

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE No. 259/2008

In the matter between:

REX

VS

FRANK BEN MAGAGULA

**CORAM:
FOR THE CROWN
FOR THE ACCUSED**

**SEY J.
MR. P. DLAMINI
MR. S. DLAMINI**

J U D G M E N T

15th JULY 2011

SEYJ.

[1] The accused has been arraigned before this Court for the crime of Murder. The indictment which was dated at Mbabane on the 15th day of July, 2009 reads:

"On or about the 17 August, 2008 and at or near Lobamba Londzala area in the Manzini region, the said accused person did unlawfully and intentionally kill Abel Muntu Dlamini."

[2] The accused person pleaded not guilty to the said indictment. In support of its case, the Crown led the evidence of six (6) witnesses and at the close of the Crown's case the accused gave evidence under oath and called two (2) witnesses. The salient features of the Crown's evidence are to be found in the testimonies of PW1, PW2 and PW6.

[3] PW1 was Dr. Komma Reddy, the police pathologist, who conducted a post mortem examination on the corpse of the deceased. He said he was on duty on the 21^s day of August 2008 when he received instructions from the coroner to do a post mortem at the RFM hospital in Manzini on one Abel Muntu Dlamini aged 48 years. The body was identified by D/Sgt. 3147 J. Motsa from Malkerns police station and one Gladys Madzandza Magagula who is an aunt to the deceased.

[4] Pwl went on to testify that the cause of death was due to both firearm injuries and stab injuries. He stated that the following antemortem injuries were present:-

1. A cut wound of 5x1 cms, with sharp margins, transverse in direction, present on the middle portion of the front side of the neck.
2. A cut wound of 4x1 cms with sharp margins, transverse in direction, present on the middle and lower portion of the right side of the neck.
3. A cut wound of 4x1 cms, with sharp margins, oblique in direction, present on the middle portion of the right side of the neck.
4. Cut wounds of 2x1 cms, and 2x2cms with sharp margins, present on the middle and lower portion of the left side of the neck.
5. A stab wound of 1.5x1 cms, with sharp margins present on the lower portion of the right side of the chest which is 12cms from the mid line and 132cms from the heel of the right foot.

6. An entry wound of 3.5cms, with inverted margins, present on the top of the right shoulder.

7. An entry wound of 1.5x1.5cms, with inverted margins, present on the middle portion of the right upper arm in its upper 1/4th portion

8. An entry wound of 1x1 cm, with inverted margins, present on the right side of the chest in the lower portion, which is 6cms from the mid line and 125cms, from the heel of the right foot.

9. An entry wound of 2x2cms, with inverted margins, present on the right side of the abdomen which is 26cms, from the umbilicus and 112cms, from the heel of the right foot.

10. An entry wound of 5x5cms, with inverted margins present on the middle portion of the lateral side of the right thigh in the upper 1/3rd portion which is 95cms, from the heel of the right foot.

[5] Dr. Komma Reddy further testified that in respect of the fire arm injuries there were five entry wounds and that each of those entry wounds was severe and fatal. He also described the cut wounds listed as 1-5 above as serious and

fatal. He said the stab injuries were caused by a sharp cutting instrument like a knife or spear. The muscles and blood vessels on the front and sides of the neck were severed. The diaphragm was ruptured and the windpipe and food pipe were cut in the middle. PW1 then went on to state that there were perforated holes in the intestines because of the firearm used and that the liver was also ruptured. He said about 500ml of blood was present in the deceased's abdomen.

[6] PW1 produced and tendered a signed post mortem report which was admitted in evidence as Exhibit A. Under cross examination it was put to PW1 that the accused had only shot the deceased four times. However, PW1 maintained that five bullets were used because he had found five bullets inside the deceased.

[7] PW2 Peggy Dlamini is the deceased's wife. She testified that on the 17th day of August 2008 at around 10 a.m. she was busy preparing to go to church to attend the Sunday service. She said the deceased was by then erecting the

barbed wire on the fence and that he was being assisted by one gentle man whose name she did not know. She told the court that as she was working at her home stead and doing her chores she heard a loud bang which caused her to go outside to see where the noise was coming from. As she was going outside she saw the other man running towards her house. She said she ran towards the direction where the noise was coming from and on reaching the place she found the accused and the deceased wrestling and the accused was underneath her husband who was on top.

[8] PW2 went on to give a graphic description of what happened next. I must state that I find her narration of the events quite telling and for ease of reference it is reproduced hereunder viz: "When I arrived there I found that the accused was underneath and my husband was on top. He said 'the accused has a gun, because the accused was lying on the ground holding the gun and my husband was trying to take it from him. What I did was to kneel on one knee and I took the gun and threw it away. I asked the gentleman who was helping my husband to take the gun. He did and went a distance away.

My husband rolled from the top and laid on the ground facing upwards whilst the accused person stood up. Whilst my husband was lying on the ground the accused shouted and said to me 'call the police.' When he said that I turned towards the main road which was near by. When I turned back I saw the accused carrying a spear and he was continuously stabbing my husband around the neck. At the time I had arrived at the scene when they were fighting I did not see the spear. My first time seeing it was when he was continuously stabbing my husband. I do not know where he got it from. When I saw him doing that I turned back and jumped on the accused trying to take the spear from him. I was able to throw him on the ground. When the accused was lying on the ground we were fighting for it to such an extent that the handle broke and then we fought for possession of the spear until it got bent. When I saw that it was bent I let him go. He stood up and went towards his house."

[9] In answer to questions put to PW2 under cross examination she told the court that even though she was not in a position to say how many times the

accused had stabbed the deceased she had seen him continuously stabbing the deceased. She said it was after they had removed the deceased's coat at the hospital that she could see the multiple injuries he had sustained. She denied defence counsel's suggestion that the accused had only stabbed the deceased once and she stated that she had seen three wounds on the neck of the deceased. When it was put to PW2 that the accused did not intend to harm her and her husband she retorted by saying that the accused person had such intention from the onset because he had the gun and he also had the spear when he left his homestead and went over to meet the deceased where he was erecting the barbed wire. She said that after he had shot him the accused also continuously stabbed the deceased which is a clear indication that he intended to finish him off as he eventually did.

[10] PW3 Magingindane Dlamini is the headman of Lobamba Londzala. He testified about the disputed piece of land which had been allocated to the deceased. He said the Magagula family had requested the piece of land on behalf of the deceased in the company of the family head called Davu

Magagula. The witness further testified that the Chief's Kraal had simply rendered their blessing as that piece of land already belonged to the Magagula family. He said the accused was displeased with the actions of the Chief's Kraal and he lodged a complaint at the Ludzizini Royal Kraal where the matter was deliberated upon and that the accused lost the case. The accused also appealed to the Swazi National Council who heard the matter but had not made a ruling on it. PW3 said that, as far as he was aware, the land in question belongs to the deceased and that he had khontaed for it and also paid the cow which is the traditional Swazi custom and practice when one is requesting for land.

[11] PW4 was Judicial Officer Fikile Nhlabatsi who had recorded a Statement from the accused on the 19th day of August 2008. She read out the said Statement in Siswati as well as the translated version in English. Both documents were tendered without objection and admitted in evidence as Exhibits B and B1. PW4 was not cross examined.

[12] PW5 was 3866 Constable Nkosinathi Ndzinisa who testified that he had visited the scene of crime where he had recovered four empty used cartridges for a revolver and two live rounds of ammunition. He said when he observed the scene he had found blood stains on the grass and that he had also noticed that the grass lay as if there was a struggle. PW5 then produced and tendered a revolver, a pack of four live rounds of ammunition and the empty cartridges he had found at the scene. These were admitted in evidence and marked as Exhibits 1, 2 and 3 respectively.

[13] PW6 Sibusiso Muzy Matsenjwa recalled what happened on the 17th August 2008. He testified that the deceased had phoned him and asked him to go and help him repair his fence. When he arrived at the deceased's home he loaded logs into a motor vehicle. He said the deceased also asked him to load a slasher, a spade and an iron rod used for digging holes. They got into the motor vehicle and drove to the place where they were supposed to dig the holes before erecting the barbed wire. Whilst they were digging the accused emerged from his home. PW6 said the accused was in his car which was

loaded with grass. He said the accused asked in a violent manner about what they were doing. The deceased replied that they were erecting a fence. The accused drove off and after a while he came back and entered his home.

[14] PW6 further testified that the accused then came out carrying a short spear in his left hand whilst the right hand was in his pocket. He said when the accused was close to them he told them to leave what they were doing. PW6 said the deceased at first asked "for what reason" but when the accused started talking aggressively the deceased told PW6 that they should stop what they were doing. PW6 said the deceased took the iron rod and put it in the car and told him that they should leave. PW6 said that he leapt in front of the car and started walking away whilst the deceased got inside the car.

[15] Testifying further PW6 stated that there was some space at the top of the window of the deceased's car. He said the accused then went to the right window of the car and he said to the deceased "what did I say to you". PW6 said he saw the accused carrying a gun which he put through that gap in the window. He said he heard a gunshot and then a second gunshot. He shouted

for the deceased's wife who came running as there were still sounds of more gunshots. Together he and PW2 rushed forward to the spot where the accused and the deceased were wrestling on the ground. He said PW2 managed to shift the gun towards him and he took it together with the slasher that was on the ground. By then the deceased was lying face up on the ground and the accused was standing up. PW6 said he left to call the police and as he was waiting he said PW2 approached him and asked if he had called the police. PW6 also testified that the accused came towards them and said he wanted his gun. He said later on he saw the accused stabbing the deceased with a spear and that when that had happened PW2 rushed back to the scene and she wrestled with the accused for the spear until it got bent and then the accused left and went to his home.

[16] PW6 was cross examined at length by defence counsel. He denied that he and the deceased had uprooted the accused person's logs and replaced them with that of the deceased. He denied the allegation that he knew the land was under dispute. When asked why he had opted to walk when the

deceased had entered the motor vehicle PW6 responded that he was trying to escape as the accused was armed. He admitted that he had run away and stood at a distance but he maintained that he did see the accused stabbing the deceased on his neck with a spear.

[17] The Crown then handed into court, by consent of defence counsel, the medical report of the accused, photographs of the deceased and the ballistics report. These were all admitted and marked as Exhibits D, E - E5 and F respectively. The crown thereafter closed its case.

[18] I shall now turn to consider the defence put forward by the accused person who, as indicated earlier, elected to give evidence on oath.

[19] He testified that in the morning of the day in question he had loaded his motor vehicle with grass and that he and his wife were going to her parental home in Mathlane. He said as they approached the gate and were about to enter the main road they found the deceased and PW6 removing the logs from the old barbed wire. He said he stopped the car and told them to stop

what they are doing as the barbed wire belonging to him but they seemed to have a problem with that so he left them and proceeded on his way.

[20] On his return he said he drove past them and went home. He parked the car and took a short spear that was behind the car seat and he returned to the deceased and PW6. He said he again asked them if they had not heard what he had said before that they must leave the place. The accused told the Court that the deceased jumped and went to the back of his vehicle and drew a slasher but he told him there was no need for violence and he insisted that they should leave.

[21] At this stage, I deem it necessary to reproduce verbatim the accused's version of the events as he recounted it to the Court as follows:

"The deceased went and opened the car and went inside. He did not start up the ignition and that was when I asked him why he was busy chasing after me. He responded by saying 'what is this nonsense you are doing burying people at my

homestead.' At the same time he assaulted me with the slasher on top of the eye. At the time he was opening his door and he wanted to approach me and that was when I took out my gun and shot him,, He did open the door and got out and we wrestled for the gun, the spear and the slasher. During that time the deceased's wife approached and she joined us in the wrestle. They pushed me and my artificial leg broke and we fell down. We continued wrestling and the gun fell and I heard the deceased's wife telling PW6 that he should take the gun and take it to the police station. We stood up together still wrestling and the deceased wife was surprised and she said to him 'he shot you'. When the deceased fell he knelt on one knee then I gained control of the spear. I stabbed him once on the neck and the shoulder. Then the deceased's wife called me by name and punched me on my mouth but I was able to gain control of the spear. It was bent by this time PW2 did not

take note of the spear. She looked after the deceased who was injured. I left and went home. When I reached home, I threw away the spear and I entered the house and took some money. I threw the spear by the flowers near the kitchen door."

[22] The accused further testified that the confrontation between the deceased and himself was as a result of a piece of land. He said the deceased was his nephew and that when the deceased had connived with Davu Magagula to represent him at the Chief's Kraal, in order to be allocated the piece of land, that action did not go down well with him.

[23] On the issue of the gun, the accused told the Court that he is in the habit of carrying guns wherever he went because when he started his business in 1998 he was attacked and also in the month of February of 1999 he was attacked and shot with two bullets on his shoulder. He said that in 2000 he was again attacked by unknown persons and that when the police gave chase

the one who was sitting at the back of a white Corolla car was his nephew the deceased.

[24] When the accused was asked about why he was carrying the spear on that day he replied that he thought that if the deceased and PW6 could see the spear they would leave. He said he only wanted to scare them.

[25] Under cross examination, the accused admitted that he used Exhibit 1 to shoot the deceased. He said he could not understand how the deceased sustained the 5th injury because he only shot him four times. He also admitted that he used the spear to stab the deceased but he was quick to add that he stabbed him only once between the neck and the shoulder. He stated that he did not know how the deceased sustained the cut wounds and he suggested they could be like the wounds he had also sustained during the struggle.

[26] The accused also told the court that he had sustained injuries when the deceased had attacked him with a slasher on his right eye. Crown counsel put

it to the accused that he was only telling the Court that the deceased had poked him with the slasher as an afterthought to exculpate him. This the accused denied. However, crown counsel put it to the accused that according to Exhibit D, which was his medical report, no bruises on his right eye was mentioned. In reply the accused said he was surprised at that. He denied that he shot the deceased through a gap in the window as PW6 had stated and he said that the window was wide open at the time he shot him.

[27] When Crown counsel put it to the accused that he was the aggressor he denied this allegation and he said the reason he had followed the deceased to his car was because he wanted to ask the deceased why he was following him. He claimed that, at that stage, whilst the deceased was still seated in his car the deceased poked him with a slasher and that was when he shot him.

[28] Judging from the totality of the evidence adduced by the Crown, I find that the evidence was largely credible. I also find that all the witnesses were forthright and therefore reliable. I believe the evidence of PW1 Dr. Komma

Reddy who testified that the injuries were fatal and I accept the contents of his post mortem report as correct findings. With respect to PW2 and PW6, I accept their detailed and graphic eyewitness accounts of the shooting and stabbing of the deceased by the accused. Moreover, all the Crown witnesses were not fazed during cross examination and I find that the evidence of PW6 corroborated that of PW2 on all material issues.

[29] I have also carefully considered the defence put forward by the accused but I must state that I find it difficult to accept his version of the events that took place on that fateful day. The accused said the deceased had poked him on his eye with a slasher. However, there were no wounds seen by the doctor who examined him. Furthermore, it is inconceivable to me that the deceased who was already seated in his car could have attacked the accused and cut him on his eye with a slasher. Rather, judging from the antemortem injuries as depicted in Exhibit A, what I accept as true is that it was the accused who shot the deceased through the gap in the window of the car.

[30] On a proper analysis of the evidence adduced before this Court, I must state that there are certain legal issues that are common cause. In the first place, it is not disputed that the deceased Abel Muntu Dlamini is dead. It is also not in contention that he died as a result of multiple firearm injuries and stab wounds. In this regard, a post mortem report was admitted by consent and marked as Exhibit A. I may also pertinently add that all the injuries sustained by the deceased were inflicted by the accused on the 17 day of August, 2008.

[31] At this stage, the only questions requiring an answer are twofold:

- (a) Whether the Crown has proved that the injuries inflicted upon the said deceased were intentionally inflicted by the accused; and
- (b) Whether or not there is any defence, whether full or partial that serve to excuse the accused person's conduct.

[32] In my considered view, the question of intention can be viewed in juxtaposition to the evidence led by the Crown in the first instant and also to

the documentary exhibits in the form of the photos marked as Exhibits E-E5. What is inexorable apparent from the Crown's evidence is that the accused was armed with a gun and a spear when he left his homestead and went over to meet the deceased where the latter was erecting the barbed wire. It is also in evidence that after the accused had shot the deceased he continuously stabbed the deceased while he was lying on the ground wounded and utterly helpless. I accept the evidence of PW2 to the effect that this was a clear indication that the accused intended to finish off the deceased as he eventually did. This was a particularly heinous crime which was totally unwarranted given the circumstances of the case. The multiple stab wounds and firearm injuries as depicted on Exhibits E-E5 were quite gruesome and they were inflicted at very close range.

[33] It is clear to me that before leaving his home that morning to go and confront the deceased, the accused had armed himself with two lethal weapons namely a gun and a spear. I therefore find as a fact that it has been established beyond reasonable doubt that the accused had evinced an

intention to kill the deceased. As it was succinctly stated by His Lordship **Troughton ACJ** in the case of **R v Jabulane Philemon Mngomezulu 1970-1976 SLR** at 7 (HC):

"the intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased."

[34] As His Lordship **Tebbutt JA** opined in the case of **Thandi Tiki Sihlongonyane v R Appeal Case No. 40/97**, Dolus can, of course, take two forms.

"(i) Dolus directus where the accused directs his will to causing the death of the deceased. He means to kill. There is in such event an actual intention to kill; and

(ii) Dolus eventualis where the accused foresees the possibility of his act resulting in death, yet he persists in it reckless whether death ensues or not."

[36] To my mind, what the accused evinced in this case was a clear instance of dolus directus whereby he directed his will to causing the death of the deceased. I find that there was no legal justification for the accused's acts and conduct which, in my opinion, amounted to a calculated, cold blooded and vicious attack on the deceased. I so hold. Moreover, I must state that I have observed the demeanour of the accused in Court and I find that he has shown no remorse throughout and he has demonstrated an outright display of callousness.

[37] I therefore find the said killing unlawful and I so hold. In the circumstances, I find that the Crown has discharged the burden of proving the guilt of the accused beyond reasonable doubt. I therefore find the accused guilty of murder as charged and I hereby convict him accordingly.

[38] I now wish to advert my mind to the provisions of **Section 295 (1) of the Criminal Procedure and Evidence Act 67/1938**

which provides as follows:

" If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them; Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof"

Sub-section (2) thereof provides "that in deciding whether or not there are any extenuating circumstances the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs (Amended **P. 47/1959.**)"

[39] At this juncture, this case will be postponed to the 5th day of August 2011 to enable the Court consider the issue of any extenuating circumstances, mitigation and the appropriate sentence to be imposed in this case. The accused is to be remanded in custody until 05/08/11.

M.M. SEY(MRS)

JUDGE OF THE HIGH COURT