



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE

Case No. 1274/18

In the matter between:

THE KING

VS

MCEBISI TSABEDZE

***Neutral Citation : The King vs. Mcebisi Tsabedze (412/13)
[2022] SZHC 69 (28 April 2022)***

CORAM : J.S MAGAGULA J

DATES HEARD : 13/8/20;25/11/20;26/11/20& 12/10/21

DELIVERED : 28/04/22

Summary : ***Criminal Law; accused charged with murder; deceased died during fist fight;***

deceased initiated fight using tomahawk; accused pleads private defence; despite gaining possession of tomahawk, accused threw it away;

Held: Accused guilty of Culpable Homicide.

- [1] In this case the accused is charged with the offence of murder and the indictment reads in part:

“Upon or about the 19th October 2013 and at or near Ka-Mfishane area in the Shiselweni Region, the said accused did unlawfully and intentionally kill one NKULULEKO DLAMINI and did thereby commit the crime of MURDER.”

- [2] Upon arraignment the accused pleaded not guilty to the charge. The prosecution then paraded (5) witnesses in an effort to establish the charge.

PW1 - Dr KOMMA REDDY

- [3] This is the Police Pathologist who conducted a post - mortem Examination on the deceased body. Dr Reddy observed several injuries on the deceased body including;

1. Abraided contusion of 2x 2cms 2x1/2 cm and 3x1 cm on the middle portion of the forehead.
2. Abraided contusion of 2x 2cms in between the eyebrows.
3. Abraided contusion of 3x 3cms on the right cheek.

4. Abraided contusions of 4x1/4 (2) in the middle portion of the lateral of the left upper arm.
5. Abraided contusion of 4x4cms in the middle portion of the left upper abdomen.
6. Abraided contusion of ½ x ½ cms in the middle portion of the left thigh.
7. Abraided contusion of 5x3cms on the lateral side of the right ankle.
8. The chest bone and two left side ribs were fractured.
9. The liver and gallbladder were ruptured.
10. Haemorrhages were also present on the heart.

Dr Reddy concluded that the deceased died due to these multiple injuries. He then handed his report into court and it is marked exhibit "A".

PW2 - JULY MAJAHONKHE BHEMBE

- [4] This witness told the court that during the year 2013 he was residing at a Johnson homestead at Ka-Mfishane area. On the 19th October 2013 and at around 7.00pm Alex Myeni, Tfunyiwe Myeni and Mcebisi Tsabedze (accused) came to the homestead. He was inside his room and he saw them through the windows. He did not know the accused then but he knew the other two.

- [5] The accused came and knocked at the door and this witness answered the knock. After introducing himself as a cousin to Tfunyiwe and Alex, he said he was looking for Tfunyiwe who had gone missing. This witness then led the accused to the deceased's rondavel. The deceased resided in the same homestead.
- [6] This witness knocked at the deceased's door and told him that Alex and others were looking for Tfunyiwe who was in the same homestead the previous day. The deceased came out. The accused asked the deceased why he had abducted Tfunyiwe who was still young and attending school. The deceased had difficulty in answering the question and the accused pulled him by his clothes whilst talking strongly to him. This witness went to separate them.
- [7] After this witness had separated the two, the deceased again speedily charged towards the accused. At this time the deceased was wielding a tomahawk and the three decided to flee and he chased them. The accused ran towards one of the gates in the homestead but before he could go through it he tripped and fell down. The deceased caught up with him. He attempted to strike the accused with the tomahawk but missed.
- [8] The accused had been tripped by a fence which was on the ground. A scuffle over the tomahawk ensued. The accused succeeded in gaining possession of the tomahawk which he

threw aside. A fist fight then ensued. The deceased was overpowered in the fist fight and he fell down. The accused dragged and pushed him out of the gate saying “ I am going to teach you a lesson.” As they went through the gate this witness shouted telling the accused not to kill the deceased.

[9] At this point this witness went back to his room to look for a phone. He used the phone to call the deceased’s mother and he told her that her son had been severely beaten by accused and they were leaving with him. This witness tried to look for Alex and the others but could not see them as it was dark in the veld and there was no source of light. He eventually heard their voices and went to them.

[10] When he arrived where they were he realized that the deceased was lying down on the ground. He was breathing with difficulty. The others said “sowusilimalele” (accidentally got injured in our hands). They further said that he was no longer talking and was weak. They tried to pour water on him but he did not respond. This witness also tried to call him and talk to him but he did not respond. This witness further reported the condition of her son to the deceased’s mother. He further requested her to arrange transport to take him to hospital but she said that was not possible at the time. She requested that deceased be taken home. Everyone there assisted in carrying him home where they left him in the sitting room. The following morning he was found dead by this very witness at around 5.00 am.

- [11] This witness further notified the deceased's mother that her son had died. She came quickly with her employers. Thereafter police came, conducted an inspection of the place and deceased body which they eventually left with.
- [12] During cross -examination it was put to this witness that the accused never manhandled the deceased outside the rondavel as he so testified. This witness maintained that he did. The witness was also asked how many attempts were made by the deceased in trying to strike the accused with the tomahawk and he said only one attempt was made. It was put to the witness that two attempts were made. His answer was that he did not witness that.
- [13] It was also put to this witness that the accused never manhandled the deceased as he alleges in his evidence. This witness maintained his stand that accused manhandled the deceased at the rondavel. He however conceded that the violence at the scene came as a result of the deceased producing the tomahawk and chasing the accused with it. It was also put to this witness that the accused never said that he would teach the deceased a lesson and he never dragged the deceased. This witness however stood his ground that this happened.

PW3 TFUNYIWE THANDEKA MYENI

[14] This witness also goes by the name of Ntentewane. She told the court that she was eighteen (18) years old in 2013 and doing form three (3) at Ekuphakameni High School. The deceased was her boyfriend.

[15] On the 18th October 2013 she was called by the deceased who wanted to see her. She first resisted as she was writing exams at the time. The deceased however eventually convinced her that they wont be long and she agreed. When she met deceased just above her home, the deceased had a big bag and other items. He asked this witness to assist him carry the items home and she obliged. They then went to the Johnson's home where the deceased was residing. She found herself staying with the deceased in his rondavel until it was around 1:00am. At that time she asked the deceased to accompany her home and he obliged.

[16] She arrived home at daybreak on the 19th October 2013. Her brother Alex was awake and he asked her where she had been. She told him the truth and she went to sleep. When she woke up the accused arrived coming from a soccer match. He also asked her where she had been and she also told him the truth. The accused and Alex then decided to go and confront the deceased about his conduct of disturbing this witness from her studies. They took this witness with them.

[17] Upon arrival at the Johnson's home, where deceased was staying, this witness went to knock at deceased's rondavel and deceased did not respond. The accused then went to knock at the main house. July (PW2) opened the door. The accused requested July to go and knock at deceased's door as they wanted to speak to him. July obliged and Nkululeko opened the door wearing an overcoat. There was some heated exchange between deceased and accused on why the former did not open the door.

[18] It is during the verbal showdown that Nkululeko drew an axe (tomahawk) from his coat and chased accused with it. They were running in the direction of the main gate when the accused fell. The deceased then tried to strike the accused with tomahawk but missed as the accused managed to dodge it. He tried to strike him the second time but the accused managed to grab deceased's hand, went for the axe and threw it on the ground.

[19] A physical fight thereafter ensued. They fought until accused dragged the deceased through the gate. They continued fighting outside the gate until deceased lost strength and fell on the ground. Whilst deceased was lying down on the ground and weak, he asked Alex to go and get some water for him. When Alex had gone to fetch the water the deceased got up and ran away. The accused chased after him and when he caught up with him he continued to assault him.

[20] When Alex came with the water he found the deceased lying on the ground and breathing with difficulty. Alex poured the water on the deceased but there was no response. At this time July came and told Alex that deceased's mother wanted to talk to him over July's phone. Alex informed deceased's mother that her son was severely injured and transport was needed to take him to hospital. She could not assist in this regard as it was late at night. Her employers could not help with transport at that time. She requested that they take deceased home. July requested accused and Alex to assist carry the deceased home and they obliged. The following morning the deceased was found dead.

[21] During cross -examination this witness was told that in his statement recorded with the police he states that after Alex had gone to fetch water, the deceased woke up and ran away and the accused followed him. She does not know what happened thereafter. However in court she said after deceased had got up and ran way, the accused chased him and continued to assault him.

[22] Trying to explain the above seeming discrepancy this witness stated;-

“ When Nkululeko got up and ran away Mcebisi chased him. I don't know what happened but when I caught up with them, Mcebisi was assaulting Nkululeko.”

The witness was further asked;

Q. “ But you did not say this to the police?”

Answer “ I have no answer to that.”

PW4 - NQABA ALEX MYENI

[23] This witness is a brother to Tfunyiwe (PW3) and a cousin to the accused. In 2013 they stayed at the same homestead with accused being in loco parentis of the two siblings.

[24] On the 18th October 2013 Alex received a phone call from the accused who wanted to have a word with Tfunyiwe. Alex went to Tfunyiwe’s room but did not find her. He asked the other two girls residing at the same homestead if they had seen Tfunyiwe and they said they had not seen her. When accused called again this witness told him that nobody knew where Tfunyiwe was.

[25] The accused called again on the 19th October 2013 at around 4:00 am and asked to have a word with Tfunyiwe. This witness went to Tfunyiwe’s room and this time she was there. He left the phone with Tfunyiwe and the two engaged. He later on got his phone from Tfunyiwe and left home. He returned at around 2:00pm. The accused also arrived at about this time and Alex and accused admonished Tfunyiwe about sleeping out. The accused and Tfunyiwe then proceeded to the Johnson’s home as accused wanted to have a word with the deceased. Apparently they did not find the deceased at home as they returned quickly.

[26] At about 7:00 pm on the same day the accused, Alex and Tfunyiwe set out to the Johnson homestead. Upon arrival there Tfunyiwe knocked at deceased's rondavel. Deceased asked who was there. Tfunyiwe said Alex who was in company of her cousin wanted to talk to him. Deceased said they would have to wait for the elders if they had something to say.

[27] The accused then went to knock at the main house where July opened the door. The accused told July why the three were there. July went to knock at deceased's rondavel and he opened the door. July told the deceased that the accused wanted to talk to him. The deceased got out and stood at the door wearing an overcoat.

[28] The accused asked the deceased how many times he had to talk to him about his love affair with Tfunyiwe. A quarrel then ensued and July intervened and separated them. The deceased then took out an axe (tomahawk) from the overcoat and charged towards the accused. July tried to intervene but was left with the overcoat. All the three i.e. accused, Alex, and Tfunyiwe ran towards the gate. The accused slipped and fell. The deceased was then able to catch up with him.

[29] The deceased tried to strike the accused with axe. The accused however managed to grab the deceased's hand. They then fought over possession of the axe until they went

through the gate. The deceased was beaten until he fell down on the ground. The accused kicked him whilst he was on the ground. This witness intervened and pushed the accused away. He tried to assist the deceased to sit. The deceased asked for water. This witness went to fetch the water from a nearby well leaving behind the accused, deceased and Tfunyiwe.

[30] Upon his return Alex did not find the three where he had left them. He found them on a pathway leading to a Dube homestead. When he found them the deceased was sitting on the ground with Tfunjiwe and the accused holding him by his hands and trying to get him up. Alex asked the accused how they got to the new spot. Accused said the deceased got up and ran away. He chased him until he caught up with him. Alex further asked how come the deceased was now in a worse condition and the accused said he decided to assault him.

[31] This witness was asked about the condition of the deceased at the time. His answer was that he was sitting and facing down and breathing with difficulty. The witness was further asked about the condition of the deceased before this witness went to fetch the water. His response was that he was able to speak and had no difficulty in breathing although he had some bruises on his head.

[32] After Alex returned with the water they tried to raise the deceased to his feet. He was however too weak and heavy. They tried pouring water on him but there was no difference. The deceased's mother was apprised of the incident and requested to assist with transport to take deceased to hospital. She was however unable to provide such assistance. She requested that deceased be taken home. This was done and the following morning the deceased was discovered to have passed away. A report was made to the Indvuna (Headman) of the area as well as to the police.

[33] During cross - examination it was put to this witness that he was lying when he said the accused said he chased after accused when this witness had gone to fetch water. The witness stood his ground that the accused told him that.

PW5 -4740 D/CONSTABLE JABULANI GWEBU

[34] This witness is a police officer stationed at Kaphunga Police Station under the Criminal Investigation Department (CID). He was on duty on the 20th October 2013 when he received a report that someone had been killed at Ka-Mfishane. He, together with 6426 Constable Mngometulu proceeded to the scene of crime. At a Johnson homestead they were led to a room where they found the deceased covered with a blanket.

Upon opening the blanket they noticed that deceased had wounds on the face and stomach. They called the Scenes of Crime officer who came and covered the scene. They then took the body to the mortuary. They then arrested the accused whom they found in a Ndlangamandla homestead in the same area.

[35] During cross examination it was conceded by this witness that the accused co-operated with the police. Asked why he did not bring the axe to court, this witness said he did not see the need as it was never used. It was further put to this witness that the accused was hurt by the axe. The witness said police investigations never revealed such and the accused was not hurt.

The prosecution then closed its case.

DEFENCE CASE

DW1 - MCEBISI SWAZI TSABEDZE (Accused)

[36] The accused told the court that in 2013 he was twenty-four (24) years old. At the time he testified he was thirty - one (31) years. Alex (PW4) and Tfunyiwe (PW3) are his cousins. He was given the responsibility to look after them by his aunt and his grandmother. He had to see to it that they finished their education. The accused has one child who is seven years old. Tfunyiwe's father died in January 2013.

[37] The accused was not home on the 18th October 2013. He had left home the previous day for a soccer match. At about 7:00pm on the same day he called home to check on his cousins. He called Alex since Tfunyiwe had no phone. He requested to speak to Tfunyiwe on Alex's phone. Alex told him that Ntentewane was not home. He called again at about 8:30 pm but discovered that Ntentewane was still not at home. He again called at about 10:00 pm and still discovered that Tfunyiwe was still not at home.

[38] Sometime between 3:30 am and 4:00 am on the 19th October 2013 Alex called accused and told him that Tfunyiwe had just arrived. The accused asked Tfunyiwe on Alex's phone where she had been. Tfunyiwe said Nkululeko came and grabbed her by force and went with her to the Johnson home where he stayed.

[39] At around 7:00 pm on the same day the accused and his two cousins proceeded to the Johnson's homestead.

Upon arrival at the Johnson's home they proceeded to the main house where they thought deceased's mother slept. They were met by July at the main house. They asked for deceased's mother and July said she was still at work. The accused then asked July about Tfunyiwe spending the previous night in the same homestead. July said he did not see her. Accused then told July that Tfunyiwe said she was with Nkululeko. July then said the best person to answer that

was July then Nkululeko suggested that they should go to Nkululeko's rondavel to establish the truth about that.

[40] They then proceeded to deceased's rondavel where July knocked on the door. The deceased said they must wait as there were some people he had called and they were coming. He did not name these people. July told deceased to open the door as the Myenis were not fighting but just wanted to talk with him. The deceased then opened the door wearing a brown overcoat. July introduced the three to deceased and told him that they believed that Tfunyiwe spent the previous night in the same homestead with him. He conceded to this allegation.

[41] The deceased further asked who was asking about this as Tfunyiwe's father had died. The accused said it was him as the person placed in charge over her. The deceased charged towards the accused and July intervened. He managed to push July aside and approached the accused. At this time accused saw a tomahawk. In his effort to intervene July was eventually left holding the overcoat.

[42] The deceased chased the accused with the tomahawk around the homestead. Alex and Tfunyiwe ran towards the gate. The accused eventually ran towards the same gate as Tfunyiwe and Alex. The accused was then tripped by a barbed wire and felt down. The deceased tried to strike him with the axe. The accused dodged it and he hit the ground.

He made a second attempt but the accused dodged the blow again and he hit the ground. Thereafter there was a struggle for possession of the axe and the accused eventually won it and threw it away.

[43] A fist fight thereafter ensued until they went out of the gate. The accused alleges that he had no intention to fight with the deceased and that is one reason he threw away the axe instead of hitting the deceased with it. The accused further maintains that even during the fist fight it was the deceased who was fighting him and he only tried to restrain him. The accused only responded to deceased's blows. The accused denied ever saying that he would teach the deceased a lesson as July told court. He said July was even too far to hear that.

[44] During the fight outside the gate the deceased eventually fell down. The accused tried to speak to him but he did not respond. The accused called Alex who also talked to him. He responded to Alex but in a faint voice asking for water. Alex went to fetch the water. Whilst Alex had gone to fetch the water the deceased tried to run away towards fields belonging to a neighbouring Dube homestead but he again fell. The accused admits that he followed the deceased at this time but denies ever assaulting him again.

[45] When deceased fell in the fields the accused says he called July. When July was at the gate he shouted saying the

accused should not kill the deceased. The accused's response was that he had no intention to do that. When July came to where they were he wanted to know how they left the earlier spot. The accused told July that the deceased tried to run away and he fell.

[46] July then called deceased's mother and reported the incident also requesting for transport to take the deceased to hospital. She could not assist in this regard. She requested that they take deceased home. They did that and the following morning the deceased was found dead.

ANALYSIS OF THE EVIDENCE

[47] The evidence of the crown witnesses and that of the accused is basically in agreement regarding what happened on the fateful night. There are of course a few glitches here and there most of which are not on material issues.

[48] The evidence of PW3, PW4 and the accused starts by establishing the reason why they had to visit the Johnson homestead. The accused wanted to talk to the deceased about his affair with Tfunyiwe who was attending school and doing form three (3) at the time. This visit was particularly triggered by the fact that Tfunjiwe had spent the night of the 18th October 2013 with the deceased. The accused maintains that he had no intention to fight but he just wanted to talk to the deceased.

- [49] Another thing that is also established by the evidence is that the deceased only opened the door when July knocked and requested him to open the door to talk to the Myenis who were there to talk and not to fight.
- [50] Further the evidence establishes that when the deceased came out he had armed himself with a tomahawk which he was hiding in an overcoat he was wearing.
- [51] Also the evidence demonstrates that after the deceased had come out there was a heated exchange of arguments between him and the accused until July had to intervene. July's intervention was in vain though as the deceased produced the tomahawk and charged towards the accused who ran away. His companions also ran away.
- [52] As the accused ran towards the gate he got tripped and he fell. The deceased tried at least twice to strike the accused but on both occasions failed. Thereafter there was a scuffle for possession of the tomahawk and the accused won it. The accused says after winning the tomahawk he threw it far away. Another witness say he put it down. One thing that is clear though is that at this time the accused had the opportunity to attack the deceased with the axe but he decided not to use it. This says much about his intentions. He could not have had intention at least in the form of *dolus directus* to kill the deceased. Otherwise he would have executed such intention at this juncture.

[53] After the accused had dispossessed the deceased of the tomahawk a fist fight ensued and the deceased was overpowered. Part of the evidence says the deceased was overpowered before the two went through the gate and the accused dragged the deceased outside the gate. This aspect does not appear in some parts of the evidence. One thing that is clearly established however is that the fight went outside the gate. Outside the gate the deceased was very weak and he fell on the ground until he asked for water.

[54] The evidence also clearly establishes that Alex went to fetch water for the deceased. After Alex had gone to fetch water the deceased got up and ran away. The accused followed him and he concedes this. PW3 says the accused again assaulted the deceased at the Dube fields. It was however put to PW3 that she never stated this in her statement recorded with the police. She could not explain this.

[55] One thing that emerges from the evidence however is that the deceased was in a worse condition when found at the Dube fields. He could not stand, sit , talk or walk. From there he had to be carried home. This is a person who had actually stood up and ran to this particular spot. It seems to me and I conclude that the evidence of PW3 gets corroboration from this state of affairs. The deceased was again assaulted by accused whilst at the Dube fields.

[56] In his evidence the accused also stated that during the fist fight next to the gate it is the deceased who was attacking and he would retaliate. This evidence is sharply contradicted by that of July Bhembe (PW2) who *inter arlia* stated;

“ When Nkululeko was weak Mcebisi dragged him and as he was resisting he ended up pushing him saying he wanted to teach him a lesson.”

I consider July Bhembe an independent witness who had no reason to lie. In any event his evidence is corroborated by that of PW3 who states;

“ Then they had a physical fight. They fought until Mcebisi dragged Nkululeko through the gate.”

I am unable therefore to accept the allegation that the accused only responded to blows coming from the deceased.

THE LAW

[57] The accused person is charged with murder which is defined as:

“ ...the unlawful and intentional killing of another person.” (Hunt; the South African Criminal Law and Procedure vol.II pg 310 2nd ed).

For the offence of murder to be established it must be proved that there was the killing of another person and that such killing was intentional and unlawful.

[58] In *casu* it has been established by evidence led in court that the accused did kill another person. The only question remaining is whether such killing was intentional and unlawful. The accused maintains that the killing was lawful as he killed in self defence. Mr.B.J Simelane who appeared for the accused person referred the court to a definition by CR Sinyman in Criminal law 6th edition at 102 where it is stated;-

“ A person acts in private defence and her act is therefore lawful if she uses force to repel an unlawful attack which has commenced or is imminently threatening upon her or somebody else’s life, bodily integrity, property or other interest which deserves to be protected, provided that the defensive act is necessary to protect the interest threatened, is directed against the attacker and is reasonably proportionate to the attack.”

[59] In this case the evidence established beyond any reasonable doubt that the initial aggressor was the deceased who charged towards the accused wielding a tomahawk, an undoubtedly deadly weapon. The accused ran away but was unfortunately tripped by a barbed wire and he fell down. The deceased tried at least twice to strike the accused with the tomahawk but missed as accused managed to dodge the blows. There was a scuffle for possession of the tomahawk

and the accused emerged victorious. He gained possession of the tomahawk and according to his testimony he “ **threw it far away tying to ensure that he does not find it.**”

[60] Thereafter a fist fight ensued and I note that the threat of being killed by the tomahawk was no longer there. The fist fight took place before the two exited the gate and the accused overpowered the deceased. He however dragged the deceased outside the gate. At this time the deceased was already defeated and powerless as he sat down on the ground and asked for water. In my view the deceased no longer posed any threat to the accused and he should have just left him. Any assault on the deceased at this juncture had nothing to do with self-defence.

[61] In fact from the moment the accused gained possession of the tomahawk and threw it far away, there was no threat of accused being killed by the deceased. There was a fist fight. Once the deceased got up and ran towards the Dube fields there was no reason for the accused to pursue him at all let alone assault him again as I have already concluded that the accused did assault the deceased even at this time.

[62] For the foregoing reasons it is a conclusion of this court that the accused person was not acting in self - defence when he killed the deceased and private defence does not therefore avail to him. The question that remains is whether he is guilty of murder as charged. Had accused proved private

defence the killing would be lawful. He however failed to establish such defence and this renders his killing of the deceased unlawful. For the accused to be found guilty of murder the prosecution has to prove that the killing was not just unlawful but that it was also intentional.

[63] Intention can take two forms in *casu*; *Dolus directus* and *dolus eventualis*. There is *dolus directus* where the accused desires the consequences of this actions. There is *dolus eventualis* where the accused person can subjectively foresee that his conduct is likely to cause the death of another, but proceeds to act regardless of the consequences of his conduct.

[64] The accused has told the court that when he and his cousins set out to the Johnsons home on the 18th October 2013, he had no intention to fight. His intention was to talk to the deceased. This evidence has not been controverted and I therefore have no reason to doubt it. This evidence is corroborated by the fact that when accused went to the Johnson's home he was not armed with any weapon. Further, when he eventually met the deceased he did not assault him. He talked to him. There may have been some heated argument at this moment which led to some manhandling but clearly that was not the intention of the accused. The aggressor was the deceased who came out of his rondavel armed with a tomahawk and eventually attacked the accused with it. Also the accused managed to

dispossess the deceased of the tomahawk but decided to throw it away when he had an opportunity to use it on the deceased. This proves beyond reasonable doubt that the accused had no intention in the form *dolus directus* to kill the deceased.

[65] The fact that the accused did not use the tomahawk on the deceased shows that the accused took precaution not to kill the deceased. If he did not care whether the deceased died or not he would have used the tomahawk in the circumstances.

[66] After the accused threw away the tomahawk, a fist fight ensued between him and the deceased. The deceased was overpowered during this fight and he eventually died. The deceased therefore died during a fist fight in which no weapon was used. In my view, the accused, being a layman when it comes to medical issues could not have foreseen that the deceased would die from fist blows. There was no serious external bleeding which could indicate that the deceased was seriously injured. The accused could not have known that the deceased had suffered serious internal injuries such as broken ribs and a ruptured liver. I cannot therefore find that during the fist fight the accused developed any form of *dolus eventualis*. The accused therefore had no intention to kill the deceased. I am unable therefore to find him guilty of the crime of murder.

[67] The only question that remains to be determined is whether the accused is guilty of the crime of culpable homicide. The accused can escape a conviction of this crime if he can demonstrate that the killing was lawful. In the case ANNAH LOKUDZINGA MATSENJWA Vs R 1976 - 1977 SLR (CA) SCHREINER JP stated the following at page 30 A:

“ If the doer of the unlawful act ...realised when he did it that it might cause death, and was reckless whether it would do so or not, he committed murder. If he did not realise the risk, he did not commit murder but was guilty of culpable homicide, whether or not he ought to have realised the risk since he killed unlawfully.”

[68] In *casu* the accused maintains that he killed lawfully and should therefore be acquitted since he killed in self -defence. However in private defence, the defensive act must be necessary to protect the interest threatened and proportionate to the attack. After the accused dispossessed the deceased of the tomahawk, the latter ceased to pose any much threat to the life of the accused. The accused cannot therefore say he was defending himself against any danger to his life posed by the deceased at this time. I cannot therefore find that the accused killed in self -defence. It seems to me that the accused killed the deceased in negligence.

[69] The accused overpowered deceased whilst they were fighting next to the gate and before exiting through it. The accused dragged him outside. It seems the fight continued even outside the gate and at this point the deceased was completely overpowered. He sat down and asked for water. It seems to me that this was the time for the accused to leave the deceased who was obviously defeated.

[70] Any assault after this moment does not amount to self - defence. The deceased got up and ran away before the water he had asked for could come. The accused followed him and as I have concluded above, continued to assault him. Such assault had nothing to do with self - defence. Private defence does not therefore avail to the accused.

[71] In the circumstances the accused killed unlawfully since the killing cannot be justified on any legal basis. He cannot therefore escape a conviction of culpable homicide this being a competent verdict on a charge of murder. For the foregoing reasons the following verdict is returned;

[71.1] The accused is acquitted and discharged of the offence of murder.

[71.2] The accused is found guilty of the offence of culpable homicide.

MAGAGULA J
JUDGE OF THE HIGH COURT