IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Criminal Case No: 379/08

In the matter between

REX

Versus

SIBONISO CASPER MASUKU **ACCUSED**

Neutral citation: *Rex v Siboniso Casper Masuku (379/08*) [2014]SZHC 215 (9 September 2014)

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

Heard: **11 June 2014, 20 June 2014, 30 June 2014, 11 July 2014, and 8 August 2014**

Delivered: **9 September 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 Murder. The Crown alleged that on or about 20 November 2008 and at or near Mhlosheni area in the Shiselweni region the said Accused person did unlawfully and intentionally kill one Magwaza Bhembe and did thereby commit the crime of Murder. When the charge was put and explained to the Accused in siSwati, he pleaded not guilty. This plea was confirmed by learned 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] PW 1 was Ncobile Doricah Dlamini. This witness told the Court that she was the Accused person's girlfriend and the deceased was her former boyfriend. She told the Court that on the day in issue, she

together with the Accused and PW5 Nokwazi Hlengiwe Siyaya were from Mhlosheni Clinic.

[4] It was her evidence that they saw the deceased at a distance sitting under a tree. As they were about to pass the deceased, he stood up and asked to speak to PW1. The Accused blocked him and the deceased pushed him telling the Accused that he only wants to speak to PW1. The Accused then retrieved a bush knife and hacked the deceased on his right arm whilst trying to evade the blow from the deceased. Both the deceased and Accused fell down but the Accused was able to stand up first and grab the bush knife which had fallen down. The Accused proceeded to hack the deceased who was facing down whilst attempting to stand up. PW1 further told the Court that thereafter she together with Accused and PW5 left the deceased lying on the ground and proceeded to Accused's parental homestead where upon arrival she reported the incident to Accused's mother.

[5] PW2 was Sebenele Masuku who told the Court that on the day in issue he was at home when PW1, PW5 and Accused left for Mhlosheni Clinic. He told the Court that later on he saw the Accused coming back home running and proceeded straight to his house. The Accused was carrying a bush knife which he later put down and took off his T-Shirt. This witness further told the Court that the Accused then told him that he has killed someone. It is this witness's evidence that the Accused thereafter left home and told them that he was going to surrender himself to the police at Hluthi. PW2 kept the bush knife and later handed it over to the police.

[6] PW3 was 2750 Detective Sergeant Mkhabela, the Scenes of Crime officer based at Nhlangano Police Regional Headquarters. He told the Court that on the day in issue he proceeded to the scene of crime where he found the body of the deceased lying on the ground in a bushy area next to the road. He then photographed the body of the deceased. He formerly handed in Court the photographs taken from the scene reflective of the body of the deceased, same were marked Exhibit A by the Court.

[7] PW4 was 3885 Detective Sergeant Dlamini, the investigating officer for this case. He related to Court about his investigations and further told the Court that the Accused surrendered himself to the police. He further told the Court how he then 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. He further told the Court that he proceeded to Accused's parental homestead with the Accused whereupon PW2 handed over to him a bush knife. He formerly handed in Court the bush knife which was marked Exhibit B.

[8] PW5 was Nokwazi Hlengiwe Siyaya. This witness was in the company of the Accused and PW1 on the day in issue. I have no wish to repeat her evidence as her evidence is consistent with that of PW1 save to state that this witness further told the Court that the Accused whilst hacking the deceased with the bush knife uttered words that he wanted to finish off the dog.

[9] The postmortem reported compiled by Doctor. R. M. Reddy was formerly handed to Court by consent as evidence and was marked Exhibit C. The autopsy report demonstrates that the deceased died due to multiple injuries. The report further stated that on examination the following antemortem injuries were observed.

> “ **1. Blood stains over sealp, face, neck, left upper limb.**
>
> **2. Cut wound over left-side scalp behind left ear 8 x 1.7cm skull vault deep.**
>
> **3. Cut wound extending from right chest to neck below right ear 27 x 1.1cm tissues deep involved muscles. Blood vessels, nerves.**
>
> **4. Cut wound outer aspect to middline 6 x 3.2 cm vertebral deep involved muscles, blood vessels, nerves, vertebra, spinal cord.**
>
> **5. Cut wounds over left shoulder 7 x 1.5 cm, 3 x 1.2 cm muscle deep.**
>
> **6. Cut wound over left forearm back bone deep 8.5 x 3.6 cm involved muscles, blood vessels, nerves, bones.”**

[10] At the close of the Crown’s case the Accused entered into his defence and presented sworn evidence. He called one witness.

[11] The Accused who testified as DW 1 told the Court that PW1 was his girlfriend. He testified that he was attacked by the deceased at his homestead on three occasions and that the deceased had threatened to kill him. On the day in question he got information that the deceased was around his area and he decided to arm himself with a bush knife as he accompanied PW1 and PW5 to the clinic. On their way back from the clinic they saw the deceased at a distance and as they approached, the deceased came straight to him without uttering any words even after he asked him what he wanted. The Accused further told the Court that he then hacked the deceased on the arm who fought with him and he continued to hack him on the neck and at the back and the deceased ran away.

[12] DW2 was Lindiwe Simelane, the mother of the Accused. She told the Court that she knew PW1 as an ex-lover of the Accused. She told the Court that the deceased came on two occasions to attack the Accused and PW1 claiming that PW 1 was his wife. She told the Court that on the day in issue she saw the Accused returning home with his clothes full of blood. The Accused then told her that he has injured Magwaza Bhembe (the deceased). It is her evidence that she then advised the Accused to go and surrender himself to the police.

[13] The question for determination 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.

[14] 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 attacked him on the day in issue and had attacked him on three other occasions before over his girlfriend (PW1).

[15] 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."**

[16] 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."**

[17] 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."

[18] 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 byVan 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."

[19] 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."

[20] *In casu,* I am of the considered view that there is overwhelming and reliable evidence adduced by PW1 and PW5 who were at the scene of crime.

[21] The Accused defence that the deceased was the aggressor on the day in issue is rejected. I consider same to be an afterthought. This, I say because, this evidence was not put to the Crown witnesses. In this regard the dicta by Hannah CJ (as he then was) in the often cited case of **Rex V Dominic Mngomezulu and 10 Others Criminal Case No. 96/94** is apposite. The learned Chief Justice in that case held that failure by the defence to put the story of the Accused to the Crown witnesses under cross-examination entitles the Court to draw an inference that whatever he says for the first time in his evidence in chief must be clearly an afterthought.

[22] In **S V P 1974 (1) SA (Rhodesia) A.D.** the Court held:-

"It would be difficult to over-emphasize the importance of putting the defence case to prosecution witnesses and its certainly not a reason for not doing so that the answer will almost be a denial…"

[23] The Accused's defence is that he attacked the deceased because he had previously threatened to kill him. It is evident that the said threats were made a long time ago and not on the day in issue. The deceased was not armed and PW5's evidence is that the deceased did not approach them in a confrontational manner on the day in issue. It is worth mentioning at this juncture that I believe the evidence of PW5 because she had no interest whatsoever in the affairs of the three that is, PW1, Accused and the deceased. To me she appeared as an independent person and I have no reason to disbelieve her evidence. I find that the Accused was not under attack on the day in issue but intentionally killed the deceased.

[24] The intention to kill is evident from the words uttered by the Accused that he wanted to finish off the dog. That such utterances were made by the Accused was maintained by PW5 who was impressive and not shaken even under intense cross-examination. This action of the Accused shows direct intention to kill the deceased.

[25] To further demonstrate the Accused's intention to kill the deceased is the fact that the Accused not only struck the deceased once on the arm but hacked him with the bush knife even when the deceased was helplessly bending down, and weak from the first injury inflicted. He even hacked the deceased on the head, a very delicate part of the body. Multiple injuries were inflicted and I am convinced that the intention to kill was clearly formulated. In any case the Accused ought to have forseen that hacking the deceased on a sensitive part of

his body as the head with a bush knife was likely to result in death but he was reckless as to whether death occurred or not. This clearly shows an intention to kill the deceased. I further find that the object of carrying the bush knife on the part of the Accused was to kill the deceased and no other reason has been advanced by the Accused why he had to carry such a dangerous weapon on the day in issue. This shows premeditation on the part of the Accused.

[26] The deceased, died as a result of the injuries sustained when he was hacked by the Accused. This evidence is uncontroverted.

[27] 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 had bent downwards and in a very weak state. The self defence advanced by the Accused is unsustainable in these circumstances. It is accordingly dismissed.

[28] I am of the considered view that the Crown has proved beyond reasonable doubt that the Accused is guilty of Murder when considering the totality of the evidence adduced before me. Consequently, I find that the Accused is guilty of the offence of Murder as charged and convict him accordingly.

M. S. SIMELANE J.

JUDGE OF THE HIGH COURT

For the Crown: Ms. E. Matsebula

For the Accused: Mr. N. Manana