



**IN THE HIGH COURT OF ESWATINI  
JUDGMENT**

**HELD AT MBABANE**

**CASE NO: 118/15**

In the matter between:

THE KING

And

BONGANI LUKHELE

FIRST ACCUSED

LUKE MALOLO MATSENJWA

SECOND ACCUSED

MBOKODVO K. DLAMINI

THIRD ACCUSED

LUKHETFO MAZIYA

FOURTH ACCUSED

Neutral Citation: ***The King and Bongani Lukhele and 3 Others [118/15]  
[2022] SZHC 156 (14 July 2022)***

Coram: LANGWENYA J

Heard: 16, 28 March 2022; 13 April 2022; 15 June 2022;  
14 July 2022.

Delivered: 14 July 2022

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

## **JUDGMENT**

### Introduction

- [1] The accused persons are charged with murder. It being alleged by the Crown that upon, or about 19 July 2014 and at or near Sikhuphe area in the Lubombo district, the said accused persons, acting in furtherance of a common purpose did intentionally and unlawfully kill Fakazi Lukhele and did thereby commit the crime of murder.
- [2] When the charge was put to each of the accused persons, they each pleaded not guilty to the offence charged.
- [3] The Crown led the evidence of six witnesses and submitted the post-mortem report as well as a photo album compiled by the scenes of crime officer to prove its case.
- [4] Only the first and the fourth accused led evidence in support of the defence case. The second and the third accused asserted their right to remain silent. No other witness was called to support the defence case.

## **The Crown's Case**

- [5] PW1 is Nkosingiphile Sihle Tsabedze is a resident of Sikhuphe. He knows the accused persons. On 19 July 2014 he was at Msongelwa Mabuza's homestead with a number of other people including the deceased. While at Mabuza's homestead, the first, second and third accused persons arrived, dragged the deceased and left with him through the gate. Bongani Lukhele was carrying a knobkerrie while the rest of the accused persons were carrying sticks. The accused persons assaulted the deceased with sticks on the knees, ribs and on the feet. Nkosingiphile Tsabedze heard Bongani Lukhele saying Fakazi had taken his maize and cut his dog's tail. The accused persons left the Mabuza homestead with Fakazi. PW1 testified that he could hear deceased crying and could tell that he was being assaulted.
- [6] During cross examination it was put to PW1 that Fakazi had come to the Mabuza homestead for medical attention because he had injuries on his body and on his head and his feet were swollen. PW1 stated that Fakazi was at the Mabuza homestead and that he did not see that he had injuries while there.
- [7] PW1 explained to the court that the deceased had mental health issues. PW1 was unaware that Fakazi was a troublesome person within the community. PW1 testified that he was not aware that on different occasions Fakazi had allegedly been assaulted by members of the community for committing crime and for playing havoc with certain people's property. PW1 also told the court that he was not aware that Fakazi is related to Bongani Lukhele. It was his evidence that Bongani Lukhele and Luke Malolo Matsenjwa are community police from Sikhuphe.

- [8] PW1 testified that he heard the accused persons say Fakazi had broken windows, cut off dogs' tails and stolen maize. When it was put to PW1 that Fakazi had attacked Bongani's home and broke windows thereat as well as assaulted Bongani's wife, PW1 stated that he was unaware that the deceased had broken windows at Bongani Lukhele's home and further assaulted Bongani Lukhele's wife. PW1 also told the court that he did not see Fakazi hit Mbokodvo Dlamini with a stone on the forehead while at Mabuza's homestead.
- [9] Nkosingiphile testified that Bongani Lukhele was not limping when he arrived at Mabuza homestead. When the deceased was forcefully led away from the Mabuza homestead by the accused persons, he was not violent. PW1 stated that Bongani Lukhele assaulted Fakazi with a knobkerrie on the knees, feet and on the abdomen. PW1 said Mbokodvo Dlamini and Lukhetfo Maziya were not carrying any weapon; he also did not see them assault Fakazi.
- [10] PW2 is Msongelwa Douglas Mabuza and a resident of Sikhuphe. He knows the accused persons. He earns a living by praying for people. On the day of the incident, Fakazi was at PW2's home and was his usual self and was relaxing next to ashes in the yard of PW2's homestead. Mr Mabuza testified that he did not observe anything untoward about Fakazi. Fakazi had also not complained about anything to PW2. Fakazi had a mental illness.
- [11] PW2 left his homestead to collect firewood. When he returned home, he observed drag marks where Fakazi had been seated. The drag marks were for a distance of fifteen to twenty meters from the place where he left Fakazi seated to the gate. Mr Mabuza testified that Fakazi used to regularly attend church services at PW2's homestead. It is his evidence that he never treated

Fakazi for any ailment but would help him if he was injured. PW2 is unaware that Fakazi was a violent person as alleged by the accused. He testified however that if Fakazi was violent it may have been because of his mental condition. PW2 denied seeing Fakazi with injuries on his abdomen and swollen feet. PW2 testified that he is aware that Fakazi's family would occasionally call the police to help restrain Fakazi before he was taken to the psychiatric hospital. During cross examination PW2 testified that he was not aware that Fakazi had allegedly harassed Bongani Lukhele's family and even killed a cow belonging to prince Gcokoma.

- [13] PW3 is Dumisa Phineas Hlatshwako. He is a resident of Malindza. He knows the accused persons. On 19 July 2014 he was at PW2's homestead for prayer as he was unwell. On arrival at PW2's home he found Fakazi and other people there. Mbokodvo Dlamini and Lukhetfo Maziya arrived at PW2's home and sat for a brief moment and they were joined by Bongani Lukhele and Luke Malolo Matsenjwa at PW2's homestead. Dlamini and Maziya held and restrained Fakazi while Matsenjwa and Lukhele assaulted him with knobkerries. Fakazi was assaulted on his feet, knees and on his body. The accused persons then took Fakazi away. Dlamini and Maziya restrained Fakazi as they took him with them; and as they walked away with him they were assaulting him.
- [14] Lukhele used a knobkerrie to assault Fakazi while Matsenjwa assaulted him with a stick. PW3 insisted that the deceased was assaulted by the accused persons when he was at the Mabuza homestead. PW3 testified that he did not see Fakazi hit Dlamini with a stone on the forehead. PW3 told the court that he had heard that Fakazi had cut Lukhele's dogs' paws and tail; he had

also heard that deceased had damaged someone's cow and that he was assaulted by members of the community at Gwayimane for theft of money.

[15] PW4 is 2414 Sergeant Khetsiwe Mthimkhulu. She testified that on 19 July 2014 she received a report through 999 that certain people were assaulting a person next to Sikhuphe. She went to the scene with another police officer. The scene was the Mbadlane/Hlane T-junction where she found four men standing and one man lying on the ground. Amongst the men were Lukhele and Matsenjwa. Matsenjwa is a member of the community police.

[16] The person who lay on the ground had been heavily assaulted. He lay facing up and was injured from head to toe. PW4 noticed that Bongani Lukhele was carrying a knobkerrie and handcuffs while Matsenjwa was carrying a stick. The other two accused persons were also present.

[17] The accused persons helped the police get the deceased into the police van. Bongani Lukhele and Matsenjwa refused to come with the police as they conveyed the deceased to hospital. PW4 testified that the accused persons were very angry when the police arrived to take the deceased to the hospital. When the police took the deceased to hospital he was unable to walk unaided but could talk. PW4 testified that it is incorrect to say when the police arrived at the scene they found the accused seated on the ground. PW4's evidence is that the deceased was assaulted on the head, body and feet. He had scars all over the body and on his feet.

[18] PW5 Hloniphile Phumzile Vilakati testified that on 19 July 2014 she was at Mabuza's homestead inside a house when she heard noise outside. She enquired what the noise was about and was informed that Bongani and his crew were assaulting Fakazi. She went outside the house and saw Bongani

and his co-accused assault Fakazi but she got no clear explanation why no one was helping Fakazi. PW5 then used her phone to call the police because the accused persons were heavily assaulting Fakazi. PW5 saw Bongani Lukhele hit Fakazi with a stick on the abdomen. Matsenjwa hit Fakazi on the feet and the other accused persons hit him at his back while another accused person hit him on the head. The police had not arrived at the scene when the accused persons dragged Fakazi and disappeared with him.

[19] Prior to the arrival of the accused persons at the Mabuza homestead, PW5 had seen Fakazi within the vicinity. She heard Bongani say I will kill this dog, he chopped off my dog's tail. When PW5 came out of the house, she testified that the accused persons and Fakazi were out of the gate already and the accused were assaulting Fakazi. PW5 knew the deceased to have a mental illness and did not know if he was unwell when he arrived at the Mabuza homestead.

[20] PW6 is 5586 Detective Constable Sebenele Sibandze. He is the investigating officer in this matter. On 19 July 2014 he was on duty in the CID at the Siteki police station when he received a report from his superior to attend to a person who had died at Good Shepherd hospital. The report was to the effect that the deceased had been brought to the hospital after he had been assaulted at Sikhuphe. When he arrived at the hospital he inspected the body of the deceased and saw that he had head injuries and was bleeding as a result of the injuries inflicted on him. The deceased had fresh injuries on the feet and was bleeding from the head and feet. He also had another injury on the right shoulder.

[21] On 20 July 2014 he went to Mpaka and recorded statements from witnesses. He left a message for the accused persons to report at Siteki police after he

went to their homes and did not find them. He was subsequently called by Bongani Lukhele on 21 July 2014. The police arrested the accused and found them waiting for the police at Mpaka filling station. The police introduced themselves to the accused persons and explained their mission to them. They cautioned them in terms of the Judges' rules before Bongani Lukhele voluntarily pointed out a knobkerrie and handcuffs which were in his possession. After due caution, the second accused Mr Matsenjwa also led the police to his home where he retrieved a stick. The police arrested the accused persons and took them to Siteki police station.

[22] On 20 July 2014 the police went to Msongelwa Mabuza's homestead because they had information that the deceased was at PW2's homestead before he was taken away by the accused persons. The police observed drag marks which led them to a ditch. In the ditch and next to the tar road, was a bushy area. The police followed the drag marks and found splinters from sticks littered in the area; the place had been cleared and it appeared like someone was hitting something. The scene appeared fresh. The scenes of crime officers took photos of the scene. The photo album was handed in to court as part of the evidence of the Crown. The postmortem report reflects that the deceased died due to multiple injuries. It also details the nature of the injuries.

[23] The Crown closed its case.

## **Defence case**

### **DW1 Bongani Lukhele**

[24] Bongani Lukhele is a resident of Sikhuphe and doubles up as a community police and an evangelist of a Zion church. Malolo Matsenjwa is an elder and



head of the community police. Mbokodvo Dlamini is a member of the Zion church and a member of the community police. Fakazi is Bongani Lukhele's brother because he is a son of Bongani's uncle (*babe lomncane*).

[25] Bongani Lukhele chronicled a number of instances when, as he put it Fakazi harassed and vandalized his family. Things came to a head when Fakazi allegedly came to Bongani's home while he was away at work and took maize and on a different occasion he took brand new shoes and later vandalized windows of a house and burnt a roof of a different house at Bongani's homestead. Fakazi, the court heard from Bongani Lukhele also took his dogs and cut their tails before he disappeared with them. According to Bongani's evidence, Fakazi was a man with a violent streak. The community often assaulted him for his acts of violence. Fakazi had a mental illness.

[26] Bongani testified that on some occasions when Fakazi came and harassed his family he informed the police but he did not get any joy from doing so. This is because the police did not arrest Fakazi. When they did, they sooner released him without any charge.

[27] DW1 testified further that on the 15<sup>th</sup>, Fakazi came to DW1's homestead in the company of *make lomncane*. When he arrived at DW1's home, Fakazi allegedly assaulted his wife. Lukhele's *make lomncane* is said to have tried to restrain Fakazi but failed.

[28] After Fakazi had vandalized windows of a house belonging to Bongani Lukhele, police were informed about the matter. They came and recorded statements and took Fakazi with them. Fakazi, the court was told was later produced before court and was referred to the psychiatric hospital. He

subsequently returned to the community with a bruised back, scar on the forehead and at the back of the head he had a wound.

[29] On his return from the psychiatric hospital, Fakazi allegedly committed more acts of violence against Bongani's family. He came in the evening hours and took dogs' food. When Bongani returned home he found that none of the dogs and puppies were home. He subsequently learnt from his grandmother's home that Fakazi had walked past and was carrying the puppies.

[30] When Bongani was informed that Fakazi had walked past his grandmother's home carrying puppies, Bongani was with Lukhetfo Maziya. Bongani says he knew that Fakazi was often prayed for at PW2's homestead. Bongani and his co-accused went to Mabuza's homestead in search of Fakazi. On arrival there, Mbokodvo Dlamini and Lukhetfo Maziya went into Mabuza's home while Bongani and Malolo Matsenjwa remained next to a homestead that was above the Mabuza homestead. Mbokodvo Dlamini came out with a bloodied face while Lukhetfo Maziya fled the scene. It was then that Bongani Lukhele entered Mabuza's homestead and left Malolo Matsenjwa behind the trees. Lukhetfo Maziya turned back to PW2's homestead and held and restrained Fakazi while Bongani handcuffed him. They left with Fakazi. No one assaulted Fakazi while they were at Mabuza's homestead.

[31] According to Bongani's evidence when the accused persons arrested Fakazi at the Mabuza homestead, he was found barefoot and wore blue jeans, a white T-shirt, a blue top and a big army coat. He had multiple visible injuries on his body and swollen feet and was bleeding from the back of his head. When the accused left PW2's homestead with the deceased they crossed a river to go to deceased's home because he had admitted to taking

the puppies and other missing items from Bongani's home. It is Bongani's evidence that Fakazi said the items were at his home under his bed.

[32] It is Bongani's evidence that Fakazi's old injuries were aggravated when he was arrested by the community police-these being Bongani and his co-accused. Fakazi's head injuries were aggravated when he was grabbed by Bongani by his feet and he fell to the ground on his head. Fakazi was then taken to the second accused. Bongani testified that the second accused told him not to touch Fakazi because his old injuries were now raw.

[33] It is the evidence of Bongani that at no point did the accused persons assault the deceased on the day of the incident. Clearly this evidence is intraducted by the evidence of crown witnesses and by the evidence of DW1. Bongani told the court that it was a norm for the deceased to have injuries as he was often beaten up by members of the community and this day was no exception. Bongani told the court that when the accused arrested Fakazi, they held him, Bongani sat on his abdomen, tied his feet and handcuffed him.

[34] DW1 admitted assaulting Fakazi with a stick on the buttocks. DW1 testified that Malolo Matsenjwa admonished him not to assault Fakazi. The accused persons further assaulted Fakazi with small sticks when they were about to reach a river. The accused lifted the coat Fakazi wore and assaulted him on the thighs and on the hips. It was after this assault that Fakazi then explained that he had lost some of the items and had cut the puppies' paws and tails and left the dogs at Nsulutane.

[35] Bongani says he then received a telephone call from the police who asked where they were with the person they were assaulting. He gave the police

the directions. Bongani testified that the police arrived and found the accused seated with Fakazi. Bongani says he explained to the police why they had assaulted Fakazi. Bongani and the other accused persons refused to help Fakazi board the police van because, according to Bongani, Fakazi could walk on his own and he did. Bongani conceded that he refused to come with the police as they conveyed Fakazi to the hospital.

[36] Bongani testified that he had no intention to kill Fakazi. He told the court that he had saved Fakazi from many dangers on various occasions. It is DW1's evidence that he took care of cattle belonging to Fakazi's family. He told the court that he had directed his wife to allow deceased's family to take some of the cattle if they wanted to.

[37] Bongani spent five days in pre-trial incarceration before he was released on bail.

[38] During cross examination, Bongani conceded that as a member of the community police he ought not to have taken the law into his own hands and assault Fakazi. He insisted however that it was not his intention to cause the death of the deceased. He stated that they were trying to scare the deceased and prompt him to tell the truth about where the items they were looking for were.

[39] Bongani testified that he only used the knobkerrie as a walking aid because he had *umklwebho*. Bongani admitted that he and his co-accused were warned to stop assaulting the deceased while they were at Mabuza's homestead. Bongani denied that they dragged the deceased out of PW2's homestead while they assaulted him. Bongani testified during cross examination that Fakazi walked unaided out of PW2's homestead and when

they got to where Malolo Matsenjwa was, Bongani was asked by Malolo to move away from Fakazi because he had an interest in the matter.

### **Evidence of Mandlenkhosi Lukhetfo Maziya DW2**

[40] In the year 2014, Lukhetfo Maziya was nineteen years old. He is 27 years old in 2022. He is not married and has eleven (11) children. His mother is alive. His father is dead. He is employed as a herdsman and earns E1200 per month.

[41] DW2 testified that he was present when the incident complained of in this matter happened. It is his evidence that he and his co-accused used small if tiny sticks to assault the deceased. He told the court that Fakazi was assaulted on the buttocks. DW2 stated that the deceased sustained head injuries when he resisted and fought the accused persons as they tried to subdue and arrest him. Fakazi then fell and hit his head on the ground and bled.

[42] DW2 says Fakazi had bruises which were the result of previous assault. It is DW2's evidence that he personally did not assault Fakazi but only witnessed the assault meted on Fakazi by the other accused. His co-accused did not assault Fakazi in as much as they scared him; the assault was not a heavy one.

[43] DW2 told the court that when he assaulted Fakazi he did not foresee that he could die. This, he surmised was because he used a small stick and hit him on the buttocks.

[44] The problem with DW2's evidence is that it is incoherent regarding his participation in the commission of the crime charged. On the one hand, he says he never assaulted the deceased and on another he says when he

assaulted Fakazi he did not foresee he could die from his injuries. What is clear though is that the accused is trying his utmost best to minimize the nature of the injuries inflicted on the deceased by him and his co-accused.

[45] DW2 testified that Fakazi assaulted Mbokodvo with a stone while they were at PW2's homestead. My view is that if the assault ever took place it would have been seen by the Crown witnesses who were present with Fakazi at PW2's home. None of those witnesses saw the said assault of Mbokodvo. I therefore reject this evidence as false.

[46] The defence closed its case.

### **Application of the law to the facts**

[47] The accused persons were seen by Crown witnesses assaulting Fakazi at PW2's homestead. The accused dragged Fakazi out of PW2's homestead and continued to assault him outside the gate of Mabuza's homestead. The court heard from the evidence of the police who was the first responder that the accused persons were very angry. Hloniphile Vilakati testified that Bongani Lukhele said he will kill this dog-in reference to Fakazi-because he has chopped off my dog's tail.

[48] The police found broken pieces of sticks at the secondary scene. The first and the fourth accused admit assaulting Fakazi but seem to play down the assault by saying they used small sticks and only hit him on the buttocks. The accused admit that when they were trying to subdue and arrest Fakazi he fell on his head to the ground.

[49] Crown witnesses testified that at Mabuza's homestead there was nothing untoward about Fakazi as he sat in the yard minding his business. There is

evidence that Fakazi was assaulted by the accused with knobkerries and with sticks. I have found the witnesses of the Crown to be credible.

[50] The investigating officer testified that the body of the deceased had fresh injuries. This evidence goes against the version of the accused persons' evidence that Fakazi had old injuries which may have been aggravated when they tried to arrest him.

[51] 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 deceased<sup>1</sup>.

[52] 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. Bongani Lukhele, the court heard, had been of assistance to the deceased. He had helped him get a job and had generally 'protected' him. He had reported the harassment of his family to the police but did not get much help from the police. The other accused persons got involved in this matter at the behest of the first accused. The aim was to get Fakazi to divulge where he had kept items he had taken from Bongani's home especially the dogs. What cannot be countenanced is that the accused persons resorted to taking the law into their own hands even though they knew that it was wrong to do so because they are members of the community police.

[53] From the 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.

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<sup>1</sup> *Rex v Bloom* 1939 AD 199.

- [54] The accused persons ought to have known as reasonable persons that the assault of the deceased with an assortment of sticks and knobkerries all over his body might possibly lead him to his death. They were negligent. Culpable homicide is the unlawful killing of a human being either (a) negligently<sup>2</sup> or intentionally in circumstances of partial excuse<sup>3</sup>. The latter form of culpable homicide does not apply in the present case. This is because when the deceased was found by the accused at PW2's homestead he was not violent towards the accused persons. When he was dragged out of PW2's homestead he was heard crying as the accused assaulted him. The accused were clearly not under attack from the deceased.
- [55] The evidence of negligence against the accused persons is overwhelming and in my view, the Crown has proved beyond reasonable doubt that the accused persons committed the crime of culpable homicide of Fakazi Lukhele.
- [56] In the result, I find accused 1, 2, 3 and 4 not guilty of the crime of murder but guilty of the crime of culpable homicide.

**M. S. LANGWENYA**  
**JUDGE OF THE HIGH COURT**

For the Crown: Mr Khumbulani Mngometulu

For the all the accused: Ms Noncedo Ndlangamandla

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<sup>2</sup> *State v Alexander* 1982 (4) SA 701 (T) at 705G-H.

<sup>3</sup> *Annah Lokudzinga Matsenjwa v Rex* 1970-1976 SLR 25 at 26A-E.



