IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 153/09

In the matter between

REX

Versus

MFANAWENKHOSI MASELESELE NDLOVU ACCUSED

Neutral citation: *Rex v Mfanawenkhosi Maselesele Ndlovu (153/09*) [2014] SZHC 169 (25 July 2014)

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

Heard: **25-27 June 2014 and 15 July 2014**

Delivered: **25 July 2014**

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

Judgment

SIMELANE J

[1] The Accused was arraigned before me on a charge of Murder. It was alleged that on or about 1st January 2009 and at or near Ekutsimuleni area, in the Manzini region the Accused did unlawfully and intentionally kill one Sabatha Dlamini. When the charge was put to him fully explained in siSwati he pleaded not guilty. The plea was confirmed by the learned defence counsel Mr. Gama.

[2] The Crown represented by Mr. A. Matsenjwa paraded five (5) witnesses in an endeavour to prove its case.

[3] The first Crown witness was Doctor Komma Reddy who testified that he conducted the autopsy examination on the body of the deceased. The good doctor explained that the cause of death was due to **"a stab wound to the chest."**

[4] The doctor further stated that the following antermortem injuries were observed on the body of the deceased.

> **"A stab wound of 2 x 1 cms, with sharp margins, present on the middle portion of the front side of the chest in the upper 1/3rd portion, slightly on the left side, 1 cm from the mid line, 13 cms, from the left nipple and 38 cms from the umbilicus and antemortem in nature."**

[5] PW2 was Gcina Mabuza. He testified that on 31st December 2008 he arrived with his brother PW3 at their maternal homestead and were advised that there was a party at their mother's relative (mother's sister), at the Magagula homestead in the same neigbourhood. PW2 told the Court that he together with his mother and PW3 proceeded to the Magagula homestead for the party and arrived at around midnight.

[6] PW2 told the Court that immediately after their arrival at the Magagula homestead, the Accused confronted PW2 and PW3 and asked them to share with him the cigarette that they had lit. PW2 further told the Court that he refused to share the cigarette with the Accused and an exchange of words ensued between the Accused on one hand and PW2 and PW3 on the other hand.

[7] The altercation attracted the deceased who came to the scene and requested the Accused to leave PW2 and PW3 alone.

[8] This, according to PW2, prompted the Accused to ask the deceased if he was intervening in the matter between him and PW2. The Accused

thereafter started pushing the deceased and stabbed him on the chest with a knife. The Accused thereafter fled from the scene.

[9] PW3 was Bhekithemba Mabuza. His evidence corroborates that of PW2 in all material respects and I will not bother analyzing his evidence *in extenso*.

[10] PW4 was 5471 Constable Machawe Nxumalo a Mafutseni police station based officer. This is the witness to whom the Accused surrendered himself at the Mafutseni police station. The Accused handed over to the police the knife he used in the commission of the offence. PW4 handed in Court the knife (Exhibit 1) which he received from the Accused when he surrendered himself to the police. He further told the Court that he then called the Mliba police as the offence was committed in their jurisdiction. He handed over the Accused and Exhibit 1 to PW5.

[11] PW5 was 5352 Detective Constable Vulindlela Hlatshwako the investigating officer at Mliba police station. He told the Court how he investigated the case. He also told the Court that he cautioned the Accused in terms of the Judges Rules and eventually charged the Accused for the offence of Murder. He formally handed in Court Exhibit 1, which is the knife that was used in the commission of the offence.

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

[13] The Accused told the Court that on the day in issue he proceeded to the Magagula homestead on the invitation of one Mseshi Magagula for the New Year celebration.

[14] The Accused told the Court that he arrived at the Magagula homestead at around 7.00pm.

[15] It was his evidence that PW2 had threatened to kill him and stated that this was well known in the whole community at Kutsimuleni and particularly to one Sifiso Mngometulu. He told the Court that he had a hostile relationship with PW2, as PW2 once chased him with a knife at or near a Nkhambule homestead and the Accused person's friends came to his rescue.

[16] The Accused also told the Court that he had a bad relationship with the deceased. He told the Court that around the year 2005 the deceased forcefully took his girlfriend in his presence.

[17] The evidence of the Accused is that he merely approached PW2 to ascertain from him why he wanted to kill him as this issue was now known throughout the community. He told the Court that the deceased is the one who started hurling insults and tried to punch him with a clenched fist. The Accused told the Court that he then stabbed

the deceased on the chest with a knife in retaliation. He told the Court that he thereafter went away from the scene of crime.

[18] 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.

[19] The question for determination at this juncture is 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? It is common cause that the deceased died on the said date and his death was due to a stab wound on the chest as reflected in the postmortem report which was handed in Court as Exhibit A. It is not in issue that the deceased died as a result of a stab wound inflicted on him by the Accused. The Accused from his evidence clearly raises the defence of self defence.

[20] 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."

[21] I conclude therefore that 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."

[22] 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."

[23] 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."

[24] 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."

[25] The Accused stated that he accidentally stabbed the deceased because the deceased tried to hit him with a fist which missed him and thus he used a knife to stab him. His defence is that he was acting in self defence. I reject the defence by the Accused. I find that there was no

need for the Accused to retaliate with a lethal weapon, the knife he was carrying even if the deceased had tried to punch him with a clenched fist. There was no reason for the Accused to retaliate with a dangerous weapon which is disproportionate with the fist. He had an opportunity to leave the deceased and walk away.

[26] The usage of a dangerous weapon by the Accused on a delicate part of the deceased person's body is evident enough that the Accused was reckless whether death occurred or not. It is my finding that the Accused had the necessary intention to kill the deceased in the form of *dolus eventualis*.

[27] I further reject the defence by the Accused that PW2 had threatened to kill him. He told the Court that this threat was known to the whole community. He however failed to call any community member or the said Sifiso Mngometulu whom he testified particularly had knowledge of this fact to prove the said threats.

[28] PW2 vehemently denied ever threatening to kill the Accused. He told the Court that he was not even staying at Kutsimuleni area and had been away from that area for almost a year. PW3 corroborates PW2 in this regard and even told the Court that PW2 was not a violent person. He is very reserved and is not in the habit of threatening to kill other people.

[29] I reject the defence by the Accused that there was bad blood between himself and PW2. The Accused said PW2 once chased him with a knife that is some years ago before the commission of the offence. He was however able to approach PW2 on the day in issue and ask for some cigarettes. I fail to understand how the Accused could ask for cigarettes from PW2 if there was animosity between himself and PW2.

[30] I find that there is overwhelming credible and reliable evidence adduced by PW1 and PW2 who were at the scene at the commission of the offence. These witnesses were not shaken even under cross-examination. I have no reason to disbelieve their evidence.

[31] 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. It is clear to me that the Accused was the aggressor.

[32] The Accused employed a very dangerous weapon and ended the life of the deceased over nothing than that he intervened in the altercation between the Accused and PW2. I am cognizant of the uncontroverted evidence that the deceased was not even carrying any weapon. He did not pose any threat to the Accused and had not provoked the Accused in any manner whatsoever.

[33] I find that the use of force employed was not reasonably justifiable and proportionate in the circumstances of this case for the defence of any person from any violence.

[34] Consequently, I find that the Accused had *mens rea* in the form of *dolus eventualis* and find him 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. Matsenjwa**
For the Accused: **Mr. S. Gama**