



## **IN THE HIGH COURT OF ESWATINI**

### **JUDGMENT**

**HELD AT MBABANE**

**CASE NO. 467/19**

In the matter between:

**REX**

Versus

- 1. NKOSINGIPHILE PHINDA KUNENE**
- 2. MAYIBONGWE GODGIFT MAGAGULA**
- 3. SONKHE VICTOR KUNENE**
- 4. MLONDOLOZI MHOLI MAMBA**
- 5. NJABULO SOLOMON VILAKATI**
- 6. THABISO MPHUMELELO MALINGA**
- 7. MXOLISI CYPRIAN KUNENE**
- 8. PHINDOKUHLE SIYANDA MALINGA**
- 9. MLANDVO PRINCE GAMA**

**Neutral Citation: *Rex vs Mayibongwe Magagula and Others [467/19] [2022]***  
***SZHC84 (12 May 2022)***

**Coram:** LANGWENYA J

**Heard:** 8, 9 December 2021

**Delivered:** 12 May 2022

**Summary:** *Criminal law-Criminal Procedure-Accused persons charged with murder but plead guilty to culpable homicide-Crown accepts plea-statement of agreed facts read into court record-accused persons convicted on the basis of their plea and on the content of statement of agreed facts-Evidence in mitigation of sentence evaluated in light of 'triad' principle.*

## **JUDGMENT**

- [1] The accused persons are charged with murder. It being alleged by the Crown that upon or about 4 December 2019 and at or near Nsuka area in the district of Manzini the said accused persons acting jointly and in furtherance of a common purpose, the said accused persons unlawfully killed Masiza Makhomba Juvy Shongwe.
- [2] Before the charge was put to the accused persons, the Crown applied to have the charge withdrawn against the first, third, fifth and sixth accused persons. The application was not opposed. The Court granted the application. The charge remains against the second, seventh, eighth and ninth accused persons.
- [3] The charge was put against the second, seventh, eighth and ninth accused persons. The accused pleaded not guilty to murder but guilty to the lesser crime of culpable homicide. The Crown accepted the plea. The Court

invoked section 155 of the Criminal Procedure and Evidence Act 67/1938 as amended<sup>1</sup>.

- [4] Accordingly, the court accepted the accused persons' plea and proceeded on a charge of culpable homicide.
- [5] With the concurrence of defence Counsel, the Crown submitted a statement of agreed facts signed by Counsel for the Crown and the Defence. The statement of agreed facts was marked exhibit 'A.' The post mortem report was marked exhibit 'B.' Both documents were handed into court with the consent of Counsel for the Defence.
- [6] The statement of agreed facts was read into court by the Crown and its contents were confirmed by defence Counsel.
- [7] The Court enquired from the accused persons personally if they were conversant with the contents of the statement of agreed facts and whether they had any objections to it being admitted into court as evidence. Each of the accused persons said they were aware of the contents in the statement of agreed facts; they also pointed out that they had no objection to it being admitted into court as evidence.
- [8] The common cause factors are that on 4 December 2019, the sixth, seventh and eighth accused persons were at a Fakudze homestead preparing to retire to bed when they heard a dog bark incessantly outside. The sixth accused person requested his younger brother, the eighth accused person to find out what the dog was barking at. The eighth accused declined to go outside and said he was afraid to go outside because it was dark already. The sixth

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<sup>1</sup> Section 155(2) states that if an accused person pleads he may plead either-(a) that he is guilty of the offence charged or, with the concurrence of the prosecutor, of any other offence of which he might be convicted on such indictment or summons.

accused person then went outside to check why the dog was barking non-stop. While outside, the sixth accused saw a man fleeing and coming out of a hut within the homestead and was carrying a chicken. The seventh and eighth accused came out of the house and together with the sixth accused person they gave chase of the intruder. While being pursued, the intruder dropped the chicken he was carrying and entered into a flat that was still under construction within the Fakudze homestead.

- [9] The accused persons herein used a cell-phone light to light up the place where the intruder hid. The intruder was identified as Makhomba Juvi Shongwe (the deceased herein). Makhomba Juvi Shongwe came out of the flat carrying a spade and assaulted the sixth accused person on his right leg with the spade. He then fled the scene.
- [10] As they pursued the deceased, the sixth, seventh and eighth accused persons were raising an alarm. The deceased was also raising an alarm as he fled from the accused persons. The accused persons herein finally caught up with the deceased when he fell in a bush where a struggle ensued. The deceased was fighting back. As the tussle continued, the accused were joined by the second accused. The second accused was armed with a spear and was with the fourth accused and Sabelo Simelane. The deceased was assaulted with fists and kicks as well as with a spear on the head. The deceased became weak and unable to fight back when he was assaulted with a spear. The deceased was dragged from the bush to a gravel road. His hands were tied with his pair of trousers on the back. The assault of the deceased continued unabated. The eighth accused person then used a rope to tie deceased's hands behind his back when the second accused took deceased's pair of trousers home where he informed the following people: Nkosingiphile

Kunene, Sonkhe Kunene and Njabulo Vilakati that the deceased was being assaulted for stealing a chicken at a Fakudze homestead. While the assault of the deceased continued, an alarm was still being raised. The ninth accused person came to the scene and joined in the fray. The accused persons jumped atop the deceased as he lay writhing in pain on the ground.

- [11] When deceased was undressed of his pair of trousers, he was left wearing a t-shirt and underwear only. At the time, the deceased was powerless to protect himself and to fight back because he was badly injured and overpowered by the accused persons. On the night deceased was assaulted, it was raining and very cold. The accused persons poured water on the deceased and further rolled him in the mud.
- [12] Present at the scene when the deceased was assaulted were: Phindokuhle Kunene (who was carrying a sjambok), Sonkhe Kunene, Njabulo Vilakati and Bhambo Kunene and Sipiwe Mondlane. The latter is a member of the community police. She did nothing to stop the assault. Sipiwe Mondlane told the accused persons to continue with the assault of the deceased because, as she put it, the deceased person was troublesome.
- [13] Bhambo Kunene and Sonkhe Kunene shone a light on the deceased person and then ordered the accused persons to stop the assault as the deceased person was about to die. While continuing with the assault, the accused persons asked the deceased person with whom he was going to eat the chicken. Deceased apologized and was, at the time unable to speak as he was weak. The deceased then asked for water to drink. He was given water to drink and drink he did. He then lay on the road facing the ground. When the accused persons turned the deceased upward, his eyes were all white and not blinking. They realized he had died. The mob then dispersed. Deceased's

family arrived at the scene and covered his body with a blanket. The police from Mliba police station were called and they arrived and carried out their investigations. The body of the deceased was conveyed to the mortuary.

[14] The police pathologist, Dr Komma Reddy determined the cause of death to be due to multiple injuries. He detailed the said injuries in the post mortem report which was handed in by consent and marked exhibit 'B.'

[15] Section 221(1) of the Criminal Procedure and Evidence Act 67/1938 states as follows:

**In any criminal proceedings in which any facts are ascertained-**

**(a) By a medical practitioner in respect of any injury to, or state of mind or condition of the body of, a person, including the result of any forensic test or his opinion as to the cause of death of such person; such facts may be proved by a written report signed and dated by such medical...practitioner, as the case may be, and that report shall be *prima facie* evidence of the matters stated herein...'**

Based on the above provision, I have accepted the post mortem report without the doctor handing it in court because Counsel for the Crown and Counsel for the Defence consented to it being so admitted. Accordingly, the court accepts the post mortem report as *prima facie* evidence of the cause of death of the deceased.

[16] The second, seventh, eighth and ninth accused persons admit that they negligently caused the death of the deceased person. They specifically admit that they all inflicted multiple injuries on the deceased which led to his demise. They admit that in so doing, they acted unlawfully and negligently; there was no legal justification for their conduct; there was no intervening factor/*novus actus interveniens* between their unlawful act and the death of the deceased. They admit further that the report of the police pathologist that

the death was due to complications consequent to multiple injuries on the deceased person is conclusive.

[17] The statement of agreed facts and the post mortem report were handed in by consent as evidence for the Crown and were marked exhibit 'A' and 'B' respectively.

[18] I am satisfied that the Crown has proved the commission of the offence of culpable homicide beyond reasonable doubt. This I say based on the evidence before court and the plea of guilt tendered by the accused persons. The accused persons are accordingly found guilty of culpable homicide.

[19] The Crown submitted that all the accused persons do not have previous convictions.

## **Sentence**

### **Submissions in mitigation of sentence**

#### *Submissions on behalf of the second accused-Mayibongwe Godgift Magagula*

[20] The second accused is a first offender. He was arrested in December 2019 and was released on bail in December 2020. He spent a year in pre-trial incarceration. He was admitted to bail of three thousand Emalangeni (E3000) and had to furnish surety of twelve thousand Emalangeni (E12000). He spent a year in pre-trial incarceration because he struggled to raise the bail amount as well as provide surety-these being terms of his bail conditions.

[21] The court was informed that the second accused is remorseful for his part in the unfortunate ordeal resulting in the death of the deceased. It was

submitted further, that the killing of the deceased was not intentional. The court heard that the second accused is haunted by the death of the deceased.

[22] The personal circumstances of the second accused are that: he was twenty-one years old at the time of the commission of the offence; he is unmarried and has a child who was three months old at the time of the hearing of the matter. The second accused person's father died in the year 2010. His mother is now married to someone else. The second accused person lives with other family members at his parental home. The accused is twenty-three years old. He is employed as a gardener and is paid one thousand and five hundred Emalangeni a month. He is a Form one graduate.

[23] Mr Nzima, on behalf of the second accused submitted that an alarm was raised and the second accused responded to the call for help at night time. The second accused was rendering a social responsibility by responding to the alarm and rushing to help. He had no intention of killing the deceased. It was impressed to the court that the deceased was troublesome in the community.

[24] It was Mr Nzima's submission that the court should suspend a part of the sentence to enable the second accused to learn from his mistake.

*Submissions on behalf of the seventh accused-Mxolisi Cyprian Kunene*

[25] The seventh accused is a first offender. He was arrested on 5 December 2019 and was released on bail on 6 November 2020. The accused spent eleven months in pre-trial incarceration before he was released on bail.

[26] It was submitted that by pleading guilty to the crime of culpable homicide, the accused was showing that he is remorseful for his part in the commission



of the offence. It was urged that the accused did not waste the court's time as he readily pleaded guilty to the crime of culpable homicide.

- [27] At the time of the commission of the offence, the seventh accused was a child of sixteen years old. He is eighteen years old now. He is an orphan. He makes a living through doing piece jobs around his community. He is a Standard 4 graduate.

*Submissions on behalf of the eighth accused-Phindokuhle Siyanda Malinga*

- [28] Phindokuhle Malinga is a first offender. He was arrested on 5 December 2019 and released on bail on 20 July 2020. He spent seven months in pre-trial incarceration.
- [29] To show that he is remorseful, the court heard that the eighth accused pleaded guilty to the crime of culpable homicide and did not waste the court's time.
- [30] At the time of the commission of the offence, the accused was a child of seventeen years. He is nineteen years old now. He is an orphan. He depends on piece jobs. He is a Form one graduate.
- [31] Mr Mtetwa on behalf of the seventh and eighth accused persons argued not in so many words that the deceased got his just deserts because he came to the home where the accused lived unannounced, trespassed and stole a chicken thereat. The deceased was caught stealing a chicken by the accused persons. Because the deceased person was troublesome in the community, the accused persons were scared of him. At the time the accused persons committed the offence, they did not know that their conduct was unlawful.

- [32] Mr Mtetwa urged the court to consider the fact that the accused persons were unsophisticated when one takes into account their level of education as well as the fact that they are residents of an area in rural eSwatini. The court was urged to mete out a lenient sentence meant to reform the accused persons. It was submitted further that, since the accused persons were admitted to bail, they have not been in trouble with the law.

*Submission on behalf of the ninth accused-Mlandvo Prince Gama*

- [33] The accused is a first offender. He was arrested on 5 December 2019 and admitted to bail on 19 December 2019. He spent two weeks in pre-trial incarceration.
- [34] It was submitted that he is remorseful for his role in the commission of the offence he has been convicted of. The offence was not committed intentionally. The court heard that the incident traumatized the accused person. He was only responding to an alarm that was raised at night in his community and had not thought his involvement would result in the loss of life of the deceased person.
- [35] At the time of the commission of the offence, the accused person was nineteen years old. He is twenty-one years old at the time of the hearing of the matter. In 2019, he was a scholar at Nsingweni High School. He is currently upgrading his subjects at ka Boyce High School. The court was urged to pass a sentence that will teach and reform the ninth accused person and not to pass a sentence that will break him and put paid to his dream of becoming a responsible citizen through applying himself in his studies.

### *Submissions on behalf of the Crown*

[36] Ms Masuku submitted that the crime complained of was as gruesome as it was violent. The deceased person's skull was fractured, ribs broken and his heart and spleen punctured. The assault of the deceased person was as savage as it was grave. His hands were tied to his back so he could not defend himself when the accused persons took turns in assaulting him and danced on his body. It was the Crown's submission that no one has a right to take away another person's life because life is sacrosanct. It was submitted further that the family of the deceased is entitled to get justice after the deceased died a violent death in the hands of the accused persons.

### **Finding of the Court**

[37] I accept that the accused persons' plea of guilty to the crime of culpable homicide is a sign of regret and a demonstration of remorse and penitence. The accused persons did not waste the court's time or resources in having the matter prosecuted. The accused persons made a clean breath of what transpired and the matter was finalized at the shortest possible period without calling witnesses. Accused persons' plea of guilty should be credited for what it is worth; and that, in my view can be shown and reflected in the sentence imposed.

[38] It is, in my view a mitigatory fact that the accused persons will forever live with the fact that they caused the death of the deceased. The general public make no distinction between murder and culpable homicide. That is the preserve of those who know the law. The accused persons would simply be viewed as murderers and this stigma will not only haunt them for life but is

punishment on its own. Put differently, the blood of the deceased will always be in the hands of the accused persons.

- [39] The circumstances of this case are rather unfortunate. The deceased was caught by the seventh and eighth accused persons stealing a chicken in their home. When he was pursued, the deceased fled and hid in a flat that was still under construction in the homestead. He later came out of the flat wielding a spade with which he assaulted the sixth accused person. The sixth, seventh and eighth accused persons pursued the deceased and while they did so they also raised an alarm. The accused persons caught the deceased when he fell while being pursued and assaulted him. The circumstances surrounding the commission of the offence, in my view are such that the conduct of the accused resulting in the death of the deceased was not premeditated. That deceased's skull was fractured, his ribs were broken and his heart and spleen were punctured implies that the accused persons used great force when they assaulted the deceased. The accused persons were negligent.
- [40] What diminishes the accused persons' moral blameworthiness is the fact that the accused persons had no intention to kill the deceased, but they should have realized that their action may cause the death of the deceased and they failed to take steps to guard against that.
- [41] In determining an appropriate sentence, I am enjoined by law to have regard to the degree of culpability or blameworthiness exhibited by the accused in committing the assault which resulted in the death of the deceased. In this regard, I have taken into account the accused persons' unreasonable conduct in the circumstances, foreseeability of the consequences of their negligence

and the consequences of their negligence and the consequences of their negligent acts<sup>2</sup>.

[42] The community expects that a serious offence will be punished, but also expects at the same time that mitigating circumstances must be taken into account. The accused persons' particular position also requires thorough consideration.

[43] That a life was lost is an important consideration but it is not the only factor that the court ought to consider. If one has regard to the fact that the seventh and eighth accused persons were preparing to sleep when the deceased came unannounced, trespassed and stole a chicken at their home; when pursued, deceased assaulted one of the accused persons with a spade; that some of the accused persons were virtually children when the offence was committed; and that prior to this incident all the accused persons had no brush with the law, and the fact that they have shown remorse for their actions are all factors which I have considered to arrive at a sentence which, under the circumstances of this case is appropriate.

[44] In *S v Bohitile*<sup>3</sup> the court referred to the work of Sentencing by DP van der Merwe<sup>4</sup> where he states that culpable homicide caused by an assault as opposed to being caused by negligent driving is correctly generally treated with a heavier hand. In this matter, the Court of Appeal imposed a sentence of eight years imprisonment of which two years were suspended for a period of five years on condition that the appellant does not commit the crime of assault during the period of suspension for which a sentence of imprisonment without the option of a fine is imposed.

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<sup>2</sup> See: *S v Nxumalo* 1982 (3) SA 856(A) at 861G-H.

<sup>3</sup> 2007 (1) NR 137 (HC)

<sup>4</sup> (1991) at 7-4

[45] It is evident from case law that sentences imposed for culpable homicide vary quite considerably<sup>5</sup>. This is so because the court in each case has to determine the degree of culpability or blameworthiness exhibited by the accused persons in committing the negligent act for which they were convicted.

[46] One cannot lose sight of the individualized nature of the sentencing process and that it is irregular to sacrifice an accused person on the altar of deterrence. Expanding on this principle of the law, Plasket J in *S v Mako*<sup>6</sup> states as follows:

[17] In *R v Karg* 1961 (1) SA 231 at 236B-C: a balanced view has been expressed as follows:

**‘It is not wrong that the natural indignation of interested persons of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if the sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Natural righteous anger should not becloud judgment.’**

I respectfully associate myself with the above sentiments.

[47] Considering all these factors, I am of the considered view that the moral blameworthiness of the accused persons in the circumstances does not warrant a custodial sentence.

[48] In the result, the following sentence would meet the justice of the case:

Mayibongwe Godgift Magagula you are sentenced to six (6) years imprisonment wholly suspended for a period of five years on condition that

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<sup>5</sup> See: *Musa Kenneth Nzima v Rex* Criminal appeal No. 21/2007; *Petros Manglisi Masuku v Rex* Criminal appeal case No. 11/2008; *Vusi Madzalule Masilela* Criminal appeal case No. 14/2008; and *Lucky Sicelo Ndlangamandla & two others*, criminal appeal case No. 8/2008; *Rex v Nkosinathi Bright Thomo* High court criminal case No. 203/2008; *Thandi Tiki Sihlongonyane* court of appeal case and *Rex v Mathokoza Anthony Dlamini* High court case No. 485/2019.

<sup>6</sup> 2005 (2) SACR 223(E) on page 228

you are not convicted of culpable homicide committed within the period of suspension. The sentence takes into account the period you spent in pre-trial incarceration.

[49] Mxolisi Cyprian Kunene you are sentenced to six (6) years imprisonment wholly suspended for a period of five years on condition that you are not convicted of culpable homicide committed within the period of suspension. The sentence takes into account the period you spent in pre-trial incarceration.

[50] Phindokuhle Siyanda Malinga you are sentenced to six (6) years imprisonment wholly suspended for a period of five years on condition that you are not convicted of culpable homicide committed within the period of suspension. The sentence takes into account the period you spent in pre-trial incarceration.

[51] Mlandvo Prince Gama you are sentenced to six (6) years imprisonment wholly suspended for a period of five years on condition that you are not convicted of culpable homicide committed within the period of suspension. The sentence takes into account the period you spent in pre-trial incarceration.

  
**M. S. LANGWENYA**

**JUDGE OF THE HIGH COURT**

For the Crown:

Ms N. Masuku

For the 1<sup>st</sup> and 3<sup>rd</sup> accused

Mr S. Zwane

For the 4<sup>th</sup> and 9<sup>th</sup> accused

Mr L. Dlamini

For the 7<sup>th</sup> and 8<sup>th</sup> accused

Mr M. P. Mthethwa

For the 2<sup>nd</sup> and 5<sup>th</sup> accused

Mr O. Nzima