

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 170/2018

In the matter between

Rex

V

Siphamandla Mngometulu

Neutral citation: *Rex v Siphamandla Mngometulu (170/18) [2022] SZHC 221 [2022] (14/10 2022).*

Coram : D Tshabalala J

Heard : 29/06/2021

Delivered : 14/10/2022

JUDGEMENT

[1] The Accused person stands charged with the crime of murder of his grandmother Betty Nkihli Mngometulu. It is alleged that on or about the 1st April 2018, at or near Mgambeni in the Shiselweni Region, he unlawfully

and intentionally killed the deceased. Upon the charge being read and explained to him the Accused pleaded guilty to culpable homicide, which plea the crown rejected and stated that it would prove the crime of murder. A plea of "not guilty" to murder was accordingly entered.

- [2] The first crown witness (PW1) was police pathologist Dr Komma Reddy who conducted a post-mortem examination on the body of the deceased, as well as compiled a report.¹ His testimony was that the deceased was a female adult of about 79 years old. From his observations he formed the opinion that the cause of death was due to multiple chop wounds to the head and backside of the right axilla. He noted at least 6 *ante mortem* injuries:

- 1) *A chop wound of 16x3cms, present on the middle portion of the back side of the head.*
- 2) *A chop wound of 13x2cms, present on the right side of the top of the head.*
- 3) *A cut wound of 3x1cm, present on the middle portion of the right jaw.*
- 4) *Cut wound of 5x1cm, present on the front, middle and upper portion of the right upper arm and muscle deep.*
- 5) *Cut wound of 6x1cm, muscle deep, present on the middle and upper lateral portion of the right upper arm.*
- 6) *Brain disrupted and coming out through the fractured portions of the skull bones. Extra-dural, sub-dural and intra-cerebral haemorrhage present.*

- [3] It was the evidence of the pathologist that occipital temporal and parietal bones were fractured; the brain was disrupted and coming out through fractured portions of the skull bones there was extra-dural, subdural, intra-dural and intra-cerebral haemorrhage.

¹ Exhibit "A"

- [4] According to the witness, any of the following weapons could have caused the chop and cut wounds, a heavy cutting instrument like a bush-knife, axe and butcher's knife.
- [5] PW2 Jabu Mabonela Mamba a woman aged 54 said she was deceased's daughter in law. She was with the deceased at the latter's home when she was attacked by the Accused on the 1st April 2018. Also present was one Jabulile Ngwenya. Prior to the attack PW2 and Jabulile left the deceased and went to a nearby homestead of Mkhumbi.² They found the accused with two others young men Bonginkosi who testified as PW3, and Mandlenkhosi. The three young men left Mkhumbi's homestead. When they left the Accused and Mandlenkhosi each carried a bush-knife. In response to PW2's inquiry, as to where they were going armed with bush knives, Mandlenkhosi said that they were going to kill the deceased because she was a witch. Bonginkhosi and the Accused disputed Mandlenkhosi's statement. They said they were going to the field or garden.
- [6] PW2 and Jabulile followed the Accused and his companions up to where they saw them go to the field belonging to one Mkhumbi. PW2 and Jabulile proceeded to deceased's home.
- [7] Shortly thereafter, PW2 saw Accused and his two companions enter deceased's homestead from a different side, and the Accused went straight to the house. At that time the deceased came of out of the house to the door. PW2 inquired from the Accused why they left the field, to which the Accused responded that they would attend to the field later. The Accused struck the deceased with the bush-knife in the area of her armpit. PW2

² Mkhumbi testified as PW10. He is the husband of PW5, Hloniphile Nurse Mamba.

cried out and also tried to come to deceased's rescue but was thrown down by Accused who warned her that she would get hurt. By the time PW2 rose from the ground, the Accused had fled through the gate. The deceased lay on the ground and many people had gathered.

- [8] It is PW2's evidence that there was no exchange of words between the Accused and deceased before the Accused attacked her. Deceased only uttering which followed the blow was "*what have I done my child.*"
- [9] PW2 told the court that the Accused was an orphan having lost both parents at a tender age of 3 - 4years. He lived with the deceased who was his paternal grandmother. She assumed the role of Accused's guardian since his tender age. Accused's father and PW2's husband were brothers. PW2 testified that had a good relationship with the Accused.
- [10] The Accused resided at deceased's home together with other children, his aunt, a sister to his father.
- [11] PW2's evidence was not challenged in any significant way through cross examination. It was only suggested that her evidence comprised hearsay from others, which she disputed.
- [12] PW3 Bonginkhosi Mngometulu testified that they were cousins with the Accused, that is, their fathers were brothers. Deceased was grandmother to both PW3 and the Accused. On the fateful day PW3 accompanied the Accused to the home of Mkhumbi Mkhaliphi and Hloniphile Mamba's homestead, PW10 and PW5, respectively.

- [13] While at Mkhumbi's, the Accused bought marula brew and they were served by PW5 Hloniphile Mamba. They were joined in the drinking by one Mandlenkhosi Mdluli. While drinking the Accused borrowed two bush knives from Hloniphile which Accused and Mandlenkhosi proceeded sharpen. After that PW2 and Jabulile arrived. PW3 left the homestead together with the Accused and Mandlenkhosi, with the latter two carrying a bush-knife each. According to PW3 they left destined for Accused person's garden. When they got to deceased's gate, the Accused entered, having told them that he wanted to fetch his gumboots. PW3 and Mandlenkhosi waited outside the gate.
- [14] PW3 saw the Accused hack the deceased with the bush-knife on the head, shoulders, among other parts. PW3 admonished the Accused to no avail. When PW2 tried to stop him, the Accused threw her to the ground. The Accused fled the scene. There was no conversation or exchange of words between the Accused and the deceased prior to the attack.
- [15] At night PW3 received a phone call from the Accused, requesting him to accompany him to kaPhunga police station. PW3 phoned the police and subsequently they picked him, the Accused, Accused's sister, Thobile (who testified as PW4) and her husband Ncedo. PW3 conceded under cross examination that he was not the one who phoned the police.
- [16] On the day of the incident the Accused had not said anything negative to PW3 about the deceased, and prior to attacking her. However, before that day the Accused had voiced a litany of complaints against their grandmother. He told PW3 that she ill-treated him. Some of the Accused's complaints were that he was overburdened with household chores – cooking, herding cattle and at the same time balance that with school work.

According to PW3 Accused was at the time in Form III. Another complaint was that he did not eat well at home despite that he contributed to the household with sponsorship money that he received as an orphan from World Vision. According to PW3, the Accused owned cattle and goats bought for him from money donated by World Vision.

[17] PW3 revealed under cross examination that they were on good terms with the Accused, that he was intimidated by him on that day even though he was younger. During the attack of the deceased, the Accused acted strangely, like someone who was possessed, PW3 observed. Although the three of them had been drinking they were only mildly drunk. PW3 thought that the bush knives were intended for use in Accused's garden. The relationship between the Accused and PW2, who was PW3's biological mother, was good. PW2 used to give food to the Accused when he came to their home complaining of hunger.

[18] PW3 stated under cross examination that he reported Accused's complaints of ill-treatment by the deceased to his mother (PW2), as well as to the deceased herself. PW3 claimed that deceased's response would be that there was nothing she could do because the Accused lost his parents a long time ago. He got the impression that deceased resented the Accused. He denied defence's accusation that he incited the Accused to attack the deceased.

[19] PW4 Thobile MkhaliPhi testified that they were cousins with the Accused (their fathers were brothers). PW4 are actually siblings with PW3. While at home in Nhlangano PW3 received a call from the Accused who told her that he was going to kill the deceased. She advised Accused against it. The Accused told her that he wanted to kill the deceased because she had

ill-treated her for too long and he was now tired. PW4 called Msizi, one of the boys who lived with the deceased and told him about Accused's intentions, and asked him to rush home. Msizi said he was at the river doing laundry. Shortly afterwards, about 20 minutes later the Accused called and told PW4 that he had killed the deceased. The Accused called her the third time informing her that he was in the bush that he was confused and wanted to commit suicide. PW4 advised him against suicide and that he must wait for her and others. PW4 and her husband Ncedo Sondezi eventually located the Accused at Mabensana forest, where they converged with the police who were also looking for the Accused. The Accused emerged from the bush together with PW3. All travelled in police motor vehicle to Sithobelweni police station where statements were recorded.

[20] PW4 was older than the Accused and knew him from his early childhood, raised by the deceased. PW4 had a good relationship with the Accused she was aware of bad blood between the Accused and deceased. She witnessed ill-treatment of Accused at the hands of deceased. Although deceased lived with other children in her household, the Accused did most chores – fetched water from far away, twice every morning before going to school. She learnt from the Accused that he went to school without pocket money and that he often got no food to eat at home after school. PW4 was aware that deceased bought cattle and goats for the Accused using sponsorship money from World Vision. Deceased spent part of the money on her children and grandchildren.

[21] PW4 had received information that the Accused slaughtered one of his goats in the forest and ate the meat there. When PW4 inquired from the Accused he told her that it was his property. The Accused also speared one

of his cattle, which had to be finished off. When he confronted the Accused, he told her that he did it because he graved meat. PW4 said under cross examination that at times the deceased verbally abused the Accused.

[22] PW5 Hloniphile Nurse Mamba testified that on the day of the incident she served the Accused, PW3 and one Bonginkhosi with Marula brew which was for free. (This is contrary to what PW3 testified that their drink was paid for by the Accused). The Accused borrowed bush knives from PW5. She inquired what they wanted the bush knives for. Mandlenkhosi responded that they need them to clear land for a garden to plant seeds. (This is in contrast to PW2's evidence that when she asked the same question, Madlenkosi responded that they were going to kill the deceased). PW5 gave them permission and the Accused fetched two bush knives which they proceeded to sharpen. About an hour after the trio had left, PW5 heard someone raising alarm.

[23] PW5 came out of the house and met up with the Accused carrying a bloodied bush knife. The Accused shouted at the witness and said *here's your bush knife*. She refused to take the knife and ran away, crying. PW5 went to deceased's home where the alarm came from and found deceased lying down in a pool of blood covered with a blanket. Police came and recorded a statement for her.

[24] PW5 confirmed other witnesses' testimony that the deceased stayed with the Accused together with her children. At times the Accused came to ask for food from her home alleging that he was not given food at home. PW5 was wife to Accused and PW3's uncle. Her home was close by to that of

deceased. She was closer to the Accused because he often came to her to make some requests.

- [25] PW5's evidence differed from that of PW3 on who carried the bush knives. According to her PW3 and Mandlenkhosi each carried the bush-knives when they left and the Accused carried none. PW5 changed under re-examination and said the Accused and Mandlenkhosi each carried a bush knife. Explaining discrepancy in her evidence in chief and cross examination to evidence under re-examination, PW5 said she was terrified during her first day of testimony and her memory was blurred as a result.
- [26] PW6 Detective Sergeant Enock Tsabedze was the Scenes of Crime officer stationed at Nhlangano Regional Headquarters. He attended the scene of crime at the request of ka-Phunga police. At the scene the victim was covered and not breathing. He took pictures. The deceased had two open wounds on the head, two gaping wounds under right arm, two gaping wounds on the shoulder, gaping wound on the right cheek. He took the body to Sithobelweni Health Centre mortuary.
- [27] PW6 conveyed the body to Mbabane for autopsy examination. He handed in the album he compiled of photographs for the scene.³
- [28] PW7 Dr Kavulu Mokunya was a medical doctor based at Sithobelweni Health Centre. His evidence was that the deceased was brought to the hospital already dead. He confirmed her death and completed a medical certificate of cause of death (exhibit "C"), in which he noted 20cm lacerations on parietal region; 20 cm laceration on occipital affecting bone etc.

³ Exhibit "B"

- [29] PW8 Detective Constable Jabulani Gwebu was chief investigator in the matter, stationed at ka-Phunga. He attended the scene with other officers around 17:00 hours on the 1st April 2018. He was directed to body of deceased, covered in blood with multiple deep wounds from top to bottom of the body. She was not breathing. He called the scenes of crimes officer. The following day he went to Sithobelweni police post where he found the Accused, and put him under arrest.
- [30] Having cautioned the Accused, the latter led PW8 and other officers to the home of PW5 and Mkhaliphi, where a blood stained bush knife was recovered (Exhibit "1")
- [31] PW9, Sanele Mamba was at a soccer pitch with others getting ready play a match. They heard an alarm being raised and rushed in the direction it came from. They met up with the Accused who was running and carried a bush knife. In response to PW9's inquiry the Accused said something had happened and that they should go to the scene. The Accused ran in the opposite direction. At the scene PW9 and companions learnt of hacking of the deceased. He knew the Accused who was younger and they grew up in the same area. They were not related nor were they friends.
- [32] PW10 Mkhumbi Mkhaliphi was PW5's husband. On the 1st April 2018 he returned home at Mgambeni from Siteki in the evening. He learnt about the attack on the deceased. PW5 informed him that the Accused and two others borrowed two bush knives, and how the Accused later returned a bloodied bush knife. The bush knife was subsequently seized by police in the present of the Accused. He identified Exhibit "1" as his bush knife that was taken by police.

Defence Case.

- [33] The Accused was the sole witness in his defence. He testified under oath. His evidence on the circumstances under which he attacked the deceased differed materially from that of the eight witnesses, PW2 and PW3 in particular.
- [34] Accused's evidence in brief was that he together with PW3 and Mandlenkhosi left PW5's home destined to his fallow garden. Accused and Mandlenkhosi carried each a bush knife borrowed from PW5, for the purpose of clearing the land where they intended to plant seeds. On their way they had to pass Accused's home. His evidence is that the three then ventured into his home where he went to get his boots and work gloves. After getting his boots and putting them on, he saw his cattle in the yard but some of them were missing.
- [35] The Accused got into conversation with PW3 about his missing cattle. PW3 told him that the missing cattle were sold by the deceased and wondered that Accused did not know that. The Accused then confronted the deceased about the sale of his cattle and wanted to know why she did not consult him about disposal of those cattle. According to the Accused deceased was seated under a tree in the company of one Jabu Ngwenya and PW2. In response the deceased told the Accused that she did not need to consult him about anything. According to the Accused the deceased proceeded to hail all sorts of insults at him. The Accused said he inquired from PW3 what he should do and PW3 advised him to attack the deceased. At this point PW3 chased away all the people who were drinking with the deceased, except PW2 and another person both of whom refused to leave.

The Accused then proceeded to hack the deceased with the bush-knife that he carried. The Accused said he was angry with deceased for the insults she levelled at him. He claims he also assaulted deceased due to the influence of PW3. Accused also blames his action on the fact that he was drunk.

[36] The Accused claims after hacking his grandmother he ran away on the advice of PW3. He confirmed that he ran to PW5's home where he tried to hand the bloodied weapon to PW5, ended up dumping it in the yard when she refused to receive it. He went into hiding in the bushes where he was later joined by PW3. Accused phoned the police and reported the incident from the forest. Accused and PW3 were eventually picked up by the police at Sithobelweni, having walked there from their hiding place. Before being picked up by police the Accused and PW3 met with PW4 and her husband at Timpisini. The duo told them that they were taking them to Mahamba border, apparently to escape. The Accused claims that he declined the proposal to skip the country.

[37] For the first time the court heard that PW4's evidence that the Accused called her before and after killing the deceased was not true. The Accused denied calling PW4 and claimed he did not even have or know her phone number. Asked under cross examination why PW4's evidence was not challenged by cross examination, the Accused claimed ignorance that he was supposed to instruct his attorney to do that.

[38] The Accused again claimed ignorance of court procedure on why PW2 and PW3's evidence was not disputed, that no altercation or verbal exchange took place between Accused and deceased before he viciously attacked her.

[39] The Accused could not account for the fact that he raised his apparent defence of provocation for the first time while in the witness box. Overall, the Accused failed to impress as a witness. The defence he put up that he was provoked or incited to attack remains unsubstantiated.

Analysis and Findings

[40] It is not in dispute that the Accused attacked the deceased with a bush knife inflicting the injuries that ended her life. The onus lies on the crown to prove beyond a reasonable doubt that the assault or the killing of the deceased was intentional and unlawful.

[41] Accused defence appears to be provocation in the form of insults he alleges the deceased hailed at him. However, there is no evidence supporting Accused's claim that deceased insulted him or provoked him in any way at the time of the attack. The evidence of PW2 and PW3 which the court finds credible attests to the fact that the attack was unprovoked and out of the blue.

[42] It is evident that the Accused harboured a grudge against the deceased. This serves as motive for commission of the crime. Evidence of PW2, PW3, PW4 and PW5 points to an unhealthy relationship between the deceased and the Accused. All these witnesses testified that the deceased ill-treated the Accused. These witnesses' testimony is that she apparently treated him unfairly *vis'avis* her other grandchildren. Be that as it may, the Accused acted unlawfully in killing the deceased.

[43] There is also evidence of premeditation of the offence. It is PW4 Thobile Mkhaliphi's evidence that the Accused called her and informed her that he was going to kill the deceased because the deceased had illtreated him for a

long time and that he was tired. Although the Accused challenged this evidence, the court finds PW4 a credible witness and her evidence acceptable against the denial of the Accused.

- [44] PW4's evidence shows that the Accused planned the attack to kill the deceased, which is contrary to the Accused's claim that he was prompted by insults to attack the deceased. PW4's evidence further goes to prove direct intention to commit murder on the part of the Accused. The nature of the weapon, the amount of force applied and the parts of the body that the Accused targeted confirm a direct intention to kill the deceased. The evidence of the pathologist refers to fractured skull and multiple chop wounds on the upper part of the body. For intention to kill or *mens rea* authority can be found in the Supreme court case of **Dlamini v Rex**⁴ at paragraph [14] wherein the court quoted the following with approval, from **William Mceli Shongwe v Rex**⁵ –

"In considering mens rea in the form of intention, the Courts would have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries were severe such that the deceased could not have been expected to survive the attack and the injuries were inflicted on a delicate part of the body using a dangerous lethal weapon, the only reasonable inference to be drawn is that he intended to kill the deceased."

- [45] The court accepts the evidence that the Accused had grievances against the deceased. However, this is no justification for the Accused to attack and to kill the deceased. the killing of the deceased in the circumstances was unlawful and intentional.

⁴ (12/2017) [2019] SZSC 45 (09 October 2019).

⁵ Criminal Appeal Case No, 24/2011.

Self-induced drunkenness

[46] Voluntary drunkenness is not a defence for murder. The Accused voluntarily imbibed alcohol, therefore his drunkenness does not avail as a defence. There is no evidence or suggestion that the Accused was drunk or so drunk that he did not appreciate his actions.

[47] It is the finding of this court that the Accused is guilty of murder as charged.

Extenuating Circumstances.

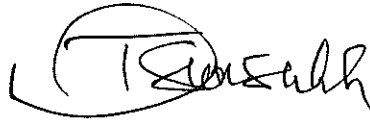
[48] The Criminal Procedure and Evidence Act requires that the court upon finding an accused guilty of murder, it must also determine existence or otherwise of any extenuating circumstances. As alluded to in the preceding parts of this judgment, there is the evidence of the Accused, that of PW2, PW3, PW4 and PW5, all of which is to the effect that the deceased ill-treated the Accused. The enquiry is whether the fact or experience of ill-treatment by the Accused perpetrated by the deceased has the effect of reducing blameworthiness on the part of the Accused for the crime that he committed.

[49] In *Dlamini v Rex*⁶ the Supreme court confirmed a conviction for murder and accepted a finding on existence extenuating circumstances based on the ongoing sour relationship between the Appellant and the deceased with whom he lived as husband and wife, and acknowledged the court *a quo*'s observation that

⁶ Supra.

"[T]o totally disregard this aspect would burden the accused with more than he legally should carry."

Verdict: Guilty of murder with extenuating circumstances.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line.

D Tshabalala
Judge

For the Crown: DPP's Chambers

For Defence: N Hlophe (Nsibande and Associates)