

IN THE HIGH COURT OF ESWATINI

JUDGEMENT

CRIMINAL CASE NO.322/17

In the matter between:

REX

VS

**1. LINDA NKOSINATHI MATSEBULA
2. JABULANI OSCAR MATSEBULA**

Neutral Citation: *Rex Vs LINDA NKOSINATHI MATSEBULA
& ANOTHER
SZHC (15TH SEPTEMBER, 2022)*

Coram: DV KHUMALO A.J.

Heard: 15TH September 2022

Delivered: 15th September 2022

Summary: *1. Criminal Law – Accused charged with murder.
2. Criminal Law – Accused persons not disputing
killing the deceased but the question is whether*

or not they had the intention to kill at the time of the attack – what constitute the intention to kill - held that the accused persons did not have the intention to kill and as such found of not guilty of murder but guilty of culpable homicide.

3. Criminal procedure – sentencing – principles involved – accused sentenced to E15 000.00 fine or five years imprisonment of which E 5 000.00 fine and 2 years imprisonment are suspended conditionally.

JUDGMENT

- [1] The accused persons are charged with the crime of murder being alleged that on or about the 8th October, 2017 and at or near Ngogo area in the Lubombo region, the said accused persons acting jointly and in furtherance of common purpose did unlawfully and intentionally kill Mancoba Sicelo Magagula.

- [2] The accused denied commission of the offence in their pleas, prompting the prosecution to lead evidence in an effort to prove its case against them. A total of eight witnesses were paraded in that regard. Pw1 was Sergeant Sihle Zwane of Siphofaneni police station. He is a scenes of crimes officer with expertise in photographing. His evidence was that he photographed the deceased's body during the postmortem operation in hospital on the 12th October, 2017. He observed injuries in a form of bruises at the back of the deceased body including on the buttocks. He observed no injuries on the front part of the body. He processed the photographs and compiled a photo album which he tendered as part of his evidence.
- [3] PW2 was Busisiwe Getrude Nkambule of Hluthi area. She told the court that on the 08th October, 2017 she joined other women who were on their way to the home of Sonile Mnisi who testified as pw5 in this case. She found many people having gathered at a pw5's home. Pw5 is said to have narrated how she got attacked by the deceased whose other name was Gofolo. The attack had allegedly taken place on the previous night.

- [4] After the report by pw5, some community police officers suggested that the deceased should be assaulted with small sticks as a punishment for what he had allegedly done to pw5. Indeed one of the community officers Isaac Mbutfo Gadlela who testified as pw3 took a stick and assaulted the deceased three (3) times on the buttocks.
- [5] After pw3 just stopped assaulting the deceased, A1 is alleged to have suddenly acted in a feat of anger and assaulted the deceased with kicks on the head. Both A1 and A2 are also said to have tied the deceased with a robe and A2 used a stick to assault him at the back of his body including on the buttocks. According to her, she did not take notice if A1 also assaulted the deceased with a stick. The deceased had been tied to a poll during the onslaught and was naked. A2 is alleged to have been pouring water on the deceased's body as he was assaulting him in order to make the assault more agonizing for the deceased. It turned out that both A1 and A2 were pw5's biological son's. Police officers, are said to have arrived after A2 had stopped the assault and they took the deceased away with their vehicle.

- [6] Pw5 was Isaac Mbutfo Gadlela of the same area. He confirmed the evidence of pw2 in most material respects. He confirmed hoe he assaulted the deceased on the buttocks with a stick on the advice of community police after the former had admitted attacking pw5 on the previous night. It was also confirmed by this witness that A1 and A2 later emerged and assaulted the deceased. This witness implicated both accused person as having assaulted the deceased with the stick. He also affirmed the evidence of pw2 that the accused was later taken away by the police. It was denied by this witness in cross-examination by the defense that other members of the society had also assaulted the deceased.
- [7] Pw4 was Phila Nkambule who was also present at the home of pw5 when the deceased got assaulted. He testified in line with the evidence of pw3 on how the deceased was assaulted by A1 and A2 before being taken away by the police. It was not disputed during cross – examination of this witness that A1 and A2 assaulted the deceased, save to say that they used small sticks to assault him.

- [8] Sonile Mnisi testified as pw5. She is the biological mother of A1 and A2. She also confirmed in her evidence how the deceased was assaulted at her home, firstly by pw3 and later by A1 and A2. She demonstrated how everything had started on the previous night while she was inside her house. Her evidence was that she heard foot steps outside the house and sudden breaking on her windows, coupled with falling of stones inside the house. No one came to her rescue when she raised an alarm.
- [9] The intruder tried to forcefully break the door but without success. When the witness looked outside the house he noticed that the invader was the deceased who later left. On the following morning she reported the matter at the chiefs residence and to A1 and A2. The deceased was later brought to her home where he was questioned by the community police on the allegations made by the witness against him.
- [10] According to her, the deceased admitted having attacked her and further disclosed that his intention was to rape and kill her so that he could conceal evidence in the process. She confirmed how the deceased was then assaulted in the manner described

by the other witnesses. She also confirmed that the deceased was later taken by the police.

[11] Pw6 and pw8 were police officers who played certain roles in the investigation of the case. Pw6 was Constable Veli Gule of Siphofaneni police station. He testified on how he received a report from pw5 on how she had been attacked during the night allegedly by the deceased. Upon reaching the witness' place he indeed observed the broken windows and proceeded to record a statement from pw5. He also took the deceased and arranged for an ambulance to convey him to hospital as he was complaining about pains. He however, received sad news of passing away of the deceased on the same day from the hospital.

[12] Pw8 was Constable Simdani Dlamini. His evidence was that he rushed to hospital immediately he learnt about the deceased's demise. He indeed confirmed the alleged death. He proceeded to pw5's home and informed the latter about the sad news relating to the deceased and further organized a meeting for all who were involved in the gathering that preceded the deceased's assault.

He also interrogated A1 and A2 including charging them with murder of the deceased.

[13] Both accused persons testified under oath after the close of the crown's case. They both admitted having assaulted the deceased in the manner described by the crown witnesses. They explained that they acted out of anger after learning from the deceased that his intentions when attacking their mother was to rape and kill her.

[14] It was their evidence that they had no intention to have the deceased killed but they wanted to have him disciplined for what he had done. They disputed that they had used the stick presented to the court as evidence, but that they had used smaller sticks that they had found at the scene. I have found their assertion to be probable in that regard because even pw2 and pw 3 confirmed that small sticks had been suggested in chastising the deceased even before A1 and A2 came. The fact that they used the sticks they found at the scene supports their claim that they used small sticks. They were not discredited during cross – examination by the prosecution.

[15] In deciding this case, it must be acknowledged that the issues for determination lie within a very narrow scope. It is not in dispute that the deceased's cause of death was injuries inflicted on his body by the accused persons. It is not in dispute that the accused's actions were unlawful as they had taken the law into their own hands when assaulting the deceased. The question to be answered is whether the accused had the necessary intention to kill the deceased.

[16] It is *trite* law that a person intends to kill if he deliberately does an act which he appreciates that may result in the death of another but nonetheless acts recklessly – not bothering whether such death occurs or not. See **S vs Mini 1963 (3) SA 188 (A)**. In the case of **Rex vs Jolly 1923 AD 176 at 187** the court also held that intention to kill may be inferred from the acts and conduct of the accused person, including the weapon used when inflicting the injury that led to the deceased death. The same sentiments were shared in the case of **Mazibuko Vincent vs Rex – 1982 – 86 S L R 377**. Also see **Rex vs Mndzebele 1972 – 76 S L R at 199**. In the cases above the courts also held that the area of the body where the injuries have been inflicted

can act as a guide on whether or not there was an intention to kill at the time of the assault.

[17] It is common cause that the attack of the deceased by the accused persons which culminated in death had not been premeditated. The accused persons' attention was drawn into the matter by their mother - pw5 who informed them about her ordeal suffered at the hands of the deceased. Evidence has shown that upon reaching the scene the deceased disclosed to the accused persons that his intention when invading their mother was to rape and kill her.

[18] The report about the attack of their mother coupled with assertions by the deceased that he intended to rape and kill her, triggered extreme anger on the part of the accused persons. The accused persons felt provoked. In terms of **section 3(1) of the Homicide Act of 1959** provocation is defined as any wrongful act or insult of such a nature as to be likely when done or offered to an ordinary person or to another person under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self control and to induce him to

assault the person by whom such act or insult is done or offered. According to section 2 of the above act, where the offender has killed another person as a result of sudden provocation, such killing may be reduced to mere culpable homicide as opposed to murder if it can be shown that the offender acted in the hit of passion caused by sudden provocation before cooling of the passion. There must also be a reasonable relationship between provocation and the act causing the death, in that the provoked individual must not be shown to have over – reacted.

[19] In the instant case it is clear that the accused persons stood in filial relationship with pw 5 as she was their mother. Her attack by the deceased coupled with his admission that he intended to rape and kill her was provocative to the accused persons within the context of the provision of the Act. The deceased's invasion of their mother together with the disclosure of his motive behind the attack was likely to deprive them of self control and to induce them to assault the deceased.

[20] They acted in the hit of passion caused by the sudden provocation. Even though they acted with fury, there is nothing

to show that they over-reacted. They used sticks as opposed to dangerous weapons. They did not inflict the injuries on dangerous parts of the body - such that the injuries suffered were in a form of bruises. Even when the police came, the deceased is said to have walked into the car on his own. Death came as a shock. In keeping with the accused's assertion, there is nothing to show that they had the intention to kill the deceased.

- [21] Their severe and prolonged beating of the deceased with sticks coupled with pouring of water on his body as they assaulted him did not constitute intentional killing but rather a negligent killing. They are therefore not guilty of murder but guilty of culpable homicide.

SENTENCE

- [22] It is *trite* law that sentencing is discretionary to the trial court and that such discretion must be exercised judiciously. See **Nkosinaye Samuel Sacolo vs Rex - Criminal Appeal Case No.**

37/2011 paragraphs 2 – 4. See also **Elvis Mandlenkhosi Dlamini vs Rex – Criminal Appeal case No. 30/2011 at paragraph 29.** This may include taking into account all attendant facts and circumstances of the case. In that regard the court may have to consider the nature and seriousness of the offence, the interests of the offender and those of the society. The court must then strike a balance between those competing interests. This sentencing procedure is known as the triad. See **S vs Zinn 1969 (2) SA 537 (A) at 540 (G).** See also **Rex vs Majahonkhe Major Mazibuko and Another – Criminal Case No. 3/2002 at page 2.**

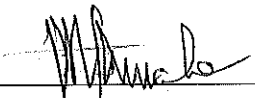
- [23] In the instant case the court has considered that the accused are first-time offenders. They are family men with minor children to maintain. Their offensive act was motivated by provocation. They cooperated with the police at the time of their arrest and they also complied with their bail conditions. The court has also considered the seriousness of the offence and its prevalence in the society. The accused persons unduly took the law into their hands and caused unnecessary loss of life in the process.

[24] It is incumbent upon the courts in the face of violent crimes, especially those involving loss of lives to pass effective sentences that will deter not only the offender but also other people who may be tempted to commit similar offences. However, in as much as deterrent sentences are desirable, the courts must as much as possible strive to pass a sentence that will be blended with a measure of mercy so as to enable the offender reform and to be swiftly reintegrated into the society. See **Ntokozo Dlamini & Another vs The King - Criminal Appeal Case No. 10/2021**. See also **Rex vs Justice Teya Mavimbela - High Court Criminal Case No. 119/1998**.

[25] It is also *trite* law that each case must be decided on its own merits. See **Mandla Tfwala vs Rex Criminal Appeal Case No. 36/2011 at page 13**. It has already been alluded to, above that the accused's behavior was triggered by the deceased's admission that he had attacked the accused's mother and that his core intention was to rape and kill her. Notwithstanding their anger, they did not use dangerous weapons in assaulting the deceased. They used sticks but without hitting the deceased on critical areas of the body. The deceased indeed did not suffer any

visibly serious injury. Death was least expected in the circumstances of the case. It has also been considered by the court that the accused persons had been provoked before commission of the offence. It is *trite* law that provocation is an extenuating factor. See **S vs Letsholo 1970 (3) SA 476 AD.**

[26] Much as the courts have mainly imposed custodial sentences in culpable homicide cases, in exceptional and justifiable cases, fine options have been considered. See in this regard the case of **Rex vs Mpendulo Bonny Ginindza – Criminal Case No. 167/2017 at paragraphs 46 and 47.** I am more than persuaded that the circumstances of this case justify granting an option to pay a fine. In light of all the above, I find it appropriate to sentence each of the accused persons to E15 000.00 fine or five years imprisonment of which E5 000.00 fine and 2 years are suspended for 3 years on condition the accused persons are not convicted for culpable homicide or assault with intent to cause grievous bodily harm within the period of suspension. The amounts paid by the accused persons as bail are converted to form part of their fines.


D.V. KHUMALO
ACTING JUDGE OF THE HIGH COURT

For the Crown: Mhlanga N.

For the Defence: Dlamini L.