



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Criminal Case No: 02/04**

**In the matter between**

**REX**

**Versus**

**MALANGENI RAPHAEL DLAMINI**

**ACCUSED**

Neutral citation: *Rex v Malangeni Raphael Dlamini (02/04)* [2014]  
SZHC154 (17 July 2014)

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

**Heard: 25 March 2014, 3 April 2014, 28 April 2014,  
23 June 2014 and 7 July 2014.**

**Delivered: 17 July 2014**

**Summary: Criminal Procedure – Culpable Homicide – Accused found guilty and convicted on a charge of Culpable Homicide.**

### **Judgment**

#### **SIMELANE J**

- [1] The Accused was indicted with the crime of Culpable Homicide.
- [2] It was alleged that upon or during 22<sup>nd</sup> December 2003 and at or near Madonsa area, the Accused did unlawfully and negligently inflict serious head injuries on Samuel Magagula from which injuries the said Samuel Magagula died, thus the Accused did commit the crime of Culpable Homicide.
- [3] When the charge was put and explained to the Accused in siSwati he pleaded not guilty.
- [4] 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.
- [5] The Crown paraded a total of four (4) witnesses in proving its case.

- [6] PW1 was Precious Hlatshwayo. She told the Court that on the day in issue she was at a place called Lucky's bar at Madonsa in the Manzini region. She further told the Court that she was in the company of the deceased, Futhi Hlatshwayo (Accused's wife), Vusi Gama and the bar lady. It was further her evidence that the Accused then picked up a quarrel with Ncamsile. The Accused pushed Ncamsile and Ncamsile fell on the deceased. The deceased fell down and hit his head against a bench that was in the bar. The deceased got injured and the police were called. It transpired from her evidence that this witness is a sister to the Accused person's late wife Futhi Hlatshwayo who was present at the Commission of the offence.
- [7] Under cross-examination this witness was very evasive and at some stage the Crown intimated that it intended moving an application for her to be declared a hostile witness. However the Crown did not pursue this application. Her version of the incident is that the Accused picked up a quarrel with Ncamsile and Ncamsile pushed the Accused who fell on the deceased. The deceased as a result fell down and hit his head on a bench.
- [8] Thereafter the postmortem report was handed in by consent, It was accordingly admitted in evidence before this Court and was marked Exhibit B. The autopsy report reflects that the deceased died due to injury on the head. The Doctor further stated that on examination, the following antermortem injuries were found.

**“A lacerated wound of 1 x 1 cms present on the back side of the head, over the external occipital protuberance, antemortem in nature. There is no evidence of any other antemortem injuries on the body.”**

- [9] PW2 was 2173 Detective Senior Superintendant H. Dlamini. He told the Court that he is the investigating officer in this matter. He related to the Court how he effected an arrest on the Accused after he had duly cautioned him in terms of the Judges Rules. The Accused was eventually charged with the crime of Culpable Homicide. This witness was not cross-examined.
- [10] PW3 was Winile N. Maseko. She told the Court that she was employed as a bar lady at Lucky’s bar in December 2003. She told the Court that on the day in issue she was at the bar with the Accused, Accused’s wife, the deceased and some other people. It was her evidence that the Accused picked up a fight with Ncamsile Matsebula. The Accused according to PW3 grabbed a stick from the deceased who tried to hold onto the stick but eventually lost grip and fell on the counter and bled from the head. The Accused wanted to beat the lady (Ncamsile) she had a quarrel with using the deceased person’s stick.
- [11] PW4 was Ncamsile Faith Matsebula. Her evidence is that on 27 December 2003 she was at Lucky’s bar at Madonsa. She told Court that whilst she was talking to the Accused person’s wife the Accused confronted her on why she was drinking with his wife and insulted PW4 calling her a prostitute. The deceased was sitting there drinking brandy from a bottle. The Accused tried to grab the bottle so that he

could hit PW4 but the bottle fell down and broke. The deceased thereafter tried to stand up but fell down on the broken bottle of brandy. This witness told the Court that Accused pushed the deceased whilst the deceased was standing and the deceased fell down. PW4 denied the version of PW1 that the Accused went straight to PW4 and PW4 pushed the Accused. The Accused thereafter fell on the deceased. PW4 denied that she pushed the Accused and as a result of which the Accused fell on the deceased who fell on the floor and got injured on the head.

[12] At the close of the Crown's case the defence invoked Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938 to have the Accused discharged. This application was opposed by the Crown. I ruled that a *prima facie* case had been established by the Crown and consequently the Accused was called to his defence.

[13] The Accused elected to present sworn evidence and did not call any witness.

[14] The Accused told the Court that on the day in issue he was at Lucky's bar with the deceased, PW1, PW3 and PW4. He told the Court that PW4 was talking to his wife. His evidence is that he confronted PW4 wanting to know what she was discussing with his wife. His evidence further is that PW4 then insulted him and said he refused to allocate her a piece of land at Madonsa yet he was in authority in that area. It is his evidence that he then tried to grab a bottle of brandy from the deceased to hit PW4 but the deceased held on to the bottle. He said he

- got angry and proceeded to PW4. His evidence is that PW4 then pushed him and he (Accused) fell onto the deceased who fell on the floor.
- [15] At the close of the defence case both parties made submissions. I have carefully considered the evidence tendered in *casu*. I have also paid due heed to the submissions advanced by each side.
- [16] This is a criminal trial and the Crown has an obligation to prove the case beyond reasonable doubt. The court therefore has an obligation to make a determination on whether the Crown has met that yardstick.
- [17] I am mindful of the fact of the common cause evidence that the accused was present at the scene of crime.
- [18] It is further common cause that the accused picked up a fight with PW 4 Ncamsile Matsebula in the bar and was chasing her around the snooker table in the bar wanting to beat her, being infuriated by the fact that at PW 4 was drinking with his wife.
- [19] The crux of the matter for determination is who caused the death of the deceased?
- [20] I do note that there are some contradictions in the Crown's case on how the deceased fell down. PW 1's evidence is that the accused pushed PW 4 who fell on the deceased and the deceased fell on the floor. PW 3's evidence is that the accused grabbed a stick from the

deceased who tried to hold onto the stick and eventually lost grip, fell down and bled from the head. The crux of PW 4's evidence is that the accused pushed the deceased and the deceased fell down.

[21] The contradictions in the Crown's evidence to me do not appear to be material to such an extent that one can say the Crown's case is factually defective. The contradictions do not detract from the Crown's case viewed objectively.

[22] This is more so as the Accused concedes in his evidence in chief that he pushed the deceased but says this was because he had been pushed by PW 4. To me it suffices that he admits pushing the deceased. This is consistent with the Crown's evidence.

[23] In my view the inconsistencies are caused by the fact that this is an old matter. Human memory fades with time. It will not be fair to penalize witnesses for not recalling all the graphics of events, particularly when the incident happened some years ago.

[24] In the case of **State v Gogannekgesi [1989] B.L.R 133 HC at 140 B-C Gyeke – Dako J** had this to say:

**“For an inconsistency to be material, such inconsistency must in my view, be of a material nature, capable of turning the result of the case one way or the other. For there could hardly be any witness of truth if the principles were otherwise, since in nine cases out of ten, witnesses are called upon to give evidence upon matters about which they might have witnessed or given**

**statements months or even years before. In such cases, the possibility of minor slips, which may be in conflict with their previous statements, cannot be ruled out. But that should not necessarily make them untruthful”.**

[25] Again in **Kenneth Gamedze and Others v The King Criminal Appeal No. 1 of 2005**, Tebbutt J.A made the following apposite remarks.

**“It is well known to our Courts that there are frequently some inconsistencies in the evidence of two or more witnesses. Witnesses hear and see events from different perspectives. Then too, their evidence is usually given months or even years later after the events when their memory of them has faded to some extent, particularly in regard to the minor details of them”.**

[26] Sometimes there would be a reason to suspect that the witnesses were schooled on what to say if the evidence were to dovetail in every aspect including minor evidential details.

[27] Having carefully scrutinized the totality of the evidence led in this case, I find that it is consistent with the inference which the Crown urges this court to draw, which is that the accused negligently caused the death of the deceased.

[28] It is overwhelmingly the judicial accord, that the offence of Culpable Homicide conduce in the negligent and careless causing of the death of a person by the Accused. This is such a case.



[29] I find that the Crown has proved its case beyond reasonable doubt. I find the Accused guilty of the offence of Culpable Homicide as charged and convict him accordingly.

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

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

**For the Accused:        Mr M.H. Mdluli**