



IN THE HIGH COURT OF SWAZILAND

Criminal case No. 101/11

In the matter between:

**REX**

**VS**

**CELANI SICACA NKAMBULE**

Neutral citation: *Rex vs Celani Sicoco Nkambule (101/2011) [2012] SZHC150 (2013)8 August 2013*

**CORAM**

**MCB MAPHALALA, J**

**Summary**

Criminal Law – accused charged with two counts of murder in different circumstances on the same day and pleads the defence of automatism in his evidence in-chief – subsequently he abandons the defence and pleads ‘dizziness’ as a result of consuming coke mixed with alcohol – held that both defences constitute an afterthought on the basis that they were not put to Crown witnesses – held further that the accused had *mens rea* in the form of *dolus eventualis* – accused convicted on both counts of murder and sentenced to thirty years in respect of each count – the sentences imposed to run consecutively.

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**Judgment**  
**8 August 2013**

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[1] On the first count the accused is charged with the crime of murder, it being alleged by the Crown that on the 23<sup>rd</sup> September 2010 at Mhlabubovu area in Maphungwane, the accused unlawfully and intentionally killed Xolile Lulane. He pleaded guilty to culpable homicide, and, the Crown did not accept the plea. A plea of not guilty to murder was recorded by the Court.

[2] On the second count the accused is charged with murder, it being alleged by the Crown that on the 23<sup>rd</sup> September 2010 at Mhlabubovu area in Maphungwane, the accused unlawfully and intentionally killed Nomsa Ntilane Sihlongonyane. He pleaded guilty to culpable homicide, and, the Crown did not accept the plea. A plea of not guilty to murder was recorded by the Court.

[3] Certain formal admissions were made in terms of section 272 of the Criminal Procedure and Evidence Act. Firstly, the post-mortem report in respect of count 1, relating to the examination of Xolile Lulane aged eighteen years, was admitted in evidence by consent, and, it was marked Exhibit 1. The cause of death was due to multiple stab wounds. The following ante-mortem injuries were present:

- (a) A stab wound of 2 x 1 cm, with sharp margins, present on the middle portion of the front and right side of the chest, which is 21 cm, from the midline and 29 cm from the umbilicus.

- (b) A stab wound of 2 x 1 cm, with sharp margins on the middle portion of the top of the left shoulder.
- (c) A stab wound of 2 x 1 cm with sharp margins, muscle deep, present on the middle portion of the front side of the left upper arm in the lower  $\frac{1}{4}$ <sup>th</sup> portion.
- (d) A stab wound 1 x 1 cm, with sharp margins, muscle deep, present on the middle and front side of the right upper arm.
- (e) A stab wound of 1 x 1 cm, muscle deep, present on the middle portion of the top of the left shoulder.
- (f) A stab wound of 2 x 1 cm, muscle deep present on the lateral and back side of the left upper arm in the middle portion,
- (g) A stab wound of 2 x 1 cm, present in the midline, on the back, in the upper  $\frac{1}{4}$ <sup>th</sup> portion of which is 127 cm from the heel of the right foot.
- (h) A stab wound of 1 x  $\frac{1}{2}$  cm present on the middle portion of the right side of the back, which is 4 cm from the midline and 108 cm from the heel of the right foot.
- (i) A stab wound of 1 x 1 cm, present on the middle portion of the midline and 97 cm from the heel of the right foot.
- (j) A stab wound of 2 x 1 cm, bone deep, present on the middle portion of the left shoulder, which is 8 cm, from the midline and 11 cm from the heel of the left foot.
- (k) A stab wound of 2 x 1 cm, present below the middle portion of the left side of the back, 7 cm below the injury No. 10 (i.e. j above), 8 cm, from the midline and 111 cm, from the heel of the left foot.

- (l) In the right lung there was a stab wound of 2 cm length present in the middle lobe and stab wound of 1 cm length, present in the lower lobe.
- (m) In the left lung there was a stab wound of 1 cm length present in the lower lobe.
- (n) In the heart and pericardial sac there was a stab wound of 1 cm length, present on the back side of left ventricle of the heart.

[4] The second formal admission relates to the post-mortem report in the second count in respect of Nomsa Ntitilane Sihlongonywane aged twenty years. It was admitted by consent and marked Exhibit 2. The cause of death was due to stab wounds to the chest. The following ante-mortem injuries were present:

- (a) A stab wound of 4 x 2 cm, with sharp margins, present on the middle portion of the front and left side of chest, which is 19 cm from the midline and 50 cm from the umbilicus.
- (b) A stab wound of 1 x ½ cm, with sharp margins, present on the middle portion of the right side of the back in the upper 1/3<sup>rd</sup> portion, which is 8 cm from the midline and 127 cm from the heel of the right foot.
- (c) A stab wound of 1 ½ cm, with sharp margins, present on the middle portion of the right side of the back, which is 10 cm from the midline and 113cm from the heel of the right foot.
- (d) A stab wound of 1 cm length, present in the middle and lower lobe of the right lung.

(e) A stab wound of 2 cm length present in the left ventricle of the heart.

(f) The mediastinum and thymus in the chest was ruptured.

[5] PW1 Johannes Nkambule, the father of the accused testified under oath that he knows Xolile Lulane, the deceased, in the first count; she was the mother to the accused's minor child. He also knows the deceased in the second count; she was the wife to his uncle. PW1 testified that on the 23<sup>rd</sup> September 2010, the accused arrived at his homestead from his place of employment at Mahlahlane; he greeted the accused as he was sitting with Xolile Lulane and their child outside their house. Thereafter, he left for the garden to irrigate his vegetables. On his way back he heard a person raising an alarm repeatedly. He saw a group of people gathered at his homestead. He saw Nomsa Sihlongonyane rolling down on the ground and he was told by the people in the group that she had been stabbed by the accused. The group further informed PW1 that the accused had also stabbed Xolile Lulane, at her grandmother's homestead, and, that she was already dead.

[6] PW1 confronted the accused and asked him why he had killed the deceased women; however, the accused told him that he didn't know how he committed the offence. PW1 demanded the knife used in the commission of the offence, and, the accused fetched the knife from his apartment and handed it over to PW1. He told the accused to wait for the arrival of the police; upon their arrival, they arrested the accused. PW1 handed the knife over to the police. On the next day PW1 was invited by the police to come to the police station and record a

Statement. PW1 maintained his evidence under cross-examination. Furthermore, he told the Court that after the incident the accused was crying and appeared traumatized.

[7] PW2 Nokubonga Matsenjwa, a Grade V scholar of Ekumeni Primary School and a neighbour to both the accused and Nomsa Sihlongonyane testified that on the 23<sup>rd</sup> September 2010 she saw the accused passing her homestead pushing the deceased in count two; the deceased tried to run away but was trapped by the accused and she fell. The accused then assaulted her; and, the deceased was crying as well as raising an alarm. Thereafter, the accused left the scene leaving the deceased lying on the ground. PW1 reported the incident to her grandmother, Khathazile Masango who in turn went to the scene of crime accompanied by her brother in-law. She maintained her evidence under cross-examination.

[8] PW3 Ndleleni Shongwe, an uncle to Nomsa Sihlongonyane, the deceased, in count two, testified that on the day in question, she heard the deceased raising an alarm. He went to the scene of crime and found a Shongwe man holding the deceased after she had been stabbed. The deceased told him that she had been stabbed by the accused. He raised an alarm; and, Bhekwako Masango reported the incident to the police by phone. The deceased was able to tell the police the name of her assailant before they took her to hospital. He maintained his evidence under cross-examination.

[9] PW4 Nonhlanhla Dlamini, a Magistrate based at Siteki Magistrate's Court, testified that on the 24<sup>th</sup> September 2010, she was at her workplace when the accused was brought to her chambers by PW5, Philile Mthimkhulu, a Court interpreter. There was no police officer within the vicinity and the door to her chambers was closed.

[10] PW4 introduced herself to the accused in the presence of PW5, and, the accused disclosed the purpose of his visit. The accused was asked certain questions by PW4 from a questionnaire; and, he told PW4 that the police did not say or do anything to induce him to make the Statement. The accused denied that he was promised to be released from custody in the event he made the Statement. Similarly, he told PW4 that no threats were made by the police to induce him to make the Statement; and, he denied that he was assaulted by the police after his arrest.

[11] PW4 asked questions to the accused in Siswati and they were interpreted by PW5 to English language; and, PW4 recorded the response in English language. The Statement was subsequently read back to the accused. PW4 signed the Statement together with PW5 as well as the accused. The Statement was admitted in evidence and was marked Exhibit 3.

[12] In the Statement the accused admitted that Xolile Lulane was staying with him at his parental home as husband and wife even though they were not married. They

have a minor child born of the relationship. He explained that sometime in May 2010, he assaulted the deceased because she had a habit of giving out his belongings to other people; however, the nature of the belongings and the people to whom the belongings were given were not disclosed. After the assault, the deceased, in the second count Nomsa Sihlongonyane, advised Xolile Lulane to end their relationship, but she did not accept the advice.

[13] On the 23<sup>rd</sup> September 2013, he visited his home; he was from his place of employment. On arrival, he discovered that the deceased had given his food to her parental home; however, the type of food given by the deceased to her parental homestead was not specified. A confrontation arose between them, and, she ran to the homestead of the second deceased; he followed her and stabbed her to death. PW4 was a reliable and truthful witness. He maintained her evidence during cross-examination. PW5 Philile Mthimkhulu, an interpreter at the Magistrate's Court in Siteki corroborated the evidence of PW4 in all material respects. She maintained her evidence under cross-examination.

[14] PW6 Patience Maziya, a relative to accused's father, testified that on the 23<sup>rd</sup> September 2010, she was at her homestead at Mhlabubovu in Maphungwane, not very far from the parental homestead of the accused. Her daughter in-law Nombuso Simelane, informed her that the accused was in the homestead, and wanted to assault Xolile Lulane, the deceased. PW6 further told the deceased to hide so that the accused could not see her, and she hid in the kitchen. The



accused left the homestead and stood just outside the gate. Suddenly, the accused saw the deceased moving to another house, and, he returned demanding to talk to the deceased. He broke the door to the house where the deceased was hiding and entered. He took out a shiny object and stabbed the deceased repeatedly many times; she cried asking the accused why he was stabbing her. The deceased tried moving out of the house but she fell on the doorstep. The accused retrieved the knife from her body and left the scene. According to PW6, the accused did not say anything before he stabbed the deceased to death.

[15] Under cross-examination PW6 told the Court that the accused did not take alcohol, and, that he was not drunk when he committed the offence. However, it was put to PW6 that the accused had taken alcohol that day for the first time; however, PW6 reiterated her evidence that the accused appeared normal and not drunk. She conceded, however, that the accused appeared angry. She denied that the accused had come to her homestead to visit Celimpilo Maziya as alleged by the accused because he came to the homestead demanding to talk to the deceased; when he failed to locate her, he left the premises and stood at the gate. When the deceased changed houses, the accused saw her and returned to the homestead immediately. He forced entry into the house by breaking the door-lock; thereafter, he stabbed the deceased several times. When she tried to move out of the house, she fell on the door-steps.

[16] PW7 Nombuso Simelane, a daughter in-law to PW6, testified that on the 23<sup>rd</sup> September 2012, she was at her marital home with her mother in-law. The

deceased, Xolile Lulane, arrived at the homestead running and crying; she asked for her uncle Celimpilo Maziya, who was also the husband to PW7. The deceased told PW7 that she was being assaulted by the accused, and that, she did not know why she was being assaulted. PW7's husband was not at home; PW6 called the deceased to the kitchen where he was seated so that she could hide from the accused. The accused came and asked for PW7's husband, and, when she was informed that he was not at home, he left and stood at the gate

[17] PW7 took the deceased from the kitchen and hid her in her house; she locked the door so that she could protect her from the accused who was allegedly assaulting her. The accused saw the deceased entering the house; he returned and went to the said house. He found PW7 outside the house on the doorsteps, and, PW6 was standing in front of the kitchen opposite the house. The accused said he wanted the deceased to fetch the child she had left at home, and he told PW7 to move away from the door steps. He kicked the door until the door-lock was broken; and, he entered the house and stabbed the deceased several times. PW6 and PW7 tried to intervene but failed. The deceased fell on the door-steps and died; and, the accused left the scene.

[18] The police were called to the scene; they recorded Statements from witnesses and further viewed the stab wounds on the deceased. PW7 told the Court that the accused did not drink alcohol and that he was not drunk on the day in question. The photographs taken on the scene of crime by the Scenes of Crime Police

officer, Detective Constable John Lokothwayo, were admitted by consent. Exhibits 1-11 show injuries sustained by Xolile Lulane in count one. Exhibits 12-14 show injuries sustained by Nomsa Sihlongonyane in respect of count two.

[19] PW8 Detective Constable Saneliso Simelane, the investigating officer, testified that on the 23<sup>rd</sup> September 2010, the police received a report of a murder case at Maphungwane. He proceeded to the Maziya homestead together to with Supt. Bhiza Dlamini and other police officers. They found many people gathered at the scene of crime; there were also police officers at the scene who were recording Statements from witnesses. PW7 and the other police officers who arrived with him at the scene of crime were shown the body of Xolile Lulane which was on the door-steps to a house, and, it was covered with a blanket. They examined the body to ascertain the injuries sustained by the deceased. They advised the police found at the scene that they should preserve the scene pending the arrival of police officers from the Scenes of Crime Unit.

[20] Upon their investigations, they found that the deceased in the first count had been stabbed to death by the accused. They further discovered that there was another victim of the accused, Nomsa Sihlongonyane, who had been conveyed to the Good Shepherd hospital. This is the deceased in the second count. Thereafter, they went to the parental homestead of the accused; they were met by PW1, the father of the accused. After introducing themselves to him, they informed him that they were looking for the accused. PW1 handed the accused

over to the police, and they introduced themselves to the accused. They told him that they were investigating the murder case of Xolile Lulane and the Assault with intent to cause Grievous Bodily Harm to Nomsa Sihlongonyane.

[21] They further informed the accused that he was a suspect in respect of both criminal cases. They cautioned him that he was not obliged to say anything or give them anything and that whatever he says or gives them would be used in evidence during the criminal trial. The accused opted to say something pertaining to the matter; he further asked his father to give the knife used in the commission of the offence to the police. The knife was about twelve to fifteen centimetres long. They took the knife as well as the accused to the police station where they charged the accused accordingly.

[22] Whilst interviewing the accused, they received a report that Nomsa Sihlongonyane had died. PW8 left for the hospital with another police officer. At Good Shepherd hospital, a nurse and a mortuary attendant showed them the body of the deceased which had stab wounds. Back at the police station, they charged the accused with the murder of the deceased. The accused asked to record a Statement with PW4 at the Siteki Magistrate's Court; and he was accompanied by Constable Nkonyane who was in charge of prosecution. The knife was handed over as an exhibit in the case.

[23] During cross-examination, the defence did not deny stabbing the deceased. PW8 was only asked if the accused appeared to be in his sober senses, and, whether or

not the accused had co-operated with police investigations. Both questions were answered in the affirmative; thereafter, the Crown closed its case.

[24] The accused in his defence testified that on the 23<sup>rd</sup> September 2010, he arrived at his parental home from his workplace at Mahlahlane area in the Lubombo region. He found the deceased Xolile Lulane at home with family members. His brother offered him a coke which was spiced with liquor; and, he felt a burning sensation in his chest when drinking it. He contends that he did not know that the coke was not genuine. His brothers laughed at him when he complained about the drink because he doesn't drink alcohol. Thereafter, he sent the deceased, Xolile Lulane, to fetch water from the river to wash his clothes. He heard the minor child crying, and, he was told that the deceased had gone to her parental home, which is also the homestead of Celimpilo Maziya, PW6 and PW7.

[25] He went to the Maziya homestead nearby to fetch money from Celimpilo Maziya; on arrival, he was told that he had gone to Mahlahlane area with a truck. As he left the Maziya homestead, he saw the truck driving back, and, he returned. He saw the deceased at the Maziya homestead, and, he was not aware that she was there. PW6 and PW7 were hiding the deceased from him; when he asked for the deceased, they ignored him. He felt his knees shaking; he went to the house where Xolile was hiding, and, he told her to go and attend the minor child at home. Since the deceased was also holding the handle from inside, the handle fell to the ground, and the door opened causing him to fall on the floor and

further hit the wall. Consequently, he suffered a blackout, and, when he gained consciousness, he was at his parental homestead; and, he did not know how he arrived there. His father told him that police had arrived at the homestead and were looking for him.

[26] The police arrested him and subsequently detained him at the police station. The police told him to record a Statement with them; they further told him to record a similar Statement to the Magistrate. However, he conceded that he never disclosed to the Magistrate that the police had told him the substance and content of the statement; and, the reason was that he was frightened of police retribution on his return to the police station.

[27] Under cross-examination, he conceded telling the magistrate that nobody had forced him to record the Statement. He further conceded that his attorney did not put to his father, PW1, that the accused drank coke spiced with alcohol; and, that the Court was hearing this piece of evidence for the first time during his evidence in-chief. He also conceded that it was not put to PW1 that in fact his brother Musa Nkambule and his friend Bheki Nkwanyane were at his parental homestead and gave him a coke spiced with alcohol; and, that the Court was hearing this piece of evidence for the first time. Similarly, he conceded that the evidence of his father, PW1, was not disputed that when he left his homestead for the garden, he left the accused in the company of the deceased Xolile Lulane and the minor child, and, everything was normal.

[28] The accused conceded that the evidence of PW7 was not disputed that the deceased, Xolile Lulane, came to the Maziya homestead because the accused was assaulting her. The accused's evidence that he came to the Maziya homestead because he was looking for Celimpilo Maziya was disputed by the Crown on the basis that when the accused saw the deceased hiding from him with the assistance of PW6 and PW7, he broke the door and killed the deceased. According to his evidence, he had already seen the truck coming from a distance; however, he did not wait for Celimpilo Maziya after killing the deceased.

[29] Similarly, the accused failed to explain why he was carrying a knife when he went to the Maziya homestead. He told the Court that he had taken the knife from home on the 19<sup>th</sup> September 2010 when he went back to his workplace in order to cut a wooden cooking pin on his way back home. He hid the knife along the way and only retrieved it on his way back. He told the Court that he came back in the company of Celimpilo Maziya; when asked by the Crown if Celimpilo Maziya would confirm seeing him retrieving the knife, he said he wouldn't know because Celimpilo Maziya was related to the deceased Xolile Lulane. However, he couldn't explain why he did not leave the knife at his homestead upon his return.

[30] The accused could not explain how he stabbed the deceased Xolile Lulane several times all over the body if he was unconscious. Furthermore, he could not explain how he reached his parental homestead after stabbing her if he was

indeed unconscious. However, he conceded that the evidence of PW7 was not disputed that he had threatened her that if she did not move away from the door, he would commit a criminal offence.

[31] The accused further conceded that the defence did not dispute the Crown's evidence that after stabbing Xolile Lulane, he proceeded to stab Nomsa Sihlongonyane; he said he doesn't know why he stabbed her. However, he could not confirm that he was unconscious when he stabbed the deceased in the second count. He further conceded handing over the knife to his father, PW1, after walking home. The accused also conceded that he did not tell his father, PW1, that Musa Nkambule and Bheki Nkwanyane had given him liquor before his arrest. He further conceded that he did not tell the magistrate, PW4, that he was given alcohol by Musa Nkambule and Bheki Nkwanyane before his arrest.

[32] The accused also conceded that defence did not dispute the evidence of PW2 that he trapped Nomsa Sihlongonyane and she fell to the ground before he stabbed her; however, the accused could not explain how this could happen if he was unconscious. He further conceded that his evidence that he fell and hit the wall when the door was opened was new, and, that it was never put to Crown witnesses.

[33] Towards the end of the cross-examination, the accused changed his version of the story and said he committed the offences not because he had taken coke mixed with alcohol but he was unconscious after falling on the floor at the homestead of



Celimpilo Maziya and further hitting the wall. When asked by the Crown if he was drunk when he committed the offences, he denied intoxication and said that he was only dizzy. When asked by the Crown if he fell along the way from his parental homestead to the Maziya homestead, the answer was in the negative. He conceded that after drinking the coke mixed with alcohol, he never complained of dizziness because he was still normal.

[34] It is apparent from the evidence that the '*actus reus*' or the unlawful killing of both deceased is not in issue. The accused in his confession before PW4 and PW5 admitted to the unlawful killing of both deceased persons. The evidence of PW2 and PW3 does show that the accused stabbed the deceased in count 2 causing her death. The evidence of PW6 and PW7 shows that the accused unlawfully killed the deceased in count one in their presence notwithstanding their attempt to intervene. PW1 led evidence which was not disputed that the accused handed over to him the knife which was used in the commission of the offences.

[35] The only issue before Court is whether or not the accused had *mens rea* to commit the offences. During the evidence in-chief, the accused said he fell when the door was opened and hit his head against a wall; thereafter he became unconscious and does not recall what happened, and, that he only gained consciousness when he arrived at his parental homestead. As stated in the previous paragraphs, the evidence of the accused is false when considering that

he could not explain why he was able to stab Xolile Lulane several times with the knife if he was unconscious. He could not explain how he subsequently stabbed Nomsa Sihlongonyane on his way home if he was unconscious. Similarly, he could not explain how he was able to walk home unassisted if he was unconscious. He admitted that he was not drunk, and alleged that he was merely dizzy.

[36] I am satisfied that the Crown has proved the commission of the offence beyond reasonable doubt. It is common cause that the accused stabbed both deceased persons several times and inflicted upon them multiple injuries. When he committed the offences, he appreciated the possibility of their death but was reckless whether or not death resulted. In *Mazibuko Vincent v. Rex* 1982-1986 SLR 377 at 380 (CA) *Hannah CJ* said:

**“A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not.”**

**See also the cases of *Rex v. Maphikelela Dlamini* 1979-1981 SLR 195 at 198 (CA), *Annah Lokudzinga Matherjwa v. Rex* 1970-1976 SLR 25 at 30 (CA).**

[37] In *Thandi Tiki Sihlongonyane v. Rex* Criminal Appeal No. 40/1997 at page 4, *Tebbutt JA* summarised the essential requirements of *dolus eventualis* as follows:

**“They are:**

- 1. Subjective foresight of the possibility, however remote, of the accused’s unlawful conduct causing death to another;**

**Persistence in such conduct, despite such foresight;**

- 2. The conscious taking of the risk of resultant death, not caring whether it ensues or not;**
- 3. The absence of actual intent to kill.”**

[38] At page 5 of his judgment, His Lordship stated:

**“In the case of *dolus eventualis*, it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e. if it can be said from all the circumstances that the accused must have known that his conduct could cause death, it can be inferred that he actually foresaw it.... The issue in *dolus eventualis* is whether the accused himself or herself foresaw the consequences of his or her act...”**

[39] The defence of unconsciousness advanced by the accused was not put to Crown witnesses for them to respond; hence, it is regarded as an afterthought. In *Elvis Mandlenkosi Dlamini v. Rex* Criminal Appeal No. 30/2011, I had occasion to say the following at para 22 and 23:

**“22. It is a trite principle of our law that the defence case should be put to the prosecution witnesses otherwise the evidence would be considered as an afterthought if disclosed for the first time during the accused’s evidence in-chief.**

**23. His Lordship Macdonald JP in *S. v. P.* 1974 (1) SA 581 (RAD) at 582 said:**

**“It would be difficult to over-emphasise the importance of putting the defence case to prosecution witnesses and it is certainly not a**

**reason for not doing so that the answer will almost certainly be a denial. The Court was entitled to see and hear the reaction of the witnesses to the vitally important allegation that the appellant was not even in possession of red sandals on the two occasions he was alleged to have worn them at the river. Quite apart from the necessity to put this specific allegation, there was in my opinion, a duty to put the general allegation that there had been a conspiracy to fabricate evidence. It is illogical for counsel to argue that there is a sufficient foundation in fact for a submission that the possible existence of such conspiracy is such as to cast doubt on the whole of the State case but insufficient fact on which to cross-examine the principal State witnesses. The trial Court was entitled to see and hear their reaction to an allegation that they had conspired with the persons and for the reasons mentioned in the course of the trial. They may have been able to satisfy the Court that an opportunity to enter into such a conspiracy never existed. So important is the duty to put the defence case that practitioners in doubt as to the correct course to follow, should err on the side of safety and either put the defence case, or seek guidance from the Court.”**

See also the case of *Rex v. Dominic Mngomezulu and Others* Criminal case No. 94/1990 (HC) at pp 16-18.

[40] With regard to the defence of unconsciousness, sane automatism or blackout, I have already indicated in the preceding paragraph that this defence constitutes an ‘afterthought’. In *Rex v. Aaron Fanyana Dlamini* 1979-1981 SLR 30 (HC) at 33-34, His Lordship Cohen ACJ stated:

**“As far as sane automatism is concerned, the Courts have stated that careful scrutiny is required of this defence which has become a popular defence.... It might be mentioned that amnesia by itself is no defence to a criminal charge.”**

[41] *Lewis J in Rex v. Johnson* 1970 (2) SA 405 (R) at 405-406 stated:

**“...amnesia in itself is not a defence to a criminal charge.... What it amounts to simply is this; that the accused, if the amnesia is genuine, is a person who cannot remember what happened. Therefore, it is the duty of the jury to scrutinize the Crown’s case with particular care to make sure that the crime has been brought home to such a person; it goes no further than that, when it is not associated with any form of mental disorder or unconscious action amounting to automatism.”**

[42] *Marais J in S. v. Trickett* 1973 (3) SA 525 (T) at 536-537 said:

**“Defences such as automatism and amnesia require to be carefully scrutinized. That they are supported by medical evidence, although of great assistance to the Court, will not necessarily relieve the Court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based upon the hypothesis that the accused is giving a truthful account of the events in question....**

**The conclusion to which I come is that in order effectively to raise the defence of sane automatism such as relied on in the present appeal there must, firstly, be evidence sufficiently cogent to raise a reasonable doubt as to the voluntary nature of the *actus reus* alleged in the indictment and secondly, medical or other expert evidence to show that the involuntary or unconscious nature of the *actus reus* is quite possibly due to causes other than mental illness or disorder.”**

[43] *Dambutshena CJ in S. v. Evans* 1985 (2) SA (ZS) at 875 defines a “blackout” as a temporary loss of vision, consciousness or memory. His Lordship concludes by

saying that a person suffering from a blackout is rendered passive or inactive by the loss of consciousness and is incapable of doing anything.

[44] The prosecution has shown that the defence raised by the accused is not supported by the evidence. The conduct of the accused as analysed in the preceding paragraphs is inconsistent with a person who was unconscious or who was suffering from a 'blackout'. It is apparent from the evidence that initially the accused pleaded that he was 'dizzy' when he committed the offence because of drinking coke mixed with alcohol. However, he conceded that he was not intoxicated but dizzy.

[45] Accordingly, I find the accused guilty of murder on both counts. The next inquiry is whether there are any extenuating circumstances in this matter which could reduce the moral blameworthiness of the accused. Extenuating circumstances are facts bearing on the commission of the offence which reduce the moral blameworthiness of the accused. The onus of proving the existence of extenuating circumstances rests upon the accused. It is well-settled that youth alone cannot be an extenuating circumstance unless combined with other factors; however, it has to be proved that such a combination of factors had an effect on the accused's state of mind and emotions in committing the offences.

See the cases of *Philemon Mdluli and Others v. Rex* 1970-1976 SLR 69 at 75; *Mbuyisa v. Rex* 1979-1981 SLR 283 (CA) at 385, *Nkosi Sifiso v. Rex* 1987-1995 (4) SLR 303 (HC) at 309, and *Mbhamali v. Rex* 1987-1995(3) SLR 58 (CA) at 62.

I accept that the accused is young and certainly immature. However, this does not suffice. In the circumstances the accused is convicted of murder without extenuating circumstances.

[46] Section 295 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides the following:

**“295. (1) If a person is convicted 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.**

**(2) 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.”**

[47] In mitigation of sentence the defence has argued that the accused was a young man of twenty-one years of age when he committed the offence, illiterate and having dropped out of school in standard three, a first offender who has shown remorse by pleading guilty to culpable homicide, and that the accused is the sole breadwinner of a minor child born by the deceased Xolile Lulane.

[48] The Crown has highlighted the existence of aggravating factors: firstly, that the accused assaulted the deceased Xolile Lulane, and, when she ran away to her parental homestead for assistance, he pursued her and eventually killed her in cold blood. Secondly, at the Maziya homestead, he threatened PW7 with physical harm when she intervened and blocked his way into the house where Xolile Lulane was hiding. Thirdly, he kicked and broke the door to gain entry into the house, and, he stabbed Xolile Lulane repeatedly several times and caused fourteen injuries until she died. Fourthly, both deceased were women, defenceless and not armed. Fifthly, both killings were not provoked, and both sustained multiple stab wounds. Lastly, the killings were cruel, savage and shocking to the extreme. The repeated stabbings show beyond reasonable doubt that the accused intended to kill the deceased at all costs.

[49] In passing sentence I will consider the triad by balancing the personal circumstances of the accused, the interests of society as well as the seriousness of the offences. I have dealt with the personal circumstances of the accused when dealing with mitigating factors. The offences for which the accused has been convicted are very serious as reflected in the aggravating factors outlined in the preceding paragraph. Suffice to say that in this country, offences of this nature where law abiding citizens are killed and slaughtered like animals and without provocation are on the increase; this Court has a duty to protect them against people who have no regard for the right to life.



[50] In the absence of extenuating circumstances, the law allows for a death penalty. Section 15 (1) of the Constitution provides the following:

**“15. (1) A person shall not be deprived of life intentionally save in the execution of the sentence of a Court in respect of a criminal offence under the law of Swaziland of which that person has been convicted.**

**(2) The death penalty shall not be mandatory.**

**(3) A sentence of life imprisonment shall not be less than twenty-five years.”**

[51] I have decided to exercise my discretion in terms of section 15 (2) of the Constitution and not impose a death penalty notwithstanding that this is an unprovoked double murder case in which innocent lives were lost. The offences did not arise from the same transaction; they were committed in different circumstances.

[52] Section 15 (3) of the Constitution provides that a sentence of life imprisonment shall not be less than twenty-five years. There is a tendency by our Court to interpret this sub-section as laying down the maximum sentence. In reality the sub-section has sets a minimum sentence of twenty-five years in those instances where the Court has exercised its discretion not to impose a death penalty. This misconception and misinterpretation of the law has resulted in the imposition of very low sentences in situations where the accused have been convicted of murder without extenuating circumstances.

[53] Accordingly, I sentence the accused to thirty years imprisonment in respect of the first count, and another thirty years in respect of the second count. The sentences will run consecutively backdated to the date of his arrest on the 23<sup>rd</sup> September 2010.

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**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For Crown

Senior Crown Counsel A. Makhanya

For Defence

Attorney B. Dlamini