



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 112/04

In the matter between

REX

Versus

SANDILE NCAMISO MZIYAKO

1ST ACCUSED

FANA NKOSINATHI MZIYAKO

2ND ACCUSED

Neutral citation: *Rex v Sandile Ncamiso Mziyako and Another (112/04)*
[2014] SZHC 214 (9 September 2014)

Coram: M. S. SIMELANE J

Heard: 4 September 2014

Delivered: 9 September 2014

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

Judgment

SIMELANE J

- [1] Both Accused persons were arraigned simultaneously before me on 4 September 2014 charged with the offence of Culpable Homicide. It was alleged by the Crown that upon or about 12 July 2004 and at or near Zandondo area in the Manzini region the Accused persons acting in furtherance of a common purpose did unlawfully assault Ngabangaba Mziyako and inflicted upon him certain injuries from which the deceased died and the Accused persons did thereby commit the crime of Culpable Homicide.
- [2] When the charge was put to the Accused persons fully interpreted in siSwati, they indicated that they understood the charge and pleaded guilty to offence of Culpable Homicide. The Crown accepted the plea. Ms N. Masuku thereafter intimated to the Court that they had prepared a statement of agreed facts with the Accused persons which was duly signed by all parties.

[3] The Crown then read into the record the statement of agreed facts which was handed into Court by consent. The statement was formally admitted in evidence as an exhibit and marked Exhibit A. The statement of agreed facts is to the effect that:-

“WHEREAS the accused are indicted with Culpable Homicide in that upon or about 12th July, 2004 and at or near Zandondo area, in the Manzini region, the accused persons in furtherance of a common purpose did unlawfully assault NGABANGABA MZIYAKO and inflicted upon him certain injuries from which the deceased died of and the accused persons did thereby commit the crime of Culpable Homicide.”

AND NOW the accused persons are pleading guilty to the offence and the Crown accepts the plea of guilty.

AND NOW the accused persons state as follows:-

1.

There was a man that deceased was staying with at home and we discovered that there was some misconduct that was going on in that our children were passing away and in total six children passed away under controversial circumstances.

2.

The deceased was the biological father of accuseds and uncle (babe lomncane) to accused 2 and 3. The reason we approached him is that he would make threats and the children would die. It was after the death of these children that we decided to approach him to find out

exactly as to why our children were dying under controversial circumstances.

As deceased had left the homestead for Matsapha where he was then residing the family met and decided that he must be called so that the issue of the deaths could be discussed further. Indeed deceased was called to a family meeting wherein he confirmed that he is the one who caused the death of the children and that this was as a result of the person he had brought, this person was brought by the deceased when he was still a little boy his name was Colani Zwane. This person was different in that:-

- On his hair he had chicken feathers, every type of heads of emadloti, every type of emahiya emadloti, every piece of clothing that is old of people from the homestead, bed chains (emaketamo embhedze);
- Emajobo lamadzala of the deceased, every animal that was killed in the event of funerals he would take the skin and wear it,
- He would also have sexual intercourse with this boy;
- on his hands he would have wires wrapped on his hands, coins that had holes on his hands, and chains;
- He also use a stick that was also having the chains, coins such that when he walked around there would be a lot of noise.

3.

When we informed him to remove this person he told us that it was his person he came to help him at his home with all the chores yet he would sit in his house and do nothing. This person would be on his knees all the time and look at us in a mirror and he never spoke to us but only the deceased.

4.

After the family gathering he confessed that, indeed he used this person to kill his grandchildren, because the matter has been reported to the Mliba police. The police came and chased this person away but the deceased brought him back it was only after the death of the deceased that this man left, he was actually taken to Mliba police.

5.

After the family meeting had been concluded we approached the deceased who was in his house.

6.

Accused 1 who was the biological son of the deceased entered the house where deceased was upon us entering he was shaken at to what was happening. At first he thought it was people who had come to rob him of his money because he had sold a cow and he directed us where the money was but we told him that we were not looking for money but we wanted what he was using to finish the people. At first he denied and said there was nothing that he finished people with but finally he said he was earning a living through this and that if these things were to be revealed or if he were to show us he might die.

7.

We asked him what must we do as our children were busy dying and we asked what must happen then he said he was going to show us.

8.

He then said he was going to show us but said he would do it in the morning as it was then late at night.

9.

He did direct us that one was in the East, West, North and West of his homestead and since we were afraid that he might disappear we then tied him on his arms and legs so that he does not run away.

10.

On his left arm he had things that he would put on. As we tied him he informed us that if he were to remove the things that are around the homestead he would die.

11.

When we arrived in the morning we found that he had passed away.

12.

The injury of the head he sustained when we entered he tried to run away as he thought we were robbers and he hit the wall.

13.

The injury on the knee is where we assaulted him when we asked him about the things he was using. We did assault him when we were enquiring about the muti.

14.

In the morning as he had promised we proceeded to his house as per our agreement that he would show us these things in the morning we found him dead on the bed.

16.

Upon realizing that he was dead accused 3 went home to report to his father that deceased had passed away and he said we should report to the Mliba police.

17.

Accused 1 and accused 2 were with deceased at his home and his wife.

18.

The reason we approached him was clearly due to the deaths of the children. We did not think he would die and as such we were greatly shocked by his death as when we left we had thought we would find him in a good condition, we were shocked on what had happened.

19.

WHEREFORE we ask the Honourable Court to be lenient with us as we are very remorseful.

20.

The Accused admit that:-

- 1. They negligently assaulted the deceased;**
- 2. The injuries sustained by the deceased occurred during the assault.”**

[4] The postmortem report which was compiled by Doctor R.M. Reddy the police pathologist was admitted in evidence as exhibit B. The opinion of the doctor is that the cause of death was “due to injury on the head.” The following ante mortem injuries were observed by the doctor:-

- “1. Constusions of 4 x 2 cms, and 1 x 1cms present on the right side of the for head.**
- 2. A contusion of 4 x 3 cms, present on the left side of one fore head.**
- 3. Contusion of 2 x 1 cms, present in the right temple region of head.**
- 4. A contusion of 2 x 1cms, present on the left knee.”**

[5] In the light of the evidence adduced before this Court as well as the guilty plea advanced by the Accused the Court comes to the ineluctable conclusion that the Crown has proved beyond reasonable doubt the commission of the offence of Culpable Homicide. It is clear to me that the Accused persons did not intend to kill the deceased. The death was as a result of the Accused person’s negligence and carelessness. I accordingly convict the Accused on their own plea of guilty to the offence of Culpable Homicide.

[6] I shall now turn to consider the appropriate sentence befitting the crime committed by the Accused persons. I am mindful that I have to consider the triad when sentencing the Accused persons. The triad is

the interest of society, the personal circumstances of the Accused as well as the seriousness of the offence itself.

- [7] See **Mfanasibili Gule V The King Criminal Case No. 02/2011 paragraph 17. The King V Xolani Dlamini Case No. 42/2011 paragraph 26 and 27.**

[8] More to the foregoing is that the sentence is expected to blend in a measure of mercy according to the circumstances. In the case of **S V Harrison 1970 (3) SA 684 (A) at 686, Holmes JA** demonstrated this trite principle of the law as follows:-
“Justice must be done, but mercy not a sledge hammer is its concomitant.”

- [9] In honour of the above trite principle of the law, I have considered the following mitigating factors as adduced by the Accused person. Accused 1 stated as follows:-

- 1) He is remorseful of the offence committed.
- 2) He is a first offender.
- 3) He is married with one wife and three (3) children, two (2) of which are school going.
- 4) He is not employed.
- 5) He is thirty-three (33) years old.
- 6) His wife is not employed.
- 7) May the Court consider the circumstances under which the offence was committed.

8) The incident will haunt him for the rest of his life as he killed a relative.

[10] Accused 2 in mitigation stated as follows:-

- 1) He is remorseful.
- 2) He is a first offender.
- 3) He is thirty-three 33 years old.
- 4) He is married with one wife and has two (2) children one of which is school going.
- 5) He went up to standard 2 at school.
- 6) He is related to the deceased.
- 7) He is a truck driver employed at Republic of South Africa.

[11] Having carefully considered all the factors *ante* it is expedient for me to state that the offence committed by the Accused persons is a very serious one. It is thus in my view inexorably apparent that the interest of society, especially in view of the prevalence of this sort of offence in the Kingdom demands that a fitting sentence be imposed. The sentence to be imposed I believe will act as a deterrent to other would be offenders.

[12] In conclusion, having carefully considered the triad I am of the firm conviction that a sentence of Eight (8) years imprisonment, Two (2) years of which is suspended for a period of Three (3) years on condition that the Accused persons are not convicted of a similar offence is befitting of the offence convicted.

[13] It is so ordered.

1. Rights of Appeal explained to the Accused persons.

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

For the Crown: Ms. N. Masuku

For the Accused Persons: In person