

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 282/2022

In the matter between:

REX

VS

MUSAWENKHOSI BENEDICT DLAMINI

Neutral citation : *Rex v Musawenkhosi Benedict Dlamini (282/2022)*
[2023] SZHC 100 (24/04/2023)

CORAM: B.S. DLAMINI J

DATE HEARD: 21 March 2023

DATE DELIVERED 24 April 2023

Summary:

Criminal trial-Accused person charged with the offence of murder. Crown parading four witnesses and introducing documentary evidence to prove commission of the offence by Accused person. Accused person testifying that at the time of commission of the offence his mind was unstable to the extent that he almost committed suicide.

Held;

The evidence led by the Crown establishes commission of the offence by the Accused person. The defence advanced by the Accused has no substance in law and is rejected. The accused person is convicted of murder with no extenuating circumstances.

JUDGMENT

INTRODUCTION

- [1] The Accused person stands accused of murder in that on or about the 28th April 2019, the said accused wrongfully, unlawfully and with intent to kill, did hack Silindelwa Zwane, a minor female (10 years old), with an axe on the head and on the neck, thereby causing injuries on the head and neck of the said child, and which injuries ultimately led to the death of the said minor child.
- [2] The Accused person was represented by an Attorney and a plea of not guilty was entered when the charge was put to the accused person as required by law.
- [3] The Crown led the evidence of four witnesses and further introduced by consent the following documents;
- (i) Photo album of the deceased taken at the scene.
 - (ii) Post-mortem Report
 - (iii) Suicide note by accused person
 - (iv) Red pen used by accused in drafting suicide note
 - (v) 2 maroon shoe laces
 - (vi) Axe used in the commission of the offence
 - (vii) Pellet gun

(viii) Black Adidas sweater worn by deceased

CROWN'S CASE

- [4] The first witness for the Crown was Nokukhanya Philile Msibi (PW1). This witness is the biological mother of the deceased child. PW1 testified that on the 27th April 2019, she was attending a traditional marriage ceremony (“emalobolo”) at a Mncina homestead in the area where she resides.
- [5] Whilst the witness was busy with some chores, she was approached by one Nkosilenhle who informed her that the accused person, Musawenkhosi Dlamini, wanted to talk to her. The witness informed Nkosilenhle, the messenger, that she was busy and that if the accused person wanted audience with her, he must come to her. Indeed the message from the witness was related to the accused. The accused approached PW1 and found her busy preparing meals in the kitchen for guests. According to PW1, she informed the accused person to leave her alone as she had nothing to discuss with him.
- [6] According to PW1, the accused followed her into a rondavel where upon entering, accused informed her that it would either be her or her

child. According to PW1, the accused wanted to cause a scene at the Mncina homestead such that she had to report the incident to the owner of the home. Mr. Mncina assured PW1 that he would talk to the accused person.

[7] PW1 informed the Court that the accused persisted in confronting her at the Mncina homestead such that she had to report him to Maja'onkhe and Sicelo. The accused, according to PW1, calmed down a bit upon being confronted by the two males. However, at around 3pm, the accused resumed his confrontation with PW1. The evidence by PW1 was that many people tried to intervene in the confrontation by accused directed to this witness. PW1 stated that she had to request his brother to go to Bhunya Police station to get assistance on her behalf.

[8] The evidence by PW1 was that at around 6pm, the accused disappeared and she seized that opportunity to go to her home. PW1 requested her brothers to accompany her to the road. Along the way, PW1 met the accused who continued to verbally threaten her but did not do anything to her at that stage.

[9] PW1's testimony was that upon arrival at her home, she sat on the couch as she was tired. The children, according to the witness, were at her mother's bedroom. Whilst seated on the couch, one Londiwe, PW1's sister, got into the house and was drunk. PW1's sister went to her room to sleep. The witness shouted for the children to go outside to fetch some blankets which had been placed outside to dry up. These children were Nokwanda, Nothabiso and Silindelwa. As one of the children was attempting to close the door whilst going out, the accused appeared and blocked the door from closing. The accused entered the house and was carrying an axe and a pellet gun.

[10] According to PW1, when accused entered the house, she ran to her sister's room to look for help. PW1's sister held her baby to her chest and started to apologize to accused person. The accused person, according to PW1, did not listen to the apology but instead pushed her sister aside and the pellet gun he was carrying fell on the floor. PW1 ran and left the accused person wrestling over the axe with her sister. PW1 exited the house through a window and ran to the road with the aim of raising an alarm and getting assistance from neighbors.

[11] PW1 met a certain Mavimbela male person along the road and the latter took the witness to the Mncina homestead. The evidence by PW1 was that a car later took her to the police station while other people from the Mncina homestead went out in search of the accused person. At the police station there was no car available. The witness was constantly in touch with the people back at home through the phone. PW1 was informed that the minor child, Lindelwa Zwane had been taken by the accused person.

[12] PW1 was brought back home by the police at around 11:35pm. There was no one at home when the witness got back home. Together with the police, PW1 went to search for her relatives at a nearby Dlamini homestead but did not find them there. They proceeded to the Mncina homestead and that is where PW1 found all her relatives camped. The minor child, Silindelwa Zwane was however not amongst the relatives. The witness and her relatives slept at the Mncina homestead for the night and only went back home the following day in the morning.

[13] The witness stated that she called a member of the community, one Mr. Malaza and reported to him about the matter. A search was made

and the search party was able to locate the pellet gun at a Dlamini homestead nearer to the witness's home.

[14] The witness and her family members went back to the Mncina homestead since the *lobola* function was still taking place. PW1 was accompanied by a police officer whose surname is Hadzebe. The witness enquired from the police officer about her child and was assured by Hadzebe that the child would be found.

[15] At around 12:00 pm, the witness heard people talking in hushed tones that the child had been found already dead near the mountains. Information got to PW1 that community police and other members of the community had gone out in search for the child and had been able to locate the dead body of the child by the mountains. The child had already been transported to the mortuary. According to PW1, she was only able to see the child during the post mortem. In conclusion, PW1 stated that she was once in a relationship with the accused but the relationship had ended.

[16] During cross-examination, it was put to PW1 that the child was sired by the Accused person at the time when the two, that is, accused person and the witness were still lovers. It was put to the PW1 she had wrongfully given the child a Zwane surname when she knew very well that the child is that of the accused person. The accused, through his legal representative, put it to PW1 that the Zwane family had disputed paternity of the child. It was further put to PW1 that the accused had intended to take his own life after killing the minor child. The defence also argued that the minor child was supported by the accused person as his own child. The witness denied all of the assertions made on behalf of the accused person.

[17] PW2, Nkosinathi Brian Dlamini, stated that he resides at Ka-Zondwako area which is his parental homestead. The witness stated that accused person is his uncle. It was PW2's testimony that on the 28th April 2019, he went to the mountains situated in his home area after being called by the accused person.

[18] Upon arrival at the mountains, the witness met the accused person and was asked by the latter what was happening at the Mncina homestead

where PW1 and her family had sought refuge. According to PW2, the accused person enquired from him what the people at the Mncina homestead were saying about the incident. PW2's evidence was that he enquired about the whereabouts of the child from the accused as the people at the Mncina homestead were concerned about the child's welfare. The response from accused was that he would let the witness know about the whereabouts of the child.

[19] Later on as PW2 continued to engage in discussions with the accused, the latter informed the witness that he had messed things up in a really bad way. The accused person pointed to a bushy area near some homesteads and told this witness that the child was buried there. According to PW2, the accused informed him that he had killed the child by hacking her with an axe on the head and on the neck. The accused informed PW2 to go and tell the mother of the child about what he (accused) had done to the child.

[20] PW2 went back to the Mncina homestead with the aim of relating to PW1 on what had happened to her child. However upon arrival at the Mncina homestead, PW2 got scared to relate the information to PW1

as she found the mother of the child crying. PW2 decided to inform his aunt about what had happened. PW2's aunt in turn related the matter to her brothers and a decision was taken to go to the police to report the matter.

[21] According to PW2, he together with police and other community members went in search for the child around the bush pointed out by the accused person. The child was eventually found and she was wearing a black jersey and was lying face down.

[22] A third witness for the crown was Ntombifuthi Mthethwa (PW3). This witness is employed as a Teacher at Ka-Zondwako Primary School. PW3 stated that the deceased was one of her pupils at the school where she was teaching.

[23] According to PW3, on the 28th April 2019, she was at home at Ka-Zondwako during the morning hours. PW3 received a call on her mobile phone from the *Umgijimi* (Chief's messenger) of the area, one Mr. Jeremiah Malaza. The *Umgijimi* reported about the missing child to this witness by virtue of her position as Vice-Chairperson of the

Zone where the child resided. The witness enquired when and how the child got to be missing and was given all the answers by the *Umgijimi*.

[24] The evidence by PW3 was that she decided to personally go to where the *Umgijimi* was in order to get more clarity on the matter. PW3 indeed travelled to see the *Umgijimi* in order to have a one-on-one about the matter and decide what to do. After the discussions with the *Umgijimi* the witness returned to her home that same day.

[25] At around 3:00pm, PW3 got information from the *Umgijimi* to the effect that the child was somewhere around Lusutfu area. The witness called a certain Zwane lady and informed her that they were going to search for the child around Lusutfu area. PW3 and the Zwane lady and other members of the community formed a search party and went to scout for the missing child.

[26] As the search was being conducted, PW3 heard the group which was searching ahead of them shouting that the child had been found. On getting closer to where the child was lying, PW3 noticed that it was indeed the child she was teaching at her school. The witness observed

that the child was wearing a black jacket which was bigger than her. The child also had some injuries but the one which was more visible was on the head. The witness left as arrangements were being made to transport the child away.

[27] PW4 was 6210 Detective Constable Muzi Vilakati. This witness was the main investigator in the matter. PW4 explained in detail the steps he took upon receiving the docket of the accused from inception to the time he effected an arrest on the accused person. On the 30th April 2019, the witness with other police officers took the accused person to his parental homestead where the accused, after being cautioned in accordance with the law, led the officers to the axe used in the commission of the offence. This was done in the presence of accused person's relatives and other members of the community. The witness also recovered several of the items listed as exhibits earlier in the judgment. These items are the pellet gun, black leatherjacket worn by deceased, suicide note, shoe laces and a red pen.

ACCUSED PERSON'S EVIDENCE

[28] After the Crown closed its case, the accused person elected to give evidence under oath in his defence in the matter. According to the accused person (referred to herein as "DW1"), PW1 was his lover from an early stage as they were growing up in the community. DW1's evidence was that the deceased child was his child born out of the relationship with PW1.

[29] DW1's evidence was that PW1 had reported to him that she was pregnant with his child. However after some three months, PW1 went to report the pregnancy at a Zwane homestead. When PW1 gave birth, she took the child to the Zwane family but the Zwane family rejected the child and disputed that she belonged to the Zwane's. The evidence by DW1 was that PW1 later got married to a certain man with a Dlamini surname. During the marriage, PW1, according to DW1, would call him and enquire if he was maintaining the child. The child was residing with her grandmother, PW1's mother.

[30] It was DW1's evidence that after the child was killed, his family provided a cow for the funeral arrangements of the child. In his

evidence, DW1 stated that what prompted him to take the life of the child was that after the failed marriage of PW1, they worked things out with PW1 and got back together. They agreed on working towards changing the child's surname from Zwane to Dlamini, being accused's surname. According to DW1, after some time into the relationship, PW1 approached him and told him that her mother was refusing that they get back together.

[31] The evidence by DW1 was that PW1 completely changed her attitude towards him. At some point, DW1 was called to the sports ground by PW1 only to find that the latter and her partner were holding each other and showed that they were lovers. DW1 lost his cool and went on to assault PW1. The assault on PW1 was reported to the police and the relationship between him and PW1 once again came to an end.

[32] DW1 further told the Court that because of the strained relationship between him and PW1, he came to the point of deciding that PW1, the child whom he believed was his and himself must all die. DW1 stated that he took the weapons being the pellet gun and the bush knife and proceeded to the Msibi homestead. On arrival, DW1 entered the house

and PW1 ran to her sister's room and later ran to her mother's room and locked the door. DW1 hit the door of PW1's mother's room with the axe he was carrying. According to DW1, he then heard footsteps outside the house and when he went to check what was happening, he saw that people were running in all directions.

[33] According to DW1, upon hearing footsteps outside, he threw the pellet gun on the floor and went outside. Whilst outside, DW1 saw the deceased child running towards a certain house within the compound. DW1 grabbed the child before she could get inside the house. The child was only wearing panties and DW1 wrapped her with the black jacket he was wearing. According to DW1, he went away with the child and killed her on the spot and left her body in the area where he had killed her.

[34] It was DW1's evidence that after killing the child, he also intended to kill himself. DW1 stated that he went home to look for weevil tablets and he drank them. The tablets however did not work as they had expired. According to DW1, he wrote the suicide note whilst in the mountain as that is where he intended to kill himself.

[35] In cross-examination, it was put to DW1 that he did not maintain the child in question and that he did not love her as claimed by him. The accused person was asked how he can claim to have loved the child or claim the child was his if he was able to kill her in the manner that she was killed.

ANALYSIS AND CONCLUSION

[36] In *S v Mnisi 1963 (3) SA 188 (A)* at page 192 F-G, the court construed the question of intention to kill as follows;

“A person in law intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts reckless as to whether such death results or not.”

[37] In the local case of *Rex v Mangaliso Fana Dlamini (91/2011) [2018] SZHC 182 (6th August 2018)*, the High Court of Eswatini held as follows;

“[35] I am also convinced that from the conduct and acts of the accused, he cannot possibly escape being found to have intended the outcome of his actions. When he stabbed the

deceased on the left hand side of the chest with vicious force using a dreadful home-made knife, I do not believe that his acts and conduct would suggest anything else. The following words were uttered by the court in *R v Jolly and Others* 1923 AD 176 at 187 which again was cited in my judgment in *Rex v Thokozani Samson King Mngomezulu (Supra)* at paragraph 23 still addressing how intention is to be construed from a set of given facts;

“The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased.”

[38] The evidence of PW1 and PW2 directly link the accused in the commission of the offence of murder. Clearly the accused person had direct intention (*dolus directus*) to commit the offence in question. The accused carefully planned to commit the offence because he was offended by PW1's conduct of rejecting him as a lover. The plan by accused person was that he would kill PW1, the deceased and then later kill himself. PW1 was lucky to escape unhurt when confronted by the accused at her homestead.

[39] In his written submissions, the accused states that he was provoked by the actions of PW1 into committing the offence in question. In his written submissions, the accused person, through his legal representative, states that;

“PW1 provoked DW1 to anger such that (as shown at A.2 and B. above), as a good and reasonable person, he lost self-control and pre-meditation, and plunged into regrettable action. She [PW1] perpetually toyed with his mind concerning the child which he supported, and whom he knew to be his. PW1 further acted unfaithfully to their relationship, and drove DW1 to provoked anger...The State has had numerous incidents where men lost their minds and acted wildly because of the women they loved. This argument can be supported [by] the Appellate Division in *R v Von Zell 1953 (3) SA 303 AD at 314* where it was said;

“The strain and stresses to which Appellate [Appellant] was subjected to because of his relationship with his wife and her daughter, because of his wife desertion and because of her legal proceedings which she instituted against him (was regarded as an extenuating circumstance which affected his conduct).”

[40] There is no element of provocation that the Court can establish from the facts of this matter. The accused person and PW1 were once in a love relationship. That relationship came to an end. The accused himself testified that he once found PW1 holding hands with another man and proceeded to assault her and that the relationship with PW1 came to an end. This can only mean one thing and that is, accused person was not willing to let PW1 leave the relationship. The accused person cannot force himself into a relationship in which he was no longer wanted and then claim to have been provoked.

[41] On the issue of the child whom accused person contends was born of him and PW1, there are traditional forums of resolving such disputes and also Courts of law. These kinds of disputes are prevalent in the country. It is unheard of that when one parent has a claim over the paternity of a child, he or she then resorts to killing the child in question. There is therefore no legal basis or justification for accused person to allege provocation in the killing of the innocent child.

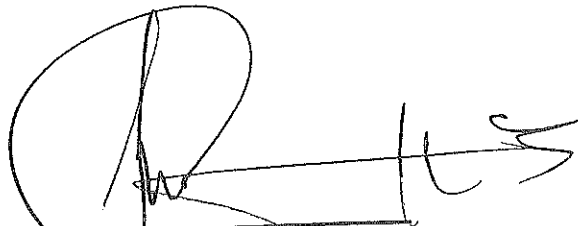
[42] In the post-mortem report, the medical practitioner who examined the body of the deceased child established that the child died due to

“multiple injuries.” The injuries identified on the body of the deceased are as follows;

- (i) a chop wound of 6 x ½ cm, present on the middle portion of the left side of the top of the head, vertical in direction.
- (ii) A chop wound of 3 x 1 cm, present on the left side of the top of the head over the left parietal eminence.
- (iii) A chop wound of 7 x ½ cm, in the middle and upper portion of the left side of the neck 2 cm, the left ear lobule.

[43] These injuries were inflicted on the helpless and innocent child by the axe carried by the accused person which was tendered as part of the evidence in Court. The accused person showed no mercy to the child who was forced to take the role of a sacrificial lamp on the failed love relationship between the accused person and PW1.

[44] The accused person is accordingly found guilty of murder committed with *dolus directus* and with no extenuating circumstances.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For the Crown: *Miss. F. Gamedze (DPP's Chambers)*

For the Accused: *Mr. S.B Methula (S.B Methula & Associates)*