

# **IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 359/09**

**In the matter**

**between: REX**

**VERSUS**

**HLOPHE .J. MR.**

**P. DLAMINI IN**

**PERSON**

**LUCKY ALBERT MABILA CORAM**

**FOR THE CROWN**

**ACCUSED**\_\_\_\_\_

**JUDGMENT ON SENTENCE**  
**18<sup>th</sup> NOVEMBER 2009**

[1] The accused person, Lucky Albert Mabila, pleaded guilty to the charge of culpable homicide and to that of contravening Section 43 (1) of the Criminal Procedure and Evidence Act of 1938.

[2] The indictment alleged as concerns count one, that on or about the 23<sup>rd</sup> August 2008 and at or near Ngwane Park area, in the Manzini District,

the accused did unlawfully and negligently kill Lindokuhle Mabila and thereby committed the crime of culpable homicide. As concerns Count 2 accused person is charged with contravening Section 43(1) of the Criminal Procedure and Evidence Act of 1938 in that on or about the 23<sup>rd</sup> August 2008 and at or near Raleigh Fitkin Memorial Hospital in the Manzini Region, the said accused did unlawfully escape from the lawful custody of 3019 Constable G. Nxumalo.

[3] The Crown accepted the pleas of guilty by the accused, after which, as concerns Count One, the statement of agreed facts was read into the record by the Crown Counsel appearing and confirmed as accurate by the accused. Mr. Dlamini for the Crown indicated that as concerns Count Two he was not leading evidence as that was not a serious offence in the circumstances of the matter with which I agreed.

[4] I thereafter found the accused guilty as charged on both counts, which was in accord with his pleas aforesaid.

In terms of the statement of agreed facts the accused *inter alia* accepted responsibility for the death of the deceased and that there was no intervening cause. He also accepted the contents of the statement he made before Magistrate Mr. Sibusiso Magagula as well as the contents of the post mortem report. Both the statement made before the said

Magistrate and the post mortem report were handed in by consent and were respectively marked exhibits "A" and "B".

In summary the contents of the statement are that the accused was assisting the deceased, his own child, with his school work, particularly spelling and mathematics. The child is said to have been slow in appreciating, resulting in the accused resorting to beating him with a stick (whose size was not described and which was not exhibited in Court). He also hit him with an open hand as well as kicked him on the stomach. He says the child died the following morning after which he informed amongst others the police who took him together with the corpse to the Releigh Fitkin Memorial Hospital in Manzini. He says he then started receiving some calls which were threatening and that he then decided to escape from police custody eventually. He was eventually captured after 5 days and taken to the Magistrate where he made the statement freely.

The post mortem paints a rather gruesome picture as it reveals that the deceased died "due to an injury to the head." On the Report's Section on schedule of observations, it lists the ante mortem injuries as a contusion of 9 x 7 cms on the side of the top of the head, over the left parietal eminence as well as a contusion of 5 x 3 cms on the right cheek. At its

Section B, the post mortem report indicates that the "parietal bones and occipital bone fractured."

I can only comment that the injuries as recorded in exhibit B, paint a picture of extreme brutality against a minor of only about 4 years as revealed by the said report. Such brutality is clearly not in accord with what could be termed as moderate chastisement of a child as envisaged in Clause 29 (2) of the Constitution of the Kingdom of Swaziland.

It indeed cannot be so when one considers the fact that the accused admits that over and above the stick used (whose size is left to speculation), the child was

also hit with an open hand and kicked in the stomach as he puts it. As stated the Court sees this as extreme brutality because as observed, the child was only about 4 years old.

Following my having found the accused guilty on both counts, it is now my duty to pass an appropriate sentence. Sentencing has been said to be the most difficult stage of any criminal proceedings because other than it being described as a "lonely and onerous task," the Court is required to maintain a delicate balance which has to take into account the accused person, the interests of the society as well as the offence itself. This delicate balance has been referred to by authorities as a triad. See in this regard:-

Sifiso Zwane v Rex Criminal Appeal Case No: 5/2008 (unreported) and S V Zinn 1969 (2) SA 537 (A).

[9] In an attempt to pass an appropriate sentence I am alive to the fact that I must strive to reach the delicate balance referred to above. As regards the duties of a judge in passing sentence, I have to observe what was stated by Rumpff J.A. in S. v Zinn mentioned above when he said,

"As regards the duties of a judge in imposing punishment, we have been referred, *inter alia*, to Voet, Vol 1 page 57, where, in a note, it is said, "It is true, as Cicero says in his work on Duties, BK 1 chapter 25, that, anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is also true that it would be desirable that they who hold the office of Judges should be like the laws, which approach punishment not in a spirit of anger but in one of equity."

In the same judgment the Honourable Judge quoted the following from the same volume of Voet:

"Among the faults of judges which are most harmful is hastiness, the striving after severity and misplaced pity."

[10] It is with these considerations in mind that I must ensure that I take no step which is more harsh or more indulgent than is called for by the circumstances of this case.

[11] I have considered the following in your favour:-

11.1 You are a young man of 28 years, which means you must be given an opportunity to reform.

11.2 You pleaded guilty to the offences you were charged with which saved the court time including that of the witnesses who you have also helped to avoid reliving the sad memories of that fateful day.

11.3 I have accepted that you did not intend to kill the deceased, who is your biological son.

11.4 You were a responsible father when considering that you were always interested in assisting your child with his school work.

11.5 You killed your own child which is a punishment on its own which shall surely linger for as long as you live.

I have also considered against you the fact that you used extreme brutality in carrying out what perhaps may have initially been meant to be moderate chastisement. It is unfortunately becoming prevalent for people in general to brutally beat or to even kill children in their care or guardianship whilst claiming to be chastising them. Consequently, a sentence that this court gives must send a clear message that brutality against children will not be tolerated. It is for this reason that no matter how sympathetic I may be of your situation, I must still impose a custodial sentence to show my disapproval of your brutality. To do otherwise could amount to misplaced pity on my part.

I have also taken into account the fact that you have been found guilty of a serious offence whose commission resulted in a loss of life, something to which members of society, relatives of the deceased and those members of the public who sympathise with them have an interest particularly to see to it that justice has been done.

[14] I have also considered against you your escaping from lawful custody after committing the said offence, but do acknowledge that you must have been in a state of confusion at the time which should mitigate considerably in your favour in this regard. It still does not detract however from the fact that your conduct in this regard was aggravating against you and cannot go unpunished. It is important that I must give a sentence that unequivocally sends a message out there that law enforcement agents ought to be given respect when performing their duties so that order prevails.

[15] I have considered several previous judgments on culpable homicide matters which have revealed the recent trends on appropriate sentences by this

court and as confirmed by the Supreme Court. I am of course aware of the fact that each matter has to turn on its own facts and circumstances.

15.1 I have for instance observed that in Sifiso Zwane v Rex Criminal Appeal Case No: 05/2008 the Supreme Court refused to alter an eight year sentence given to an accused who had pleaded guilty to culpable homicide after having killed the deceased as a result of a fight.

11.6 In Rex v Mpivakhe Albert Shongwe High Court Case No: 441/07. an accused who killed the deceased after being provoked by him and where the said deceased was an aggressor, was sentenced to 7 years with a portion thereof (2 years) suspended for a period of 3 years.

11.7 In Rex vs Thabo Sibeko High Court Criminal Case No. 1468/2009, the accused was sentenced to five years imprisonment two of which were suspended after having been found guilty of culpable homicide following his own plea of guilt. The offence in question was preceded by provocation in that the accused had unjustifiably been referred to as a thief by a drinking partner of his in the accused. The sentence was also backdated to the day of his arrest.

[16] Having considered all the circumstances of the matter, it is my considered view that the following will be an appropriate sentence:-

[17] On Count One

11.8 You are hereby sentenced to 5 years imprisonment.

11.9 Two years of which is suspended for 3 years on condition you are not convicted of an offence of which violence against another person is an element.

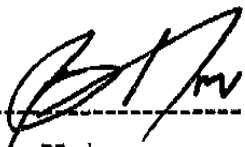
17.3 The sentence is backdated to the 27<sup>th</sup> August 2008 when you were arrested and taken into custody.

[18] On Count Two

11.10 You are hereby sentenced to two months imprisonment without the option of a fine.

11.11 This sentence is to run concurrently with the one in Count 1 above when taking into account the close proximity of the commission of the offences.

11.12



N.i

r. HLOPHE JUDGE

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 18<sup>th</sup> DAY OF NOVEMBER, 2009.**