



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Criminal Case No. 439/2011**

**REX**

**And**

**DUMISANI SIMANGALISO DLAMINI**

**ACCUSED**

**Neutral citation:** *Rex v Dumisani Simangaliso Dlamini (439/2011) [2014] 48 (19 March 2014)*

**Coram:** OTA J.

**Trial commenced:** 14 OCTOBER 2013

**Trial ended** 13 MARCH 2014

**Delivered:** 19 MARCH 2014

**Summary:** Criminal procedure: Murder: the Accused killed his girl friend and their 8 months old baby; pointing out process; evidence recorded therefrom; how treated; allegations of torture; torture how proved; The Accused is found guilty and convicted of the murder of the two deceased persons.

## JUDGEMENT

### **OTA J.**

- [1] The Accused is charged on two counts of Murder. Count one alleges that about 30 July 2011 and at or near Mbhutfu area in the Lubombo Region, the Accused unlawfully and intentionally killed Tengetile Gumbi.
- [2] Count two alleges that about 30 July 2011 and at or near Mbhutfu area in the Lubombo Region, the Accused unlawfully and intentionally killed Temalangeneni Dlamini.
- [3] It is pertinent that I observe at the this juncture that the parties admitted the following evidence by consent.
- (A) Exhibit A: The postmortem report of Tengetile Gumbi. This document which was prepared by Dr Komma Reddy indicates the following: that the cause of death was due to **“cut throat”** injury; a cut injury of 10 x 3cms, with sharp margins, antemortem in nature; Present across the front and middle portion of the neck; brain and meninges and cerebral vasculature were congested; Oesophagus was cut in the middle portion; Trachea was cut in the middle portion; right lungs was congested, petechial haemorrhages present on the heart; and the liver, gallbladder, biliary passage and pancreas were congested.
- (B) Exhibit B – the postmortem report for Temalangeneni Dlamini was also prepared by Dr Komma Reddy and it indicates that the cause of death was due to multiple injuries and throttling. It further indicates the following antemortem injuries present.

- (1) Contusion of 3 x 1cms, present on the middle portion of the right side of the neck.
  - (2) Contusions of 1 x ½ and 1 x 1cms present on the middle portion of the left side of the neck.
  - (3) Abraded contusions of 5 x 2cms, 4 x 1cms and 3 x 2cms, present on the middle portion of the abdomen.
- (C) The evidence of PW9 in the summary of evidence, Jockoniah Gumbi, who is the father of the deceased in count one and grandfather of the deceased in count two. He identified the bodies of both deceased persons during the post mortem examination on 2 August 2011 at the Good shepherd Hospital.

[4] The Crown also called evidence through six (6) other witnesses in proof of its case. A summary of the Crown's case is that Tengetile the deceased in count 1 and the Accused were lovers. The product of that love affair was the deceased in count 2 Temalangi who was just 8 months old when she met her death. PW1 Jabu Gumbi who is Tengetile's sister told the court, that on 29 August 2011 she had gone to the Accused's house to fetch Tengetile. She discovered that Tengetile had been beaten up by the Accused because she was limping and also had bruises on her neck. Tengetile informed her that she had done nothing to deserve the beating. Tengetile then telephoned her father telling him that she was going to lay a charge against the Accused for assaulting her. When they reached the gate of her home, the Accused who was then with them, turned back and left. Thereafter, PW1 left home for a funeral. When she woke up the following day around 11 am, she did not find Tengetile at home. She enquired from neighbours who told her that Tengetile had left on foot for the Lubulini Police Station to report the assault

by the Accused and she was using the path which cuts across the bushes. PW1 telephoned a relative at Lubulini to enquire if Tengetile had arrived and she also called the Lubulini Court to find out if Tengetile had registered a case there and she was told that she had not. She then took a community police man and went to the Mbhutfu barracks in search of Tengetile but they were told that she had not been seen at the barracks. It was further PW1's evidence that whilst waiting at the barracks, they saw the Accused coming out from the direction of the forest. They shouted at him and he ran away. The following day PW1 took Tengetile's photograph to the Lubulini Police Station and reported to the police that she was missing and they started searching around the bushes. PW1 and the community police later found the Accused with the police officers on the other side of the river. The police called them and they went to the other side of the river where they identified the bodies of Tengetile and Temalangeni. Tengetile had been cut in the neck and PW1 could see that she had been dragged on the ground but she did not notice anything on the baby Temalangeni.

- [5] Under cross-examination, PW1 told the court that she heard after the death of Tengetile that on the Thursday before she collected her from the Accused's house that the Accused had found her and the child at the Mavimbela homestead. When it was put to her that the Accused never assaulted Tengetile, therefore, she never laid a charge against him, PW1 replied that the Accused assaulted Tengetile but that she never had the chance to reach the Lubulini Police station to lay a charge against him. When it was further put to her that around 4 pm the Accused was at the Mbhutfu Barracks watching a match between Orlando Pirates and Kaizer Chiefs, PW1 replied that the Accused went to watch the match after she had seen him coming out of the forest called to him and he ran away. She said she woke up from sleep around 11 am and Tengetile was not at home, so she must have left before 11 am. She further stated that by 2 pm when the defence alleges that a

meeting between the Accused, Tengetile and her family was to hold, she was out searching for Tengetile. She said she was sufficiently worried to embark on the search due to the fact that the Accused had assaulted Tengetile the previous day and the route she was informed that Tengetile took to go to the Lubulini Police Station to lay a charge against the Accused passes by the Accused's homestead. She agreed that she heard that the Accused was at the bus stop waiting for his sister whom he had sent to collect money from the ATM when she saw him but denied any knowledge of the allegation that the Accused went to Lavumisa and spent the night with the mother of his other child. She also denied any knowledge of the allegation that it was the police that showed the Accused the bodies of the deceased persons. She denied any knowledge of the allegation that the Accused was assaulted by the police and that one of the police officers bit him on the hand. She denied any knowledge of the allegation that the police assaulted and threatened the Accused into going to a Magistrate and recording a statement and that he told the Magistrate what he had been told to say by the police.

- [6] PW2 Thomas Bhembe is the Accused's Uncle. He is also the headman of the Mbhutfu area where this incident occurred. He confirmed that on 30 July 2011 PW1 approached him to report that Tengentile was missing. He said PW1 told him that Tengetile was last seen with the Accused and that the Accused had quarreled with her and assaulted her. PW2 went to the Chief's runner and reported the matter. The community was summoned and a search mounted for Tengetile. He also advised PW1 to report the matter at the police station which she did and the police officers came. One of the police officers was called Mdlovu. The Police officers told the community members to stop the search and the police continued with the search. On 31 July 2011, PW2 received a call from a certain lady who informed him that the Accused had been seen in a bar at Lavumisa. PW2 relayed this information to the police. The police officers took PW2 and another man

from the community to Lavumisa in search of the Accused. On getting to a bar at Lavumisa, PW2 pointed out the Accused to the police officers. The Accused was then drinking some bottles of beer at the bar. The police arrested him. PW2 testified that he asked the Accused where Tengetile was and the Accused responded that he had killed her since he had told PW2 previously that he was going to kill her as she was playing games with him. PW2 also asked the Accused of the whereabouts of Temalangi, the baby and the Accused responded that he had also killed her. It was further PW2's evidence that the Accused continued to say that he had killed the deceased persons and hid their bodies next to a water pump at Sgomtane and that he could show them the bodies.

[7] Thereafter, they proceeded to the Mbhufu Army Barracks. From there they went to the police station. Then they proceeded to the Ngwavuma river with the Accused who was in the vehicle in the front of the entourage leading them. At the river, the police officer called Mdlovu asked the Accused if that was the right place and he said yes. Mdlovu then cautioned the Accused that he had a right to point or not to point out the bodies. Thereafter, the Accused pointed to a place where there were trees which were surrounded by flies. The Accused removed a tree branch and PW2 saw Tengetile's body. She was naked and her underwear was towards the knees and her neck was cut. The Accused further pointed at a place about 30 meters away from the body of Tengetile. When they proceeded to that place they found that the baby was put in between the trees with her head in an upside down position. The head was within the trees.

[8] It was further PW2's evidence that he asked the Accused why he had killed the baby and the Accused replied that the baby was crying. PW2 told the court that whilst there the community members came running carrying weapons and

bushknives and the police officers told him to speak to the community not to assault the Accused. The station Commander ordered the police to take the Accused away from the community members and whilst they were taking the Accused away, PW2 tried to talk to the community members to calm them down. PW2 told the court that they later crossed to the other side of the river and the Accused pointed at where he had covered the blood of the deceased. The blood was mixed with the wet soil. The Accused also showed the police officers where he was dragging the body of the deceased. The police officers also asked the Accused what he used to kill the baby and he said he had suffocated her by closing her nose together with the month. He denied breaking the neck of the baby. PW2 also testified that the Accused told him that the reason why he killed the deceased persons was because Tengetile had reconciled with the father of her first child, Celimphilo Mavimbela and was playing games with him. He said that the Chief's runner had tried to reconcile the Accused and Tengetile pertaining to the issue of the Mavimbela boy.

[9] Under cross-examination, PW2 told the court that Accused admitted to him in the presence of the police officers that he had killed the two deceased persons. He insisted that he was present when the Accused admitted killing the deceased persons and he was not forced or assaulted by the police officers.

[10] PW3 Joseph Dlamini is a Judicial Officer. He is a Magistrate who is based at the Siteki Magistrates Court. He told the court that on 4 August 2011 he was on duty and he recorded a statement from the Accused in the presence of PW6 his interpreter. He duly cautioned the Accused after which the Accused insisted on making the statement. He further cautioned the Accused in terms of the proforma form, thereafter, the Accused made a statement. PW3 told the court that the

Accused spoke in Siswati and he recorded in English. That the Accused was calm and looking normal, there was nothing strange about him when he recorded the statement which was admitted in evidence as exhibit C.

[11] Under cross-examination, PW3 said that it is not correct that when the Accused initially came to him he was in his chambers for about 30 minutes then he left. He said he explained the Accused's rights before he recorded the statement and also read the portion of the proforma form on threats and arrests to him and he said that he was not under any threats. That the Accused did not say anything to him about being assaulted before he came to record the statement. He said that the only assault the Accused mentioned was the one he said was from Tengetile which was a bite mark on his hand. When it was put to him that the bite mark was inflicted by a police officer, PW3 said he did not know anything about that. He said he did not take off the Accused's clothes to inspect him to ascertain if he had injuries. He trusted the Accused's assertions that he was not assaulted. That the Accused told him that he had no physical injuries on his body and that if the Accused so wished to show him his injuries he was at liberty to do so there was nothing stopping him. Under re-examination, PW3 told the court that there were no police officers within the vicinity of where he recorded the statement from the Accused.

[12] PW4, was 2325 Sgt J. Lokotfwayo a scenes of crime officer. He attended the scene of the double murders. He met the Accused together with some police officers. After he was introduced to the Accused, and the Accused told what he was there to do, the Accused pointed at a thick bush near the Ngwavuma river. That was scene number one where the Accused pointed out the dead body of a female, Tengetile, under the thick bush lying face up with a cut wound on the neck. The deceased was wearing a blue panty and grey T shirt and she had a baby



carrier. PW4 told the court that they then proceeded to scene two which was about 5 metres away from scene one. There the Accused pointed out the body of the deceased baby Temalangi also under a thick bush. The baby had some bruises on the stomach like someone who had been dragged on the floor. She was wearing a pink tracksuit. Thereafter, they proceeded to the Accused's house at Mbhutfu area where he pointed out a table knife which was on a small table. The table knife had a few blood stains on it. He also pointed out some items of clothes namely trousers and sweater. From the Accused's house they went back to another part of the Ngwavuma river which appeared to be the spot where the deceased was killed. There were some blood stains at the scene. PW4 testified that he took photographs at the different scenes pointed out by the Accused. Some blood sample was also taken from the deceased Tengetile at scene one and packaged for forensic analysis. The knife which the Accused pointed out at his house, as well as, the Accused's trousers and sweater were all packaged. All these items collected from the pointing out were taken to the Forensic laboratory in South Africa for forensic analysis. The photographs which PW4 took at scene one were tendered in evidence as exhibits D – D6 respectively. Those he took at scene two were tendered in evidence as exhibits E – E5 respectively. The photograph taken at the Accused's house where the kitchen knife was pointed out were tendered as exhibits G and G2 respectively. The view of the scene where the crime took place was tendered as exhibit H. PW4 identified the knife which the Accused pointed out. The forensic report was tendered in evidence by consent as exhibit I. There was no cross-examination of this witness.

[13] PW5 was 3267 Detective Sgt N. Mdlovu a police officer attached the Lubulini Police Station. He was the Chief Investigating Officer. He stated that the matter was first reported on 31 July 2011 as a missing person's case. He proceeded to Mbhutfu to see the Ndvuna PW2. He confirmed that on 1 August he got a call

from PW2 saying that the Accused was seen at Lavumisa. PW5 in the company of PW2 and other police officers proceeded to Lavumisa, where they found the Accused seated in a bar. PW5 told the court that the Accused was so cooperative. When PW2 questioned him about the whereabouts of both Tengetile and the baby, the Accused replied that he had killed them the previous day. The Accused also mentioned that he was prepared to show the police officers the exact place he hid the dead bodies of the two. PW5 told the court that in view of the fact that the Accused verbally admitted the offence to PW2, he verbally cautioned him in terms of the Judges Rules. They rushed back to the Lubulini Police Station where PW5 again cautioned the Accused pertaining to the pointing out, that he was not obliged to point out exhibits relating to the matter which will self incriminate him, but the Accused insisted on leading them to the Ngwavuma river. The Accused then led PW5, the scenes of crime officer, PW2 and other police officers, to the Ngwavuma river via Valley farm. PW5 again cautioned the Accused person, but the Accused maintained that he will point out the dead bodies of the deceased persons. PW5 then introduced the scenes of crime officer PW4 to the Accused telling him that he will take photographs at every scene pointed out by the Accused. Thereafter, they crossed the fence of valley farms and walked for about 10 meters from the fence to the first spot. The Accused pointed at a thick forest. There was a fallen tree there. He pointed that he hid Tengetile there. When they removed the fallen tree they found a dead female body which was folded. It was half dressed and it was facing downwards. They found a deep cut wound on its neck. Some photos were taken. That was scene one. When they finished there they proceeded for about 30m away from that scene and the Accused again freely and voluntarily pointed and it was there they found a dead body of a child. It was facing downwards. Again some photographs were taken. This was scene two. They were disturbed by a mob from the community advancing towards them and crying for the blood of the Accused. They took the Accused back to the police station for safety and

asked PW2 to go and negotiate with the mob not to disturb them. After about one hour PW2 came back and reported that the mob had calmed down.

[14] PW5 further told the court that at the police station he noted a bite wound on the Accused's left arm. He asked the Accused how he sustained the wound and the Accused freely and voluntarily told him that he was bitten by Tengetile before he killed her because they engaged in a fight. Thereafter, the Accused indicated that there were still two spots which he wanted to point out. PW5 again cautioned him verbally after which he voluntarily led them to one of the flats at his parental homestead which they found locked. The Accused got the keys and opened the flat. The Accused pointed out a knife which was on top of a table in the flat. The knife had some blood and sand on it. The Accused indicated that he used the knife to kill Tengetile. The scenes of crime officer took photographs. Thereafter, the Accused led them back to the Ngwavuma river. Near the scene where he had pointed out the two dead bodies he also pointed out the actual spot where he had killed Tengetile. They noted a pool of blood hidden under the sand. The scenes of crime officer also took photographs of this spot. Then, they took the Accused back to the police station where PW5 formally charged him. PW5 identified the knife which was handed in evidence as exhibit J.

[15] Under cross-examination, PW5 denied that the Accused was assaulted by the police officers when he was being transported from Lavumisa to Lubulini Police Station. He denied that the Accused was threatened with death to compel him to admit to the crime and to go for the pointing out. He denied that the Accused was told what to say in relation to this crime and also in his confession recorded at the Siteki Magistrates Court.

[16] PW6 Collin Shongwe who is a Clerk at the Siteki Magistrates Court confirmed that PW3 recorded a statement from the Accused in August 2011. He said it was only the Magistrate (PW3), the Accused and himself that were present when the statement was recorded. His role was to interpret from English to Siswati for the Accused and from Siswati to English for PW3 to record . After PW3 finished recording the statement, he read it back to the Accused in English and PW6 was interpreting from English to Siswati to the Accused. Thereafter, the Accused was asked whether the statement was correctly recorded and he confirmed that it was. The trio then signed the confessional statement including the format and questionnaires. PW1 further stated that there were no police officers or other members of the public in sight when the statement was recorded. He identified exhibit C as the confessional statement recorded by the Accused.

[17] Under cross-examination, PW6 denied the allegation that there were police officers within the vicinity of the office where the statement was recorded. He maintained that there were only the three of them inside an office. He stated that PW3 explained every thing pertaining to a statement to the Accused before he recorded the statement from him. That the Accused was asked specifically by PW3 whether he was assaulted or threatened which motivated him to record the statement and the Accused's answer was no. The Accused told PW3 that he was not threatened by anybody.

[18] At the close of the Crown's case the Accused entered into his defence. He testified on oath and called no witnesses. He told the court that he was born on 10 October 1992. Both his parents are deceased. He cannot recall when his parents passed away because he was then very very young. He dropped out of school in form one because the school was very far from where he was staying and he also had no one

to continue paying for his education. He said it hurt so much to be charged with the murders of his lover and child because he did not commit the crime. Accused testified that on Monday 1 August 2011, he was sitting near a bar at Lavumisa waiting for a kombi to return to where he was staying, when his Uncle PW2 in the company of a member of his community as well as two police officers, approached him. He said they asked him when he last saw Tengetile and Temalangeneni and he replied that he last saw them on Saturday morning when he was with his sister and the Chief's runner at Tengetile's homestead. The police officers then took him to Lubulini Police Station where they posed the same question. He gave them the same answer and further told them that he had a problem with Tengetile on the Thursday. That Tengetile's mother had called him on Thursday morning to say that the baby was sick. He went to Tengetile's place but she and the baby were not there. That whilst he was still explaining these things one of the police officers slapped him and continued to beat him telling him to tell the truth and stop lying. He said he further told the police officers that a certain lady called Zinhle told him that Tengetile and the child went with Mpendulo to the Mavimbela homestead. He then told Tengetile's mother that he was going to the Mavimbela homestead to get the baby and bring her back home. On getting to the Mavimbela homestead the Accused went to Celimphilo's house. He heard a child crying and confirmed that it was his child crying because he knew her voice. The Accused knocked severally on the door but there was no response though the child kept crying. He then shouted for Tengetile and Celimphilo. There was still no response though the child cried louder. The Accused eventually pushed open the door and entered the house where he saw Tengetile and the child. He questioned Tengetile as to who was the father of the child himself or Celimphilo. Tengetile confirmed that the child belonged to the Accused. The Accused after cautioning her about not leaving the child at home with Zinhle, took the child and left. He went straight to his house. He put the child to sleep after which he cooked some food. Then woke the child up and fed her.

This was his usual practice and the child never gave him any problems. Whilst feeding the child Tengetile arrived at his house where she spent the night. In the morning Accused reported the matter to the daughter of the Chief's runner one Duduzile Mngometulu because he could not find the Chief's runner who was said to have gone to South Africa. He asked Duduzile to explain the matter to the Chief's runner because he was unhappy with what Tengetile did. Since the Accused was told that the Chief's runner would be back on Saturday, he went back to the Chief's runner's home on that day. The Accused told the court that Tengetile had previously given birth to a child which she told the Accused belonged to him. After the Accused had supported the child she eventually told him that the child belonged to Celimphilo.

- [19] The Accused eventually reported the matter to the Chief's runner. Thereafter, the Accused and the Chief's runner proceeded to Tengetile's homestead to deliberate the matter. At the gate of the homestead they saw Tengetile leaving with the child. The Chief's runner asked her where she was going and she replied that she was not going to talk with them. Thereafter, she left. The Chief's runner then talked to Tengetile's mother after which he informed them that they must come back by 2 pm. It was at the meeting at 2 pm that he heard from Tengetile's mother that she had gone to Lubulini. PW1 also told him that when she woke up in the morning she found that Tengetile had already left. The Accused was told by Tengetile's family that they will call him when they confirm that she was at the other homestead at Lubulini. It was further the Accused's evidence that he then left together with the Chief's runner who is his Uncle and went to watch soccer at the army barracks. After watching the game he went back home and took his bath. Thereafter, he went back to the army barracks in search of his sister whom he had sent to withdraw some money for him. The Accused stated that the evidence of the Crown witness's to the effect that he was seen on that day coming out of the forest

where the bodies of the deceased persons were found and when he was called he ran away, is not true because he has never been to that forest. He said he was watching soccer between 4 pm and 6 pm, and after 6 pm he went to check for his sister and after he collected the money he had asked her to withdraw, he went out of the army barracks towards the bus station. That was where he found Tengetile's sister, PW1 and her brother one Mbongeni Gumbi. The Accused asked them if they had found Tengetile since they had promised to call him when they find her. They told the Accused not to be worried. The Accused then informed PW1 that he was going to Lavumisa to meet another mother of his child one Noxolo Mngometulu. Thereafter, he left for Lavumisa where he spent the night.

[20] It was whilst a Lavumisa on Sunday 1<sup>st</sup> of August that he had the encounter with the police officers. That was when he told the police officers that he last saw the deceased persons on Saturday morning. He said it is not correct that he told one of the Crown witness's that he killed the deceased persons. The Accused further stated that it is not true that he told the Crown witness's that he was willing to point out where he put the two deceased persons. He said he pointed out the deceased bodies because he had been heavily assaulted at the police station. He said that prior to recording his confessional statement the police officers had threatened to shoot and kill him if he tells the Magistrate that he was assaulted. That the bite wound on his hand was actually inflicted by the police officers prior to making his confessional statement, when they were suffocating him and not by Tengetile as testified by the Magistrate. He further alleged that on their way to the Magistrates Court to record his statement the two police officers who escorted him one of who was PW5, stopped the car along the way where there were bushes and they each took out a gun and they showed him a notebook and told him that he must answer the questions posed by the Magistrate according to what they had written in the notebook and that if he does not, they will hear of it and they will

bring him back to the bushes and kill him. The Accused told the court that he has been remanded at the Big Bend Prison for about 1 year and that he has not had an easy stay there because PW5 will occasionally visit him and when he applies for bail PW5 will oppose it.

[21] The Accused further alleged that on the Monday when he was arrested the police took him and showed him clothes stained with blood. They insisted that he points to the clothes even though he told them that he knows nothing about the clothes and they also took photographs. Thereafter, they took him to his homestead and showed him clothes lying on his bed which were stained with blood. He told the police officers that even though those clothes belong to him, he had however left them on his bed without any blood on them. He also told the police officers that the clothes he was then wearing were the clothes he had been wearing since Saturday which were his pirates T shirt, a pair of khaki trousers and white sneakers. The police officers told him that he was lying and he will speak the truth when they reach the police station PW5 then showed him a knife. That he did not know where PW5 took the knife from because he had never seen the knife before. The knife was also stained with blood. That he knows nothing about the forensic report which states that the blood on the knife belongs to Tengetile. The Accused alleged that he suffered injuries in his hands and back which were inflicted by the police officers whilst they were suffocating him.

[23] Under cross-examination, the Accused agreed that PW2 is his Uncle and he grew up before him. He however denied telling PW2 at Lavumisa that he killed Tengetile and Temalangi. He stated that he does not know why PW2 would tell the court that. He also denied PW2's statement that he led the police officers to the bodies of the deceased persons and to the knife which was found in his homestead.



He stated that he does not know how the knife ended up in his room. The Accused said he could not say anything about the fact that the knife and trousers found in his homestead were found by forensic reports to have the blood of Tengetile. He said PW5 was not within the room where he recorded the statement but he was outside. When it was put to him that he recorded the statement freely and voluntarily before the Magistrate and that what he told the Magistrate is actually what he had done, the Accused denied this saying that he was forced to do the confession and he was afraid that he was actually going to be killed. He said that PW1's evidence to the effect that he had assaulted Tengetile a day before she disappeared is not true. He said he did not know that the day Tengetile disappeared she was actually on her way to go and report the assault at the police station. He was told that she had gone to visit her other homestead. That PW1's evidence to the effect that before he went to watch the soccer she had seen him coming from the bushes from the direction where the deceased persons were found is not true. He also said that it is not true that they called out to him and he made a sign that he was coming back and then ran past. He however stated that he does not know why PW1 would fabricate such a story against him. He said even though he was worried about the whereabouts of Tengetile and Temalangi, he however proceeded to Lavumisa to see the mother of his other child because Tengetile's family had told him not to be worried. He had to go to Lavumisa because the mother of his other child had called him to go and give her money since she stays in South Africa. He denied that the reason why he went to Lavumisa was because he was running away. He said both PW1 and Tengetile's brother saw him when he went to Lavumisa. Nothing turns on the re-examination of this witness.

[23] At the close of the defence both parties filed written submissions which they adopted in court. I have carefully considered the totality of the evidence tendered *in casu*. I have also paid due heed to the submissions urged by each side.

[24] ANALYSIS

Since this is a criminal trial, the question here, is, did the Crown prove its case beyond reasonable doubt? The Crown says it has. It urges the court to rely on the pointing out process, the evidence recovered therefrom, the forensic report, the Accused's confessional statement as well as other pieces of evidence to draw the inference that it was the Accused who committed the offences.

[25] As I have already shown in the summary of evidence, the Accused objects to the pointing out process and the evidence recorded therefrom as involuntary. A pointing out exercise constitutes an overall confession by the Accused. It is a communication by conduct, as such, it is a statement by the person pointing out that he has knowledge of relevant facts, which prima facie operate to his disadvantage and it can thus, in an appropriate case, constitute an extra-judicial admission. The law therefore demands, that just like every other confession, it should be made freely and voluntarily. See **S v Sheehama 1991 (2) SA 860, July Petros Mhlongo and Others v The King Case No. 185/92, The King v Khetha Mamba Criminal Case No. 198/11.**

[26] *In casu*, I believe the evidence of the Crown that PW5 duly cautioned the Accused before he led him together with PW2, PW4 and other police officers to the pointing out exercise. PW5's evidence was corroborated by PW2. I believe the evidence of PW5 and PW2 whom I find credible, truthful and reliable witnesses.

[27] On the other hand, I find the evidence of the Accused that he was assaulted and that was what motivated him to lead the police officers to the pointing out process both at the Ngwavuma river and his homestead, clearly unsustainable. PW2 an

independent witness and who is Accused's Uncle and who was an integral part of this whole process, told the court that the Accused not only admitted to the crime but freely and voluntarily led the police officers for the pointing out process. PW2 categorically told the court under cross-examination that he was with the Accused and the police officers at all material times from the arrest of the Accused at Lavumisa up until the pointing out at the Ngwavuma river, as well as, the Accused's homestead and he did not see the police officers assaulting or forcing the Accused to embark on the pointing out. There is no reason before me to show why PW2 who is an Uncle to the Accused person, by reason of being his mother's brother, would go out of his way to contrive such a magnitude of story against the Accused and implicate him in the crime. The Accused himself urged no such reason.

[28] Furthermore, there is unchallenged and uncontroverted evidence from PW2 and PW5 that during the point out at scenes one and two at the Ngwavuma river, a mob arrived from the community carrying weapons, baying for the Accused's blood wanting to lynch him. The police officers protected the Accused from being assaulted by the mob by promptly taking him to the police station and detailing PW2 to negotiate with the mob to desist from their actions. It was only after the mob had calmed down and the Accused was no longer in danger of any harm from them that PW5 and his entourage, which was inclusive of PW2 and PW4, continued with the pointing out exercise. This evidence is not in consonance with the allegation of assault or police brutality which the Accused wants the court to uphold.

[29] I find it as a fact in these circumstances, that the pointing out exercise was indeed freely and voluntarily made. The evidence recovered therefrom is not evidence

recovered by means of an illegal process. The evidence is legally admissible evidence.

[30] In any case, assuming without conceding that I were to adjudge the pointing out process as tainted and thus involuntary, the question would be whether this would preclude evidence recovered from such pointing out which is relevant to the facts in issue in this case, from being admitted in evidence? I do not think so. I say this because such legally inadmissible evidence can be admitted in evidence pursuant to **section 227 of the Criminal Procedure and Evidence Act 67/1938, as amended, (CP&E)**, which postulates as follows:-

- “(1) Evidence may be admitted of any fact otherwise admissible in evidence notwithstanding that such fact has been discovered and come to the knowledge of the witness giving evidence respecting it, only in consequence of information given by the accused person in a confession or in evidence which by law is not admissible against him, and notwithstanding that such fact has been discovered and come to the knowledge of the witness against the wish or will of such accused.**
- (2) Evidence that any fact or thing was discovered in consequence of the pointing out of anything by the accused person or in consequence of information given by him may be admitted notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him”.**

[31] It is clear from **section 227 of the CP&E** that such evidence is admissible if relevant. The relevance of the evidence recovered from the pointing out exercise, which includes the bodies of the deceased persons, the knife allegedly used in the commission of the offence, and some blood stained items of clothing alleged to belong the Accused, cannot be overemphasized. This evidence also forms the crux of the forensic report exhibit 1. These exhibits which were admitted without any objection from the defence are relevant to the facts in issue. They cannot be

expunged from the evidence . I reject the proposition of the defence that they should be so expunged.

[32] Similarly, the suggestion by the Accused that the knife and blood stained items of clothings were planted in his homestead is inconceivable. The Accused has failed to tell the court how these items got into his room. All he did was deny ownership of the knife and allege that though the clothes belong to him, he had however, left them in his room without any blood stains and does not know how the blood got on them. This defence is so improbable as to be incapable of belief regard being had to the fact that there is no evidence to show that the Accused's house was broken into or the locks of his house tampered with in any way. Rather, the unchallenged and uncontroverted evidence from PW5 is that when they got to the Accused's house during the pointing out exercise the door was locked. The Accused produced the keys and opened the house. Upon entry into the house they found these items in his room. Since this evidence is unchallenged, it is trite law that it must be taken as admitted and as establishing the facts alleged therein. This state of affairs puts paid to the contention by the Accused that he knows nothing about these items.

[33] Furthermore, the Accused objected to his confessional statement as legally inadmissible evidence. He urged the court to discountenance the statement which was admitted in evidence without any objection. Before, going any further, I deem it meet at this juncture to recount the law on how to record confessional statements as prescribed by **section 226 (1) of the CP& E**, which states as follows:

**“(1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any**

**person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such persons:**

**Provided that such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses without having been unduly influenced thereto:**

**Provided further that if such confession is shown to have been made to a policeman, it shall not be admissible in evidence under this section unless it was confirmed and reduced to writing in the presence of a Magistrate or any justice who is not a police officer; and,**

**Provided also that if such confession has been made on a preparatory examination before any Magistrate, such person must previously, according to law, have been cautioned by such Magistrate that he is not obliged, in answer to the charge against him, to make any statement which may incriminate himself, and that what he then says may be used in evidence against him”.**

[34] The question here, is, does the confessional statement meet with the above prescriptions of the law? The Accused says it does not. His contention is that he was severally tortured, threatened and in fact bitten on the hand by the police officers, in order to compel him to record the statement (exhibit C). On the other hand, PW5 told the court that the Accused freely and voluntarily opted to record the confessional statement after he was duly cautioned. PW3 and his interpreter PW6 told the court that before recording the statement, PW3 explained to the Accused both verbally and in terms of the proforma everything relating to a confessional statement. PW3 told him that he is not obliged to make the statement. The Accused was also specifically asked both in terms of the proforma and verbally whether he was assaulted or threatened which motivated him to record the statement and he answered no. He specifically told them that he was not forced or threatened to record the statement and insisted that he wanted to record the statement. It was after this that PW3 recorded the statement. Thereafter, the parties signed the confessional statement including the format and questionnaires this was

after the statement was duly read and explained to the Accused in Siswati and he confirmed it as correct. PW3 and PW6 told the court that they were alone with the Accused in a room at the Siteki Magistrates court and there were no police officer and other members of the public in sight when the statement was recorded.

[35] I believe the evidence of the Crown witnesses that the statement was freely and voluntarily made. I find PW3 and PW6 in particular, credible and reliable witnesses. Their evidence on this issue was consistent. It was not shaken under cross-examination. If the Accused was tortured as he alleges, there was nothing stopping him from telling PW3 and PW6 this before he recorded his statement considering that he was all alone with the duo when the statement was recorded. The Accused's contention that he did not reveal the alleged torture to PW3 and PW6 because he was afraid of what the police officers would do to him thereafter, is clearly unsustainable. In these circumstances, I view the allegation of torture with suspicion. I see it as a recent fabrication and an afterthought, contrived by the Accused solely to perfect his defence.

[36] In coming to this conclusion, I am mindful of the fact of the common cause evidence that the Accused had a bite wound on his left arm as at the time he recorded his statement. The Accused alleges that the bite wound was inflicted by the police officers whilst assaulting him. This evidence is however contradicted by the Crown's case. PW5 told the court that he first observed this wound at the Lubulini Police Station after the Accused was arrested. Upon enquiry, the Accused told him that the bite wound was inflicted on him by Tengetile with whom he had engaged in a fight or struggle before he killed her. This evidence is corroborated by PW3 who told the court that the only injury which the Accused told him he had on his body as at the time he recorded his confessional statement was the bite

would which the Accused told him was inflicted on him by Tengetile. This evidence of PW3 and PW5 is in consonance with the confessional statement, wherein under paras 12 and 13 the following appears:-

**“12 Q Have you received any injuries? If so where and what is the nature thereof? (give full description)**

**A. Yes, I have a bite wound on the left arm inflicted by Tengetile Gumbi.**

**13 Q Do you have any wounds, bruises or injuries on your body? If so what caused it? (give full description)**

**A. NONE”.**

[37] I find the overwhelming evidence led by the Crown on this issue consistent, credible and reliable. I accept it. The allegation by the Accused that he did not tell PW3 and did not state in exhibit C that the bite wound was inflicted by police officers for fear of further assault and possible death at the hands of the police, is incapable of belief in these circumstances. I am unable to subscribe to this proposition I rejected it as a recent fabrication and an afterthought.

[38] On these premises, I adjudge the confessional statement as having been freely and voluntarily made. It is thus legally admissible evidence.

[39] Now, 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 the court to draw, which is that the Accused killed the two deceased persons.



[40] I say this because the Accused confessed to PW2, his Uncle, that he killed both deceased persons. He then led the police officers from Lavumisa where he was arrested to the Ngwavuma river and showed them three scenes, namely scene four where he killed Tengetile which clearly had a pool of blood mixed with the river bank sand. It is obvious from the evidence led that the Accused dragged the bodies of the deceased persons from the point of their deaths to scenes one and two where the bodies were respectively discovered after he had pointed at the scenes. The postmortem report exhibit A demonstrates that Tengetile died due to a cut throat injury which severed her oesophagus in the middle. This is consistent with the photographs of the deceased body of Tengetile taken during the pointing out exercise (exhibits D3 and D6). These photographs show a gaping and horrible cut wound on the deceased's throat. This is also confirmed by the Accused's confession where he admitted stabbing the deceased three times on the neck and that he cut her oesophagus (neckpipe) and she died on the spot.

[41] There is no doubt in my mind that the weapon which the Accused used to commit the grievous offence in count 1 is the knife which he pointed out in his homestead (exhibit J). The evidence of the Crown demonstrates that the knife which had traces of blood on it as well as Accused's items of clothing which were recovered from his homestead during the pointing out, were sent to the Forensic Laboratory in South Africa. The traces of blood found on these items were compared with the blood which was drawn from the deceased body of Tengetile at scene one during the pointing out process. The result of the Forensic analysis which PW5 received from the Forensic Laboratory in South Africa is contained in exhibit I the forensic report.

[42] In para 2 of exhibit I the forensic expert one Kenneth Aluoneswi Mphephu, detailed his qualifications as follows:-

**“ I, number 0542894-7, am a Captain in the South African Police Service, attached to the Biology Unit of the Forensic Science Laboratory as an Senior Analyst and Reporting Officer, and I am in the service of the State.**

**2(a) I am in possession of a B.Sc degree majoring in Biochemistry and Microbiology, obtained from the University of Venda. I am also in possession of a B.SC Honours degree majoring in Botany, obtained from the University of the North. Included as part of the above mentioned course are Molecular and Cellular biology which is relevant to DNA.**

**2(b) I have been attached to the Biology Unit of the Forensic Science Laboratory since 28 March 2002. I have undergone in-house training within the Forensic Science Laboratory with reference to the opening of parcels containing biological evidentiary material, the preliminary testing for body fluids there-of and DNA techniques which have offered the knowledge and skill for Forensic Biological analysis. I have attended the 1<sup>st</sup> African Interpol DNA users Meeting convened by Forensic Science Laboratory, ASGEP and Interpol in 2002. I have also attend DNA Forensic Workshop convened by BIOPAD, BODE technology and Inqaba biotec in 2009. I have fourteen years experience in the biological sciences.**

[43] The expert further went on to state in para 3 of exhibit I, the methods, procedure and techniques he employed in carrying out the DNA analysis. He clearly set out the relevant results obtained via the STR – DNA analysis system in a table set out in para 3. In conclusion in para 4 of exhibit I, the expert says the following.

**“(4) During the course of my official duties, I examined the results in Table I and the following findings were made**

**4.1 The DNA result obtained from the kitchen knife (RSPFSL – 14451) and Trouser (RSPFSL – 14450) matches the DNA result**

**obtained from the Reference Blood Sample 11D4AB7316MX and the most conservative occurrence for the DNA result from the kitchen knife (RSPFSL – 14451), and Trouser (RSPFSL – 14450) in the South Africa population is 1 in 21billion people. ‘Research has shown that the frequency of occurrence in other countries would be within the same range’.**

[44] Appended to exhibit I is a document headed FURTHER EXPLANATION OF STR PROFILING. In this document the method, procedure and techniques employed by the expert in arriving at his conclusion are exhaustively canvassed. The detail that attended the expert report rendered the necessity of the expert attending court to tender oral evidence in further elucidation of same, otiose. I accept the report which was admitted in evidence without any objection, as reasonable within the circumstances of this case. Science has shown that DNA is constant for an individual and does not change during a person’s lifetime. Each persons DNA is the same in all of their cells. So DNA recovered from blood cells will be the same as found in other tissues and body fluids, such as semen or hair roots. Each persons DNA is unique, except for identical twins and therefore indicates differences between individual. The DNA result contained in exhibit I shows clearly that the blood sample collected from the deceased body of Tengetile was a match to the blood sample found on the kitchen knife and the Accused’s clothes. Though this is not conclusive proof that the Accused killed Tengetile, it however goes to support the totality of the evidence pointing in that direction which include the admissions which the Accused made to PW2, the confessional statement and the pointing out process. I am also inclined to agree with the Crown that going to Lavumisa in the wake of the disappearance of both his lover and child, obviously shows that the Accused was fleeing from these offences. It points at his guilt.

[45] It becomes crystal clear at this stage, that the Accused's allegation that he was watching a soccer match between 4 pm and 6 pm on the day of the offences does not impinge on the Crown's case. It does not, in my view, take the defence any further. This is because the evidence led is that the two deceased persons disappeared in the morning of that day. PW1 categorically told the court that by 11 am when she woke up from sleep, they were already gone. The Accused has not accounted for his whereabouts in the morning hours of that day between when he allegedly left Tengetile's homestead after the first failed meeting and when he allegedly returned to the homestead around 2 pm for the subsequent meeting. This is most important in view of the evidence by PW1 that at sometime during her search for the deceased persons on that day, she came across the Accused emerging from the forest where the deceased persons bodies were subsequently found. She called upon the Accused but he ignored her and ran away.

[46] It appears to me from the foregoing, that there is only one inference that can be drawn from the totality of the evidence led which is that the Accused killed the deceased persons. The Crown's case has satisfied the rule on reasoning by inference as elucidated in **R v Blom 1939 AD 188 at 202 – 3 per Watermeyer JA**, which is that

- “1. The inference sought to be drawn must be consistent with all the proved facts, if it is not, the inference cannot be drawn.**
- 2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct”.**

From the totality of the evidence tendered, I find that the Crown has proved its case beyond reasonable that the Accused killed the two deceased persons.

[47] Furthermore, in my view, the Accused had a direct intention to kill Tengetile. He was obviously aggrieved by the fact that she appeared to be reactivating her past love relationship with Celimphilo Mavimbela which relationship also produced a child. This was what clearly caused the row between the Accused and Tengetile the day prior to her demise. When she would not pay heed to him or attend the meeting summoned in this respect, which as appears from the evidence to be only one of the meetings which had been convened to reconcile this issue, he went after her with a kitchen knife and stabbed her to death. If he did not intend to kill her how then was a kitchen knife conveniently in his possession to be used as the murder weapon at all places but the Ngwavuma river? This is consistent with the evidence of PW2, which I believe, that the Accused told him that he killed Tengetile because she had reconciled with the father of her first child, Celimphilo Mavimbela, and was playing games with him

[48] In any case, quite apart from the direct intention, the Crown has clearly proved an indirect intention to kill Tengetile. In the case of **Thandi Tiki Sihlongonyane v Rex Appeal Case No. 40/97**, the Supreme Court stated as follows:-

**“Dolus can, of course, take two forms:-**

- (i) dolus directus where the Accused directs his will to causing the death of the deceased. He means to kill. There is in such event an actual intention to kill; and**
- (ii) dolus eventualis, where the Accused foresees the possibility of his act resulting in death yet he persists in it reckless whether death ensues or not”.**

[49] *In casu*, by employing a dangerous weapon like a kitchen knife, stabbing Tengetile in the throat and cutting her oesophagus, as the Accused admitted in his confessional statement, the Accused clearly foresaw that his action was likely to result in death but he was reckless as to whether death occurred or not. The throat

is a sensitive part of the body. The Accused did not just stab Tengetile once in the throat but 3 times causing the kind of gapping and fatal injury demonstrated in the photographs taken at the pointing out.

[50] In the case of **R v Jabulani Philemon Mngomezulu 1970 – 1976 SLR 5 at 7 (HC) Troughton A CJ** made the following illuminating pronouncement:-

**“the intention of an Accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased”.**

[51] It is also clear from the totality of the evidence led that the Crown has proved the Accused’s indirect intention to kill Temalangeni. In his confessional statement the Accused admitted that he pulled the baby by its neck off Tengetile’s back. The neck snapped and she died. Again the Accused should have foreseen, that considering the tenderness of the baby who was just 8 months old at the time of this incident, that pulling her by her neck was likely to lead to her death. The Accused however persisted in this action and was reckless as to whether death occurred or not.

[52] From the totality of the foregoing, I come to the ineluctable inference that the Accused intended to kill the two deceased persons. The Crown has proved its case beyond reasonable doubt. I find the Accused person guilty of the murder of the two deceased persons. I accordingly convict him of the offences as charged in counts 1 and 2 respectively.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS  
THE ..... DAY OF ..... 2014**

**OTA J.  
JUDGE OF THE HIGH COURT**

**For the Crown:**

**N. Masuku  
(Crown Counsel)**

**For the Accused:**

**N Mazibuko**