3 and 4 took part in setting the dead body of the deceased alight after she had already died. This remains a possibility on the evidence. The onus is on the crown to prove that the assault took place on a live human being.

While there is clear evidence that they associated themselves in the attack of the deceased, it is not at all clear that they were parties to the striking of the fatal blow. This remains a matter for doubt. As I say their participation in the actual assault took place after accused no. 1 had already struck her fatally and she may have been already dead when the deceased was doused with petrol and set alight. I am accordingly finding accused 2, 3 and 4 not guilty of the murder.

Accused no. 1 on the other hand is found guilty of murder as charged.

SENTENCE

You have been found guilty of murder and you have given evidence with a purpose of showing me that

you are a person who believes in witchcraft and share a common belief with many others that the deceased who was your sister was a witch and was responsible for the death of members of the family. You have not connected the death of the deceased with your belief in witchcraft and you appear to insist that her death was caused by other people. As I have said in finding you guilty of murder, this version just does not wash. But on the other hand what you have told the Court and because with the other evidence suggesting that the deceased was killed because you considered that she had to be disposed off because of her evil character as a witch. As belief in witchcraft as a factor is the cause of your assaulting this woman and you recognized as an extenuating circumstance. I now am satisfied despite what you said that you are the person who administered the fatal blow because you felt it was your duty or obligation to do this because your sister was a witch. Such conduct is quite unacceptable but this belief in witchcraft and the belief of the evil deeds of your sister can be taken into account as extenuating circumstance but it does not in any way excuse the cruel way in which the deceased was treated. But for the purposes of the present enquiry I find that there are extenuating circumstances.

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You the accused has been found guilty of murder, I also found that there are extenuating circumstances as a result of which it is not obligatory for me to impose a death sentence. It is open to me to pass some other sentence which is appropriate to the offence. Your counsel who has pledged leniency on my part has stressed that your case can operate as an example to other members of the community. But as I have previously observed and I again observed in this case the Court cannot by imposing a wholly suspended sentence of imprisonment be seen to be remarking your deeds with any sort of approval. Your council argued that if you were to go out mend your ways you would be an example to other members of the community but I were to fail in my duty and impose a wholly suspended sentence on you the message that would go out is that you can kill a person if you feel he or she is a witch. A message which must go out is exactly the opposite and that message is although the courts are prepared to recognise this belief in witchcraft as an extenuating circumstance it does not justify a failure to impose a substantial custodial sentence.

In passing the sentence I take into account your age. You are an old man ,nearing the Biblical three score years and ten. You will be even closer to that age when you will be released from prison. Your sentence is less than it would have been had you been a younger man.

The sentence which I impose on you is five (5) years imprisonment. This sentence will be deemed to commence on the 28th October, 1996.

S.W. SAPIRE

ACTING CHIEF JUSTICE