

**IN THE HIGH COURT OF SWAZILAND  
JUDGMENT**

**CASE NO. 13/10**

**HELD IN MBABANE**

**In the matter between:**

**REX**

**V**

**CEBISA M. MOTSA**

**1<sup>st</sup> Accused**

**NHLONIPHO DLAMINI**

**2<sup>nd</sup> Accused**

**NTOBEKO DLAMINI**

**3<sup>rd</sup> Accused**

**SIBUSISO MOTSA**

**4<sup>th</sup> Accused**

**ELECTION L. DLAMINI**

**5<sup>th</sup> Accused**

**Neutral Citation: *Rex v. Cebisa M. Motsa & Four Others*  
(13/10) [2019] SZHC 182 ( 26<sup>th</sup>  
September 2019).**

**Coram: *Magagula J***

**Dates Heard: *15/6/17; 1/11/17;2/11/17;15/3/18;  
28/3/18;5/7/18;9/7;18;18/10/18;  
11/12/18;31/7/19;1/8/19 and  
8/8/19.***

**Delivered: 26<sup>th</sup> September 2019**

[1] In this matter the accused persons are charged with the crime of murder and the crown alleges that:

***“ Upon or about the 1<sup>st</sup> January 2010 and at or near Mankayane area in the Manzini Region, the said accused persons each or all of them acting jointly and in furtherance of a common purpose did unlawfully and intentionally kill SIFISO NTULI.”***

[2] Upon arraignment all the accused persons pleaded not guilty to the charge. One of the accused persons, Cebisa Mfanzile Motsa, who appears as accused No.1 was then turned into an accomplice witness by the crown which then went ahead to lead evidence in proof of the charges preferred against the accused persons.

Pw1 - Dr Komma REDDY ( Police Parthologist

[3] This witness told the court that he conducted a post - mortem examination on the deceased body on the 7<sup>th</sup> January 2010. He noted the following ante - mortem injuries:

1. A cut wound of 2x1/2 centimetres, bone deep, on the left side of the forehead.

2. A lacerated wound of 2x1cms on the middle portion of the mouth.
3. A lacerated wound of 5x5 cms on the middle position of the head.
4. The chest bone, 3 left side ribs and 2 right side ribs were fractured.
5. On the head he observed that the left side of the frontal bone was fractured.
6. The left side lung was ruptured.

From his observations this witness concluded that the cause of death was injury to the head.

- [4] During cross examination the witness was asked to give an opinion as to the kind of weapon used to inflict the injuries upon the deceased. He stated that as regards the head injuries his opinion was that a heavy object such as a stick or stone was used. In relation to the chest injuries his opinion was that a blunt heavy object such as a stick or fists were used. Asked if he could identify the injuries that were fatal he said it would be the head injuries as well as the chest injuries since there were bone fractures. The witness then handed in his post - mortem report which was marked exhibit **"P1"**

**Pw2 - ELLIOT MSHIYENI NTULI**

[5] This witness is the father of the deceased and he told the court that he identified the deceased body as that of his son before a post mortem examination was conducted on it.

**Pw3 - DUMSILE ZIKALALA**

[6] This witness told the court that in the afternoon of the 1<sup>st</sup> January, 2010, she was at home lying under a tree when she saw a boy running through her homestead. He went through the fields and he was being chased by others. These were four in number and they were carrying stones and throwing them at him. When he was next to a church he joined other four boys. But as his assailants pursued him continuing to throw stones at him he separated himself from the four he had joined and ran into a nearby bush. They continued to chase him whilst throwing stones at him until he fell into a swamp. One of his assailants was carrying a golf club which he used to hit him and finish him off.

[7] The four whom he had joined by the church retrieved him from the swamp and laid him just above the homestead. This witness got to where the deceased was laid and she covered him with a kanga. The boys went up to Cebisa Motsa's car and he came down to observe the deceased. After he had seen the deceased he wanted to take him to hospital but the other boys would not let him do that. He then went to his car where the deceased's assailants were already on board. He drove away with the boys and thereafter police came.

[8] This witness further told the court that she did not know the deceased nor did she know his assailants. She however recalled that the deceased was wearing a cream - white pair of shorts, black shoes, and a red golf t- shirt. The witness was then given four photos depicting the deceased in different positions and she identified him. Although she recalls seeing one of deceased's assailants carrying a golf club as they were chasing him she could not tell which one was it. Further, although she saw one of them hitting the deceased with the golf club she could not tell which of them was it. In cross examination this witness maintained that Cebisa Motsa was not at the scene when the deceased was assaulted. She also could not estimate the distance from where the car was parked to the place where deceased was assaulted.

#### **PW4 - CEBISA MFANZILE MOTSA**

This witness told the court that on the 1<sup>st</sup> January 2010 and at around 4:00 pm he went to Wonkhe - Wonkhe shop. He had two or three children in the back seat of his car which was a double cab. At the shop he gave a lift to his cousin Election Lukhetfo Dlamini (Accused No.5). The latter occupied the front passenger seat. As they were driving home they would pass groups of boys who were apparently from the soccer field ( Wonkhe - Wonkhe sports ground). After he had driven for about 1 km he came across another group in which there was Nhlonipho Dlamini (Accused No.2)

Ntobeko Dlamini (Accused no.3) and Sibusiso Motsa ( Accused no.4). He passed them.

[10] As this witness was approaching a Zikalala homestead and at a blind rise, he found others. Election Dlamini who was with this witness in the car, asked him if he knew the person who had stabbed Nhlonipho Dlamini. He replied in the negative. Election Dlamini then pointed him out. He then stopped the car and asked the deceased why he had stabbed Nhlonipho. He said Nhlonipho had torn his T - Shirt. He asked him why he did not take Nhlonipho to hospital. He responded by saying “ **Please go we are still going to get hold of him.**” This witness then alighted from his car as the group of boys went on. He signalled to Nhlonipho and the others who were about 100m away that they should join him and go. They came and got onto the bakkie. They drove past the first Zikalala homestead. The group which was with deceased was no longer on the road. He drove past the Revival Church and when they were about to reach the 2<sup>nd</sup> Zikalala homestead accused No.5 said he should stop the car as it seemed the boys were no longer in the bakkie. The car was driving slowly.

[11] This witness stopped the car and elighted. He saw people going around the church and others were running as if they had been following the car. He followed in the direction where the people were going. Below where he was he saw a number of people. He proceeded there and as he was going

down he came across Nhlonipho Dlamini, Ntobeko Dlamini and Sibusiso Motsa. These are the only ones he saw and apart from them there were no others. He proceeded to where the deceased was lying down. He observed that the deceased was bleeding. He went back to the road and he found the three there. He suggested that the victim should be taken to hospital and they agreed. However when they tried to take him the others who were with him refused. These were people from the deceased's area.

[12] This witness and the three then boarded the car and proceeded to Mankayane Police Station. According to this witness their mission at the Police Station was to report the incident and get a clearance for Nhlonipho to be taken to hospital as he had been injured on the shoulder. They reported the incident at the police station, got the clearance and took Nhlonipho to hospital. They returned to the police station but found that the police who had gone to attend to the incident had not returned. They were allowed by the police to go home after they had taken their contact numbers. On the way home they met a small boy carrying the golf club and he said he had brought it to Ntobeko. Ntobeko said the boy should go with it and he would collect it some other time.

[13] This witness dropped his companions at their destinations and proceeded home. At about 7:30 pm on the same day the police called this witness and told him to report at the police

station together with the soccer boys he had given a lift. The following morning he went to the police station with Ntobeko, Sibusiso, Election and Nhlonipho. After questioning by the police this witness was released and the others were detained. On the 22<sup>nd</sup> January Pw4 was telephonically invited to the same Police station. Upon arrival he was charged with the murder of the deceased and incarcerated. He was released the following week after being admitted to bail. This witnesses was not cross - examined.

#### **PW5 WONDER BOY DLAMINI**

[14] This witness told the court that he was at Wonkhe- Wonkhe sports ground on the 1st January 2010. There was a football match between Junior Bucs FC and Screamer Pirates. Junior Bucs F.C won the match and celebrations ensued. As celebrations continued he heard that the deceased was being assaulted. He then heard that the coaches had managed to stop the fight which was between the deceased and Nhlonipho Dlamini.

[15] This witness went inside a shop which is apparently in the same vicinity as the sports ground. He then heard that the fight between the deceased and Nhlonipho had ensued again and the accused had stabbed Nhlonipho. A certain Dabane Hlophe who was in charge of the games then ordered the games to stop since there was violence and he called the police. This witness then suggested to his companions that



they should go since the games were over. He also said that the police would get any person they want. He then left with the deceased, Bhekani Mbuyisa, Sifiso Msibi and Ncamiso Ndzinisa.

[16] After they had travelled for about 1 kilometre, Cebisa Motsa approached from behind then driving a black motor vehicle which was a double cab. The motor vehicle slowed down when it was next to them and the driver (Cebisa) asked who had stabbed his brother's child. The deceased said he is the one that accidentally stabbed him. Cebisa asked why he had stabbed him and deceased said Nhlonipho wanted to assault him and he even tore his T-shirt. Cebisa asked whether it is right that when someone wants to assault you, then you stab him. He did not even need an answer to this question. He just drove back to the soccer field saying "**You will see what happens to someone who stabs another. I am a soldier.**" As he drove back he was driving very fast as compared to the time when he was approaching this witness and his group.

[17] As this witness and his companions proceeded with their journey they again saw the car driving fast towards them with a lot of people on its bakkie. When the deceased saw the car approaching he ran away. The car passed this witness and the others and chased after the deceased. When the car was about to catch up with the deceased he went out of the road. This was next to the Revival Church. He went

through a Zikalala homestead and proceed down. The car continued to chase after the deceased but when it could not drive on the off - road terrain it stopped and the people on the bakkie jumped off and chased after the deceased.

This witness and his companions also ran towards where the deceased was running aiming to broke peace so that deceased could not be killed.

[18] As this witness and his company were running towards where the deceased was going the deceased was already being assaulted by his assailants and this witness saw Nhlonipho hitting him with a golf - club. According to this witness there were many people who chased after the deceased. This witness further states that he saw Ntobeko Dlamini ( Accused No.3) stabbing the deceased above the eye. This witness identified all the accused persons saying that they all participated in assaulting the deceased with stones and beer bottles. Efforts were made by this witness and his group to broker peace but these efforts did not yield any fruits. The deceased was assaulted until he was lying down.

[19] According to this witness Cebisa was amongst the group that assaulted the deceased and he was encouraging them to assault him. Cebisa was also taking part in the assault. They left him lying down and bleeding at the swampy area. They

returned to the car which was not very far from the swampy area and drove away.

[20] This witness and his company retrieved him from the mud and tried to get transport from neighbours so that he could be taken to hospital. As they were doing this Cebisa came back and offered to take the deceased to hospital. This witness and his company refused as they thought they would kill him since all his assailants were in the car. This witness went to look for a car but upon his return he found that the deceased had already died. This witness then called the police who came and took them to the police station to record statements as well as the deceased body.

This witness further described the clothes worn by deceased on the fateful day. He was also given photographs by the prosecutor and he identified them as those of the deceased in different positions after his death at the crime scene. He also identified the golf club used to assault the deceased in court. He also revealed that the deceased was his nephew.

[21] During cross - examination Pw5 maintained that Cebisa also participated in the assault of the deceased. He said he saw Cebisa throwing a stone at the deceased and that he was also encouraging the others to continue assaulting the deceased. When it was put to this witness that Cebisa gave

evidence in court and denied ever assaulting the deceased, he said Cebisa was lying when he said that.

It was further put to this witness that accused No.5 Election Lukhetfo Dlamini never participated in assaulting the deceased and that he actually never went to the scene of crime. Pw5 maintained that he did participate in assaulting the deceased and that he actually saw him there.

[22] It was put to this witness that accused No.2 Nhlonipho Damini and others wanted to apprehend the deceased as he had left the scene after stabbing Nhlonipho yet police had already been called to attend to that earlier incident. However as they chased the deceased Nhlonipho being in hot pursuit, the deceased produced the knife he had used to stab Nhlonipho and charged at him with intention to stab him again. Nhlonipho then hit him once with the golf - club. This witness denied that deceased's assailants intended to apprehend him. He maintained that they were all carrying weapons such as knives, stones and bottles which they used to assault the deceased. He maintained that their intention was just to assault the deceased.

[23] Pw5 further maintained in cross - examination that he saw accused No.3, Ntobeko Dlamini stabbing the deceased with a knife above the left ear. He said this was a big black knife, not the folding type and that he told the police about the knife. He however said he never saw it again thereafter.

This witness is also an uncle to the deceased.

#### **PW6 - SIFISO WANDILE MSIBI**

The evidence of his witness was in line with that of Pw5. He told the court about the match between Juniors Bucs F.C and Screamer Pirates at Wonkhe - Wonkhe sports ground. He further told the court about a fight which broke out at the end of the match and which fight they managed to stop and broker peace. He further mentioned that whilst seated behind a shop within the same vicinity he heard that deceased had stabbed Nhlonipho. Thereafter the match organizer, one Dabane Hlophe, called off the games and called the police.

[24] Before the police could arrive this witness and his companions who included the deceased decided to leave and go home. On their way home they saw Cebisa approaching from behind driving a black bakkie. He enquired as to who had stabbed Nhlonipho. The deceased said it was him. Cebisa drove back to the shop and later came back with a number of people on the bakkie of his car. He only knew Nhlonipho (accused no.2) and Ntobeko (accused no.3) among the people in the bakkie. When the vehicle was about to stop the deceased ran away and entered a Zikalala homestead. All those who were in the bakkie alighted and chased after the deceased.

[25] Upon realising that the people were pursuing him the deceased ran towards the Revival Church. This witness Ncamiso, Wonderboy (Pw5) and Bhekani followed with the aim of assisting the deceased. However they could not assist as the people chasing after the deceased were carrying weapons and stones. Nhlonipho was carrying a golf - club and Ntobeko was carrying a long knife. They assaulted the deceased with stones but Nhlonipho hit him with the golf - club and Ntobeko stabbed him above the eye. Cebisa was telling the others to assault him also carrying a stone as he approached the crime scene. They beat the deceased and left him lying down and returned to the car. After sometime the deceased's assailants returned and offered to take him to hospital. This witness and his companions refused maintaining that they had already sent someone to try and get a car to ferry him to hospital. He subsequently died before he could be taken to hospital. This witness also identified accused No.2 to 5 in court as some of the people he saw assaulting the deceased.

[26] During cross - examination this witness maintained what he told the court in chief. He rejected the notion that the deceased's assailants intended only to apprehend him. He said if they had such an intention they would not have armed themselves with the weapons they were carrying. They also would have no reason to assault the deceased as he was not armed. It was further put to this witness that

when the deceased produced a knife and charged at Nhlonipho at the swampy area, he was not there. This witness maintained that he was there and the deceased never produced any knife or try to attack Nhlonipho at this point in time. He said it was only the accused persons who were throwing stones at the deceased. When it was further put to this witness that Ntobeko Dlamini did not carry any knife on this day and that he never stabbed the deceased, he maintained that Ntobeko was carrying a knife and he stabbed the deceased.

**Pw7 4825 CONSTABLE THULANI VILAKATI**

[27] This is the investigating officer. He told the court how he received a report of a person who had been assaulted and killed at Malangeni area. He also told the court that he proceeded to the scene of crime and found a deceased body covered with a kanga. He and his colleagues uncovered the body and noted an injury on the head and another on the mouth. Thereafter he conducted investigations which led to him arresting all the accused persons in this matter. He also handed into court the golf - club which was marked ' Exhibit P3".

[28] In cross examination this witness conceded that he was aware that deceased had stabbed Nlonipho before he was killed. He however maintained that he had no details of this

earlier assault as this was not his case. The crown then closed its case.

**DW1 - NHLONIPHO DLAMINI ( Accused No.2)**

[29] The defence opened its case by leading Nhlonipho Dlamini who is accused No.2 and shall hereinafter be referred to as DW1. This witness told the court that on the 1<sup>st</sup> January 2010 there was a soccer match at Wonkhe wonkhe sports ground. He was one of the players playing for a team called Screamer Pirates. Whilst he was playing the deceased insulted him by calling him a dog who was no good at playing football. The deceased made such unpallatable utterances several time and directing them to him.

[30] As a result of the insults hurled to this witness at the end of the game they manhandled each other but other players intervened before they could engage in a real fight. Thereafter there was a squable between members of the two teams. Team members of the other team had manhandled him and his team- mates intervened. This squable bowever settled down soon.

[31] After sometime this witness and Sibusiso Motsa ( Accused no.4) went to a nearby shop where they bought some drinks. As they were sitting outside the shop and enjoying the drinks the deceased stabbed this witness at the back of his right shoulder. His assailant then ran towards a group of people who included members of the opposition team that they



were playing against. He was carrying an okapi knife. He bled profusely from this stab wound. The match organizer, Dabane Hlophe, witnessed the stabbing. He then called the police and told the deceased not to leave. The deceased however left. Mr Hlophe then called the games off after the stabbing incident.

[32] This witness and some of his team mates were leaving the shop when they came across Cebisa Motsa. Cebisa asked why the games had been cancelled. They told him that the games had been called off after Nhlonipho was stabbed by deceased. They proceeded on their way home and after a short while Cebisa caught up with them and offered them a lift which they declined preferring to take short cuts home.

[33] Cebisa left them but after driving for about 100 metres he stopped his car. He alighted and chased after a person. He also signalled to them that they should come to him. They obliged and got into his car. Nhlonipho went inside the vehicle whilst the others boarded on the bakkie. Inside the vehicle there was Lukhetfo Dlamini (accused No.5) and two little children. According to this witness about fifteen people boarded the vehicle. This witness also told the court that Cebisa said the person he was chasing (the deceased) had said he would wait for Nhlonipho ahead so that they settle their score.

[34] As they were in the car they saw deceased running next to the road. After he had run a short distance Lukhetfo told the driver to stop the car as there was no one on the bakkie. As the car stopped they saw all those who were on the bakkie chasing after the deceased who ran into a Zikalala homestead. Nhlonipho also alighted from the car and joined the chase. He told the court that his intention was to apprehend the deceased and he took a short cut in order to apprehend the deceased. The deceased then got stuck in a swamp. He then decided to come towards Nhlonipho with his knife in his hand. When Nhlonipho saw the knife he ran away. As Nhlonipho retreated he came across the group that was chasing the deceased. He took a golf club from Ntobeko Dlamini and hit the deceased with it.

[35] It is Nhlonipho's evidence that when he hit deceased with the golf - club his aim was to disarm him of the knife and he hit him only once and ran away. He maintains that the deceased was accidentally killed and he had no intention to kill anyone. This witness further confirmed that Lukhetfo Dlamini (Accused No.5) never alighted from the car and he never chased after the deceased. In cross examination he maintained that when he hit the deceased he was alone.

## **Dw 2 - ELECTION LUKHETFO DLAMINI ( Accused No.5)**

[36] The evidence of this witness as regards the chasing of the deceased by a group of people who alighted from Cebisa Motsa's car is in line with that of Nhlonipho Dlamini. He however did not see who first caught up with the deceased nor did he witness any assaults upon the deceased. He never alighted from the vehicle. His evidence that he never took part in assaulting or chasing the deceased has since been conceded by the prosecution and I find no need to deal with it any further.

**DW3 - NTOBEKO DLAMINI ( also accused No.3)**

[37] This witness also alluded to the insulting of Nhlonipho by the deceased during the game between Junieur Bucs and Screamer Pirates. He also confirmed that the two manhandled each other at the end of the game but they were separated. He further stated that another squable occurred between the fans of the two teams next to some trees at the sports ground and it was also calmed down. This is where he got the golf club under a tree.

[38] He further confirmed the stabbing of Nhlonipho at the shop and the cancellation of the games by Dabane Hlophe. Thereafter he noticed that the deceased had disappeared. He and his companions then decided to go home. Cebisa left with Lukhetfo in a motor vehicle belonging to Cebisa. This witness and companions followed on foot.

[39] After it had travelled a short distance Cebisa's car stopped and he raised his hand signalling that they should join him. They then boarded Cebisa's car. When Cebisa called them he had stopped next to a group of people and he saw a person from the group running away. He got to know when they got to the car that the person who had run away was the deceased and they found him along the road.

[40] They alighted from the car and tried to apprehend him. They chased after him until he went next to the Revial Church and proceeded down to a swampy area. This witness could not tell how many people chased after the deceased save that they were many. He however recalled that Lukhetfo Dlamini (Accused No.5) was not among the people who chased after the deceased as he remained in the car. He also recalled that Cebisa did not join in the chase. He also remained in the car. He further confirmed that the motor vehicle had not stopped but was still in motion when they alighted from the bakkie and started chasing after the deceased. Also they did not notify those inside the car when they alighted. They just jumped off.

[41] It is this witness's evidence that as they were about to reach the swampy area they came across Nhlonipho running towards them. The deceased was then chasing him with a knife. Nhlonipho then took the golf club from this witness and struck the deceased with it. The deceased fall down. They went to the deceased where he had fallen. After

observing his status they returned to the car. On their way back they came across Cebisa and Lukhetfo. Cebisa proceeded to observe the condition of the deceased. Upon his return Cebisa suggested that the deceased should be taken to hospital. However the Junior Bucs fans would not allow him to ferry deceased to hospital. They then left.

**DW4 - SIBUSISO MOTSA (Also accused No. 4)**

[42] This witness confirmed the insulting of Nhlonipho by the deceased during the match between Junior Bucs and Screamer Pirates. He further confirmed that the two manhandled each other after the match and that a squabble between the fans of the two teams ensued. This squabble was however calmed down after sometime. He further confirmed the stabbing of Nhlonipho by the deceased whilst this witness and Nhlonipho were enjoying soft drinks at the nearby shop. The games were then called off by Dabane Hlophe who also called the police.

[43] According to this witness Mr Hlophe also announced that police were coming and he said deceased should be apprehended. The deceased and his company then vanished from the area. This witness further confirmed that Cebisa arrived thereafter and enquired why the games had been called off. This witness relayed what had happened. Cebisa then suggested that they should go home and they left. He also confirmed that Cebisa was with Lukhetfo and two kids in

his car. As they were walking home Cebisa came from behind them and offered them a lift. They declined it and opted to take short cuts home.

[44] Cebuisa drove for some distance and then stopped next to a group of Junior Bucs fans and talked with them. He then signalled to this witness and his company who were more than ten in number, that they should join him. They obliged and boarded the car. When they were next to a Zikalala homestead they saw the deceased running away in the veld. Before the vehicle could stop they jumped off and chased after the deceased. Nhlonipho went around the revival church trying to get in front of the deceased. When Nhlonipho was about to meet the deceased the latter took out the knife he had used to stab him. Nhlonipho then ran towards the others and took a golf club from Ntobeko. He went back to the deceased and hit him with it. The deceased then fell down on the ground. A group of Junior Bucs fans then came.

[45] Upon seeing the deceased lying down, this witness and his company left the scene. As they were proceeding back they met Cebisa who proceeded to check on the condition of the deceased. Upon his return Cebisa suggested that the deceased be taken to hospital. He offered to ferry him to hospital but the Junior Bucs fans refused. Lukhetfo Dlamini remained in the car and never chased after the deceased.

After the rejection of the offer to take the deceased to hospital they left.

## **ANALYSIS OF THE EVIDENCE**

[46] It seems convenient to start by the evidence of the defence. From the evidence of the accused persons it is manifestly clear that their defence is that they never intended to assault, let alone kill, the deceased. They maintain that their reason for chasing after the accused was to apprehend him so that the police could find him.

[47] Secondly, the accused persons maintain that apart from Nhlonipho Dlamini (Accused No.2), none of them ever assaulted the deceased. They never even reached the spot where the deceased died. They also maintain that even Nhlonipho only assaulted the deceased in self-defence as the deceased came charging towards Nhlonipho wielding a knife. Nhlonipho himself maintains that the deceased accidentally died as in hitting him with the golf club his intention was to disarm him of the knife. He hit him only once. Finally the accused persons are all in agreement that Election Lukhetfo Dlamini (Accused No.5) never participated even in chasing the deceased.

[48] The accused persons maintain that the reason why they could not reach the deceased and apprehend him is that Nhlonipho was the first to catch up with the deceased and eventually hit him with the golf club in self-defence. The

deceased then died. I must say that in my view the story of Nhlonipho outpacing everyone else and reaching the deceased first is absolutely untenable. Nhlonipho himself says he was inside the car. The other people who chased after the deceased were on the bakkie of the car. Lukhetfo told Cebisa to stop the car when he realised that there was nobody on the bakkie. This clearly means that before the car could stop the people in the bakkie had already started chasing after the deceased. Nhlonipho who was inside the car had to wait for it to stop before he could alight and join the chase. There is no way Nhlonipho could then be the first to catch up with the deceased. Without the slightest of doubt, I reject the story that Nhlonipho was the first to catch up with the deceased. It follows therefore that the story of Nhlonipho being chased by the deceased wielding a knife and Nhlonipho running back towards the others who were chasing the deceased must be rejected.

[49] Apart from the above analysis, it is the evidence of the accused persons that the people who were chasing after the deceased were more than ten in number. There is absolutely no likelihood that the deceased who was already running away anyway would try and put up a fight against such group. The evidence of Pw3, Dumsile Zikalala is rather more probable and indeed it was not challenged. She told the court that she saw four boys chasing after the deceased and throwing stones at him. They continued their chasing and



assault until the deceased fell into a swamp. One of his assailants was carrying a golf club which he used to hit him after he had fallen and he died. The story put forward by the accused persons in their evidence was not put to this witness. Besides its being improbable it is also clearly an after thought and I reject it as such. I accept the evidence of Dumsile Zikalala who is an independent witness and whose evidence was succinct, clear and unshaken.

[50] During submissions Mr Xaba who appeared for the accused persons contended that the evidence of the crown witnesses should be rejected since they contradicted each other. In particular he observed that whilst Pw3, Dumsile Zikalala said she saw four boys chasing after the deceased and throwing stones at him, Pw4 Cebisa Motsa mentioned only three people he met coming from the crime scene. These were Nhlonipho Dlamini ( Accused No.2), Ntobeko Dlamini ( Accused No.3) and Sibusiso Motsa ( Accused No.4). Mr Xaba considered this to be a contradiction.

[51] Mr Xaba further observed that whilst the evidence of PW3 Dumsile Zikalala and Pw4 Cebisa Motsa suggests that Cebisa Motsa never participated in assaulting the deceased Wonderboy Dlamini (Pw5) and Sifiso Msibi (Pw6) say they saw Cebisa Motsa assaulting the deceased as well. Further, Wonderboy Dlamini and Sifiso Msibi say Lukhetfo Dlamini also participated in the assault whilst Cebisa Motsa say he did not. Mr Xaba contends that this is another contradiction.

[52] I must say that I am in agreement with Mr Xaba only in so far as Lukhetfo Dlamini is concerned. I think this is the reason why even the crown conceded that he did not participate in the commission of the crime. Some of the crown witness were saying that he participated when at least one said he did not. This was indeed a material contradiction. However in so far as the other accused persons are concerned, none of the crown witnesses said they did not participate. There is therefore no contradiction as regards their participation. As regards Cebisa Motsa he has already been made an accomplice witness anyway and there is no point in making a finding regarding his participation in the crime.

I accordingly find that there is no contradiction in the evidence of the crown witnesses as regards the participation of accused 2,3 and 4 in the commission of the crime.

## **FINDINGS**

[53] It is my finding that apart from Lukhetfo Election Dlamini ( Accused No.5) all the other accused persons, acting in furtherance of a common purpose did assault and kill the deceased. Cebisa Motsa specifically mentioned Nhlonipho Dlamini ( Accused No.2), Ntobeko Dlamini ( Accused No.3) and Sibusiso Motsa ( Accused No.4) as the ones he met coming from the scene of crime when he went to observe the condition of the deceased. These are the accused persons before court.

I also reject the evidence of the accused persons that the deceased was only hit once by Nhlonipho Dlamini and he died. This evidence clearly cannot stand in light of that of Pw1, the Police Parthologist who identified at least three injuries on the head, five fractured ribs and a fractured chest bone.

[54] The accused persons have been charged with murder. However the prosecution concedes that they could, be found guilty of culpable homicide. In our law culpable homicide is a competent verdict on a charge of murder.

**“ Culpable homicide consists in the unlawful negligent killing of another person.”** ( See P.M .A Hunt South African Criminal Law and Procedure Vol.II page 401 2<sup>nd</sup> edition)

[55] The circumstances under which the deceased was killed and in particular the evidence led, leave one in doubt regarding whether the accused persons had an intention to kill the deceased. Firstly the deceased had provoked Nhlonipho for no apparent reason. A fight between the two almost ensued at the sports ground as a result of this provocation. Such was abated. However the deceased, again for no apparent reason, he assaulted Nhlonipho by stabbing him with a knife whilst he was enjoying drinks at the shop. Naturally this angered Nhlonipho and his companions. However he did not retaliate. When the police were called,

the deceased did not wait for them but he left with his friends showing no sign of remorse for what he had done. This further infuriated Nhlonipho and his friends.

[56] The accused persons told the court that when they chased after the accused their intention was to apprehend him so that the police who had indicated that they were coming could find him.

In my view the accused were justified in trying to apprehend the deceased. They were therefore justified in chasing after him and trying to hinder him in every way possible. However in throwing stones at him and hitting him with an object made of metal they clearly overreacted and were negligent. This is particularly so since they were many and he was un armed.

## **VERDICT**

[57] I accordingly find:

57.1 Nhlonipho Dlamini ( Accused No.2), Ntobeko Dlamini

( accused no.3) and Sibusiso Motsa (accused no.4) guilty of culpable homicide.

57.2 Election Lukhetfo Dlamini not guilty and he is acquitted and discharged.

57.3 Cebisa Mfanzile Motsa ( accused no.1) who was made an accomplice witness is released.

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## **SENTENCE**

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- [58] In determining the sentence to be imposed upon the accused persons I am guided by the nature and seriousness of the offence, the interests of society and the circumstances of the accused persons. I also take into account the main purposes of punishment being retribution, deterrence, prevention and rehabilitation.
- [59] On the seriousness of the offence I observe that a life has been lost and that is a very serious matter. To this is attached the interests of society which is interested in the protection of human life and safety. Society views the taking away of human life by another in very serious light. The community wants to see that a person who takes away the life of another receives appropriate punishment and if not for anything else, at least to prevent others from committing such offences. Over and above this, the loss of human life grieves society and members of the society want such offenders to pay such debt to them. This is particularly so with the family and relatives of the deceased. They want to see that the offender receives appropriate punishment.

[60] Having made these observations I remain mindful of the circumstances under which the offence was committed and the submissions of counsel in this regard. As Mr Xaba observed, the deceased started insulting Nhlonipho Dlamini (accused No.2) whilst he was playing soccer inside the sports fields for no apparent reason. The match ended with deceased 's team winning. However deceased again approached Nhlonipho uttering some unpalatable words and they manhandled each other until other people intervened and stopped the ensuing fight. When Nhlonipho was seated and enjoying drinks at the nearby shop, the deceased came and stabbed Nhlonipho on the back. Luckily Nhlonipho survived the stabbing. The court was told that the deceased used an Okapi knife to stab Nhlonipho and this evidence was not challenged. I do not find it unreasonable to conclude that the deceased wanted to kill Nhlonipho for no apparent reason. This is particularly so because it was revealed in evidence that Nhlonipho did not know the deceased.

[61] The assault on Nhlonipho was so serious that the organiser of the games cancelled them and called the police. To show that deceased was not at all remorseful about what he had done, he did not wait for the police. Instead he left the scene with his group. I have already concluded above that at the time the accused person

chased after the deceased they had no intention to kill him. Their aim was most probably to apprehend him so that the police could find him. This is only natural. They could not let someone who had committed such a serious offence upon one of their own to simply escape before them and avoid being brought to law at least. They had already exercised great restraint in not retaliating. I note that Ntobeko Dlamini (accused No.3) is not just a soccer mate or friend of the Nhlonipho. He is actually his elder brother. He, like Nhlonipho was naturally infuriated by the deadly assault on his younger brother. I find it not unreasonable to conclude that the deceased was the initiator and perpetrator of all the events leading to his own death. Had he not assaulted Nhlonipho for no apparent reason and thereafter sought to avoid being apprehended by the police, he probably would be still alive today.

[62] On the circumstances of the accused persons first the court has been told that at the time of commission of the offence they were fairly young. Sibusiso Motsa (accused No.4) was 19 years old, Nhlonipho and Ntobeko were 20 and 21 years old respectively. They were therefore not fully matured and this reduces their moral blameworthiness. Secondly, the accused person did show that they were remorseful of their deed in that after the accused fell down injured, they together with

Pw4 (Cebisa Motsa) offered to take him to hospital but his companions rejected the offer. It was also submitted that the accused persons did try to go and offer apologies and condolences to the deceased's family but the police advised against this. Since their release on bail some nine (9) years ago the accused have attended every court appearance without giving any hassles.

[63] Sibusiso Motsa holds an Associate Degree in Information Technology which he obtained from the Limkowing University of Creative Technology. Before his conviction and termination of his bail he was employed by a firm called Digitex Electronics.

Nhlonipho Dlamini holds a Diploma in Sales and Marketing Management. Before his conviction and bail cancellation he was employed by a firm called Premier Beverages in Matsapha.

Ntobeko Dlamini has two minor children. Before his conviction and bail cancellation he was operating a taxi and school bus ferrying school going children.

[64] From the foregoing it is clear that these are responsible young persons who have a very bright future ahead of them. It would be absolutely unfair to cut off their promising careers so early in their lives when clearly they would not have committed the offence they have



been convicted of had it not been for the conduct of the deceased. I also note that they had not been convicted of any offence previously. They are all first offenders.

[65] Mr Xaba who appeared for the accused persons implored the court to impose a wholly suspended sentence. The public prosecutor was not opposed to such sentence. Mr Xaba referred the court to a least one Namibian and one South Africa case in which persons convicted for culpable homicide had their sentences wholly suspended. The first one is that of *GEORGE MDAMWOODNGELA v. THE STATE* (CA43/2017) [2017] NAHCMD 282 ( 6 October 2017). In this case the appellant who was a police officer was pursuing a suspect who was fleeing by car to avoid arrest. The appellant tried to shoot the tyres of the fleeing car. However the bullet hit the passenger on the head and the passenger died. The court held that the sentence had to be blended with mercy and thus imposed a sentence of five years imprisonment. The sentence was wholly suspended for five years on the usual conditions.

[66] In the South African case of *S v. MASHEGO* (CC 142/2017) [2019] ZAGPPHC 95 ( 22 March 2019) the accused, a police officer, was controlling traffic on the road. When he tried to stop deceased's car and asked for a licence, the deceased was uncooperative and bumped him with his car on two occasions apparent

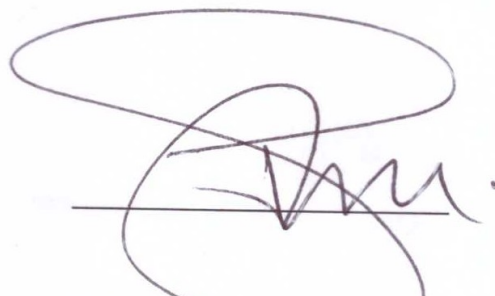
without causing him injury. When accused then directed deceased to park his car on the painted island, he refused and moved his car towards accused who was then in front of the car. The accused then fired one shot which killed the deceased. His explanation was that he thought his own life was in imminent danger.

[67] When delivering judgment in the above cited case Sardiwalla J had occasion to refer to the comments of Corbett JA in the case of S. v Nxumalo 1982 (3) SA 856 A at 861 G - H where the learned justice of appeal states:

***“ It seems to me that in determining an appropriate sentence in such cases, the basic criterion to which the court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the accused’s deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused’s negligence. At the same time the actual consequences of the accused’s negligence cannot be disregarded.”***

[68] In my opinion the culpability or blameworthiness of the accused persons in this case is very low. Also, I have doubts if they actually foresaw that the deceased would actually die from the assaults they inflicted on his person. They most probably were shocked themselves that the deceased had actually died.

[69] In the premises each of the accused persons is sentenced to three (3) years imprisonment wholly suspended for three (3) years on condition that within the period of suspension the accused persons are not found guilty of a crime involving violence and sentenced therefor to imprisonment of not less than twelve (12 months) without the option of a fine.



**J.S MAGAGULA J**

**Fore the crown:                    A. Matsenjwa**

**For Defence:                    B. Xaba**