



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 118/2012

In the matter between

**REX**

and

**BEZILE SIKHALA KHUMALO**

**Neutral citation:** *Rex v Bezile Sikhala Khumalo* (118/12) [2013] SZHC  
203 (18<sup>th</sup> September 2013)

**Coram:** Mamba J

**Heard:** 3,4,8 April & 19 June, 2013

**Delivered:** 18 September, 2013

- [1] Criminal Law – murder – deceased last seen alive with accused and later found dead and some of his belongings with the accused who was his close friend. Accused saying that items given to him for safe keeping.
- [2] Law of Evidence – cogency and reliability of evidence by crown witness. Crown case based on circumstantial evidence – test for reasoning by inference restated.
- [3] Practice and Procedure – Accused shown to have told a lie on a specific issue – that is no evidence of his guilt or that the court should therefore reject his whole version. If version may reasonably possibly be true, accused to be given the benefit of that doubt and be acquitted.

- [1] On the first count, the accused is charged with the offence of murder. It is alleged that on or about 23 June, 2011 and at or near Ezulwini area in the Hhohho region he unlawfully and intentionally killed Ayanda Dlamini. On the 2<sup>nd</sup> count it is alleged that on 14 July 2011 at Enshakabili in the region of Hhohho he unlawfully and intentionally assaulted Juliet Nokuthula Dlamini. He pleaded not guilty to both counts.
- [2] The crown led ten witnesses in its quest to establish its case against the accused.
- [3] It is common ground that the accused and the deceased were relatives and very close friends. The mother of the accused is the deceased's father's sister. At the time of his death, the deceased was employed as a soldier in the Umbutfo Swaziland Defence Force and was stationed at the barracks at EPhocweni. He had returned home on 20 June 2011 as he was on leave. The accused was employed by SNS Refrigeration at the relevant time.
- [4] It is also common ground that on 23 June 2011, the accused visited the deceased at his home at Ezulwini during the morning hours. They subsequently left the homestead together. According to PW3, Winile

Sibanyoni, the accused asked the deceased to accompany him to the bank as he wanted to find out if his employer had deposited his salary or wages into his bank account. Apparently, the deceased wanted to go to the bank for the same purpose.

- [5] It is common cause further that the two were together for the whole of that day. They travelled to the various shops in Ezulwini, Gables Shopping Centre, went to Mdzimba mountain barracks to gather firewood for the wedding festivities that were underway at the home of the deceased, tried to go to Siteki at the home of one of the deceased's girlfriend in order for the deceased to collect some of his belongings there but aborted the trip at Malindza when PW5, Vusi Msibi, the taxi man the deceased had hired to transport them that day, told them his motor vehicle was overheating and they would not be able to make the journey to Siteki and return to Ezulwini. (This was of course not true. The truth was that it was already at night and PW5 did not want to travel any further). All the while, the accused and the deceased were drinking alcoholic drinks. On their way back from Malindza, they stopped near the Manzini Police Station where Msizi Dlamini, a brother to the deceased was stationed as a police officer. Msizi advised them to go home as they were too drunk and it was already at night.

[6] From Manzini, they travelled to a bar at Eteni in Matsapha and there they continued drinking. From there they went to another bar known as Bizzah's place. Both the accused and the deceased went into the bar whilst PW5 remained in the motor vehicle. About 15 minutes later, PW5 went into the bar and found the accused standing or leaning against a wall and carrying beers. The disc jockey therein told him that certain boys in the bar wanted to assault the deceased. That misunderstanding was, however, amicably settled and PW5 and his companions left the bar. Their destinations were their homes but before reaching Ezulwini PW5 was instructed by the pair to drive them to eGogogweni KaBhellinah to check on someone known as Ntchu where both accused and deceased went in leaving PW5 in the motor vehicle. They returned a few minutes later with Ntchu. They were also carrying beers. Pw5 was instructed to drive them to KaMchoza bar at eZulwini, which he did. This was around 10.30 p.m.

[7] Once at KaMchoza bar, the accused and his companions continued imbibing in alcoholic drinks and they released, PW5 to go on his way as they said they would reach their respective homes comfortably without his help. PW5 had been paid a sum of E600-00 at Manzini by the deceased for his services

– transporting the accused and the deceased that day. It would also seem that it was the deceased alone who was buying and paying for the drinks in question. This court was not told by anyone what became of Ntchu.

[8] All the above facts are common cause – they show or exhibit the closeness of the relationship or friendship between the accused and the deceased; their state of sobriety at the relevant time and perhaps the generosity or lack of frugality on the part of the deceased that day.

[9] Nokuthula Juliet Dlamini is the complainant on count two. She gave evidence as PW6. She was one of the girlfriends of the accused at the time and she had a child fathered by him. She confirmed that earlier that day ie 23 June 2011 both the accused and deceased had been to her house at Ezulwini. They left for Matsapha and said they wanted to check if their respective salaries had been deposited into their accounts by their employers. According to PW6, the two later returned to her house and the accused told her that his wages had not been credited into his bank account. He promised to check again the next day. He left together with the deceased and they said they were going to their respective homes. Later at around 6 pm, the accused telephoned her and told her that they were at Bizzah's place and

certain boys wanted to harm the deceased. She told him to come back home. He returned home – to her house – at about 3 am the next day.

[10] She testified that when the accused came into the house she was busy breastfeeding her baby. The accused set at the edge of the bed facing down and appeared tired. On being asked why he looked tired, the accused simply said no one at Ezulwini could beat or defeat him. On being asked about the whereabouts of the deceased – presumably following the reported incident at Bizzah's – the accused told her that the deceased did not want to go home and this had resulted in a fight between them. He said he had not injured the deceased but on being pressed further on the issue, the accused said he was joking and he had parted with the deceased near KaNyatsi homestead. To this, PW6 retorted that should the deceased die, the police would suspect the accused to which the accused said he did not care or mind.

[11] Nokuthula testified that as the accused tried to find food in her house, she noticed that his hands and trousers were muddy and blood stained. Again he denied having assaulted the deceased and attributed the blood stains to the meat they had roasted at KaMchoza bar.

- [12] Because of his state of cleanliness. PW6 refused the accused to sleep on her bed. He slept on a foam mattress that was used by another baby on the floor. Whilst the accused was fast asleep, PW6 searched his pockets and there found a wallet, the deceased's National Identity Card and other cards.
- [13] The accused woke up at about 5.30 a.m. and immediately said: "my wallet my wallet". After locating it he told her that the wallet belonged to the deceased who had asked him to keep it for him. He also informed her that the deceased had not given him the money he had promised to give him as a loan. He then produced E20.00 from a wallet and gave it to her. When this witness protested that this sum was too little for their baby's needs, the accused hit her with the E20.00 note, which he later gave to her sister to buy emasi for the child. PW6 was furious with his behavior and she immediately left him in the house with the baby.
- [14] When she returned to the house, she found him there drunk and he said he had been given free alcohol at Riba's. The accused then left saying he was going to the deceased's house to give the deceased his wallet and cards. However, he returned to say that he had found no one at the deceased's place. When the accused was later advised by PW6 to give the deceased's

wallet and cards to his mother, the accused refused. He justified his refusal by saying that the mother of the deceased would use the bank card to withdraw his money from the bank.

[15] PW6 explained that in the deceased's wallet, she had seen money in excess of E100.00 made up of E100.00, E10.00 and R20.00 notes. She also told the court that she had dissuaded the accused from trying to use the deceased's bank card to withdraw money from his bank account through the Auto Teller Machine service.

[16] Nokuthula also stated that the accused had told her that he had fought with the deceased because the latter was boasting that he was a soldier and had a lot of money or was rich.

[17] Regarding the second count, PW6 stated that on the day in question she had met the accused who was in the company of one of his girlfriends. This other woman was wearing PW6's jacket and carrying her mobile telephone. An argument ensued between the two women and the accused attempted to assault her. He was prevented from doing so by the timely intervention of Mr Matimela and the other women there. I note, however, that under cross



examination PW6 said that the accused actually hit her with the back of his hand.

[18] The evidence of Busisiwe T. Hlatshwayo PW7, was very short and pertains to the conversation he had with the accused after the disappearance of the deceased. The accused informed PW7 that his cousin, the deceased had been found dead and he, the accused had been the last person seen with him alive. The accused said he did not know how the deceased had met his death. This witness advised or assured the accused that there was nothing wrong or sinister in the police questioning him under those circumstances. The accused wanted this to be reported to his grandmother.

[19] PW8, Mlungisi Bheka Dlamini, testified that sometime in July, 2011, the accused sold him an LG mobile telephone for a sum of E100.00 on or around 13 July 2011. The accused retrieved this telephone from under a mattress in his house. PW8 did not pay for the telephone then but promised to pay for it at the end of that month, ie July 2011. His evidence is corroborated by PW9. He gave this telephone to his girlfriend to use. It was later impounded or confiscated by the police. This telephone, it was common cause, belonged to the deceased and was handed in as exhibit 7 by

PW10. This mobile telephone was seized from PW8 by PW10 on 12 August 2011.

[20] The body of the deceased was found in the Mbabane river at Ezulwini on 9 July, 2011. It was examined by a pathologist on 13 July 2011

[21] The pathologist noted that the body was in a state of decomposition and the skin was peeling off. The Doctor observed;

‘a cut wound on the middle portion of the left side of the top of the head, a contusion on the left side of the forehead, a lacerated wound... on the rightside of the chin and adjacent to the right angle of the mouth and that the soft tissues on the body and face (skin, muscle etc) had been eaten away by aquatic animals, like crabs. These wounds were ante mortem. The pathologist came to the conclusion, after examining the body, that the death was ‘due to multiple injuries and throttling.’

This report was handed in by consent as exhibit C. It was also recorded that this exhibit pertained to or was in respect of the body of the deceased herein who was identified to the pathologist by his father Mr Hhansense Dlamini, PW4.

[22] PW4 testified that on 29 June 2011 he received a call from Gonso, one of the deceased's superiors at Phocweni Army Barracks, that the deceased had not reported for work. He was also informed that a certain young man had come to the said barracks with the deceased's wallet, identity and Nedbank cards but had been turned away with these items from the barracks. He subsequently called the accused on his mobile telephone and the accused confirmed that he was in possession of these items belonging to the deceased. On being asked by PW4 of the whereabouts of the deceased, the accused said he did not know where deceased was. Later PW4 instructed PW2, Shuqile Dlamini, his daughter, to go to the mother of the accused to get the said items.

[23] When the accused was arrested on 15 July 2011, PW10 seized a vest and a pair of jean trousers (exh 4 and 5) from him and a greyish sweater (exh 3) and brown Arno pair of shoes (exh 6) were obtained from PW 6's house. These are the items that the accused wore on the night he was last seen with the deceased. They had been washed then. This was also confirmed by PW6.

[24] It is not insignificant that all the above items were taken for forensic examination and analysis by the police. PW10 told the court that the results of this examination was negative.’ By that I understood him to be saying that there was nothing thereon incriminating the accused.

[25] That, in a summary form is the evidence of the crown herein.

[26] At the close of the crown case, the defence applied for the discharge and acquittal of the accused in terms of section 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938. It was submitted by the defence that there was no evidence implicating the accused in this matter.

[27] After hearing submissions by the crown in opposition to the said application, I refused the application and held that there was evidence implicating the accused in this case. This evidence, I ruled, consisted of the evidence of PW6 who told the court that the accused had told her that he had had a fight with the deceased and that the cloths worn by the accused at the relevant time (morning) were blood stained and so were his hands. There was also the evidence that he was the last person to be seen with the deceased alive on that night. Further, the evidence that certain items of the deceased were

found in the possession of the accused after the disappearance of the former. Also implicating him was the evidence by PW8 and PW9 that the accused had sold the deceased's mobile telephone to PW8. Further, PW6 testified that the accused had suggested to her that they should go to the bank and use the deceased's bank card to withdraw money from his bank account. This I reasoned, suggested that the accused was aware that the deceased had died and would not be in a position to know that his bank card had been fraudulently used to withdraw his money from his bank account. And, in relation to the deceased's wallet, bank card and national identity card, it was instructive and indeed incriminating that when the deceased's body was found, the pockets of his trousers were turned inside out, suggesting that he had been pick-pocketed.

[28] The accused gave sworn testimony and did not call any witness.

[29] In his evidence the accused confirmed that he had been with the deceased on 23 June 2011. He also substantially confirmed that they had been together and had visited the various places mentioned by the crown witnesses on that day and that they spent most of the 23<sup>rd</sup> June drinking alcoholic drinks. His

evidence is substantially the same as that of Vusi Msibi, the taxi man who ferried them around for most part of that day.

[30] There are however minor differences in his evidence and that of Vusi Msibi. The accused told the court that the reason they aborted the trip to Siteki that night was because Msibi said the motor vehicle was overheating and the fuel therein was not sufficient for them to return to eZulwini. Msibi did not mention the issue of shortage or insufficiency of the fuel. Another point of difference is that Msibi testified that he reported his departure to the deceased and the accused when he left them at KaMchoza bar. The accused said that Msibi did not do so, but when they went out to look for him outside the bar, they did not find him there. He had gone. I have referred to these differences as minor simply because they do not affect the substance and credibility of either of the witnesses herein.

[31] The accused told the court that he was in the bar at Kamchoza until about 215 am on 24 June 2011. They were still drinking liquor and it was at this time that the deceased told him that he was feeling cold and they should leave for their respective homes. He gave the deceased one of his T-shirts to wear as a result. He said they walked together and when they reached

Midway Supermarket the deceased gave him his wallet and cellular telephone to keep for him. In the wallet was the deceased's bank card and National Identity card plus a sum of E35.00.

[32] The accused, told the court that they walked together towards KaNyatsi near the Police post and because the deceased was too drunk, the accused suggested to him that he should go and spend the night at his rented place. The deceased declined this offer and said he would manage to go home on his own. They separated and went towards their respective destinations, promising to meet later that morning at about 10 am either at the accused's house or PW6's place. This was the last time that the accused saw the deceased alive. The accused stated that that area of eZulwini was infested with thugs or hooligans.

[33] The accused said he and the accused never quarreled that night or morning and they parted peacefully. He denied that he told PW6 that he had a fight with the deceased. He denied also that he arrived at PW6's place at 3.00 am but said he got there about 2-3 hours later and this was by arrangement with her. He explained that his child was not well and PW6 had to go to work so he had to look after the child whilst she was away. The accused denied

further that his cloths and hands were soiled and blood-stained. He explained further that when he could not meet the deceased as planned or arranged, he went about looking for him. He made enquiries on his whereabouts at his home and also consulted his brother Mfanfikile Lukhele. On Monday 27 June, 2011 he went to look for the deceased at his place of employment and he took with him the deceased's wallet and cards. There he was informed that the deceased had not reported for work. He was not allowed to leave the deceased's wallet and cards there. Later these were to be surrendered to the deceased's family after PW4 instructed the accused to do so.

[34] The accused denied that he sold the mobile telephone belonging to the deceased to PW8. He said he lent it to him and specifically told him that it belonged to his cousin and PW8 would have to return it to him once his cousin returned. The accused stated that he valued the telephone to be worth E500.00 and would never have sold it to anyone for E100.00.

[35] I have detailed above, the bits and pieces of evidence that seem to implicate the accused herein. There was no eye witness as to what caused the tragic death of the deceased. Other than the confession of a fight between the



accused and the deceased allegedly made by the accused to PW6, the case for the crown is based on circumstantial evidence.

[36] PW6, as stated above, is the complainant on count two. At the commission of both offences she was one of three or four girlfriends of the accused in the Ezulwini area. PW6 had at the time an infant that was fathered by the accused. I think it is also fair to say that PW6 thought that the accused was not adequately maintaining their child such that on 23 June, 2011 she asked the deceased to lend some money to the accused so that they could have food for the child. Again, on 24 June 2011 when PW6 asked for money to buy food for the child, the accused was only able to give her a sum of E20.00. PW6 protested at this saying that this sum was too little and accused hit her with the E20 note.

[37] It is also clear to me that there was very little trust between the two. For instance, after the accused fell asleep on the floor on 24 June, 2011, PW6 secretly searched his pockets for money. She told the court that she had to do it secretly because she feared that the accused would assault her if he realized what she was doing.

[38] The Accused, as already stated, denied that he told PW6 that he had had a fight with the deceased or that his clothes and hands were muddy and bloodstained. At least regarding his clothing, his evidence appears to be supported by the evidence of the Police who told the court that there was no incriminating evidence found on the accused's clothes when these were subjected to forensic examination or analysis.

[39] The evidence of PW6 on count two is very brief and short on details. There is certainly no evidence of what the accused actually did other than that he wanted to assault PW6 and the situation was calmed down by the intervention of Matimela. I cannot, based on such evidence conclude that a case of assault has been proven by the crown on the required standard of proof.

[40] From the above evidence, it is plain to me that PW6 was not a neutral and disinterested witness in this case. She clearly was not in good terms with the accused notwithstanding that she was the mother of his child. One has to also take into account her rather startling evidence that the accused invited her to accompany him to the bank to withdraw money using the ATM card of the deceased. I say startling because I cannot see how the accused could

have even thought of doing so when he did not know the accused's Personal Identity Number (PIN) on that account. It is common cause that since the arrest and detention of the accused, PW6 has never visited him in custody. The only reason PW6 gave for her failure to do so was that she was now romantically involved with another man and it would be insensitive and inappropriate for her to do so. This may be partly understandable for present purposes, but the said romance was not there at the time of the arrest of the accused. Or if it was already there, the visitations were not inappropriate as the accused was allowed to visit her then.

[41] Overall, as a witness, PW6 did not appear to me as a truthful and reliable witness of the truth. Her demeanour and reactions to questions pertaining to the accused was always argumentative and clearly geared to portray him as guilty of the crimes herein. It was this demeanour and apparent disposition that prompted this court to ask her if she still loved the accused. Again, she did not directly answer this question but told the court that she was now in love with another man. Her evidence of bloodstains on the clothes of the deceased at the material time, could not be confirmed by Police investigation.

[42] I have already referred to the close relationship that existed between the accused and the deceased at the time. The two were not just friends but relatives. They were apparently together for the whole day on 23 June, 2011 and part of the morning of the next day. There is no suggestion in the evidence before me that the two ever quarrelled with each other on this crucial and material time or at any time prior thereto. On the contrary, the evidence points in the direction of a good and cordial relationship between them.

[43] For his part, the accused told the court that he was given the mobile telephone, wallet and cards belonging to the deceased by the deceased. The object was for the accused to keep these on behalf of the deceased until the following day or later that morning. The accused never tried to conceal this fact. Indeed on 27 June 2011 he attempted to hand these items to the superiors of the deceased at Phocweni Army Barracks. I do not find this as consistent with the actions of a person who is guilty of the murder of the deceased in the circumstances. The crown has submitted that I should infer that the accused did this as an act of misleading the investigation that he knew was afoot to find the killer or killers of the deceased. He was thus

being the guilty man playing innocent. This may be true but it is not the only reasonable inference that may be drawn from his action.

[44] In *Shongwe, Lucas v R, 2000-2005 (1) SLR 136 at 142* this court per Masuku and Maphalala JJ referred with approval to the well known judgment in *S v Pepenene 1974 (1) SA 216 (O) at 219* where the court stated that:

‘All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error, because the court may be mistaken in its reasoning. The inference which it draws may be a *non sequitur*, or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible ... .

In reasoning by inference there are two cardinal rules of logic which cannot be ignored.

- (i) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (ii) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there

must be a doubt whether the inference sought to be drawn is correct.’

[45] Lastly, mention must be made of the actions of the accused in dealing with the mobile telephone belonging to the deceased. PW8 said he sold it to him. The accused has denied this. Whether he sold it or lent it to PW8 does not in my judgment support the inference that he had killed the deceased or stolen the cellular telephone from him. It is reasonably possible that he was given the telephone by the deceased for safe keeping that fateful night but after noticing that the deceased had disappeared decided to sell it to PW8. I again, emphasise, it is a reasonable possibility and nothing more. PW8 said the phone was sold to him on or about 13 July, 2011. This was after the discovery of the body of the deceased, on 9 July 2011. One should also bear in mind that the accused had been arrested and released on 10<sup>th</sup> July 2011. This piece of evidence of course makes it unlikely that the accused would have told PW8 that the telephone belonged to his cousin and that he would want it back from him once his cousin had resurfaced. By that time he knew that his cousin had died as his corpse had been discovered on 9<sup>th</sup> July, 2011. But the fact that the accused has been shown to have lied on this point does not, in law, prove beyond any reasonable doubt that he killed the deceased.

Experience has taught the courts that witnesses, even innocent persons, do lie even when it is not necessary to do so. The reasons for these are legion and may vary from one case to the other.

[46] For the foregoing reasons, I hold that the crown has failed to prove beyond a reasonable doubt that the accused committed any of the two counts herein, consequently he is found not guilty on both counts and he is acquitted and discharged.

**MAMBA J**

**For the Crown : Mr. T. Dlamini**

**For the Accused : Ms N. Ndlangamandla**