



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE No. 449/10**

In the matter between:

**REX**

**VS**

**NHLANHLA LUCKY MHLANGA**

Neutral Citation: Rex vs. Nhlanhla Lucky Mhlanga (449/2010) [2012] SZHC 39 (1<sup>st</sup> June 2012)

**CORAM: SEY J.**

**Heard: 15, 22 March 2012 and 11, 26 April 2012**

**Delivered: 1 June 2012**

---

**JUDGMENT**

---

**SEY J.**

[1] The accused **NHLANHLA LUCKY MHLANGA** is indicted on two counts, being murder and assault with intent to cause grievous bodily harm.

[2] The indictment dated at Mbabane on the 18<sup>th</sup> day of November, 2010 reads as follows:

**Count One**

The accused is guilty of the crime of **Murder**.

In that upon or about the 3<sup>rd</sup> April 2010 and at or near Tihosheni area in the district of Shiselweni, the accused did unlawfully and intentionally kill **Nikiwe Nxumalo**.

**Count Two**

The accused is guilty of the crime of **Assault with Intent to Cause Grievous Bodily Harm**.

In that upon or about the 3<sup>rd</sup> April 2010 and at or near Tihosheni area in the district of Shiselweni, the accused did unlawfully assault **Mzwakhe Mamba** by striking him with a sharp edged object on the head with the intention of causing him grievous bodily harm."

[3] Upon being called upon to plead, the accused pleaded not guilty to both counts and defence counsel Mr. Piliso indicated that the pleas accorded with his instructions. Thereupon, by consent, Post Mortem

Report No. 72/2010, which was prepared by the police pathologist Dr. R. M. Reddy, was admitted in evidence and marked as **Exhibit A**.

[4] At this nascent stage, it is well to mention that certain legal issues are common cause. In the first place, it is not disputed that the deceased person Nikiwe Nxumalo is dead. It is also not in contention that she died as a result of penetrating injuries to the heart and lungs following an altercation with the accused and during the process a slasher, which was admitted in evidence as **Exhibit 2**, was used. There is also no dispute as far as the identity of the accused person is concerned. The Crown witnesses who know him well gave evidence of this fact and identified him before Court and even the accused placed himself at the scene of crime during his testimony.

[5] In support of its case, the Crown led the evidence of four witnesses who adduced *viva voce* evidence. The first prosecution witness was Menzi Mdluli, the accused person's nephew. On account of his age, I first of all satisfied myself that he understood the importance of telling the truth and the nature of taking the oath before he was sworn. In his evidence, PW1 stated that on 3<sup>rd</sup> April, 2010, he accompanied the accused from Phongola in the Republic of South

Africa into Swaziland to look for the deceased who was his girlfriend with whom he had two children. PW1 went on to state that he and the accused arrived at the deceased's homestead where they found her seated with her family. The accused requested to have a word with the deceased but she refused.

[6] PW1 further testified that by then it was getting dark and the accused sent him to his uncle's place to borrow a bush knife to protect themselves with on their way back. PW1 said there was no bush knife at his uncle's place and he was given a slasher instead. He testified that, upon returning with the slasher, the accused insisted that he wanted a bush knife and he further said that the slasher was not sharp enough and that he could not use that to protect them. The witness and the accused then set out to the homestead of Nozipho Mhlanga (PW2) together to request for a bush knife once again but they were told that they only had a slasher. PW1 said the accused asked him to remain at his uncle's place and the accused returned to the deceased's homestead to spend the night.

[7] PW2 Nozipho Mhlanga told the Court that she lent her slasher to the accused who had sent PW1 to fetch it. She further told the Court that on the 3<sup>rd</sup> day of April, 2010 when the deceased was killed,

the accused had gone to her homestead in the early evening and he had requested that she allows PW1 to spend the night at her place as he was going to sleep at the deceased's homestead. The accused then left her homestead carrying the slasher which had earlier been given to PW1. Testifying further, PW2 told the Court that the next morning she heard that the deceased had been murdered. Her testimony was unchallenged.

[8] The investigating officer, 5113 Detective Constable Hynd Lukhele, testified as PW3 and he told the Court that three days after the deceased was killed, the accused, in the company of his relatives handed himself up at the Hluthi police station where he was then formally charged with murder and assault with intent to cause grievous bodily harm. As part of his testimony, PW3 produced and tendered a pair of black push in, a sharpened slasher with a black handle, a pair of blue trousers and a navy blue/white T-shirt which were all admitted by the Court and marked as **Exhibits 1, 2, 3** and **4** respectively.

[9] PW4 Nonhlanhla Fortunate Nxumalo is the deceased's sister and she was present when the accused attacked the deceased. PW4 testified that on the 3<sup>rd</sup> day of April, 2010, in the middle of the night, she was in the company of her two sisters, namely, the deceased

Nikiwe and Thuleleni when the accused forced his entry into the house they were sleeping in by knocking down the door. She said that the accused lit matches inside the dark room she and her siblings and young children were sleeping in and she could see that the accused was in a violent mood. She told the Court that upon lighting the matches and locating the deceased's position inside the room, the accused aggressively advanced towards the deceased who then sought cover behind her. PW4 further testified that she spoke to the accused at that moment and asked him why he was being so violent and the accused responded to the effect that he had come to the deceased and that he should be left alone.

[10] PW4 went on to state that the deceased was still hiding behind her and by then it was dark in the house and that the violent and aggressive conduct of the accused forced Thuleleni to flee outside. PW4 further testified that it was when she bent down to pick up her child who was crying that the accused got a chance to get hold of the deceased. She said she saw the accused pushing the deceased onto the floor and he was lifting up an object which she did not clearly see but she saw him lowering it down towards the deceased as she heard a banging sound as if the accused was chopping something. PW4 then bolted out of the house but she could still hear the chopping sound from inside the house. She said she fled to

the homestead of the accused to wake up his grandmother and brother and on her return she found her sister lying in a pool of blood dead and with multiple injuries all over her body.

[11] In cross examination, PW4 maintained that on the day of the incident the door was locked and that they had used a locking device made of planks. She also maintained that when the accused was inside the house he had lit some matches which did not last for a long time. It was put to PW4 that whilst she was outside the house the deceased had slapped the accused several times and that was when he had retaliated by using what was in his hand at the time. In reply PW4 stated that she did not know what happened when she went outside.

[12] In his defence, the accused elected to give evidence under oath and to call no witness. The evidence for the defence is to the effect that the accused travelled from Phongola in South Africa on foot for a period of about two hours to come and talk to the deceased in Swaziland at Tihosheni area. On arrival at the deceased's homestead she refused to speak to him and since it was getting dark the accused sent PW1 to go and borrow a bush knife so that they could be able to protect themselves on their way back to Phongola. PW1 failed to get a bush knife but came back with a

slasher which the accused felt was not sharp enough for the journey and as a result thereof he sought accommodation for PW1 at the homestead of PW2, a relative, and then proceeded to the parental homestead of the deceased where he said he would sleep and they were to proceed with their journey the next day.

[13] The accused further testified that he took with him the slasher and his explanation for this was that it was dark and he had to protect himself. He said that on arrival at the parental homestead of the deceased, he found the deceased and her sisters Thuleleni and Nonhlanhla sleeping in one of the houses. He said he knocked but they kept quiet and did not open. The accused said that he pushed the door and it opened and he went inside. Upon entering it was dark and he lit a match and wanted to speak to the deceased who hid behind PW4. The accused said that at that time the light went off and PW4 took her child and went outside. The accused said he wanted to speak to the deceased but she slapped him in the face and that was when he hit her back and that it was during the fight that the deceased got injured. He said he got scared and he ran off and went back to Phongola where he reported the matter to his sister in law Dudu. He said he had no intention to kill the deceased.

[14] Under cross examination, the accused said he did not count how



many times he had assaulted the deceased. He also stated that the assault on the deceased was as a result of provocation in that he had travelled on foot for two hours to get to Swaziland to meet the deceased as per her instruction and in an attempt to talk to her he had received a slap in the face which in turn resulted in the subsequent assault on the deceased with the slasher.

[15] It would appear to me that the accused does not dispute that he inflicted those fatal injuries upon the body of the deceased but merely contends that he did not intend to kill her and that he was provoked by the deceased who had slapped him. The accused gives two unclear versions in relation to the allegation that he was slapped by the deceased. On the one hand, it is contended that the deceased slapped him first just when he entered the house, after the match he lit had gone off in the presence of PW4. Conversely, the deceased slapped him in the dark after PW4 had bolted out of the house. PW4, however, gives one clear, unambiguous and logical version which demonstrates that the deceased could not have slapped the accused first because it was the accused who had lit the match to locate the deceased's position in the house as he aggressively advanced towards the deceased who was by then hiding behind PW4.

[16] Further, on the issue of the alleged slapping by the deceased, it is not clear as to whether the accused butchered the deceased in self defence, as it was put to PW4 in cross examination, or whether he attacked the deceased out of anger after being provoked by the slap as he said when testifying.

[17] The analysis of the evidence above, in my view, clearly excludes the touted defence of provocation. I find that PW4's version of what happened in the house that night is more credible than the inconsistent version given by the accused person. I accept PW4's version that the accused advanced aggressively towards the deceased who was taking cover behind her and that he raised his arm and brought it down towards the deceased and she then heard a chopping sound which continued even when she had bolted out of the house. It is clear that PW4 never witnessed the deceased slap the accused because the accused just pounced on the deceased and assaulted her indiscriminately with **Exhibit 2**. I particularly reject the evidence of the accused that the deceased had slapped him several times and that was when he had retaliated by using what was in his hand at the time.

[18] It is trite that it is not every case where there has been provocation which entitles a person to resort to severe violence. Moreover, in order to establish the absence of intention, the provocation must

have been commensurate with the violence following it. Furthermore, even if it can be remotely said that the accused was acting in self-defence, I find that he by far exceeded the bounds of self-defence and the brutality with which he responded was disproportionate as he was under no imminent danger. There is no doubt that the deceased was not armed and the accused said so himself.

Therefore, the accused may not benefit from the provisions of the Homicide Act 44/1959 because it is inexorably clear that the act of killing the deceased bore no reasonable relationship to any form of provocation in the circumstances of this particular case. The Homicide Act only applies to grave insults likely to deprive an ordinary person of his self-control. See **Rex v Aaron Fanyana Mabuza 1979 - 1981 SLR 30 at 35 A-C (HC); Rex v Paulos Nkambule 1987 - 1995 (1) SLR 400 at 405 F-G (HC)**

[19] On a proper analysis of the evidence adduced before this Court and the submissions made by both counsel, I find that the Crown's evidence was largely cogent, corroborative and reliable. Therefore, in the light of the entire evidence adduced by the Crown and taking into consideration the fact that the accused does not dispute that he inflicted the fatal injuries using **Exhibit 2**, I am of the considered view that the issue to be determined at this stage is

whether the accused had the intention of murdering the deceased.

[20] According to **Hunt**, the learned author of **The South African Criminal Law and Procedure, Juta, 1982 Vol. II** at **340**, the crime of murder consists of the unlawful and intentional killing of another person. Intention is classified as legal or actual, the former being where the accused appreciates that his conduct might result in death but is reckless as to whether death results or not.

[21] In the case of **Thandi Tiki Sihlongonyane v Rex Appeal Case No. 40/97, Tebbutt JA** remarked that 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.”

[22] Judging from the nature of the weapon used and the extent of the penetrating injuries to the lungs and heart of the deceased, it would appear that the accused had **dolus eventualis**. As stated

succinctly 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.”

[23] The accused admits to having assaulted the deceased indiscriminately using **Exhibit 2**. Furthermore, **Exhibit A** depicts ante mortem injuries consistent with wounds inflicted using the said **Exhibit 2** and the report states that the cause of death was due to “Haemorrhage as a result of penetrating injuries to lungs {and} heart.” There is no doubt, in *casu*, when taking into consideration the above-mentioned factors, that the accused did foresee the possibility of his act resulting in death, yet he persisted in it reckless as to whether death ensued or not.

**Exhibit 2** is a lethal weapon which when used in assaulting a human being indiscriminately all over the body and inflicting either penetrating or cutting wounds will inevitably bring about death. The Supreme Court of Swaziland had occasion to consider these factors when confirming a conviction of murder against a 17 year old boy who butchered a pregnant woman in a similar manner as the accused herein did. See **Rex v Ntokozo Adams SC No. 16/2010**.

[24] In the light of all the foregoing, I find that the accused was reckless in the manner he assaulted the deceased with the slasher in the dark and even though he appreciated that she might die he was reckless as to whether death ensued or not. I therefore find the said killing of the deceased by the accused 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 the crime of murder as charged in **count one** and I hereby convict him accordingly.

[25] In respect of **count two**, the only piece of evidence before the Court is the evidence adduced by PW4 to the effect that after she had returned to the scene of crime with her child, she noticed an injury on her child's forehead. She then went on to state that he was not injured before the accused came into the house.

However, PW4 neither disclosed the nature and/or size of the injury nor did she produce and tender any medical report in respect of the said Mzwakhe Mamba which would have enabled the Court to reach a logical conclusion on the issue.

[26] It is my finding that the Crown has failed to prove that the accused

did unlawfully assault Mzwakhe Mamba by striking him with a sharp edged object on the head with intent to cause grievous bodily harm. It is trite that the onus probandi in criminal matters rest on the Crown to prove its case beyond any reasonable doubt and continues throughout and that no onus rests upon the accused to prove his innocence. It is the Crown which brings this case and it is for the Crown to satisfy the Court so that it is sure of the accused person's guilt.

[27] The leading authority is the case of **Woolmington vs DPP [1935] A.C. 462 HL** wherein it was stated that:

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt [subject to the qualification involving the defence of insanity and to any statutory exception]. If at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

**{per Viscount Sankey at pp 481-482}.**

[28] In the South African case of **S v Van Der Meyden 1991 (1) SA 447** at **449 Nugent J.** summed up the position in the following terms:

“The onus of proof in a criminal trial is discharged by the State if the evidence established the guilt of the accused beyond reasonable. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. (see for example, **R v Difford 1937 AD** at **373** and 383). .....In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt.”

[29] I am therefore of the considered view that the accused must be acquitted and discharged on count two on the basis that the Crown has failed to prove his guilt beyond a reasonable doubt. I also do not find that he is guilty of any lesser offence in that regard.

**FOR THE CROWN**

**MR. S. FAKUDZE**

**FOR THE ACCUSED**

**MR. M. PILISO**

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE.....  
DAY OF JUNE 2012.**

.....



**M. M. SEY (MRS)**  
**JUDGE OF THE HIGH COURT**