



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Criminal Case No: 78/05**

**In the matter between**

**REX**

**Versus**

**NHLANHLA MDAKA MOTSA**

**ACCUSED**

Neutral citation: *Rex v Nhlanhla Mdaka Motsa (78/05)* [2014]SZHC 142  
(17 July 2014)

**Coram: M. S. SIMELANE J**

**Heard: 17 JUNE 2014**

**Delivered: 17 JULY 2014**

**Summary: Criminal procedure – Murder – Culpable Homicide – statement of agreed facts – Accused found guilty and convicted on a charge of Culpable Homicide.**

### **Judgment**

#### **SIMELANE J**

[1] The Accused person was arraigned before me on 18 June 2014 charged with the offence of murder. When the charge was put to him and fully interpreted in Siswati he indicated that he understood the charge and pleaded guilty to a lesser charge of Culpable Homicide. The plea was confirmed by learned defence Counsel Mr M. Sithole. At that stage Mr B. Magagula, learned Crown Counsel, told the Court that the parties had prepared a statement of agreed facts which they wished to tender in Court as evidence. This was confirmed by learned defence Counsel.

[2] The statement of agreed facts was read and explained to the Accused in Siswati. He accepted it as true and correct. Thereafter, the statement of agreed facts was admitted in evidence and marked Exhibit “A”. The statement of agreed facts states as follows:

**“1. The accused has pleaded guilty to the lesser charge of Culpable Homicide and the Crown has accepted the plea.**

2. **That on 22<sup>nd</sup> June 2002, Busisiwe Matsebula (Mrs. Motsa) (PW2) went to visit the deceased who was staying with Victoria Simelane (PW1). PW1 told PW2 to go home because it was late.**
3. **PW2 asked to talk to the deceased. PW2 eventually came out of the house. The deceased also came out and went with PW2.**
4. **On the way, the deceased and PW2 decided to have sexual intercourse. They went to a bush and started engaging in sexual intercourse.**
5. **The accused then appeared and found the two (2) engaging in sexual intercourse. He confronted and assaulted both of them with a bush knife which he was carrying.**
6. **PW2 was hit on the left arm and deceased was hit on the head. Both were injured, but the deceased was more severely injured.**
7. **The accused left them there and went to raise an alarm. He came across David Ndiya Gamedze (PW3). The accused told PW3 that he had killed PW2 and the deceased. He told PW3 further that he had found them engaging in sexual intercourse. PW 3 and the accused went to where the accused had left PW2 and the deceased but they were nowhere to be found.**
8. **PW3 and the accused then went to report to PW1 what had happened. When they got there they could not talk to PW1. PW2 then appeared. She was asked where the deceased was**

and she led the accused and PW3 to where she left him. The deceased was not found there.

9. The following morning PW2 went to where PW1 was residing and asked to see the deceased. Ncamsile Matse (PW4) told her to go look for him in his bed room. When PW2 went there, the deceased was not there. PW2 then started crying. She was asked why she is crying and she stated that the accused found her with the deceased and struck them with a bush knife. She then left.
10. The Accused also came to the homestead. He told PW1 who was with PW4 that he had finished with the deceased and PW2. He then left.
11. On 6<sup>th</sup> July 2002 Sibongile Motsa (PW5) discovered the body of the deceased in a bush next to her marital homestead. The discovery was confirmed by Falaza Armstrong Motsa (PW6). Next to the body of the deceased was a knife and the bush knife that the accused had used on him. Community police were informed who in turn informed police officers from Sidvokodvo Police Station.
12. On 11<sup>th</sup> July 2002, the body of the deceased was examined by Dr. Komma Reddy (PW10) to determine the cause of death. According to the post mortem report death resulted “due to Multiple Injuries”. Two (2) chop wounds were noted on the head. One measuring 9 x 1cm and another measuring 5 x 1cm. There was also noted a cut wound of 2cm in the palm of the right hand.

13. **On 13<sup>th</sup> July 2002 the accused was arrested at Malkerns.**
14. **The accused admits and acknowledges that the death of the deceased was brought about by his unlawful and negligent conduct which he attributes to finding his wife having sexual intercourse with the deceased.**
15. **He further accepts that there was no intervening cause of death.**
16. **That this statement of agreed facts, knife, bush knife and the post mortem report be submitted as evidence in this matter.”**

[3] The parties also by consent tendered a post-mortem report which was admitted by the Court as Exhibit “B”. The postmortem report reflects the following antemortem injuries as observed by the pathologist Dr. Komma Reddy.

- “1. A chop wound of 9 x 1 cms present over the left parietal eminence of the head.**
- 2. A chop wound of 5 x 1 cms present on the front of the forehead in the middle portion.**
- 3. A cut wound of 2 cms present in the palm of right hand.”**

[4] The parties also handed in by consent a silver knife which was admitted as Exhibit 1. It was submitted as one of the weapons that were used in the commission of the offence.

- [5] The parties further handed in Court by consent a bush knife which is black with a brown handle. It was also admitted and marked Exhibit 2. It was submitted as one of the weapons that were used in the commission of the offence.
- [6] Having carefully considered the statement of agreed facts together with the other exhibits tendered, it is clear to me that the Crown has proved beyond reasonable doubt the offence of Culpable Homicide. I say this because the Accused himself has admitted to having confronted and negligently assaulting the deceased with a bush knife, which he was carrying. He further admitted that he hit the deceased more severely on the head. That the deceased was hit on the head finds corroboration in the evidence of Dr Komma Reddy as per the antermortem injuries alluded to by the Doctor which injuries are on the head.
- [7] The Accused unlawfully and negligently killed the deceased. It is established that the deceased died as a result of injuries sustained from being chopped by the Accused on the head.
- [8] I agree fully that there was no intention by the Accused to kill the deceased. He chopped the deceased with the bush knife because he found him having sexual intercourse with his wife in a bush. The Accused confronted the deceased and Accused wife and thereafter assaulted both of them but severely hitting the deceased with the bush knife.

[9] The facts of this case show that the Accused was provoked into killing the deceased whom he came upon having sexual intercourse with his wife. The Crown has proved the offence of Culpable Homicide in terms of Sections 2 and 3 of the Homicide Act 44/1959 which state as follows:-

**“2. (1) A person who-**

- (a) unlawfully kills another under circumstances which but for this section would constitute murder, and**
- (b) does the act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool;**

**Shall only be guilty of culpable homicide.**

**(2) This section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.**

**3.(1) Subject to this section “provocation” means and includes any wrongful act or insult of such nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.**

- (2) **In this section “an ordinary person” means an ordinary person of the class of the community to which the accused person belongs.**
- (3) **If such act or insult is done or offered by one person to another or, in the presence of another, to a person who is under the immediate care of such other or to whom the latter stands in any relation referred to in subsection (1), the former is said to give the latter provocation for an assault.**
- (4) **A lawful act shall not be provocation to any person for an assault.**
- (5) **An act done by a person in consequence of incitement gives by another in order to induce him to do such act and thereby to furnish an excuse for committing an assault shall not be provocation to such other for an assault.**
- (6) **An arrest which is unlawful is not necessarily provocation for an assault but it may be evidence of provocation to a person who knows of the illegality.”**

[10] More to the above is that the evidence discloses the unlawful negligent causing of the death of a fellow human being which clearly founds the offence of Culpable Homicide. Case law has distinguished the offences of Murder and Culpable Homicide in the following words:-

**“Murder is the unlawful killing of a human being with intent to kill. Where this intent is absent, the offence is Culpable Homicide... A**



**definition of Culpable Homicide is the unlawful negligent causing of the death of a fellow being. See R V Mbekezeli Wiseman Dlamini and Others Criminal Case No. 370/09, R V Nhlonipho Mpendulo Sithole Criminal Case No. 370/11.”**

[11] For the above stated reasons, the Accused is hereby convicted on his own plea of guilty to the offence of Culpable Homicide.

[12] **SENTENCE**

The learned Crown Counsel informed the Court that the Accused is a first offender.

[13] In mitigation of sentence the defence Counsel submitted the following factors.

- (1) The Accused person is sixty years old.
- (2) The Accused is married with seven (7) children, two (2) of whom are school going.
- (3) He is not employed and was not employed even at the time of the commission of the offence.
- (4) He has complied with all bail conditions imposed on him upon his release on bail in May 2003.

- (5) He was remorseful and demonstrated same by pleading guilty to the offence of Culpable Homicide.
- (6) The Accused was greatly traumatized by the incident.
- (7) May the Court consider a wholly suspended sentence.

[14] In passing sentence on the Accused I have considered the triad consisting of the offence, the offender and the interest of the society as mandated by the law. This principle of our law is the import of the dictum of Holmes JA in the case of **S V Rabie 1975 (4) SA 855 (A)**, as follows:-

**“Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.”**

[15] Also, there is the case of **S V HARRISON 1970 (3) SA 684 (A)** at **686**, where **Addleson J** stated as follows:-

**“Justice must be done, but mercy, not a sledge-hammer is its concomitant.”**

[16] The foregoing principle has been repeatedly applied in our Courts. The authorities are legion. See for example **Mandla Vilakati V Rex Criminal Appeal No. 18/07 per Ramodibedi JA** (as he then was). I have thus considered the Accused person’s personal circumstances.

[17] I fully agree that the Accused has shown remorse by pleading guilty. The Court cannot however lose sight of the fact that in the cause of the assault precious life was lost which life is irreplaceable.

[18] I note further that the offence you committed is very serious and very prevalent in Swaziland. People have a tendency of resorting to violence and usage of lethal weapons in killing other people. The Courts have an obligation to discourage it.

[19] Having carefully considered the triad, I find that an appropriate sentence will be as follows:-

1. Eight (8) years imprisonment, two (2) years suspended for a period of three (3) years on condition that the Accused is not convicted of a similar offence.
2. Ten (10) months of the sentence shall be deducted to reflect the period of Accused's arrest and incarceration before his release on bail.

[20] Rights of Appeal explained to the Accused.

**M. S. SIMELANE J.**  
**JUDGE OF THE HIGH COURT**

**For the Crown:            Mr B. Magagula**

**For the Accused:        Mr M. Sithole**