

**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO: 495/2019**

In the matter between:

**REX**

**VS**

**OSCAR METHULA**

**MACHAWE P. NDWANDWE**

Neutral citation : *Rex v Oscar Methula and Machawe P. Ndwandwe*  
495/2019 SZHC 153 [2022] (14/07/2022)

**CORAM:** **B.S. DLAMINI J**

**DATE HEARD:** 08 June 2022

**DATE DELIVERED** 14 July 2022

**Summary:**

*Criminal proceedings-Application for discharge of accused persons at the close of the Crown's case in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938. Accused persons submitting that evidence led by Crown insufficient to require them to be put to their defence on the count of murder and the offence of allegedly contravening Section 122 (1) as read with Section 122 (5) of the Road Traffic and Road Transportation Act, 2007.*

**Held;**

*The evidence led by the Crown in respect of the offence of allegedly Contravening Sections 122 (1) and 122 (5) of the Road Traffic Act falls below the required standard of proving a case against an accused person beyond reasonable doubt. The accused persons are acquitted on this charge.*

**Held further;**

*The evidence led by the Crown in respect of the charge of murder is sufficient to require the*

*accused persons to take a stand and defend themselves against this charge. The application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938 is dismissed.*

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**RULING ON APPLICATION IN TERMS OF S.174 (4)  
OF THE CP & E ACT 67/1938**

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**INTRODUCTION**

- [1] The two Accused persons in this matter are Oscar Methula and Machawe Ndwandwe. The two are facing a charge of Murder and a charge of Contravening Sections 122 (1) and 122 (5) of the Road Traffic Act, 2007.
- [2] On the count of Murder, it is alleged by the Crown that *'Accused 1 and 2 are guilty of the crime of Murder in that upon or about the 16<sup>th</sup> November 2016 and at or near Mpholi, in the Manzini Region, the said accused persons acting jointly in furtherance of a common purpose did unlawfully and intentionally inflict injuries to the person*

*of Thubelihle Maphanga who later died in hospital from the inflicted injuries and did thereby commit the crime of Murder.'*

- [3] In Count 2, it is alleged by the Crown that *'Accused 1 is guilty of Contravening Sections 122 (1) as read with Section 122 (5) of the Road Traffic Act, 2007 in that upon or about the 16<sup>th</sup> November 2016 and at or near Mpholi, in the Manzini Region, the said accused did unlawfully and intentionally fail to comply with a demand or direction as set out under Section 88 (1) (a-d) of the Road Transportation Act, 2007 and did thereby contravene the said Act.'*

- [4] In seeking to prove the guilt of the accused persons, the Crown paraded a total of twelve witnesses namely Busisiwe Dlamini (PW1); Khumbuzile Sikhondze (PW2); Tengetile Shongwe (PW3); Gugulethu Simelane (PW4); Dr Swabrinka Enugala (PW5); Bongani Matse (PW6); Banele Zewulo (PW7); Dr Petros H. Mengestu (PW8); Detective Constable Mfanukhona Ngwenya (PW9); Nomzamo Dlamini (PW10); Constable Bongiwe Simelane (PW11) and Cynthia Du Pont (PW12).

[5] At the close of the Crown's case, the accused persons' attorney moved an application for acquittal in terms of Section 174 (4) of the Criminal Procedure and Evidence 67/1938. In support of their application for acquittal in terms of the provisions of the said Act, it is submitted on behalf of the accused persons that;

**"In *casu*, the Crown has not addressed and or established the crucial requirement that the Accused persons had the necessary intention to commit any offence and as such, the necessary *mens rea* on the part of the accused persons has not been established and neither has the Crown demonstrated participation or at the very least establish that the accused knew or must have known that the crime of Murder was likely to be committed. In fact, the only evidence before court is the uncorroborated evidence given by PW4 who told the court that she saw the deceased being pushed out of the kombi by A2 [accused 2]. Evidence was led to the effect that none of the other witnesses in close proximity saw what PW4 claimed to have seen. PW9 admitted that this was a traffic matter and he never bothered to investigate a murder [case] even after he was handed the docket bearing in mind that PW4 never made another statement save for the one she made on**

**the day of the incident.PW9 resorted to the fabrication of evidence depicted through pictures of a scene taken some 7 years later on a severely contaminated scene of crime.”**

- [6] In essence, it is argued on behalf of the accused persons that the evidence adduced by the Crown is insufficient to require the accused persons to be put to their defence in that the evidence led by the Crown falls short in proving all the necessary elements of the offences in question. The submission being made on behalf of the accused persons is that on the totality of the evidence adduced by the Crown at the end of presentation of its evidence, the Court cannot return a verdict of guilty against the accused persons.

- [7] The Crown on the other hand, holds a different view. The Crown submits that;

**“The accused are implicated by the evidence of eye witnesses who were at the scene on how the deceased sustained the injuries that led to her death. The evidence is that accused 1 was the driver. When the kombi was from Mpholi it came back at a high speed surprising the witnesses in that they were expecting that it will stop at Canaan bus stop and drop the deceased before proceeding**

to town. However as it was speeding it passed the bus stop where the deceased should have been dropped. Upon passing, the door was opened and the deceased was thrown out and, at a distance, the groceries followed.”

- [8] The Court is required to put the evidence of the Crown’s witnesses on a scale in order to determine if such evidence is sufficient to support the charges leveled against the accused persons. The first witness to be paraded by Crown was Busisiwe Dlamini (“PW1”) who is the biological mother of the deceased. This witness and her daughter, one Thubelihle Maphanga (hereinafter referred to as “the deceased”), were aboard a mini-bus (kombi) from Manzini bus rank to a place called Canaan (an area immediately past Fairview) which is where they resided. The bus conductor of the kombi proceeded to collect bus fare from the passengers including this witness and the deceased. PW1 took out a note of E20.00 and made payment for the two of them. The payment was made to Accused No.2 who was the bus conductor or Assistant Driver. When making payment, PW1 was talking on her mobile phone. The deceased then alerted this witness that the change given by Accused No.2 was short of E 2.00. Indeed the witness when

looking at her change realized that it was E 2.00 less than what it ought to have been. PW1 alerted Accused No.2 that the money given to her as change was short of E 2.00. Accused No.2 however disputed that he had given less change to this witness.

[9] Both PW1 and the deceased insisted that they were short-changed by Accused No.2 until the kombi arrived at the station where they were to drop off. PW1 alighted from the kombi with other passengers. The deceased however did not alight from the kombi but stood behind the seat normally occupied by the bus conductor and still demanded to be paid the E 2.00 by Accused No.2. The kombi then took off at high speed with the deceased still standing and demanding the E 2.00.

[10] PW1 then waited for the kombi to return with her daughter since she knew it would drop the last passenger at a place called Mpholi and then head back to town. Indeed after some few minutes, the kombi came back driving at high speed and passed the Canaan station on the opposite side of the road. When the kombi had just passed them as they were standing on the other side of the road, PW1 saw the door of the kombi opening and, in a split second, saw the deceased falling from the kombi and hitting head first onto the edge of the tarred road.



PW1 then saw the plastics containing the groceries carried by the deceased being thrown out of the kombi after the deceased had fallen. The plastics landed a few distance away from the deceased. The kombi continued to move away and until it came to an abrupt stop at a corner by the gate of a certain family yard. Both accused persons did not come to the scene of the incident but remained in the kombi.

- [11] PW2 (Khumbuzile Bongiwe Sikhondze) was a passenger in the kombi that had been boarded by the PW1 and the deceased. Her evidence was along the line of evidence given by PW1 especially on what had transpired when the kombi came back from Mpholi area. This witness confirmed that the deceased was the first to fall from the speeding kombi and her grocery fell on the ground after the deceased. PW3 had boarded another kombi from Manzini bus rank that had come or passed earlier at Canaan than the kombi ferrying PW1, PW2 and the deceased. Upon being dropped at the station (Canaan), this witness had stayed a little longer at the station whilst buying some maize corn by the side of the road. This witness also testified that when the kombi came back from Mpholi, it was driving at high speed and did not stop to drop off the deceased. Instead, the witness saw the deceased falling

off from the kombi whilst it was still in motion and the deceased hit the ground. Some plastics then fell after the deceased and hit the ground a little away from where the deceased had fallen.

- [13] PW4 (Gugulethu Simelane) was a friend of the deceased. This witness had received a call from the deceased to the effect that she (deceased) was from town and that this witness must meet deceased at the bus station (Canaan). The witness indeed proceeded to the bus stop to meet the deceased at Canaan bus stop. The witness waited for the kombi being boarded by the deceased to arrive at the station. A kombi scripted with the words 'criminal' came and stopped at the station. The witness saw PW1 alighting from the kombi but the deceased remained just behind the seat normally occupied by the conductor. The witness was standing on a slight uphill and could see the deceased standing and talking to the conductor. The kombi then left at high speed with the deceased still inside. The witness enquired from PW1 on why the deceased had not alighted from the kombi and the response she got was that deceased was demanding to be paid E 2.00 which had been withheld by Accused No.2. The witness and PW1 laughed at the fact that the money being pursued by the deceased was small.

[14] According to PW4, when the kombi came back from Mpholi, it was driving at a high speed and she was expecting it to stop in order to drop off the deceased. The kombi however did not stop and just when it was opposite to where they were standing, she saw the kombi door opening and further saw the bus conductor holding the deceased and pushing her out of the speeding kombi. The deceased fell onto the tarred road and landed on the upper side of her body. The witness then saw some plastics carrying grocery being thrown out after the deceased. The deceased and the plastics fell a little far from each other. This witness informed the Court that when the kombi came back from Mpholi, there were only three people namely, the driver, Accused No.2 and the deceased. The witness stated that the deceased could not have jumped from the moving kombi as argued by the Accused persons in their defence. This, according to PW4, was because had the deceased attempted to jump from the speeding kombi, she would have landed on her feet on the tarred road and most probably have fractured limbs and other serious injuries on her lower side of the body.

[15] The evidence from the medical practitioner who examined and attended to the deceased confirmed that the death of PW1's daughter was as a result of the complications due to the injuries sustained from the fall onto the tarred road.

### **ANALYSIS AND CONCLUSION**

[16] The Court is required to determine the Section 174 (4) application against the above summarized evidence. The Crown, in calling for the dismissal of the application in terms of Section 174 (4) relies *inter alia*, on the decision of the Appellate Division in **Katlego M Maarohanye and Another v The State 1968 (4) SA 498 AD at 510** wherein it was stated that;

**"Suffice to state however that the determination of *dolus eventualis* is, in essence, a subject value judgment reliant on inferential reasoning and is based on what the person thought and not what he should have foreseen. The controversy regarding decisions involving drivers of motor vehicles is illustrative of the caution required in determining the distinction between *dolus* and *culpa*. In our view, if foresight of any possibility, however remote, should suffice for *dolus eventualis*, that would set the threshold**

potentially lower than that of negligence- which requires the possibility to be reasonably foreseeable. The comment by Holmes JA in *S v De Bruyn & Another* remains an important reminder regarding the distinction between objective foreseeability (*culpa*) and subjective foresight (*dolus eventualis*) that-‘The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probanda* is *dolus* not *culpa*. These two different concepts never coincide.’”

- [17] The Accused persons’ representative also relies on a number of legal authorities to support the contention that the evidence adduced by the Crown does not meet the threshold of necessitating that accused persons be called to their defence. In her written submissions, the Accused persons’ attorney under the heading ‘Sufficiency of Evidence’ relies amongst other cases, on the decided case of *R v*

**Magongo (25/2010) SZSC 13 (30 November 2010)** referring to the case of *Bereng Griffith Lerotholi and Others v The King (1926-1953)* in which it was held that;

**“a Judge in Basutoland, as elsewhere, must always have in mind the danger of accepting evidence which is uncorroborated by independent evidence.”**

[18] The defence also referred the Court to a case of **The King v Bongani Bhabhama Dlamini (153/12) SZHC 236 [2018]** in which it was held that;

**“It is true that if a party fails to place the evidence of a witness who is available and able to elucidate the facts before the trial Court, this failure leads naturally to an inference that he fears that such evidence will expose facts which are not favourable to him.”**

[19] The reliance by the Accused persons’ attorney on the above decided cases is meant to support the contention that the evidence of PW4, who informed the Court that she saw Accused No.2 pushing or forcing the deceased out of the moving motor vehicle and throwing

her groceries after her should be rejected as it is not supported by some other independent evidence.

[20] Before the Court can consider the law applicable to the facts, it is important to diagnose the facts of the matter as presented by the Crown's witnesses. The evidence by PW4 was that from the position where she was standing and waiting for the kombi to arrive at the bus stop, she could see what was going on inside the kombi. The witness informed the Court that even when the kombi was coming back from Mpholi area, she was able to see what was happening inside the kombi. The witness told the Court that she saw Accused No.2 holding the deceased around her shoulder area and pushing the deceased out of the moving kombi and causing her to fall on the tarred road.

[21] In the Court's view, as stand-alone testimony, the evidence of PW4 is sufficient to require the Accused persons to be put to their defence on the allegations against them. PW4's evidence constitutes direct evidence being that Accused No.2 opened the kombi's passenger door and proceeded to push the deceased out of the motor vehicle. Accused No.1 being the driver of the motor vehicle was required to stop the

kombi in order to allow the deceased to alight from same but instead, he drove at the normal or high speed with the full knowledge that there was a passenger who had to be dropped off at Canaan bus stop. It can be said that the actions of the accused persons, taken cumulatively, brought about the ultimate consequence of the deceased falling or being pushed out from the moving vehicle in the manner in the manner as described by the witnesses. Furthermore, the contention by the Crown is that by omitting or failing to stop the vehicle and allowing the deceased to alight from the kombi in the normal way, Accused No.1 can be said to have played a direct role in causing the serious injuries which ultimately caused the death of the passenger. These are some of the issues that the Accused persons need to answer to.

- [22] In addition, the evidence of PW1 was that when the deceased fell on the tarred road, the plastics which had the groceries were thrown out after the deceased had already fallen off from the moving vehicle. This witness estimated the distance between where the deceased fell and where the plastics landed to be about 15 metres. PW3 estimated the distance between the point of impact of the deceased on the tarred



road and the plastics which, according to this witness came out after the deceased had already fallen, to be about 1.5 metres. PW4 also confirmed that the deceased was the first to fall from the moving vehicle and then later the plastics followed her.

- [23] What the evidence of the plastics or groceries demonstrate is that it is unlikely that the deceased would jump on her own from the moving vehicle and leave behind her groceries. If the deceased had elected to jump out of the moving vehicle, she most certainly would have attempted to jump out whilst carrying the groceries with her. This, however, according to the witnesses, was not the case. The testimony by the different witnesses was that the deceased fell off from the moving vehicle and then later, her groceries fell off after her and landed some distance away from her. It is improbable that the deceased would attempt to jump out of the moving vehicle and leave behind her groceries. This aspect of the evidence is crucial and the Accused persons are required to answer on how the plastics carrying groceries could fall or be thrown out of the moving vehicle after the deceased had already fallen. This is particularly so because during cross-examination, it was not disputed that first to fall or be thrown

out of the vehicle was the deceased and then later, the plastics carrying the groceries followed her.

[24] The other aspect of the evidence which requires an answer from the Accused persons relates to the sitting arrangement inside the kombi. PW2 stated that she was the last person or passenger to alight from the kombi when it reached Mpholi. This witness informed the Court that when the kombi reached Mpholi, the deceased was still sitting behind the conductor's seat (Accused No.2). This witness informed the Court that it would have been impossible for the deceased to open the kombi door by herself from where she was sitting. According to this witness, in order for the deceased to have been able to open the door, the kombi would have to come to a complete stop which would enable the conductor's seat to be folded and allow the deceased passage to first alight from the kombi and occupy the bus conductor's seat. The interior photographs of the kombi which were handed in as evidence show that the door handle of the kombi's passenger door would not have been reachable by the deceased if indeed she was sitting behind the conductor's seat.

[25] The Accused persons therefore have to answer on how the deceased could have reached the kombi's door handle if she was sitting behind Accused No.2's seat when the kombi came back from Mpholi. Furthermore, the evidence of the post mortem report showed that the deceased had more serious injuries on the upper side of her body, and in particular around her head and face as opposed to the lower side of her body. The evidence of the injuries appears to be in line with PW4's testimony to the effect that she saw Accused No.2 holding the deceased around the shoulder area and forcing or pushing her out of the moving vehicle after the door was opened. In this way, the deceased fell with the top part of her body onto the tarred road as opposed to having injuries on her legs or lower part of her body which would be reminiscent of someone attempting to jump out of a moving vehicle. The Accused persons need to answer on all of these allegations.

[26] This Court aligns itself with the statement of law made in the case of **Director of Public Prosecutions: Limpompo v Molohe and Another (1109 of 2019) [2020] ZASCA 69 (18 June 2020)** wherein it was held that;

**“[31] But even if the contradictions were of a kind that could be described as ‘material’ this was not sufficient to discharge the accused. The threshold requirement for a discharge at the end of the State’s case in terms of s 174 is whether there is evidence upon which a court might reasonably convict. If there is no evidence the court is entitled to discharge the accused. The fact that there may be contradictions in the State’s case, whether material or not, does not in itself give a judge the competence to discharge the accused. The evidence must, in addition, be of a quality that no court might reasonably convict.”**

[27] On the charge of murder against the Accused persons, the Court comes to the conclusion that the Accused persons have a case to answer and the application in terms of Section 174 (4) of the C.P& E Act 67/1938 in respect of this count is dismissed.

[28] What remains now is for the Court to make a determination on the charge of allegedly Contravening Sections 122 (1) read with Section

122 (5) of the Road Traffic Act, 2007. Section 88 (1) (a-d) of the Road Traffic Act provides;

**“The driver of a motor vehicle on a public road at the time when such vehicle is involved in or contributes to any accident in which another person is killed or injured or suffers damage in respect of any property shall-**

**(a) Immediately stop the vehicle.**

**(b) Ascertain the nature and extent of the injury sustained by the person;**

**(c) If a person is injured, render such assistance to the injured person as he may be capable of rendering;**

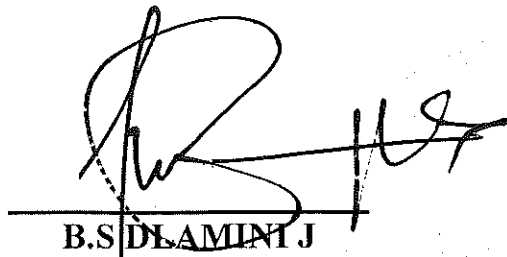
**(d) Ascertain the nature and extent of any damage sustained.”**

[29] Sections 122 (1) and 122 (5) of the Road Traffic Act stipulates that the driver of a motor vehicle who fails to comply with Section 88 (1) (a-d) may, upon conviction, be liable to a fine not exceeding E 5,000.00 or imprisonment for a period not exceeding 3 years.

[30] The Amended Charge Sheet or Indictment states that it is Accused No.1, the driver of the motor vehicle, who is liable on this charge.

However, PW9 Detective Constable Absalom Ngwenya was clear in his testimony that Count 2 was preferred against Accused No.2 only. There is therefore a contradiction on the charge sheet and the evidence of PW9 as to who exactly should be held liable on this charge. The Act places a legal obligation on the 'driver' of a motor vehicle to comply with Section 88 (1) of the Act. This witness also confirmed that it was not safe for the accused persons to get near the scene where the deceased was lying down as the people who had gathered around could have caused harm to them. This testimony of PW9 confirms the accused person's version during cross-examination that it was not safe for the accused persons to get near where the body of the deceased was lying as the people who had gathered around showed signs of being angered by the actions of the accused persons and could have harmed them.

- [31] The Court accordingly finds that the accused persons or either one of them has no case to answer in respect of Count 2 and accordingly acquits them on this charge.



B.S. DLAMINI J

**THE HIGH COURT OF ESWATINI**

*For Accused Persons:*                      *Miss. N. Hlophe (Mongi Nsibande & Partners)*

*For the Crown:*                              *Miss E. Matsebula (DPP's Chambers)*