



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Criminal Case No: 36B/03**

**In the matter between**

**REX**

**Versus**

**MFANASIBILI CHARLES DLAMINI**

**ACCUSED**

Neutral citation: *Rex v Mfanasibili Charles Dlamini (36B/03) [2014]*  
SZHC 143 (17 July 2014)

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

**Heard: 17 - 18 March 2014, 16 April 2014,  
30 April 2014 and 2 - 3 June 2014.**

**Delivered: 17 JULY 2014**

**Summary:**                    **Criminal Procedure – Murder – self defence – Convicted on a charge of Murder.**

## **Judgment**

### **SIMELANE J**

- [1] The Accused was indicted with the crime of the Murder. The Crown alleged that on or about 22 February, 2003 and at or near Mangozeni location – Malkerns in the Manzini region, the said Accused person did unlawfully and intentionally kill one Mduduzi Zwane and did thereby commit the offence of Murder. When the charge was put and explained to the Accused in SiSwati, he pleaded not guilty. This plea was confirmed by the defence counsel.
- [2] It is apposite for me at this juncture to have regard to the key evidence led *in casu* for a proper determination of the case.
- [3] The crown paraded a total of seven (7) witnesses in proving its case.
- [4] PW1 was Celumusa Sidumo Zwane. This witness told Court that he knew the Accused very well as they grew up together in the same neighbourhood, Mangozeni. He told Court that on 22 February 2003 at midnight he heard his brother, the deceased, shouting outside the

house. He further told Court that deceased was in the company of his girlfriend and the Accused. He said the three were from the drinking spot. He told Court that he requested his brother (deceased) to proceed to his house as it was already late at night. The deceased complied and after about fifteen minutes, the deceased told PW1 from outside his house that he was going to buy cigarettes. PW1 heard someone raising an alarm a few minutes after the departure of the deceased to buy cigarettes. PW1 told Court that he proceeded to the place where the alarm was coming from and on arrival he found his brother, the deceased, lying down on the ground, with the Accused beating him with a knobstick. PW1 rebuked Accused to stop beating the deceased but he persisted. PW1 then ran to Malkerns police station to report the matter. PW1 with PW7 the investigating officer, proceeded to the scene of crime and on arrival found the deceased but the Accused had disappeared. The deceased was then conveyed to the Nazarene hospital through a police van. PW1 also told the Court that his brother eventually passed away in the hospital.

- [5] Under cross-examination, PW1, denied that the deceased had problems with the law, as it was suggested to him that the deceased had problems with the law. It was also put to PW1 that the deceased had insulted the Accused for talking to his (deceased) girl friend hence a fight between the two and this was on the way home from the drinking spot. It was further put to PW1 that the deceased was carrying a knobstick and that the deceased and Accused fought over the knobstick. The deceased according to the defence was overpowered and the Accused got hold of the knobstick and then

started assaulting the deceased using the knobstick. PW1 stated that he was not aware of what the defence was saying. It was further put to PW1 that during the fight between the Accused and deceased, the Accused was stabbed by the deceased on the right finger, left elbow, left arm and left scapula and he was treated for the injuries at Phocweni clinic. PW1 stated that he was not aware of all this.

[6] PW2 Thembinkosi Goodwill Masuku told the Court that on the day in issue whilst in his house at Mangozeni, he heard a female raising an alarm. He went out to see what was happening. He found the Accused beating the deceased. He said he tried to rescue the deceased but the Accused kicked him. He told the Court that he knew the Accused from the same area Mangozeni. He told Court that the police were then called and the deceased was taken to the hospital. He further told the Court that on the following day, he met the Accused and asked him why he was beating the deceased on the previous day. The Accused responded and said he would be happy if Mduduzi were dead. PW2 was cross-examined and he maintained that he saw the Accused assaulting the deceased.

[7] It was put to PW2 that the Accused was acting in self-defence as the deceased was trying to rob him. PW2 stated that he was not aware of that. PW2 corroborated PW1's evidence in all material respects.

[8] PW3 was Doctor R.M. Reddy a pathologist. He compiled an autopsy report which demonstrates that the deceased died due to head injuries

(cranio cerebral). He further stated that on examination, the following antemortem injuries were found.

- “1. Sutured wound over right eye brow 2.1 cms parietal region 3 cms length, left forehead 3 cms with contused abrasion over left cheek 7.6 cms area. On reflection of scalp contusion 9 cms fronto parietal region with depressed fracture 5.2 x 4.4 cms area linear fracture middle cranial fosa, diffuse subdural haemorrhage over brain about 140 ml.**
- 2. Abrasion over right shoulder 5 x 2.1 cms, 1 x 1.5 cms, back of trunk middle 1 x 1.1 cms.**
- 3. Abrasion over left hand 2.7 cms area.”**

[9] The postmortem report was formally handed to Court as evidence and was duly admitted and marked Exhibit “A”.

[10] PW4 was Idah Madzandza Masilela. She told the Court that she is a community police at Mangozeni area. She told Court that she knew the Accused from Mangozeni area. She told the Court that on the day in issue she heard someone raising an alarm saying they must go and help the deceased as he was being beaten by the Accused. PW4 duly proceeded to the scene of crime and found the Accused beating the deceased with a knobstick. She told Court that she is the one who rescued the deceased. She then proceeded to the police to report the incident in the company of PW1. She told Court that on arrival at the scene of crime with the police they found that the Accused had

disappeared and the deceased was taken to the hospital. Under cross-examination it was put to PW4 that the deceased earned a living through robbing other people. This was vehemently denied by PW4 who stated that the deceased would do piece jobs in the neighbourhood and at vickery.

[11] PW5 was 2173 Detective Senior Superintendant H. Dlamini who told Court that he together with PW7 Detective Constable Jabulani Dlamini proceeded to Mdzimba Army barracks where they effected an arrest on the Accused after he was duly cautioned in terms of the Judges Rules. The Accused was eventually charged with the crime of murder by PW7. I have no wish to repeat PW7's evidence as nothing much turns on his cross-examination other than to state that PW7 denied that the deceased had trouble with the law.

[12] PW6 was Nothando Gabsile Vilakati. This witness told Court that she was in the company of the deceased on the day in issue as she was his girlfriend. She told the Court that whilst on their way to deceased homestead from a drinking spot called "Guys bottle store" someone came and closed her mouth. The person grabbed her and she tried to raise an alarm. She told Court that the person threatened to kill her as she was trying to raise an alarm. She further told the Court that the deceased was calling her so that he can know where she was exactly as it was dark and he could not see her. She further told the Court that the person who had grabbed her then ran back. She told Court that she heard someone saying I will beat you until you are dead. It is further her evidence that she then saw someone lying on the ground

and someone was beating the one who was lying on the ground with something. She further told the Court that thereafter she realized that the person who was being beaten was her boyfriend, the deceased. The deceased according to her evidence was taken to the hospital and the person who was beating the deceased disappeared. She told the Court that she did not identify the person who was beating the deceased.

[13] Under cross-examination it was put to PW6 that the deceased was trying to rob the Accused and therefore the contention is that he was acting in self-defence. PW6 disputed the defence story. She further denied that the deceased was someone who always had trouble with the law.

[14] At the close of the Crown's case the Accused entered into his defence. He elected to present sworn evidence and did not call any witness.

[15] The Accused told the Court that he is a soldier and was based at Mdzimba army barracks at the time of the commission of the offence. He said on his way to his cousin's place where he was to sleep from the bar, he heard a female crying. He said thereafter a man came by shouting. The Accused told Court that he then saw the man taking out something from his trousers, he thought he was taking out a gun. He says he then ran away but the man caught up with him and started beating him with a knobstick. He says he then fell down and fought over the knobstick with the person who was attacking him. It was further his evidence that the deceased insulted him. He says he

overpowered the man who was attacking him and took the knobstick and beat him to overpower him. He told the Court that this man then stabbed him with a sharp object on the hand. It was his evidence that the woman who was raising an alarm then ran away to call other people. The Accused then decided to run away as per his evidence. It is his evidence that he was eventually arrested and charged.

[16] It was put to the Accused by the Crown that he was never stabbed by the deceased with any sharp object. The Crown further put it to him that had he been stabbed he would have reported this to the police. The Accused maintained that he was stabbed.

[17] It was also put to the Accused that had he been stabbed he would have asked for a certain document RSP 88 from the police so that he could be taken to the hospital. In response the accused stated that he did not bother with the police because he wanted to use the Phocweni clinic for his treatment.

[18] It was further put to the Accused that if indeed he was attacked by the deceased he would have run to the police station which was just nearby.

[19] It was further the Crown's contention that it was the Accused who attacked the deceased and not the otherway round. The Accused denied this.



[20] It was also put to the Accused that he was not being truthful when he said he did not know the Mangozeni area. The Crown stated that the Accused did not challenge the evidence of PW1, PW2 and PW4 that he grew up at Mangozeni area.

[21] It was also put to the Accused that he was not being truthful when he said the deceased was trying to rob him.

[22] The question to determine at this juncture is, has the Crown proved the offence of Murder beyond a reasonable doubt or has the Crown proved that the accused had the necessary intention or *mens rea* whether direct or indirect to kill the deceased on the day in issue.?

[23] It is evident that the Accused's defence is that he did not kill the deceased intentionally. The Accused's defence is that he was acting in self defence as the deceased wanted to rob him.

[24] The Constitution of Swaziland Act of 2005 Section 15 (4) states as follows:-

“ 15 (4) without prejudice to any liability for a contravention of any law with respect to the use of force in such cases as are mentioned in this sub section, a person shall not be regarded as having been deprived of life in contravention of this section if death results from use of force to such extent as is reasonably justifiable and proportionate in the circumstances of the case

- (a) **for the defence of any person from violence or for the defence of property.”**

[25] Therefore, for this defence to lie, the use of force employed must be

**“to such extent as is reasonably justifiable and proportionate in the circumstances of the case for the defence of any person from violence or for the defence of property.”**

[26] In the case of **Rex v Mbongeni Mtsetfwa Criminal Trial Case No.81/2010** the Court stated as follows:-

**“(44) I proceeded to consider a number of judgments from other jurisdictions in which the whole concept of the defence fell for determination. These included the cases of Magula v The State [2006] I.B.L.R 209 (CA) Mmoletsi v The State [2007] 2 B.L.R. 708; Palmer v R [1971] 55 CR. APP R 223. In the Magula case (supra) Tebbutt J.P speaking for the majority of the court, enunciated the applicable principles in the following terms at page 212 of the judgment.**

**“The Courts have repeatedly emphasized that in considering whether an Accused person has acted in self defence, the court should not take what has been described as “the arm chair approach” to the facts. It is all very well, sitting in the cool, calm atmosphere of the court to opine that the Accused should have taken this step or that when faced with an unlawful attack upon him. The trier of fact must, however, try to place himself in the position of the Accused in the circumstances that existed at the time--- it must also be remembered that it is not**

necessary that the Accused person should have feared for his life. He can act in self defence if he had a reasonable apprehension that the aggressor intended to inflict grievous harm on him. See S V Jackson 1963 (2) SA 626 (A)”

(45) In Mmolets, (supra) Dr. Twum JA said the following regarding the proper application of this defence:

“Under the law of this country, when a person is attacked and fears for his life or that he would suffer grievous bodily harm he may defend himself to the extent necessary to avoid the attack. In plain language, this means that the attacked person would be entitled to use force to resist the unlawful attack upon him. It also means that the degree of force employed in repelling the attack should be no more than is reasonably necessary in the circumstances. The law also means that if killing is perpetrated as a revenge or retaliation for an earlier grievance and there is no question that the would be victim was facing an emergency out of which he could not avoid serious injury or even death unless he took the action he did, the killing can hardly be described as self defence.”

[27] Similarly, in the case of **John Tcharesakgosi Mothai v The State Criminal Appeal No. 21/82**, the **Court of Appeal of Botswana** said the following:-

“In SNT (supra) the court held that the approach in a matter of this kind had been correctly set out by Van Winsen AJ (as he then was) in **Ntanyana v Vorster and Minister of Justice 1950 (4) SA 938 ( C )** at

**406 A, where setting out that the test was an objective one, he said this:**

**“The very objectivity of the test however demands that when the court comes to decide whether there was a necessity to act in self defence, it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted.”**

[28] In **S v Ntuli 1975 (1) SA 429 (A1) E Holmes JA** said the following:-

**“In applying these formulations to the flesh and blood facts, the court adopts a robust attitude not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death.”**

**Counsel for the appellant has also referred the court to the remarks of Lord Morris in *Palmer v R 1971 (55) Criminal Appeal Reports (P 242)* where he said the following:-**

**“If there has been an attack so that the defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.”**

[29] *In casu*, I am of the considered view that there is overwhelming credible and reliable evidence adduced by PW1, PW2, PW4 and PW6 who were at the scene of crime that the Accused was beating the deceased with a knobstick. The Accused did not tell anyone of the people who were at the scene that he was beating the deceased because he was trying to rob him.

- [30] He did not even report to PW4, PW5 and PW7 the law enforcement agents that the deceased was trying to rob him.
- [31] It is also not in dispute who assaulted the deceased as the Accused himself concedes that he is the one who assaulted the deceased. PW1, PW2, PW4 and PW6 corroborate each other that the deceased was assaulted by the Accused even when he was lying helplessly on the ground.
- [32] The Accused's intention to kill the deceased is evident from the undisputable words he uttered to PW2 that he would be happy if the deceased were dead. That was upon being asked by PW2 on the following day as to why he was beating the deceased. This finds corroboration in the evidence of PW6 that at the scene the person who was beating the deceased said **"I will beat you until you were dead."** The intention to kill was clearly formulated.
- [33] The Accused did not challenge the evidence of PW2 that he uttered words to the effect that he would be happy if his brother would be dead. This clearly shows that the intention of the Accused was to kill the deceased.
- [34] The Accused also told PW1 at the scene that he would hit the deceased even if he was dead. The deceased died as a result of the injuries sustained when he was assaulted by the Accused. This evidence is uncontroverted.

[35] I fail to understand why PW1, PW2 and PW5 would fabricate such a story against the Accused as they grew up together and were on good talking terms. There is no evidence of any bad blood between the Accused and PW1, PW2 and PW5 for them to fabricate such a story against the Accused. I accept the evidence of the Crown and reject that of the Accused.

[36] The Accused did not challenge the evidence of PW6 that as she and her boyfriend the deceased were going to deceased's home she was grabbed by someone. She also told Court that this person closed her mouth and threatened to kill her if she ever raised an alarm.

[37] The evidence of PW6 that the deceased called her to know where she was as it was dark and he could not see her was not challenged.

[38] She further told the Court that this person eventually left her and thereafter she saw someone beating the deceased. This was not challenged.

[39] The Accused failed to put it to PW6 that it was the deceased who was armed with a knobstick. It is further the evidence of the Crown which was not challenged as well that the Accused persisted in beating the deceased even when he was lying on the ground helplessly and in a weaker position.

[40] I find in the totality of the evidence that there was no emergency facing the accused out of which he could not avoid injury or death

unless he took the action that he did. All through this sordid incident, the Accused was the aggressor not letting up even when the deceased fell and was lying on the ground.

[41] I am of the considered view that the Accused is guilty of Murder when considering the totality of the evidence adduced before me. Even though the Accused had drunk alcoholic beverages he could appreciate the nature and consequences of his acts. He has stated in Court that he was not drunk. It was his unlawful actions which led to the death of the deceased.

[42] The Accused assaulted the deceased and fully appreciated that his actions had the prospects of harm but was reckless as to whether death occurred or not.

[43] Consequently, I find that the Accused had *mens rea* in the form of *dolus eventualis* and is guilty of Murder. The Accused is accordingly convicted of the offence of Murder as charged.

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

**For the Crown:            Mr A. Makhanya**

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