

IN THE HIGH COURT OF SWAZILAND

CRIM CASE NO. 131/98

In the matter between

REX

And

KHENCE VILAKATI

AND ANOTHER

Coram

S.B. MAPHALALA – J

For the Crown

MR, D. WACHIRA

For Accused No. 1

MR. M. NXUMALO

For Accused No. 2

MR, B. SIMELANE

JUDGEMENT

(27/05/99)

Maphalala J:

The two accused persons before court are charged with the murder of one Musa Nhlabatsi. The crown in its indictment alleges that upon or about the 7th December 1997 at or near Mthombe area, Shiselweni Region, the said accused persons acting jointly with common purpose did unlawfully and with intent to kill assault the said Musa Nhlabatsi and inflicted certain wounds upon him from which the said Musa Nhlabatsi died at Mbabane Government Hospital on the 25th December 1997.

The two accused persons pleaded not guilty to the charge. The crown proceeded to call its witnesses to prove its case.

The first crown witness called was PW1 Mongameli Shongwe who told the court that he knows accused no.1 and accused no.2 as they are from the same area. He also knew the deceased. On the 7th December 1997, he saw the accused persons and the deceased. They were all at certain homestead belonging to Magwence partaking to some traditional beer. He saw the deceased running and he was immediately followed by accused no. 2. Afterwards he came back and told them something. Accused no. 2 told them that "there is a dog that they had killed". They then asked him to show them this "dog". They proceeded to the scene where deceased was and he was lying there. Accused no.2 then ran away and they chased after him and caught up with him. They proceeded to call the police. PW1 told the court they were the two of them who killed the deceased accused no. 1 when he joined accused no. 2 he raised a bush-knife

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and hacked the deceased with it. The deceased then was walking towards his homestead. Accused no.2 caught up with the deceased and he assaulted him with a sjambok. The deceased attempted to run away but they hit him with a stone. The deceased fell down. The witness identified the bush-knife in court as the one which was used by accused no. 2 on the day in question.

This witness was first cross-examined by Mr. Nxumalo for accused no.1 and it was suggested to him that accused no. 1 was not present when this took place as he was in a traditional wedding at Maseyisini. The witness maintained that he saw accused no.1. It was also put to him that he could not see what these people were doing to the deceased at that distance. He was adamant that he saw it all. Mr. Simelane's cross-examination followed the same line and he put it to the witness that he could not see what was taking place at the garden because there was a hillock between that place and Makhence's homestead where there was a drinking party. The witness told the court that one was

able to see. He was also pressed by Mr. Simelane that it was not possible for one to see a person being hit by a stone in his ankle at distance of 2 kilometres. The witness maintained that he could see what took place. Further it was put to him that accused no. 2 never said that he had killed a "dog". PW1 maintained that accused no. 2 did utter these words.

At this juncture the court proceeded to an inspection in loco as it was the general feeling that PW1's evidence as to distances was suspected. The court at the inspection observed that the distance mentioned by PW1 in his evidence-in-chief were highly exaggerated and there is no way one would see clearly what was happening at the garden (where the murder is alleged to have taken place) and Makhence's homestead where PW1 was with the other people. The court also observed that in between the two points there is a hillock, which makes it even more difficult for one to make clear observations of the scene of crime. When PW1 was confronted with this situation at the inspection he changed his testimony and said he moved from the rest of the group and stood next to an aloe tree that is where he was able to observe what took place.

The crown then called PW2 Musa Mavuso who also knows accused no. 1 and accused no. 2 and the deceased. On the 7th December 1997 he got a report at about 8.00am that the deceased was injured. He was called by PW1 to the scene and he observed that the deceased was still alive and had injuries on his left shoulder, chest and at the back of his head. These injuries according to his observation appear to have been inflicted by a bush-knife. He then said that on Monday he was at the dipping tank where he saw accused no. 1 who ran away upon seeing him. He called him and asked him why he was running away. He told him that he was going to enquire about what started the fight between accused no. 2 and the deceased. PW2 told him that he was not interested in that but wanted to know what happened. As they were going under a wire fence a bush-knife came out of accused no 1 's shirt. PW2 asked him if it was the bush-knife that they had used to kill the deceased. Accused no. 1 replied that he had just fetched the knife from his uncle. They continued to walk together accused no. 1 told him that it was accused no.2 who chopped the deceased not him. PW2 then told him that he was then going to report the matter to the police. He then proceeded to the police station and laid a charge against the accused person.

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PW2 also told the court that the relationship between accused no.1 and the deceased was good. What caused the quarrel was accused no.1's wife. PW2 identified the bush-knife before court. On the 8th December 1997 he saw accused no. 2 they grabbed him with others and asked him why they had chopped the deceased and he said it was not him. He said it was accused no. 1 who chopped him with the bush-knife and he was merely using a baton. He was subsequently arrested for the crime.

This witness was cross-examined by the defence. It was put to him that the bush-knife was forced on him by the mob which pounced on him at the dipping tank. He replied that was not true. It was also put to him that the mob assaulted him accused no. 2 and he implicated accused no. 2 where he replied that he could not recall that taking place. The witness denied that accused no. 2 was assaulted by the mob, which eventually arrested him.

The crown then called PW3 Mangaliso Thwala he also knows accused no. 1 and accused no.2. He also knew the deceased. On the 7th December, 1997 he saw the deceased at Makhence's homestead where they were seated and enjoying traditional beer. PW1 was also there so was accused no. 2. At about 4.30pm accused no. 2 left the drinking place and was thereafter followed by the deceased. They followed each other at short intervals. He told the court subsequently accused no. 2 came to the drinking place and pronounced to all that "they have just killed a dog". He refused to show them. They grabbed him and took him outside the hut. He then agreed to go and show them where the "dog" was. He took them to the spot. At the scene they found the deceased. They order him to wait until the police arrived, however accused no. 2 got a chance and he ran away. The matter was subsequently reported to the police.

The witness told the court that he did not see accused no.1 that day and accused no. 2 did not mention who he was with when they assaulted the deceased.

He was not cross-examined by Mr. Nxumalo for accused no. 1 and was cross-examined by Mr. Simelane for accused no.2. It was put to him that it was not possible for PW1 to have witnessed the

scene of the assault on which he answered in the affirmative. He denied when pressed that accused no.2 was assaulted when he was arrested by the mob.

PW4 Mbizo Shongwe was called by the crown. He deposed that accused no. 1 was his nephew. On the 7th December 1997, accused no. 1 came to his homestead late at night and he was in the company of his wife. Accused no. 1 requested to leave his bush-knife at his homestead because his wife did not want him to carry the bush-knife at night. PW4 told him to place the knife on top of his wife's bed. He left the bush-knife and collected it the following morning. PW4 identified the bush-knife before court as the one accused no. 1 brought at his homestead on the 7th December, 1997.

He was cross-examined briefly by Mr. Nxumalo for accused no. 1 where it was suggested to him that there was bad blood between him and accused no. 1 over a woman. The witness answered that it was not the position.

The crown then called PW5 Kingsley Dundun a medical practitioner attached to the Mbabane Government Hospital. He treated the deceased when he was admitted on

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the 8th December, 1997. The doctor went on to read into the record his findings reflected in a medical report entered as exhibit "A".

He was cross-examined briefly by Mr, Simelane for accused no. 2 however, nothing of substance came out of it.

The crown then called PW6 1974 Joseph Mabuza who is the police officer who attended to the incident. He proceeded to the scene of crime where he found the body of the deceased next to Makhence's homestead. The deceased at the time was still alive and he had open wounds on the head. The deceased was then taken to Nhlanguano Health Centre for treatment. On the 8th December, 1997 he proceeded to Mthombe area in connection with his investigations in this matter. On the way he met some community members who has arrested accused no.1. They handed over to him accused no.1 as he was suspected in this case. They also handed to him a black bush-knife. He then cautioned the accused person in terms of the Judges Rules whereas he denied any involvement in this matter and implicated accused no.2. He then arrested accused no.1 and took him to Nhlanguano Police Station. He later received a report that accused no.2 have been arrested. On the following day he proceeded to Mthombe area and arrested accused no. 2. He cautioned him as he did to accused no. 1. Accused no.2 stated that he was with accused no. 1 but he denied that he was the one who chopped the deceased with the bush-knife. He learnt later on that the deceased had died in hospital in Mbabane.

The witness was cross-examined by the defence where he conceded that the bush-knife was not taken for forensic tests. Further, when it was put to him that accused no.2 was assaulted by the community members who arrested him he stated that he did not observe any visible injuries on accused no.2 when he was handed to him by the arresting mob.

The crown at this stage closed its case.

Mr. Nxumalo for accused no. 1 then moved an application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended) that the crown has failed to prove a prima facie case against him and thus he was entitled to his discharge. This application was opposed by the crown advancing reasons for its opposition.

The court rejected the application and held that accused no.1 had a case to answer and reasons for the court's finding were pronounced in open court.

Accused no.1 then gave evidence under oath led by Mr. Nxumalo. The accused gave a lengthy account of his side of the story. The long and short of his version is that on the day in question he has attended a traditional wedding at a Mayisela homestead next to Dwaleni Primary School. He left the wedding party at about 4.30pm and went home at Esibovu where he met his mother and discussed about the ploughing of the family fields. Thereafter he proceeded to his homestead at Mthombe where

he joined his family. Later he went to sleep.

Accused no. 1 told the court that all what PW1 said about him was not true in that he did not see PW1 that day. On Monday he went to a Mkhonta homestead where he was approached by a Mavuso man. Mavuso asked him if it was true that he was

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involved in the assault on the deceased. He told him that he did not know anything about this matter. Mavuso then suggested that they go to the dip tank. At the dip tank he whistled to some people who ran to where they were and they all started to assault him.

Accused no.1 further told the court that Musa was not telling the court the truth when he told the court that the bush-knife came out of his shirt but the bush-knife came with Magameni (PW1) and gave it to him after he had been severely assaulted. That it was not true that he collected the knife from his uncle's homestead. Accused no.1 also dismissed as false the evidence of his uncle that he came at night with his wife and asked to leave a bush-knife. Further that he came the following day to collect the knife.

He was cross-examined at length by the crown where he dismissed as false all the crown evidence which linked him to the commission of the offence.

Accused no.2 also gave evidence on oath led by Mr. Simelane. His story is that he was one of the people who were drinking at Makhence's homestead on the day in question. After he had had his fill he went home. When he came to the garden he saw the deceased lying down and thought that deceased was too drunk. He then went back to alert the others as he was in a hurry to get home. He deposed that it was not true that he reported to the others that they have killed a dog.

He was arrested on the 8th December, 1997 and he was assaulted by the police who arrested him.

He was cross-examined by the crown where he revealed that after discovering the deceased in that state he went to Makhence's homestead to inform him about the deceased state whereby Makhence the owner of the homestead thanked him for informing them about deceased condition.

The defence then closed its case.

Mr. Wachira then urged the court to invoke the provisions of the Criminal Procedure and Evidence Act (as amended) and call Makhence Ndzinisa as the crown's witness. The application was granted and Makhence was called where he told the court in-chief that accused no.2 came to him and others and said that he had killed a "dog" and they all wanted to be shown where the "dog" was. They proceeded to the spot led by accused no.2 where they found the deceased person. Whilst they were attending to the deceased who was still alive then accused no.2 disappeared from the scene.

When cross-examined by the defence this witness maintained his story he gave under oath. At this point the court entertained submissions by both sides. I have listened to the submissions very carefully and considered the evidence presented in toto. It is not in issue that the deceased was injured and taken to hospital and later died on the 25th December, 1997 at the Mbabane Government Hospital. The post mortem report entered as part of the crown's evidence show that the deceased died as a result of serious head injuries.

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The crucial evidence before court is that of PW1 Magameni who told the court that he was with the deceased at Makhence's homestead and also the accused were present. The deceased left the homestead for his home and was followed by accused no.2 later he saw accused no. 1 threw a stone at the deceased and hit his ankle. They then both attacked the deceased. Accused no.1 hacked the deceased with a bush-knife and accused no.2 assaulted him with a sjambok. The court took cognizance of the distance between Makhence's homestead and the scene of crime and it would seem PW1 was lying but my view is that variation in his evidence does not affect his evidence materially. The court observed that he was very poor with distances and he appeared to me to be an

uneducated and unsophisticated young man who only related what he saw. He appeared to me to be a credible witness in his simplicity and I have no reason to doubt his testimony at all.

It was also revealed in evidence that accused no.1 admitted that he was with accused no.2 and the deceased. Why would PW1 connect accused no.1 and accused no.2 if he never saw them that day? The answer is that he saw them. PW1 does not deny that at one stage he had a confrontation with accused no.1 over chickens. He wanted to make a report to the police but his father persuaded him not to lay a charge and he did not.

One surprising aspect of accused no.1 case is that he is trying his level best to disassociate himself with the bush-knife which is the murder weapon in this case. He even denied the evidence of Musa Mavuso who told the court that he saw the bush-knife falling from accused no.1's shirtfront. He even went further and denied the evidence of his own uncle who told the court that on the day of the murder late at night the accused together with his wife knocked at his door. He opened the door and accused no.1 requested that he leave with him his bush-knife as his wife did not want him to carry the knife at night. This was on the day of assault of the deceased. The uncle acceded to this request and the bush-knife was placed on top of his wife's bed. Accused no.2 according to the evidence of the uncle came early in the morning to collect the bush-knife. This is damning evidence. The uncle has no reason to come to court and lie against his own nephew unless what he told the court took place. Accused says it did not take place. I do not believe him. My view of the matter is that the crown has proved its case beyond a reasonable doubt in respect of accused no. 1.

Now coming to accused no.2 again as I have alluded to the evidence of PW1 it equally applies to accused no.2. Further we have the evidence of Musa Mavuso who told the court that accused no.2 admitted assaulting the deceased before he was assaulted by the mob.

In this case we have direct and circumstantial evidence. We have the evidence of PW1, Shongwe, accused no.1's uncle places accused no.1 and accused no.2 at the scene of crime. It appeared from the evidence that the motive for the assault which subsequently led to the death of the deceased the fight between accused no. 1 acting together with accused no.2 against accused no.2 was over accused no.1 wife.

The court observed that both accused persons were evasive. Some of aspects of their evidence appeared for the first time in their evidence-in-chief and we were all taken

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by surprise. These were not put to the crown witnesses. One need not go deeper into the ratio decidendi in R vs P 1974 (1) S.A. 581 (A) and the case of Rex vs Dominic Mngomezulu and 10 others Criminal Case No. 96/94 (unreported) to emphasize the need for the defence to put as much of its case to the crown witnesses for the defence case to have a semblance of credibility. One glaring point that was not put to the crown witnesses is the issue of the chickens by accused no.1. However, in his evidence-in-chief he gave a very long story about this.

There is damning evidence against accused no.2 which places him in a real bad spot. PW1 said after a while he had followed the deceased he came back to the drinking place and said "they have just killed a dog" and these his very words are corroborated by Makhence the owner of the homestead who was called by the court after accused no.2 had said he went to Makhence's place to inform the revelers there that the deceased had collapsed next to the garden due to heavy drinking. He said he was thanked by Makhence for a job well done. However, when Makhence came to give evidence he denied this and said accused no.2 came and pronounced to all who were present that "they have killed a dog".

I am satisfied with the evidence of the crown witnesses in this matter and I come to the conclusion that both accused acting jointly with common purpose and unlawfully and with intent to kill assaulted Musa Nhlabatsi and inflicted certain injuries upon him for which he died at Mbabane Government Hospital on the 25th December, 1997.

In the result, I find the accused guilty in respect of the crime of murder.

S.B. MAPAHALALA

JUDGE