IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 919/11

In the matter between:

SIPHO MASILELA **APPLICANT**

AND

LOMAHASHA SWAZI NATION COURT **1ST RESPONDNET**
PRESIDENT PHANGINJOBO METISO N.O.

THE DIRECTOR OF PUBLIC PROSECUTIONS 2nd **RESPONDENT**

ATTORNEY GENERAL 3rd **RESPONDENT**

Coram **OTA J.**

For the Applicant

For the Respondent

JUDGMENT

[1] In this application the applicant prays for a review, correction or a setting aside of the sentence imposed by the First Respondent on the applicant under case number L18/2011.

[2] The facts stated in the founding affidavit are that on the 28th of January 2011, the applicant was arrested on the charges of assault with intent to cause grevious bodily harm. He was subsequently

released. On 3rd of March he stood trial at the Swazi National court presided over by the 1st Respondent, for assaulting both his mother and his father. He pleaded guilty to both charges. Thereafter, the crown lead evidence in proof of the offences. At the end of evidence, the court sentenced him to 8 months imprisonment with an option of a fine of E240.00 on the first charge of assaulting his mother **Sibongile Masilela.** On the charge of assaulting his father, he was sentenced to 4 months imprisonment without an option of fine. Applicant contends that 1st Respondent did not consider his plea in mitigation before imposing the mandatory Custodial sentence of 4 months imprisonment. That the transaction or offences occurred at the same time, therefore one charge should have been preferred. That since the complainants were the aggressors, the 1st Respondent ought to have entered a plea of not guilty and advised the applicant accordingly. That no injuries were suffered by the complainants to sustain the charge of assault with intent to commit grevious bodily harm. And in any event the offence is not one of those enumerated in the schedule of offences for imposition of mandatory sentences to warrant the mandatory sentence of 4 months imprisonment.

[3] Now, the review power of this court derives from statute. The relevant statute is rule 53 of the Rules of the high court which provides as follows:-

> *"53 (1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior Court and of any tribunal, board or officer performing judicial, quasi judicial or administrative functions, shall be by way of Notice of Motion, directed and delivered by the party seeking to review such decision or proceedings to the Magistrate, presiding officer or chairman of the Court, tribunal or board or to the officer, as the case may be, and to all other parties affected.*
>
> (a) *Calling upon such persons to show why such decisions or proceedings should not be reviewed corrected or set aside, and*
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> (b) *Calling upon the Magistrate, presiding officer, chairman or officer as the case may be, to dispatch, within fourteen days of the receipt of the Notice of Motion, to the Registrar the record of such proceedings sought to be corrected or set aside together*

with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

(c) *(2) The Notice of Motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected*"

[4] I thus have the power to review the decision of the Swazi National Court, as I am being entreated so to do. However the review power of this court, is a discretionary power which must not be exercised capriciously or arbitrarily, but judicially and judiciously, upon facts and circumstances which show that it is just and equitable to do so. Case law has thus demonstrated that the court will exercise its power of review to correct an irregularity or illegality in the process of making the decision.

[5] A case in point is the case of **Manqoba Dlamini v Busisiwe Grace Dlamini (born Sbandze) N 0 Civil appeal No, 12/2007,**

where Banda CJ expressed this position of the law, in the following language:-

> "*12 The remedy of review is directed at correcting any irregularity or illegality in the process of making that decision*"

[6] Furthermore in the **Text Civil Practice of the Supreme Court of South Africa (4th edition)** Page 929, the learned authors Herbstein and Van Winsen, set out the following as the grounds upon which proceedings can be brought for review namely:-

1) Absence of jurisdiction on the part of the court

2) Interest in the cause, bias, malice or corruption on the part of the presiding judicial officer.

3) Gross irregularity in the proceedings

4) The admission of inadmissible or incomplete evidence or the rejection of admissible or competent evidence.

[7] Now, whether an irregularity or illegality attended the proceedings before the Swazi National Court can only be gathered from the record of proceedings of that court. The record of the relevant proceedings forms a part of the record of this case as annexure SM2. The record demonstrates that on the 3rd day of March 2011, the applicant, was charged before the Swazi National Court presided over by the 1st respondent for assaulting his father. The charge read as follows:-

> "*Did wrongfully, unlawfully, intentionally assault one* ***Vumani Masilela*** *by biting him once on his right fore finger and chin thus causing her grievous bodily harm.*"

[8] Upon the applicant's plea of guilty, the crown led evidence in proof of the offence. What I notice from the evidence led is that the offence of assault causing grevious bodily harm in respect of which the applicant was charged was not established. I say this because even though the complainant testified that the applicant bite him on the forefinger and the applicant confirmed this fact in his evidence, however, there is nothing in the record to show that the complainant

suffered any injury as a result of the bite. There is no indication from the record that an injury was shown to the court. There was also no medical certificate tendered in proof of said injury. Such a certificate from a qualified medical practitioner attesting to the fact of the said injury was imperative. This is more so as the complainant himself testified to the bite on the forefinger but did not testify to the fact of any injury as a result of the bite. There was also absolutely no evidence tendered by the complained or via a medical certificate in proof of the alleged bite on the complainant's chin as per the charge sheet.

[9] The foregoing in my view is compounded by the fact that the trial court failed to give any reasons for the sentence it imposed in the circumstances. A court in sentencing is required to take into consideration all the surrounding circumstances of the case as well as the plea in mitigation. This process shows what weighed in the mind of the court in imposing sentence. This was not done in the present case.

[10] I therefore hold in the light of the totality of the foregoing, especially as there was no evidence tendered in proof of the alleged grievous harm and in view of the sentence imposed in these circumstances, that gross irregularity attended the said proceedings a quo and the sentence imposed ought to be set aside.

[11] On these premises, it is hereby ordered that the sentence of 4 months imprisonment imposed upon the applicant in case number LI8/2011, by the Swazi National Court is hereby set aside.

[12] There is no doubt in my mind from the evidence tendered that the applicant assaulted both his mother and father, and that he was the aggressor in this whole unpalatable affair. The proper charge therefore should have been one of simple assault on both complainants. Since the assault on the complainants was carried out in the same transaction, the proper procedure was for the applicant to be charged on one charge sheet. This procedure would have afforded the court the opportunity of ordering a concurrent sentence which would be the appropriate course in the face of the type of offence committed. I hold the view that a grave injustice enured to the applicant by the separate

charges preferred in the circumstances. The justice of this matter therefore demands that no sentence be imposed on the applicant, even though, I have found him the offence of common assault against his father established. Since the respondent's did not oppose this application, I make no order as to costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 17th ....DAY OF April 2011

OTA J.
JUDGE OF THE HIGH COURT