

**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT ON SENTENCE**

**HELD AT MBABANE**

**CASE NO: 476/2019**

In the matter between:

**REX**

Versus

- 1. SABELO MLUNGU MNISI**
- 2. NKOSINATHI LUKHELE**
- 3. DOUGLAS MNISI**
- 4. MFANASIBILI MAGONGO**
- 5. THEMBISA DLAMINI**
- 6. SANDILE MSIBI**
- 7. NDZABATELIVE MNISI**
- 8. SANDILE MAGONGO**
- 9. NKHOSIKHONA MASILELA**

**10.NHLANHLA MNISI**

**11.BHEKISISA MNISI**

**12.ZAKHELE MASANGO**

**13.NKHULULEKO MNISI**

**Neutral Citation:** *The King vs Sabelo Mlungu Mnisi and 12 Others [476/19] [2022] SZHC 275 (6 December 2022)*

**Coram:** LANGWENYA J

**Heard:** 30 March 2022; 6 April 2022; 26 April 2022; 26 September 2022; 21, 30 November 2022; 6 December 2022.

**Delivered:** 6 December 2022

**Summary:** *The accused were convicted of culpable homicide-consideration of the triad-accused each sentenced to eight years imprisonment-two years of which are hereby suspended for a period of three (3) years, on condition that each of the accused are not, during the period of suspension, found guilty of a crime in which violence to the person of another is an element-Sentence will take into account the period of eight months that the accused have spent in custody since 30 March 2022.*

## JUDGMENT ON SENTENCE

- [1] On 30 November 2022 the accused were convicted of the crime of culpable homicide. They were found to have negligently killed Sincomiso Ernest Dlamini on 30 October 2017 at Ntsanjeni area.
- [2] In sentencing the accused, I am bound by law to consider the salutary triad factors of sentencing namely: the nature and seriousness of the crime, the interests of the offender and the interests of society<sup>1</sup>. Put differently, I am bound by law to consider the personalities of the accused, their age as well as their personal circumstances as well as the crime and the interests of society<sup>2</sup>.
- [3] In addition to consideration of the triad of factors, I must consider tampering the sentence meted out with the element of mercy, basic humanity or compassion. Mercy in this context does not refer to over emotional sympathy for the accused. Where punishment is robust, compassion is a balanced and humane quality of thought that softens one's approach when considering the basic factors of letting punishment fit the criminal and the crime and being fair to society<sup>3</sup>.
- [4] Sentencing requires a balancing approach between the competing factors to be steered to an appropriate punishment. It is, however, settled law that in the process, it may sometimes be unavoidable to emphasise one factor at the expense of the others.
- [5] To clarify the applicable principle in sentencing, the Court in **Rex v Mduduzi Mkhwanazi** stated as follows:

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<sup>1</sup> *S v Zinn* 1969 (2) SA 537(A).

<sup>2</sup> *S v Jansen* 1975 (1) SA 425(A) 427-428

<sup>3</sup> *S v Khumalo* 1973 (3) SA 697 at 698B; *S v Rabie* 1975 (4) SA 855(A) at 861C-D.

**‘The elements of the triad contain equilibrium and tension. A Court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of or to the exclusion of the others. This is not merely a formula, nor a judicial incarnation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern...’**

- [6] Counsel for the accused persons and Counsel for the Crown prepared written submissions in mitigation of sentence on behalf of the accused and for the Crown respectively. I am grateful for the compressive submissions made by both Counsel.

***Personal circumstances of the first accused-Sabelo Mlungu Mnisi***

- [7] The Court was informed that the first accused is a first offender. The accused has never had a brush with the law prior to the commission of the offence convicted of herein. The Court heard that the first accused is an esteemed member of the Ntsanjani community police-a job he carried out at great financial and personal cost to himself in order to help his community to fight crime.
- [8] Mr Sabelo Mnisi is forty-nine years old. He dropped out of school in Grade 2. He is married. Together with his wife he has five children; four of whom are minors. Three of his children are in Form 4 and one of them is in Form 2. The last-born child is a year old. His wife is unemployed.
- [9] The first accused is unemployed and relies on piece jobs for a living. He is the breadwinner in his family. He also supports and maintains three of his nephews and nieces since the death of his sister.

***Personal Circumstances of the second accused-Nkosinathi Lukhele***

[10] Mr Lukhele is thirty-nine years old. He is a first offender with no formal education. He is a member of the community police at Ntsanjeni. He earns a living through farming and is not in formal employment. He has children whose ages range from seventeen years and a year old. His first-born child is currently in Form 4. It was submitted on behalf of the second accused that he has recently been diagnosed with breast cancer and is due to undergo cancer treatment.

***Personal circumstances of the third accused-Douglas Mnisi***

[11] Mr Douglas Mnisi is a first offender and a member of the community police at Ntsanjeni. He is also a chairman of the eNkonyeni High School. He is also a vegetable farmer. He is thirty-nine years old.

[12] He is a sickly person who is on anti-retroviral treatment (ART). It was submitted on his behalf that the conditions at the correctional services are not conducive for his health and wellbeing because the diet served at correctional services does not accord with the diet recommended for a person who is on ART. It was submitted further that at correctional service the food is served long after he is due to take his medication.

[13] Mr Mnisi has four minor children who are dependent on him for support and maintenance. Two of the minor children are in Form 3 while one is in Grade 7 and the youngest is at pre-school.

***Personal circumstances of the fourth accused-Mfanasibili Magongo***

[14] He is a first offender aged forty (40) years. He has no formal education. Prior to his arrest he was employed as a labourer at the Ministry of Agriculture. He has four minor children who are in Grade 6 and in Grade 7 and in Form 1 and Form 3. The mother of his children is deceased. Mr

Magongo is the sole breadwinner and is responsible for support and maintenance of his children. He is a sickly person and is on ART.

***Personal circumstances of the fifth accused-Thembisa Dlamini***

[15] He is a first offender aged thirty-seven years. He is a member of the community police. He is a Grade 3 graduate.

[16] He has five minor children who are all dependent on him for support and maintenance. The age of his minor children ranges between thirteen years and five months old.

[17] It was submitted on behalf of the fifth accused that the Court should consider that the accused persons pleaded guilty to the offence of culpable homicide and admitted the role they played in the death of the deceased. It was submitted that the fact that the accused pleaded guilty to culpable homicide shows that they are remorseful.

***Personal circumstances of the sixth accused-Sandile Msibi***

[18] Mr Msibi, the Court was told is thirty-three years old. He is a first offender. The accused is unsophisticated as he resides in the rural area of Ntsanjeni. He is a Grade 7 graduate.

[19] The accused is married and has three minor children who are all in primary school in Grade 3, 5 and 7.

***Personal circumstances of the seventh accused-Ndzabatelive Mnisi***

[20] Mr Mnisi is a first offender aged thirty-eight years. He is unmarried and has no children. He is a high school graduate. He is a breadwinner for his family. He takes care of his elderly parents and his niece since his sister is deceased. He is healthy and has no known sicknesses.

***Personal circumstances of the eighth accused-Sandile Magongo***

[21] The accused is a first offender. He is thirty-two years old. He is married and has three minor children who are dependent on him for support and maintenance. The age range of his minor children is between 11 years and 3 years old.

[22] Mr Magongo is a manager of the community Feeding Centre at Ntsanjeni. He is also a member of the school committee at Ntsanjeni.

[23] The Court was told that the accused suffers from arthritis-a sickness that attacks the bones.

***Personal circumstances of the ninth accused-Nkosinathi Masilela***

[24] The accused is a first offender aged thirty-six (36) years old. He has two minor children aged thirteen and four years respectively. The minor children are dependent on him for support and maintenance.

[25] It was while he was in custody that the ninth accused person received the news of the death of his father. He could not attend his father's interment because he was in custody.

[26] The accused is self-employed. He is also a secretary of a development programme at Ntsanjeni.

***Personal circumstances of the tenth accused-Nhlanhla Mnisi***

[27] The accused is a first offender and is thirty-seven years old. He is married and has four children. Some of the children are at primary school level while another is at pre-school and the last born is eleven months' old.

[28] He holds a Diploma in Teaching. Prior to his arrest he was employed as a teacher at Lobamba High School. He is a breadwinner at his home. He takes care of his sickly elderly parents and three siblings.

***Personal circumstances of the eleventh accused-Bhekisisa Mnisi***

[29] The accused is not a first offender because he was convicted for housebreaking and theft in April 2022 by Piggs Peak Magistrate Court and is currently serving a five years sentence at Piggs Peak Correctional Services. The offence for which he is currently serving time was committed while the accused was out on bail for the offence of killing of Sincomiso Ernest Dlamini.

[30] It was submitted on behalf of the eleventh accused that at the time of the commission of the offence he was nineteen years old. He is currently twenty-five years old. It was urged that the eleventh accused deserves to be given a second chance because he was a young person when the offence was committed.

[31] The accused is unmarried and has one minor child aged five years old. The child attends pre-school.

[32] The accused earns a living by doing piece jobs from which he supports his family and siblings.

***Personal Circumstances of the twelfth accused-Zakhele Masango***

[33] The accused is not a first offender. He was previously convicted of housebreaking and theft and is currently serving his sentence at Piggs Peak correctional services.



[34] He is twenty-nine years old. He is married and has two minor children who are dependent on him for support and maintenance. His wife is unemployed. His children are aged between six years and one year old.

[35] The accused is not formally employed but relies on piece jobs like gardening to earn a living. He is a Grade 3 graduate.

*Personal circumstances of the thirteenth accused-Nkululeko Mnisi*

[36] Mr Mnisi is a first offender. Prior to his arrest, he was employed as a herdsman at Ntsanjeni. He is a breadwinner in his family. His father is deceased. His mother is elderly and sickly with diabetes. He is the eldest son in his family.

[37] He has two minor children aged six years old and two years old. His six year old daughter is in Grade 1.

*Period accused spent in custody*

[38] The trial of the accused in this matter commenced on 30 March 2022. After they had pleaded the Court invoked section 145 of the Criminal Procedure and Evidence Act<sup>4</sup> not before the side of the accused was heard. Except for the accused persons who are currently serving sentences for other offences, most of the accused have been in custody since 30 March 2022.

*Prayer for leniency*

[39] It was submitted on behalf of the accused that the accused implore the court to be lenient in passing sentence. It was urged that the accused have learnt their lesson in the eight months they have spent in custody since 30 March 2022.

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<sup>4</sup> 67/1938

[40] The Court was informed that the accused appreciate the seriousness of the offence they have been convicted of. They also appreciate that a life was lost. They cooperated with the police by handing themselves to the police. They also assisted the police during the investigation and owned up to their wrongdoing.

*Submission for payment of a fine/suspension of sentence*

[41] Ms Ndlangamandla entreated the Court to give the accused an option of paying a fine; alternatively to suspend the sentence in its entirety as was done in **The King v Bongani Lukhele and 3 others**<sup>5</sup>. I remark however that the facts in this case are distinguishable from the facts in the Bongani Lukhele case. In the latter case, one of the accused persons was seventy-five years old; the head of the community police and had tried to admonish the first accused person against assaulting the deceased. In other words, the head of the community police in the Lukhele case took the responsibility to discourage his co-accused from engaging in the assault of the deceased. In the present matter, the accused did not reprimand each other against assaulting the deceased.

[42] The Courts in our jurisdiction have given guidance on the sentencing range in culpable homicide cases. In *Musa Kenneth Nzima v Rex*<sup>6</sup> where the Court held as follows:

**‘There are obviously varying degrees of culpability in culpable homicide offences. This court has recognized this and in confirming a sentence of ten years in what it described as an extraordinarily serious case of culpable homicide said that the sentence was proper for an offence ‘at the most serious end of the**

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<sup>5</sup> [118/15] [2022] SZHC 161 (27 July 2022)

<sup>6</sup> Unreported Case No. 21/2007

**scale of such a crime.’ (see Bongani Dumsani Amos Dlamini v Rex CA case 12/2005). A sentence of nine years seems to me to be warranted in culpable homicide convictions only at the most serious end of the scale of such crimes. It is certainly not one to be imposed in every such conviction.’**

[43] I consider the culpable homicide in this case to be of a serious nature. The deceased was asleep when he was woken by the accused who assaulted him. Before he was attacked by the accused, the deceased was healthy and well. The deceased died due to multiple injuries inflicted on him by the accused persons. The accused showed no mercy to the deceased as he screamed raising an alarm each time he was assaulted on the way to the place where he was handed over to the police.

*Remorse versus Regret*

[44] It was submitted further on behalf of the accused that they were remorseful; and that they showed their remorse by pleading guilty to culpable homicide. This mitigating factor must be contrasted with the behaviour of the accused persons during the hearing of the matter. The accused were generally nonchalant. They laughed at PW1 when she cried as she related how her romantic partner-the deceased- was brutalized and killed by the accused persons. In fact, I got the distinct impression that the accused thought, at the elementary stage of the trial that this was a circus. Although Ms Ndlangamandla subsequently apologized to the Court on behalf of the accused citing their ignorance of the law and court etiquette, I was left with the distinct impression that the accused persons did not show remorse as much as they did regret their conduct. There is a difference between remorse and regret. The two are not synonymous. Remorse implies being cut to the

quick for the plight of another while regret implies being sorry about one's conduct once caught out<sup>7</sup>.

### *Community police-expectation*

[45] The Court heard that the first, second, third and fifth accused persons are members of the community police at Ntsanjeni and as such occupy a leadership position within their community. I will reiterate what I said in *The King v Bongani Lukhele and 3 Others*<sup>8</sup> with regard to what is required of members of the community police.

**'[18]...[M]embers of the community police are expected to set an example of good behaviour and strict adherence to the law in their communities. They are supposed to work hand in hand with the Royal eSwatini police; they are not supposed to take the law into their own hands.**

**[19] Members of the community police should set an example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to visit excessive violence against transgressors.'**

[46] These words apply with equal force to the present case. A person who is in a leadership position serves as a moral compass for those he/she leads. A position of leadership comes with the added responsibility to uphold the law; protect and not endanger people's lives. That is the call of the people who act as members of the community police.

### *Accused's health condition*

[47] The court heard that accused 2, 3 and 4 are unwell and require special care; that the conditions at Correctional Services are not conducive for them. I am of the view that the Correctional Services have medical facilities that are equipped and able to attend to medical complaints of inmates in their care. The Correctional Services further refer inmates to public hospitals if the

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<sup>7</sup> *S v Matyityi* 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) (30 September 2010).

<sup>8</sup> *Supra*

medical condition of an inmate cannot be addressed in a health facility in-house the correctional facility. (See *Sibusiso Fannie Lusenga v Rex* [261/2020] [2020] SZHC 184 (23 September 2020) at paragraph 28.

It has not been submitted that the in-house medical facilities within the correctional facility where the accused are kept and other public hospitals where serious medical conditions are referred to by the Correctional Services have failed to deal with the medical conditions of the accused cited herein.

#### *Interests of society*

[48] Society and in particular the family of the deceased expects that convicted persons should be sentenced appropriately. Courts must protect society and when called upon to do so the community should not be disappointed by the imposition of too lenient sentences for crimes that are serious. Lest the community take the law into their own hands. On the contrary, the accused persons and other prospective offenders must realize that killing someone is forbidden and will attract the appropriate sentence.

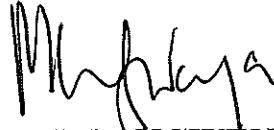
#### *Seriousness of crime*

[49] The crime of culpable homicide is a serious offence because it negates the right to life. The killing of people negligently is prevalent in the country and the courts need to do more to bring the scourge under control by meting out appropriate sentences.

[50] The death of another person is always serious, especially when the death is the result of an assault like in the present case. This requires that the offenders be punished accordingly.

- [51] The deceased is said to have been a menace in the community of Ntsanjeni as he is said to have committed crimes of assault and robbery as well as cultivate dagga in the area when he was not a resident of Ntsanjeni. This was wrong. The accused should have been arrested and handed over to the police who would investigate and take him to the law to face his just desserts.
- [52] Deceased's alleged criminal activities however pale into insignificance if one considers the extent of the violence the accused persons resorted to in arresting the deceased. The deceased was beaten with an assortment of weapons-a bush-knife, a baton and with sticks all over the body. The deceased was assaulted until he bled and was critical and weak when he was handed over to the police.
- [53] I have attempted to balance the personal circumstances of the accused against the interests and expectations of society and the seriousness of the crime. I take the view that in this case, retribution and deterrence should come to the fore and that personal circumstances of the accused persons by themselves should necessarily recede into the background.
- [54] Having regard to all the above factors and the submissions made by both Counsel for the Crown and Defence to which I have given anxious consideration, I consider the following sentence appropriate:
- [55] Accused Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 you are each sentenced to eight years imprisonment, two years of which are hereby suspended for a period of three (3) years, on condition that the accused persons are not, during the period of suspension, found guilty of a crime in which violence to the person of another is an element. The sentence will take

into account the period of eight months that the accused have spent in custody since the commencement of the trial on 30 March 2022.



**M. S. LANGWENYA**

**JUDGE OF THE HIGH COURT**

**For the Crown:            Mr T. Mamba**

**For the Accused:        Ms N. Ndlangamandla**