



**IN THE HIGH COURT OF ESWATINI
JUDGMENT ON SENTENCE**

CASE 44/2010

HELD AT MBABANE

In the matter between:

REX

Versus

MBONGENI MAZWI MNGOMETULU

1st ACCUSED

NOMSA NOBUHLE SIMELANE

2nd ACCUSED

Neutral Citation: *Rex vs Mbongeni Mazwi Mngometulu & Another [44/2010]*
[2020] SZHC 92 (11 May 2020)

Coram: LANGWENYA J

Heard: 3 October 2019; 2 December 2019; 16 March 2020; 19 March
2020; 30 April 2020

Delivered: 11 May 2020

Summary: *Criminal Procedure-Sentence of murder-factors to be taken
into account-personal circumstances of the offenders-*

both accused persons are first offenders-factors in their
favour-the first accused apologises-apology not synonymous
with remorse.

Nature of offence-serious offence-prevalence of offence-
deceased died of multiple injuries inflicted with a bush
knives- deceased was attacked while he was asleep in his
bedroom- need to mete out punishment to deter other would
be offenders.

Interest of society-Court not to emphasize one interest at the
expense of the other-instead interests of the accused
persons as well as those of society should be considered and a
balance between the two should be struck-Having
considered both interests-Court finds interests of society
outweighs personal interest of the accused persons-Both
accused persons sentenced to twenty-three years imprisonment,
period spent by both accused in custody will be
taken into account.

JUDGMENT ON SENTENCE

[1] The first and the second accused were convicted of the murder of Mfanukhona Charles Mthupha.

- [2] The particulars of the offence are that on 27 June 2009 both accused persons acted in furtherance of a common purpose in killing the said Mfanukhona Mthupha. The deceased and the second accused lived as husband and wife. The deceased had multiple injuries as a result of being hacked with bush knives. The deceased died due to multiple injuries.
- [3] Both accused persons did not lead evidence in extenuation. Counsel for both accused made submissions on their behalf.
- [4] The concept of extenuation circumstances is defined as that which morally, although not legally, reduces an accused person's blameworthiness or the degree of his or her guilt¹. The Court must now consider all the relevant facts and circumstances-both mitigating and aggravating-in order to make a value or moral judgment about the existence or otherwise of extenuating factors. Such an inquiry must not been done so much haphazardly as it should with due diligence as well as with an enquiring mind. The inquiry probes whether or not any factor is present that can be considered to extenuate an accused person's guilt after conviction-such factors include but are not limited to immaturity, intoxication, provocation or abuse of drugs². The Court should also consider whether such facts have had a cumulative effect in having a bearing on the accused persons' state of mind in doing what they did. Coupled with all these considerations, the Court must also

¹ Daniel Mbulane Dlamini v Rex Court of Appeal Case No. 11/1998; R v Fundakubi & Others 1948 (3) SA 810, 818.

² Mciniseli Jomo Simelane v Rex Supreme Court Case 3/2014.

evaluate whether such facts were sufficiently appreciable to abate the moral blameworthiness of the accused persons in doing what they did.

[5] It was submitted on behalf of the first accused that murder with indirect intention constitutes an extenuating factor.

[6] In mitigation of sentence on behalf of the first accused, it was submitted that 'notwithstanding the fact that the offence with which the first accused has been convicted is of a serious nature; is prevalent and was unprovoked,' the Court must exercise leniency in sentencing him. The Court was urged not to pass a sentence that will break the first accused and make him believe that he has been hard done by a harsh sentence. The Court was urged to pass a sentence that will make the first accused realize that what he has done is wrong and deserves censure.

[7] The Court was further urged to consider, in favor of the first the accused the fact that he is a first offender; he co-operated with the police while they were investigating this matter; he complied with his bail conditions and displayed his remorse during the trial. It was stated that the first accused is a good candidate for rehabilitation. The first accused person was twenty eight (28) years when the offence was committed. He has two minor children. He spent three (3) months in pre-trial incarceration before he was released on bail. His mother, his siblings and his two minor children are dependent on the first accused for support.

[8] The submission on behalf of the second accused is on all fours with that of the first accused on extenuating factors. The Court was urged further on behalf of the second accused to consider it an extenuating factor the fact that there was uncertainty on the nature of the planning done by the second accused.

[9] It was submitted that the Court should take into account the fact that the second accused is a first offender and that prior to her being admitted to bail, she spent thirteen months (13) in custody. The second accused was married to the deceased in terms of our indigenous law. Together they had three children one of whom is living with a disability. The second accused also has a child from another relationship who is six (6) years old. The second accused is a bread winner for three minor children. The second accused spent a total of thirteen (13 months) in pre-trial incarceration before she was released on bail.

[10] There is no denying that the nature of the offence is savage and appalling.

[11] Punishment must not be disproportionate to the offence charged³.

[12] My value or moral judgment is that extenuating factors exist in this matter. This I say for the following reasons: both accused persons at the time they

³ Dodo v S 2001 (3) SA 381(CC) at paragraph 37.

committed the offence they were relatively young the first accused was twenty-eight years old and the second accused was twenty nine years old.

[13] Counsel for the first accused has submitted that the accused was remorseful. During the trial, the first accused said he was apologising to the family of the deceased for what he did. He said he was misled by the second accused to commit the crime charged. In my view this is not remorse as much as it is regret. There is a difference between being remorseful and being regretful.

[14] Regret is when a person feels sorry for himself or herself at having been caught while remorse is a ‘gnawing pain of conscience for the plight of another.’ It is a genuine contrition that comes from an appreciation and acknowledgment of the extent of one’s error⁴. In my view there is no genuine contrition on the part of the first accused as he still blames someone else for his conduct.

[15] The second accused on the other hand expressed no remorse for the error of her ways in the death of the deceased.

[16] There is no gainsaying this was a gruesome crime visited on a defence-less man in his sleep at his home. The deceased was attacked in his sanctuary-his

⁴ S v Matyityi

home-where he should have been safe. The invasion of deceased's home by the first accused in the manner he did makes this crime even more abhorrent.

[17] I do, however consider on behalf of both accused persons that they are first offenders. I also consider that the first accused co-operated with the police.

[18] Having considered the personal circumstances of the accused persons, the seriousness of the offence and the interests of society and all the factors presented before me with regard to sentence, I am of the view that although the accused were relatively young when the offence was committed, their personal interest has been outweighed by the interest of society.

[19] Although the accused have dependents who rely on them for support, unfortunately they have to be sent to prison as this is a consequence of committing crimes especially heinous ones.

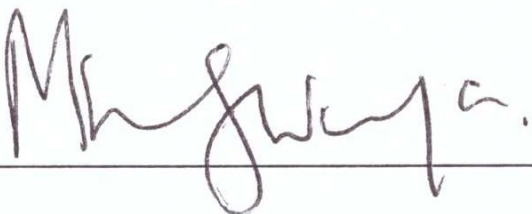
[20] The deceased's family is poorer for losing him. No matter what, the deceased can never be brought to life again. One can only hope that both accused persons will, in their sojourn in jail reflect on their conduct and change their ways for the better. For these reasons I hand down the following sentences:

First accused you are sentenced to a term of imprisonment of twenty-three years. This sentence will take into account the three (3) months you have spent in lawful pre-trial incarceration.

Second accused you are sentenced to a term of imprisonment of twenty-three years. This sentence will take into account the thirteen (13) months you have spent in lawful pre-trial incarceration.

Right to appeal

[21] The accused are informed of their right to appeal that should they not be satisfied with the conviction or sentence or both conviction and sentence, they have the right to apply for leave to appeal to the Supreme Court within fourteen (14) days. If they fail to apply for leave within fourteen (14) days they have to apply for condonation for the late filing of an application for leave to appeal accompanied by an affidavit in which the accused should give a reasonable and satisfactory explanation of their delay. They must also state that they have reasonable prospects of success to prosecute their appeal should they be granted leave to appeal and the reasons on which they are basing their contention.



M. LANGWENYA J.

For the Crown: Mr. K. Mngomezulu

For the First Accused: Mr. X. Mtetwa

For the Second Accused: Mr. O. Nzima