

# **IN THE HIGH COURT OF SWAZILAND**

## **JUDGMENT**

**HELD AT MBABANE**

**Case No. 202/17**

**In the matter between:**

**THE KING**

**VS**

**ZANELE TAKHONA DLAMINI**

Neutral Citation:      The King vs Zanele Takhona Dlamini  
   (202/2017) [2023] SZHC 216 ( 15<sup>th</sup> August  
   2023)

CORAM                :      J.S MAGAGULA J

DATES HEARD:      11/4/23; 7/6/23 & 18/7/23

DELIVERED        :      15/8/23

[1] In this matter the accused is charged with three counts as follows;

Count 1:

MURDER in that upon or about the 31<sup>st</sup> May 2017 and at or near Sibetsaphi area in the Lubombo Region, the said accused person did wrongfully, unlawfully and intentionally kill one Cebolethu Matsenjwa and did thereby commit the crime of murder.

Count 2:

MALICIOUS INJURY TO PROPERTY in that upon or about the 31<sup>st</sup> May 2017 and at or near Sibetsaphi area in the Lubombo Region , the said accused person did unlawfully and wrongfully set alight the following movable property on fire;

- |                                   |           |
|-----------------------------------|-----------|
| 1. 1x sofa valued at              | E300-00   |
| 2. 5x blankets valued at          | E1500-00  |
| 3. Curtain valued at              | E 1800-00 |
| 4. DVD player valued at           | E275.00   |
| 5. Wardrobe valued at             | E2 500-00 |
| 6. School book valued at          | E500-00   |
| 7. Grass mats valued at           | E100-00   |
| 8. Clothes valued at              | E160-00   |
| 9. 2x hair cutting machine valued | E400-00   |
| 10. Dishes valued at              | E50-00    |

11. Electrical valves	E2000-00
12. Eletrical kettle valued at	E150-00
13. Toiletry valued at	E150-00
14. Cellphones valued at	E1200-00
15. DSTV dish cables valued at	E420-00
16. Face towels valued at	E45.00
17. Underwears valued at	E260-00
18. Shots valued at	E500.00
19. Boys clothes valued at	<u>E800-00</u>
<b>E15 810.00</b>	

With intent to injure one Sandile Matsenjwa who was in lawful possession of the said items.

Count 3:

ARSON in that upon or about the 31<sup>st</sup> May 2017 and at or near Sibetsaphi area in the Lubombo Region, the said accused person did unlawfully and with intent to injure SANDILE MATSENJWA in his property set on fire and thereby damage a certain house, being an immovable and property of the said SANDILE MATSENJWA and thus accused is guilty of the crime of ARSON.

- [2] Upon arraignment the accused pleaded not guilty to count No.1. She however pleaded guilty to the 2<sup>nd</sup> and 3<sup>rd</sup> counts. The crown accepted the guilty pleas. The prosecutor Mr A.

Mkhaliphi proceeded to lead evidence to establish the charge on murder.

- [3] Worth noticing from the beginning in this matter is that whilst proof of the commission of the crime has two legs being *actus reus* and *mens rea*, there is common cause on the *actus reus* aspect. Apart from the evidence of the crown witnesses which was not challenged on this aspect the accused herself in her evidence in chief stated *inter alia* the following:-

“ I admit that I lit the fire which burnt the child.”

- [4] It remains for the court to establish if the accused had any intention to kill the deceased and if so, the type of intention thereof. The accused denies that she had intention in any form. Mr S. Bhembe who appeared for the accused submitted that the accused could only be found guilty of Culpable Homicide as she had no intention to kill the deceased but only acted negligently. The court can only rely on the evidence tendered in court to establish if the accused had the necessary intention. In my observation the evidence of PW2 (THOKO MATSENJWA). PW3 (NOMALUNGVELO MBINGO) and the accused person is the most relevant in this regard.

- [5] Thoko Matsenjwa (PW2) told the court *inter alia* that on the 31<sup>st</sup> May 2017 she was at home with his son SANDILE MATSENJWA (PW1). As she was seated under a tree the accused came into the homestead. The accused was Sandile's girl friend and the two had a child. The accused went straight

to Sandile's flat and Sandile was also in the flat. PW2's evidence also reveals that Nomalungelo Mbingo together with her baby (the deceased) and three other children were also inside the flat.

- [6] According to PW2, after the accused had entered the flat Sandile came out of the flat and she sent him to borrow some car tool from a neighbour. Soon after that PW2 heard Nomalungeo (PW3) raising an alarm. Nomalungelo was Sandile's other girl friend and the deceased was a child of the two. She came out of the flat and fell on the ground. Thoko Matsenjwa (PW2) then rushed to the flat to see what was happening. PW2 further states;-

*“ As I entered the flat I saw Zanele (accused) lit a match stick and she threw it on Cebolethu (deceased) A fire arose.”*

- [7] This evidence suggests that the accused had intention to kill the deceased and such intention was in the form of dolus directus. However during cross – examination her evidence that the accused lit a match stick and threw it on the deceased child was somewhat contradictory. On this aspect the questioning went *inter alia* as follows;-

*“ Q. On 31/5/17 police asked you to tell them what had happened.”*

*A. “ Yes and I did”.*

Q. *" You did not tell the police that you saw the accused lighting a match stick and throwing it on the child."*

A. *" I told them that."*

Q. *" In your statement to the police you said you saw Nomalungelo coming out of the flat crying and she fell down on the ground."*

A. *"Yes".*

Q. *" You also said she was wet and smelling of petrol."*

A. *"Yes"*

Q. *" You said you then rushed to the boy's flat and found Zanele standing and Cebolethu, a four month old baby was already in flames."*

A. *"Yes".*

Q. *" You never saw the accused lighting a matchstick and throwing it on Cebolethu because you just said that when you saw the child he was already in flames."*

A. *I saw her."*

- [8] From the foregoing it is not clear if PW2 saw the accused lighting a matchstick and throwing it on the deceased child or she found the child already in flames. However the most probable version is that when she entered the flat the deceased was already in flames. This is so because this witness agrees that she only arose and went to the flat which

was about ten metres away, when she saw Nomalungelo (PW3) coming out of the house crying and falling on the ground. It is most likely therefore that by the time this witness entered the flat the child was already in flames.

- [9] The evidence of Nomalungelo Mbingo (PW3) who is the mother of the deceased child was the most clear, straight forward and to the point. She came out of cross – examination unshaken. On the aspect relevant to intention this witness told the court that on the 31<sup>st</sup> May 2017 she was at her boy friend's (PW1) homestead with her baby (the deceased).
- [10] At about 7.00 am the accused came into the flat where PW3 was. She was looking for a hospital card which she took and left. She came back in the afternoon and entered the flat again. She put her cellphone in the charger and left again. At this time there were five people in the flat being PW3 and her baby who was on her lap and three other children who were watching television just above the bed.
- [11] The accused came back again and this time she took a bucket which was in the flat and she left with it. She came back with the bucket and she also poured petrol on Nomalungelo (PW3) and the deceased baby. She came in front of PW3 and tried to light her up with matches. PW3 grabbed her by the hand and by that time the child had fallen onto the floor. PW3 went out to raise an alarm. She left her baby and the three other children inside the flat as well as the accused. PW2 went

inside the flat together with one Viki Matsenjwa who took out the deceased child from the flat. As the flat caught fire all the children, to wit, the now deceased baby and the three other children were inside the flat. The accused was outside by the door. PW2 rescued the three children from the burning flat whilst Viki took out Cebolethu. Cebolethu was taken to hospital but she could not make it and she eventually passed on.

[12] During cross -examination this witness was questioned *inter alia* as follows;-

Q. " You said the accused poured you with petrol and attempted to light a matchstick."

A. " yes."

Q. "Did she light the matchstick in your presence?"

A. "No".

Q. So you never saw the accused lighting a matchstick."

A. " No, I did not."

Q. "I am instructed that the accused was not aware of the whereabouts of Cebolethu when she lit the matches and threw it on the floor."

A. " She saw Cebolethu since she was on the floor."



*Q.” Accused maintains that when she came with the petrol and poured it on the sofa where you were seated Cebolethu was not on your lap.”*

*A. “ That is not true. The child was on my lap.”*

[13] From the above it would appear that the accused had intention to kill both PW3 and her baby as she poured the petrol on their bodies. Evidence of this is that when PW3 came out of the flat she was wet and smelling of petrol. There is no evidence that the petrol was poured on any part of the flat or other items inside the flat.

[14] Further, one thing that is certain for sure is that Cebolethu was in the flat. Being a four months old baby there is nowhere she could hide or be hidden within the flat and there would be no reason for hiding her. She could either be on her mother’s lap or on the floor if sleeping. There is no way the accused could not have seen the baby.

[15] The accused told the court *inter alia* that on the 31<sup>st</sup> May 2017 she bought a litre of petrol at a filling station in Siphofaneni. When she was asked by the defence counsel why she bought the petrol, she first said she had no reason for buying the petrol. However her counsel posed further questions as follows;-

*Q.” You spent money on something you did not need?”*

*A. “ I wanted to burn Sandile’s house.”*

*Q." Why did you want to burn the house?"*

*A. "I found his girl friend Nomalungelo Mbingo at his home."*

The accused further explained that she had been told by PW1 (Sandile) that he had parted ways with Nomalungelo and was only maintaining his child which he had with her. When she saw Nomalungelo in Sandile's flat she got angry and shocked that the two were back together.

- [16] The accused further told the court that when she went back to Sandile's parental home in the afternoon of the fateful day, she administered some medication on her own child which she had also taken to the clinic. Sandile came and enquired about the health of the child. Thereafter Sandile was sent by his mother (PW2) to borrow a jack for a motor vehicle from a neighbouring homestead. The accused waited for a while and thereafter poured the petrol into a bucket she got from the flat. She then got into the flat and poured some of the petrol on the sofa. At that time Nomalungelo bolted out of the flat. Nomalungelo was seated on the sofa all along. She was all by herself.

*"I set alight the sofa and the whole house caught fire and I remained inside the house. Make Thoko came shouting and asking why I was burning the child. I was not aware that there was a child lying on the floor. By that time my foot was burning and I decided to go out. Viki went in and came out with the child....I never saw Nomalungelo*

*bearing a child when I poured the petrol on the sofa. I did not see Cebolethu at that time."*

- [17] The accused further denied having seen Cebolethu in the morning when she came to fetch the health card for her child. Asked if she saw the other children in the flat, she answered in the affirmative but said they were two and they bolted out when they saw her pour the petrol. She further stated that she had no intention to kill anyone when she poured the petrol and lit the matches.
- [18] During cross -examination the accused was asked if she did not know that the child was in the flat or did not know where about the child was in the flat. She answered that she did not know the place where the child was in the flat. This suggests that she knew that the child was in the flat but proceeded to set the flat on fire anyway. It was also put to her that per her evidence in chief she entered the flat four times on this day and it was not possible that she could not have seen the child. She admitted only entering the flat twice yet in chief she did mention three instances where she entered the house. She denied ever entering the house to boil water yet in chief she stated;

*"I sent a child Temashayina to get a kettle from the main house so that I could boil the water and I boiled it from Sandile's house."*

[19] By her own admission she did enter the flat at least three times on this day. That is in the morning when she collected the health card, in the afternoon when she boiled the water, and when she poured the petrol and set the flat on fire. It baffles anyone's imagination how she could not see the child who was evidently inside the flat.

### **CONCLUSION**

[20] As already stated above I am unable to conclude that the accused threw the lit matchstick on the deceased child. However by her own admission her intention was to burn down the flat in which the deceased was. I totally dismiss the contention that when she lit the matches and burnt the flat the accused was not aware that the helpless child was inside. The child was visible to everyone and that is why when PW2 came into the flat which was already on fire asked; *"why are you burning the child?"*.

[21] The accused person was not only aware that the child was in the flat but she actually saw the child. If her intention was only to burn the flat, she would not have poured the petrol only on the sofa where Nomalungelo and her child were seated. The petrol would have been poured on to some other parts of the flat or on other items in the flat. There is no evidence to this effect.

[22] For the foregoing reasons the court returns the following verdict.

**22.1 COUNT ONE**

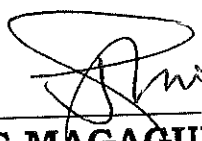
The accused is found guilty of murder as charged.

**22.2 COUNT TWO**

The accused is found guilty of malicious injury to property per her plea.

**22.3 COUNT THREE**

The accused is found guilty of Arson per her own plea

  
**J.S MAGAGULA**  
**JUDGE OF THE COURT**

For the Crown : A. Mkhaliphi

For the Accused : S. Bhembe