



**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

CASE NO. 6/2012

HELD IN MBABANE

In the matter between:

REX

Versus

1. VUKA MXOLISI DLAMINI

2. CHURCHILL SIGCINO DLAMINI

Neutral Citation: *Rex vs Vuka Mxolisi Dlamini & Another [6/2012] [2020]*
SZHC 41 (17 March, 2020)

Coram: **M. LANGWENYA J**

Heard: 31 July 2019; 1 August 2019; 12 August 2019; 14 August 2019;
9 September 2019; 7 November 2019; 13 November 2019; 4
December 2019; 12 February 2020; 9 March 2020

Delivered: 25 March 2020

Summary: *Criminal Procedure-Accused charged with murder-Evidence does not show that the accused had the requisite subjective foresight to kill the deceased-accused convicted of competent verdict of culpable homicide-culpa was proved-in using sticks to assault the deceased, the Court finds the accused ought to have known as reasonable persons that the assault of the deceased might possibly lead him to his death-The test for dolus is subjective while that of culpa is objective.*

JUDGMENT

- [1] The accused persons are charged with murder, it being alleged by the Crown that on 1 January 2012, and at or near Makholweni area, in the Manzini region, the accused persons, each or all of them acting jointly and in furtherance of a common purpose did unlawfully and intentionally kill Sicelo Dlamini. Both accused pleaded not guilty to the offence charged.
- [2] The Crown led the evidence of six witnesses to prove its case. Each of the accused persons gave evidence in a bid to marshall their defence and did not call witnesses.
- [3] Except for the investigating officer and the pathologist the Crown witnesses are related to the accused persons and to the deceased. At the time of the

incident in 2012 they all lived at eMakholweni near Kush at the home of George Dlamini.

- [4] The deceased had a mental illness and would from time to time be taken to the Psychiatric hospital in Manzini by the family with the help of the police. The deceased was a man of violent disposition when he was unwell due to his mental illness. As a result, the family would enlist the help of the police to restrain the deceased before he was taken to the hospital.
- [5] On 1 January 2012, PW1 was at home when the first accused came to him and reported that the deceased was attacking him with an axe. PW1 went to the house of the deceased and found both accused armed with a broomstick and sticks. The first accused carried a stick (*umzaca*) while the second accused carried a wooden broomstick. PW1 stated that he thinks the stick and the broom stick were later handed to the police. When PW1 arrived at the scene, the deceased was seated next to the steps of his house and was not injured. Both accused persons stood side by side while the deceased sat between them. The deceased could not walk. The police came and took the deceased to the RFM hospital in the company of PW1. The bone of contention, according to PW1 was money. PW1 heard the deceased say he wanted his money from the first accused. The first accused did not respond to the issue of money raised by the deceased.

- [6] During cross examination by Counsel for the first accused, PW1 told the Court that the deceased was accused 1's uncle (*babe lomncane*) and that they had a good relationship. It was put to PW1 that the first accused could therefore not have done anything to hurt his uncle. PW1 answered in the affirmative. PW1 was not cross examined on behalf of the second accused.
- [7] PW2 is Nosipho Ruth Dlamini. She told the Court that the second accused is her father and the first accused is her brother. PW2 told the Court that she also referred to the deceased as her father. On the day in question she was on her way to the shop when she heard noise and saw both accused persons, the deceased and PW1. The second accused told PW2 to go away. She saw the deceased being beaten and lying on the ground. She did not see who assaulted the deceased. Both accused persons stood next to the deceased. When the deceased lay on the ground he was not fighting back. She heard loud voices from both accused persons and could not figure out what they were saying. She told the Court that in the year 2012 she was thirteen years old. PW2 was not cross examined on behalf of the second accused.
- [8] The Crown called Mzwandile Martin Dlamini as PW3. He told the Court that the deceased is his biological father. He stated that the second accused is his uncle (*babe lomncane*) and that the first accused is his brother. He clarified that the second accused is not his biological father but that he comes after the deceased in the context of the extended family structure of the Dlamini family.

[9] On 1 January 2012 in the morning hours between 6am and 7am he returned home from church where he had gone to celebrate the ushering of the new-year. He found the deceased lying on the ground in the yard in the company of PW1, and both accused persons. The deceased asked his brothers to excuse PW3 and the deceased and they did. The deceased informed this witness that he had been assaulted and that he was dying. The deceased person told this witness to look after his grandmother. The deceased also made peace with PW3 and told him that he had broken his brother's window and that he was sorry. The deceased asked PW3 to give him water to drink. When he was given the water, deceased could not drink as he spat it out. He asked for more water and said PW3 should pour the water over his body because he felt like his body was being pierced by thorns. According to PW3, the deceased lay in front of his house by the door on the grass. An axe was in the yard at a distance away from where the deceased lay. Next to the deceased were broken pieces of a stick (*umzaca*), as well as a broken broomstick.

[10] When PW3 arrived at home, he found PW1, both accused persons talking to the deceased. PW1 told the deceased to get up as the car that was going to take him to the hospital was on the way. The deceased could not walk unaided. PW3 supported the deceased to board the car that was taking him to the hospital.

[11] The first accused was responsible for collecting rental money from deceased's flats on behalf of the deceased. This arrangement was made because the deceased was unable to do so because of his mental illness. According to PW3, the first accused would collect money from the tenants and give it to the deceased.

[12] During cross examination, PW3 stated that it is possible that on the day the deceased asked to be given his money, the rental money was not due and had not been paid by the tenants. PW3 does not know when the rental money was due. It was the evidence of PW3 during cross examination that when the deceased became violent, he would restrain him by tying him. The deceased would be violent towards PW4 and would take PW4's pots and at times he would break windows of PW4's house. PW3 conceded that as members of an extended family they all had a good relationship with each other.

[13] PW3 stated that he knows that the deceased died because he was assaulted by the first and the second accused. During cross examination PW3 conceded that he did not see the accused persons assault the deceased.

[14] PW3 was not cross examined on behalf of the second accused.

- [15] PW4-Minah Nomthandazo Dlamini told the Court that the deceased is her only son; the first accused is her grandson and the second accused is her son and they belong in the senior house-(*bendlu yaka babe lomkhulu*).
- [16] On 1 January 2012, in the morning hours, she was inside her house when she heard noise coming from outside. The noise was of people who were not having a good conversation. She heard the first accused saying the deceased had broken a window of his house. PW4 opened her door a little and was asked by the first accused to call the police. The police would be called by the family every time the deceased became violent and they would help restrain and take the deceased to the hospital.
- [17] In the morning of 1 January 2012 the deceased was unwell. Before PW4 heard the noise outside her house in the morning of 1 January she did not know where the deceased was the whole night. When she opened the door, she saw the deceased but did not hear him say anything. It is PW4's evidence that 1 January 2012 is the day the deceased got injured and died. When she opened the door of her house she saw the deceased sitting on the ground. She did not see anything next to the deceased even though the deceased looked tired. PW4 did not ask what happened because she had heard already that the deceased had damaged a window of first accused's house. The deceased was taken to the hospital by the police in the company of PW1. Later on that day, PW1 called to report that the deceased had died.

- [18] The house whose window was alleged to have been broken by the deceased belonged to Cecilia Nanane Dlamini. Cecilia Dlamini is PW4's mother in law and is now deceased. The house in question is currently used by the first accused.
- [19] PW4 said the accused persons used to help her when the deceased became violent and attacked her. PW4 said on 1 January 2012 she was taken aback about the death of the deceased and wonders what happened-(*kwangima ingcondvo kutsi ngalo mhlaka 1 bese kwentekani*). Speaking in a very soft but emotional tone, PW4 told the Court that since her only biological son died, her life is difficult. No one caters for her needs now that the deceased is dead. No one looks after her. She ekes a living by selling ice blocks to school children.
- [20] PW4 was not cross examined on behalf of the accused persons.
- [21] The investigating officer is PW5 5709 Detective Constable Ndumiso Calvin Myeni. He told the Court that on 1 January 2012 he was on duty at CID at the Manzini police station when received a report at 1100hrs that a certain man had been injured at a Dlamini homestead at Fairview North. He proceeded to the scene with 4865 Detective Constable Jerome Dlamini. On arrival at the scene they found family members.

[22] At the scene the police were shown a man who lay on the ground next to the door of a house. The man was wearing a brown jacket and a reddish T-Shirt and he was wet. After interviewing family members, PW5 established that the man who lay on the ground was assaulted. On examination, he found that the man had fresh bruises all over the body and was unconscious. The assailants were among family members.

[23] He then introduced himself to the accused persons and cautioned them according to the Judges' rules. The accused said something. He cautioned them again that they were not obliged to give him any item but that if they did, such could be used as evidence in court against them. Both accused persons freely and voluntarily gave PW5 sticks which were next to them on the family yard. PW5 seized the sticks as exhibits in this matter. The police then conveyed the deceased to RFM hospital in the company of PW1. The deceased was certified dead at the hospital and was later taken to the mortuary. A statement was recorded from PW1.

[24] Another police van was called to convey the accused persons to the police station.

[25] PW5 returned to the crime scene and located the deceased person's mother and other family members. They stated that the deceased was assaulted by both accused persons.

[26] PW5 went to the police station where he found both accused persons. He introduced himself and informed both accused persons that he was investigating a crime of murder committed at eMakholweni at a Dlamini homestead. He cautioned both accused persons in terms of the Judges' rules. The accused persons were also informed of their right to legal representation and the right to remain silent. They said something and were charged with murder and RSP 218 was completed. Both accused persons were detained in police cells pending their appearance in Court.

[27] PW5 handed into court a short wooden stick (*umphini*); a big brownish stick (*umncumo*) and three small guava sticks (marked exhibits 1, 2 and 3 respectively) as part of his evidence. PW5 told the court that the big brownish stick was given to him by the first accused. He gathered that the bone of contention was that the deceased broke a window of one of the accused persons' house. It was also established that the deceased had a misunderstanding with his mother. When he first met the accused persons at the scene they were not injured but were shocked.

[28] During cross examination PW5 was asked who assaulted the deceased and his response was that both accused persons assaulted the deceased. PW5 stated that he did not establish anything in relation to a broomstick but insisted that the exhibits presented in court were the ones used by both accused persons to assault the deceased.

[29] PW6 is Dr. Komma Reddy. He stated that the cause of death of the deceased was due to multiple injuries. He observed the following injuries on the body of the deceased: (1) abraded contusions of 2x2cms and 2x1cms on the middle portion of the forehead; (2) abraded contusions of 3x1cms and 2x1cms on the front side of the lower portion of the right thigh; (3) contusions of 7x2cms on the back side of the left forearm; (4) lacerated wounds of 2x2cms and abraded contusions of 3x1 and 1x1cm on the front portion of the left leg; (5) lacerated wound of 2x1cms on the middle portion of the front side of the right leg. The doctor also observed that the frontal bone and occipital bone were fractured. The doctor stated that the injuries suffered by the deceased were likely caused by hard impact use of force with an object such as a stick, stone etc. According to PW6's evidence, the fatal injury is the fracture of the frontal bone and occipital bone of the skull. PW6 was not cross examined by Counsel for both accused persons. The post mortem report was handed into Court and was marked as 'Exhibit 4'.

[30] The Crown then closed its case.

[31] The defence moved an application for the discharge of the accused in terms of Section 174(4) of the Criminal Procedure and Evidence Act 1938. The application was dismissed and written reasons were furnished in the ruling of the Court on 1 October 2019. The accused were put to their defence.

The Case of the First Accused-DW1

- [32] The deceased is his uncle from a junior house in the Dlamini extended family (*ngu babe lomncane waka mkhulu lomncane*). Between the hours of 6 and 7 in the morning, the deceased arrived home from his travels. He called the first accused and said the first accused was in good spirits because he had something to eat on Christmas day when the deceased had had nothing to eat on that day. The deceased did not wait for a response but went to his house and returned to the first accused's house carrying an axe. The deceased went on to break the window of the house that the first accused was using.
- [33] The reason the deceased accused the first accused person of having food on Christmas day while the deceased had nothing to eat is because the first accused was responsible for collecting and keeping deceased's rental money. On 31 December 2011 and between 6pm and 7pm, the deceased had arrived home and had demanded his rental money from the first accused. The first accused told the deceased that the money for rental was not due from the tenants as they paid rent on the 5th of the following month. The first accused suggested that he could give the deceased cash from his private funds-money that would be repaid when the rentals were paid by the tenants.
- [34] After the deceased had broken the window the first accused went to call the second accused to help tie and restrain the deceased from causing further damage until the police came and he was taken to the hospital.

- [35] The first accused was in the company of the second accused when they went to deceased's house. According to the first accused they found the deceased in his house carrying an axe and a rod. When both accused entered through the sitting room door, the deceased went out of the house through the kitchen door. The first accused asked the deceased what he was doing, and the deceased pleaded with both accused not to assault him and not to tie him. The first accused called gogo Ndwandwe and asked her to call the police.
- [36] Both accused persons sat in front of the house of the deceased until police from eMoyeni Police Post arrived and asked the deceased for how long he would be troublesome. The police took the deceased to the hospital in the company of PW1. Two hours later, they got a report that the deceased had died. The matter was reported to the police and both accused persons were charged with culpable homicide.
- [37] It was DW1's evidence that he had last seen the deceased on 31 December 2011 at 10pm when he gave him food before he saw him in the morning when deceased spoke to this witness about not having food on Christmas day.
- [38] It was the evidence of DW1 that they were initially charged with culpable homicide and three years later the charge was changed to one of murder. When DW1 was led in evidence and was asked how he has been feeling

since the charge of murder was preferred-he stated that it pained his spirit that the deceased died (**kufelwa ngubabe Sicelo**).

[39] During cross examination DW1 stated that the deceased did not fight the first accused when he told him that the money from rental had still not been paid. The deceased simply left the first accused and went to his house.

[40] The following morning, the first accused was in his house when the deceased came to first accused's house and broke a window. When deceased left and returned to his house, DW1 went to call the second accused. Both accused persons went to deceased's house. They found the deceased inside his house. According to DW1 the deceased was showing signs of being mentally unstable. When both accused came to deceased's house, he left through the kitchen door but returned and sat on a stoep of the sitting room door. The deceased was not armed when he went out of his house through the kitchen door and when he returned and sat on the stoep of the sitting room door and asked both accused persons not to assault and tie him.

[41] The first accused denied that he or the second accused assaulted the deceased.

[42] When the following was put to DW1- that the deceased was not of unsound mind when both accused assaulted him; that if deceased's mental illness

been playing up, he would have fought both accused and would not have pleaded with them not to assault him, the first accused's response was that when the deceased person was unwell, he would break windows, sing at night and pray as well as walk around naked. According to first accused, the deceased became violent only when he was restrained.

[43] It was further put to the first accused that when the deceased was unwell mentally, he would be violent and fight anyone who sought to restrain him. DW1's response was that the deceased was not given to being violent towards people; he only did not like to be tied, and that is why he sat on the stoep and asked that we do not tie him.

[44] DW1 stated that he did not assault the deceased and that he did not have a reason to assault the deceased because every time the deceased broke windows, he would take the money from the rentals and replace the windows or pay for the damage. During cross examination, DW1 initially said when they followed the deceased from his house they were not carrying anything. When he was confronted with the evidence of PW1 who gave evidence that both accused were armed with sticks and a broomstick respectively first accused stated that while on their way to deceased's house he saw and took a black stick and an axe by the door and placed it on gogo's verandah.

[45] According to this witness a broomstick was in the kitchen of deceased's house. DW1 said he did not see the broken pieces of sticks that PW1, PW3 and PW5 alluded to at the scene of crime.

The Case of the Second Accused-DW2

[46] On 1 January 2012, he was at home and asleep when between 5am and 6am he heard the first accused knocking on his door and reporting that the deceased was unwell as a result of his mental illness and was breaking windows. He asked DW2 to come and help. It is DW2's evidence that whenever deceased became sick they would restrain him and then call the police and he would be taken to the hospital.

[47] When both accused got inside the house of the deceased, the deceased fled out the kitchen door and pleaded with the accused not to tie him. According to DW2, the deceased was not his usual self. When he was sick he would either sing or sing the praises of the King but on the fateful day he did none of those things. The deceased was ordinarily a neat person but on this day he was dirty. When DW2 got inside deceased's house, he found a 30cm broomstick which he took. The deceased fled through the kitchen door but returned and sat on the stoep of the sitting room door of his house. Three minutes later, PW1 arrived at the scene.

[48] It is the evidence of DW2 that he did not see injuries on the deceased because he was wearing a long pair of trousers and a long-sleeved jacket. DW2 said he had sent PW2 to the shop to buy him a copy of the Times newspaper. He shouted at PW2 and told her to go away. The reason he sent PW2 away is because-as he put it-he was protecting PW2 from violence by the deceased who could have hurled stones at her. PW2 had been following the accused persons and the deceased and that was before deceased pleaded with the accused not to tie him.

[49] Both accused persons stood guard of the deceased until the police arrived and took him to the hospital.

[50] When it was put to DW2 that the investigating officer found sticks where the accused persons stood with deceased and PW1, his response is that there were guava sticks and mango sticks at the scene where they all stood.

[51] DW2 denied pointing out anything to the police at the scene of crime. He stated that both accused persons were kept inside a police van when they eventually returned to the scene of crime after they were arrested.

[52] Myeni is one of the police officers who arrested DW2. DW2 stated that he knew nothing about the brown stick that was presented to Court as exhibit 2. He stated that he only knew a broomstick which he was carrying on that day.

[53] During cross examination DW2 told the Court that it was necessary for him to arm himself with the broomstick because when the deceased was sick he would grab anything and throw it at the person attempting to restrain him. When both accused confronted the deceased, he was not in a fighting mood. DW2 said the broomstick he was carrying was too short to hurt a person and that he only carried it for three minutes in that space of time he could not have assaulted the deceased. This is contrary to the evidence of PW1 who said the second accused was carrying a broomstick.

[54] Un-meritoriously, the case for the second accused was not put to most of the Crown witnesses. It was not put to PW1 that the second accused was carrying a 30cm long broomstick; nor was it put to the Crown witnesses that he could not have assaulted the deceased with a stick that short. What compounds the issue is how the second accused expected to repel any violent attack from the accused with a 30cm piece of a broomstick. This evidence is rejected as false.

Application of the Law to the Facts

[55] The Crown has, through circumstantial evidence shown that both accused persons used sticks to assault and kill the deceased. The accused were seen by Crown witnesses at the scene of crime armed with sticks standing next to the deceased who lay on the ground. The accused persons were angry that the deceased had broken a window of first accused's house. Earlier, the accused were heard talking in loud voices to the deceased. When the accused

persons confronted the deceased in his house, the deceased ran out of the house, unaided and pleaded with the accused not to tie him. When PW3 arrived at home, he found the deceased badly injured and next to him were the accused who were talking to him. The inescapable conclusion is that it was the assault with sticks by the accused persons which immobilized the deceased. The deceased could only have been assaulted by the accused persons as they were the last people he was with when he fled out of his house unaided and was subsequently found badly injured and unconscious in the presence of the accused persons. The deceased died as a result of the injuries inflicted on him by the accused persons.

[56] The deceased informed PW3 that he had been assaulted and that he was dying. The deceased further confided in PW3 that he had broken a window and he was sorry. Next to the deceased PW3 found broken pieces of a stick and a broken broomstick. The deceased could not walk unaided and was assisted by PW3 to board the police vehicle.

[57] PW5 states that he found the deceased lying unconscious in the Dlamini family yard. The deceased was wet. When carrying out his investigations, he concluded that the accused persons were responsible for the death of the deceased. The accused persons subsequently pointed out the broken sticks that were supposedly used to assault the deceased.

[58] The investigating officer-Mr. Myeni was unshaken during cross examination. He maintained that the accused persons pointed out the exhibits that were used in the commission of the offence charged. He stated that the accused persons were shocked but not injured.

[59] The evidence of the pathologist also shows that the deceased died due to multiple injuries and in chief, the Doctor stated that the fatal injury was the one relating to the fracture of the frontal and the occipital bones. The evidence of the pathologist was not challenged.

[60] I am of the considered view that the proven facts are such that they exclude every reasonable inference from them save the only inference that it is the accused persons who inflicted the mortal injuries on the deceased¹.

[61] I do not however hold that the accused persons had the requisite intention to commit the offence charged. This I say because it has not been shown by the Crown that the accused persons actually foresaw the possibility that their conduct might cause death. The deceased was violent that morning when he broke a window of a house used by the first accused. The violence of the deceased was a usual occurrence when his mental illness played up. The accused persons were responsible for restraining the deceased and calling the police to help have him taken to the hospital. The accused persons had a good relationship with the deceased. On the fateful day, the accused

¹ *Rex v Bloom* 1939 AD 199; *Sean v Blignaut v The King* Criminal Appeal Case No. 1/2003.

determined that the deceased's mental illness was playing up again; they went to deceased's house in order to restrain and confine him until he was taken to hospital; they assaulted the deceased with the sticks they were carrying; the aim of the assault was to disable the deceased so that he could be restrained and conveyed to the hospital. If the aim was to have the deceased conveyed to the hospital, there certainly was no intention on the part of the accused persons to see the deceased dead.

[62] From a conspectus of the above evidence, it cannot be said that the accused persons subjectively foresaw the consequences of their actions resulting in the death of the deceased.

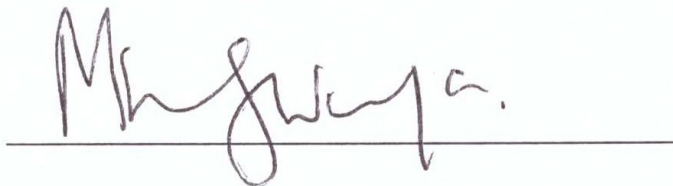
[63] The first and the second accused ought to have known as reasonable persons that the assault of the deceased with an assortment of sticks especially on the head might possibly lead him to his death. They were negligent. Culpable homicide is the unlawful killing of a human being either (a) negligently² or (b) intentionally in circumstances of partial excuse³. The latter form of culpable homicide does not apply in the present case. This is because when the deceased fled out of his house on seeing the accused he was not in a fighting mood nor was he violent towards accused persons. He is heard pleading with the accused persons not to assault or tie him. The accused persons were not under attack from the deceased.

² *State v Alexander* 1982 (4) SA 701(T) at 705G-H

³ *Annah Lokudzinga Mathenjwa v Rex* 1970-1976 SLR 25 at 26A-E.

[64] The evidence of negligence against the accused persons was overwhelming and in my view, the Crown has proved beyond reasonable doubt that the accused persons committed the crime of culpable homicide of the deceased.

[65] In the result, I find accused 1 and accused 2 not guilty of the crime of murder but guilty of the crime of culpable homicide.

A handwritten signature in black ink, appearing to read 'M. Langwenya J.', is written above a solid horizontal line.

M. LANGWENYA J.

For the Crown: Ms. N. Mhlanga

For the First Accused: Ms. N. Mabuza

For the Second Accused: Mr. S. Mnisi