

CRIMINAL CASE NO.172/98**In the matter between:****REX****VS**

1. **PHILLIP WAGAWAGA M. NGCAMPHALALA**
2. **MLAHLWA NGCAMPHALALA**
3. **HARRIS MAVIMBELA**
4. **PETROS NGCAMPHALALA**
5. **GEORGE G. MAMBA**
6. **ELIZABETH HHALAZA**
7. **PHILEMON D. NDZABANDZABA**
8. **MTININI A. NDZABANDZABA**
9. **PETROS G. DLAMINI**
10. **JOSHUA J. DLAMINI**
11. **THOMAS J. DLAMINI**

CORAM	:	MATSEBULA J
FOR THE CROWN	:	MS. M. LANGWENYA
FOR ACCUSED 1 & 5	:	MR. M. NXUMALO
FOR ACCUSED NOS 2, 3, 4, 8 & 11	:	MR. BEN SIMELANE
FOR ACCUSED NO.6	:	MR. T. MASINA
FOR ACCUSED NO.9 & 10	:	MR. S. SIMELANE

RULING

At the end of the Crown case, the respective counsel for the accused moved an application for their discharge in terms of Section 174(4) of the **CRIMINAL PROCEDURE AND**

EVIDENCE ACT AS AMENDED on the basis that the Crown has not made out a *prima facie* case on all the counts.

The ten accused who were originally eleven but accused no.8 Agrippa Ndzabandzaba died before the commencement of the trial, were charged on a number of counts that I will read out and pleaded not guilty to all the counts. The counts range from two murders, arsons, malicious injury to property and three assaults.

- On count one they are charged with the crime of murder, the allegation being that upon or about 26th December 1997 at or near Sinyamantulwa area in the Lubombo District they each or all of them accused acting in common purpose did unlawfully and intentionally kill Ndodebomvu Mamba.
- On count two, the same day, in the same area, acting in common purpose they are alleged to have killed Piet Mamba.
- On count three and four they are charged with the crime of arson, it being alleged that, on count three on the same date and same place as in count one and two and acting in furtherance of a purpose they did unlawfully and with intention injured Doris Hlabezile Sibandze in her property and set on fire three huts.
- On count four the same allegation as in count three but the complainant being one Esther Lomhlangano Mamba it is alleged that they set on fire four huts.
- On count five all the accused are charged with malicious injury to property, the allegation being that on the same day, same place and acting in the furtherance of a common purpose they broke windows and destroyed property inside the complainant's house the complainant being Ncamsile Ncane Vilakati with the intention to injure the said complainant and her property.
- On count six all the accused are alleged to have, on the same date and place and acting in the furtherance of a common purpose as in count three and four set on fire six huts belonging to Esther Fakazile Mamba with intent to injure her and her property.
- On count seven accused one only is charged with assault, the complainant being Doris Hlabezile Sibandze by hitting her with an open hand.
- On count eight accused no.5 only is charged with assault on the complainant Esther Lomhlangano Mamba by hitting her with a knobstick on her head.

- On count nine all the accused are alleged to have assaulted the complainant Dortia Matse on the same day, place as in count one and two by hitting her all over the body with different weapons.

It would be appropriate to dispose of the evidence of Dr. R.M. Reddy who was called as PW9 before I deal with the other witnesses. He stated that he was the police pathologist and his qualifications range from MBBS to DFM and these were not challenged and I accepted the qualifications as deposed to by the doctor.

It was his evidence that he examined the body of the deceased Ndodebomvu Mamba on count one and found multiple injuries. He was convinced beyond any doubt that the deceased died from these injuries and that the deceased was still alive when he was set alight. He read the post mortem report and confirmed his findings and handed in the report as exhibit "A". I do not propose to go into details of the contents of exhibit "A".

PW9 also performed an autopsy in respect of Piet Mamba on count two. He was of the opinion that the deceased died as a result of "cranio-cerebral injury". He listed seven injuries which the deceased sustained. He read the contents of the autopsy performed on the body of the Piet Mamba and confirmed the contents and findings and handed the report in as exhibit "B". PW9's evidence was not challenged by the defence. I accept his evidence as being true.

The Crown led the evidence of PW1 Esther Lomhlangano Mamba. She testified that on the 26th December 1997 she and Doris Hlabezile Mamba were on their way to attend a funeral of an acquaintance of theirs when the accused and other unknown people approached them. She said the mob of people who approached them was by approximation plus minus 40 in number. They were armed with assortment of weapons including sticks, knobsticks and bushknives and spears. Some of them, she testified, did not have clothes on the upper body. It was her evidence that she knew the accused even though she may not be familiar with their names. She testified that the mob that the present accused formed part of, ordered her and Doris Hlabezile Mamba PW2 to join them. She had just come out from one of her children's hut when she was ordered back and ordered to open the door of the hut. She said she refused and one of the people in the mob struck her with a stick and ordered her to open the door. The mob then forced the door open and ordered the girls who were in the hut to get out and

join them. These girls were Nobuhle and Bethulsile. They then moved to Ndodebomvu's homestead, the deceased on count one. It was her evidence that the mob had surrounded her and the two girls and her companion. Along the way they were joined by one Fakazile Mamba who was subsequently called as PW6. She was also surrounded by the mob. Then the mob asked PW2 where her husband was, that is the deceased on count one. According to PW1, PW2 told them that he was in the hut asleep. PW1 testified that the person that was asking the questions then kicked the door to Ndodebomvu's hut forcing it to open. According to her, Ndodebomvu came out armed with a spear. The mob wondered why he was carrying a spear and suspected that he wanted to kill them. One member of the mob said even if he was going to be spared his life, he is now going to be killed because he came out armed. They then started assaulting him and thereafter demanded some petrol. They also asked PW2 to produce the bag of "muti" which deceased had used to kill people. They assaulted the deceased, poured petrol over his head and set him alight. He burnt and became weak as a result of the assault but he again stood up and extinguished the fire from his head using his shirt. He succeeded in extinguishing the fire but the mob approached him again and assaulted him further. One person struck him on his foot so that he fell. They again sprinkled petrol on him, covered him with grass put a motor tyre around his neck and set him alight. He burnt.

PW1 testified that the mob then drove them to her homestead and threatened to kill her once they arrive there. They were still driven in the company of the two girls and PW6. Someone out of the mob instructed her to remove the goods from the hut. She was however not in a position to say who that person was. She and the children obeyed but as they were removing the goods from the hut they noticed that the hut was already on fire and some of the goods were being thrown back into the burning hut.

From there the mob proceeded to Bethulsile's hut and as they did so they were singing words to the effect that "we will continue to burn down huts belonging to wizards/witches." From there the procession went to Singelengele's homestead. They enquired where Bethulsile's property was. It was suggested that the property be removed as she was not a resident of the area. PW1 testified that she suddenly noticed that all the huts were ablazed, five huts and one corrugated rooms structures. From Singelengele the procession went to Piet Mamba's homestead that is deceased on count two. It was PW1's evidence that as they were driven to Singelengele's homestead by the mob, the mob kept on singing and they were threatening her and her companion with death. The procession stopped at Mndvoti's place and the mob

engaged in some talking. PW1 stated that the police then arrived. PW1 and PW6 were identified to the police as witches. They were then taken back by the police to the deceased Nnodebomvu's homestead. They found that the deceased had burnt so badly that his intestines were exposed. He was dead. She and PW6 and the children were taken to Lubuli Police Station where they were kept until May of the following year.

It was further her evidence that accused no.5 hit her on the head with a stick and ordered her to open the door to Nnodebomvu's house. She was adamant that all the accused were at the scene. Accused no.1 and 2 were the ones who ordered that Nnodebomvu's "muti" bag should be produced. It was also her evidence that when the deceased emerged with a spear someone said because he emerged with a spear he should be killed. And someone had hit the deceased on his foot. She said accused nos.1, 2 and 3 sprinkled the deceased with petrol and accused no.5 covered him with grass. The deceased, according to her, was subsequently set alight and the devastating consequences followed as the evidence of PW9 demonstrated. She identified the remains of the burnt items from the different huts and rooms. I do not propose to go into details about these items. It is in any event common cause that these crimes did take place. The only aspect that the court has to determine for the purpose of this ruling is who were the perpetrators.

PW1 was extensively cross-examined and in my view she stood her ground. PW1's cross examination was at some stage put in abeyance firstly when she had discomfort with her stomach and again when rivers were overflowed at her area and she could not come to court. It was then agreed that PW2 should be called as the next witness so that the proceedings were not delayed.

PW2 gave evidence. She stated that she knew PW1 and PW6 and the accused because they are from her area of residence. She actually knew their names as well. She testified that on the 26th December 1997 accused came to her homestead and ordered her to produce a "muti" bag. She denied any knowledge of such "muti" bag and was harassed by the accused and ordered to produce it. In desperation she went into the hut and took a personal bag that contained some medication she obtained from the hospital and an indigenous powder called "sibhaha" which had nothing to do with witchcraft, she said. She emptied the contents of the bag on the ground. It was at this stage that her husband came out carrying a spear. He was met by a mob and assaulted. She said her husband was Nnodebomvu Mamba the deceased

on count one. It was her evidence that she saw accused no.1 assault him and subsequently he was set on fire. According to her he managed to extinguish the fire with soil. He also succeeded in extinguishing the flames after three attempts. He then fell to the ground and the members of the mob put grass on him and the grass encouraged the flames. She testified that they also put a tyre around his neck. According to PW2 it was Mkhali who put the tyre around his neck and she said Mkhali is not one of the accused. She stated that, all the time the accused insisted that they want the “muti” bag which deceased used to kill Joseph Tsabedze. It was her evidence that accused no.1 and Mkhali uttered these words. PW2 then fled to her neighbour one Msongelwa Ngcamphalala and raised an alarm. The neighbour afraid to help her, did not come to her rescue, she subsequently went to the police and reported the matter.

In the evening, when she went to her homestead she found that three huts had been burnt. It was her evidence that the members of the mob that included the accused were carrying sticks and were angry. Accused no.1 according to her even hit her with an open hand on her cheek demanding that she produces the “muti” bag. She does not know how Joseph Tsabedze died. She had learnt of his indisposition but that had nothing to do with her husband having bewitched him. She said Joseph died before her husband was killed. She said after this incident she was kept at the police station and was only released during the fourth month. She also identified certain remains and articles that were damaged by fire.

Under cross-examination by Mr. Nxumalo on behalf of accused no.1 and 5 she admitted that she never used to go to the homestead of Joseph Tsabedze. Joseph Tsabedze is the person who is alleged to have been bewitched by her husband. She stated in one of her answers that when she married her husband the sour relationship between her family and that of some of the accused existed already. She answered that she knew the man Mandla Tsabedze who is the son to the late Joseph Tsabedze. It would be recalled that Mandla Tsabedze was in jail following a theft of beast belonging to her husband, she said. Mandla is the witness PW5 who deviated from his previous statement made to the police. The Crown applied that he be declared hostile in order for the Crown to cross-examine him.

The Crown also called PW3 Ncamsile Ncane. She stated that she was the wife to the deceased Piet Mamba who featured on count two. She told the court that she was told that her huts were on fire and discovered the damage caused by the fire but she never found the

perpetrators. Except confirming the damage of her property this witness did not take the matter any further because she never saw the perpetrators.

The Crown led the evidence of PW4 Nobuhle Mamba. She identified some of the accused by name and confirmed that they were present at the scene. She testified that a number of people who came to her homestead were plus minus 45. According to her these included the accused. She testified that they were carrying sticks and were angry. They ordered her mother to open the door in which the girls were sleeping. They then ordered PW4, her mother and sister, PW6 to join them and then moved to Nnodebovu Mamba. She testified that she could hear the orders but was unable to identify the speaker. She heard one voice ask where Nnodebovu was and she heard the wife say that she did not know where he was. After a while she saw Nnodebovu come out of the house with a spear. She saw Mabandla kick the door of the deceased before deceased emerged. She said the deceased came out and Mabandla grabbed hold of him from behind and deceased fell and then others began assaulting him.. Deceased protested and said the law will protect him. She heard one voice from the mob saying how is the law going to protect you because you are now dying. She also testified that she and her relatives were surrounded by the accused and others. She heard them ask where the petrol was. Again, she was unable to say who asked the question. According to her accused no.2 brought petrol in a litre container. She said that it was accused no.2 who poured petrol over the deceased. Deceased was set alight and he tried to put off the flames and in the process his hair was removed. He managed to put off the flame and tried to flee but Dinini tripped him so that he fell and was assaulted further. She said she could not exactly say who assaulted him because they were many of them and she was threatened as well. She said they were also accused (i.e. her and her companion) of having known how Nnodebovu killed Tsabedze. It was her evidence that Nnodebovu later died of the burns as he was poured with petrol and grass put on him. She said accused no.6 suggested that she and her sister remove the goods from the house which was to be burned but Mandla threatened them with assault if they did that. She witnessed the occasion when deceased's wife was ordered to produce the "muti" bag and heard the mob sing a song to the effect "down with the witches, down with the thieves".

I pause here to note that the relevance in this song is made more dramatic when one takes into account certain pertinent questions put to PW1 by Mr. Masina on behalf of accused no.6. The questions were to effect that PW1 had stolen chickens belonging to the family of accused

no.6 and that these chickens were later recovered at Big Bend, of course PW1 denied this allegation. I will deal with some of the questions at length when I deal with the merits.

To continue with PW4's evidence. PW4 stated that she saw accused no.8 Dinini Ndzabandzaba set Nompulelo's huts on fire.

Dealing with the ruling on the application for the acquittal of the accused at the end of the Crown case, I am of the view that on a *prima facie* basis I find considerable measure of corroborative evidence in the evidence of PW1, PW2, PW3, PW4 and PW6 and PW8 that is Detective Alphabert Mkhabela. I did say when I started giving this ruling that at the close of the Crown case the defence moved an application for the discharge of the accused in terms of Section 174(4) of the **CRIMINAL PROCEDURE AND EVIDENCE ACT AS AMENDED**. This was on the ground that the Crown had failed to make out a *prima facie* case. This application was opposed by Ms. Langwenya in respect of all the accused except accused no.9, 10 and 11. She addressed me that in respect of the seven remaining accused a *prima facie* case has been made. I have consulted the case law to which I was referred and I am in agreement with the *ratio decidendi* in the case of the **THE KING VS DUNCAN MAGAGULA AND 10 OTHERS CASE NO.43/96** and I agree with Mr. Simelane that the mere presence of an accused does not render him criminally reliable on the basis that there is an allegation that the accused would have acted in the furtherance of a common purpose. But in the case I have referred to the learned Dunn J quoted with approval the case of **REX VS SIBILONE NALANE AND OTHERS CRIMINAL CASE T51/69** where Jacob CJ said the following and I quote:

“Now it has been said in many cases that when considering an application at the close of the Crown case, the Judge should not pay regard to the credibility of the witnesses and that his duty is to consider whether the evidence advanced by the Crown is believed and might be sufficient to satisfy a reasonable man that accused are guilty of the crime charged.” End of quote.

Even though the question of credibility does not come in, I have taken the trouble of analysing the evidence as far as I could because I want to point out that on a *prima facie* basis a *prima facie* case has been made.

In my considered view a *prima facie* case has been made against accused no.1, 2, 3, 4, 6 and 8. The Crown has conceded correctly in my view that accused no.9, 10 and 11 are entitled to their acquittal and discharge. I therefore find that the case against accused no.9, 10 and 11 has not been established and they are acquitted and discharged at this stage. These are Petros G. Dlamini, Joshua J. Dlamini and Thomas J. Dlamini but with the rest of the accused a *prima facie* case has been made.

J.M. MATSEBULA

JUDGE