

### HELD AT MBABANE

**IN THE HIGH COURT OF ESWATINI**

**CASE No . 146/2022**

In Matter bet ween:

### REX

And

### SEBENELE MAGONGO

**Neutral citation:** *Rex v Sebenele Magongo (146/22) SZHC 291*

*[2022] (20.10.2023)*

**CORUM:** Magagula Z

**Date heard:** 22.08 .23 & 19.09.23

**Date delivered:** 20.10.23

*Summary:*

*Sentence:*

*Criminal Law* - *Culpable Homicide* - *accused charged with Culpable Homicide*- *Accused Pleading guilty- sta tement of agreedfacts presented- Ac use d found guilty*

*of the charge.*

*Courtcon sidered rage of sentencing* - *Interest of society not be served by wholly custodial sentence.*

*Accused sentenced to* 7 *000 .00 fine or 5 years imprisonment.*

MENT

[1]

The accused, Sebenele Fano

gongo is charged with crime of Culpable

[2]

Homicide. It is alleged in the in 1ctment as fo llo w s;

*"In that upon or out the 16th March 2022 and at or near Mbadlane area i the Lubombo Region, the said accused person did unto ully and negligently kill one Thabi so Magongo by stra ulating him and did thereby commit the crime of Culpable* / *omicide"*

When the accused was arraig d in court on the 22nd August 2023 duly assisted by Counsel, he plead I guilty to the charge.

[3] The Crown accepted the plea d informed the court that a st at ement of agreed facts would be filed., n the 1 9 t h September the statement of agreed facts was filed and th Crown further submitted a photo album with pictures taken from the ne, a post-mortem examination report, a statement made by the accu . d before judicia l officer, Lungile Shongwe

of the Siteki Magistrate cour the affidavit of 7379 Detective Constable Thembinkho si Hlandze, two I amsung cellphones and all these were

admitted into evidence by co Ient.

[4]

The st at ement of agreed fac w hose contents were confirmed by both the accused and his counsel s read into the record as follows:

The accused and the decease are brothers. The accused was home with his mother when the deceas came home with one Ncamiso Ndzinisa. The deceased borrowed the cused's house key and went to the house. The accused who wanted o charge his phone followed him and

proceeded to retrieve the c

deceased was in the kitchen deceased refused to hand o with which he poked the ace

rger from his bedro om. At that time the d when accused asked for his key back, the r the keys and picked up a "brick" hammer

sed and challenged him to a fight.

[5] The deceased proceeded to · the accused on the head with the hammer. A st r uggl e ensued between t two until they were separat ed by Ncam iso Ndzini sa and accused's mot

[6]

[7]

The deceased who was suf ring from so m e sort of mental disorder was encouraged by the mother I take his m edicatio n and also admonished to refrain from taking alcoh I becau se he was noticeably drunk.

Accused went back into th house and locked himself in. The deceased managed to unlock the mai oor, entered into the house, armed himself with a bush knife and went to the accu sed' s bedroom demanding that they fight until either of th m died. Sadly, that is what happen ed. The deceased went on to attac I he accused who lost h is temper and fought back. He st r angulat ed the d eased until he died.

1. When the accused realised hat the deceased was no longer struggling, he info rmed the elders wh came to see for t hem selves and concluded that the deceased was dea The alarm was r aise d, neighbours came to assist and member of the P li ce Service were called.
2. The report on post-m o rt e death was "death due to m

examination concluded that the cause of ual strangulation"

[10) I am of the considered view at the Crown has in the statement of agreed facts as well as the accused own plea of guilty, proved its case beyond reasonable doubt . The accu d is accordingly found guilty of the offence of Culpable Homicide.

[11) The verdict was pronounce in court on the 19th September 2023. The acc used bail was then term ated in accordance with Section 145 of the Cr im ina l Procedure and Evid ce Act 67/1938 and remanded into custody pending sentence

**JUDGEMENT ON SENTENCE**

1. In Mitigation of sentence it as subm it t ed on behalf of the accused that he is a first offender, had hown remorse by pleading guilty and not wast ing the court's time, he ad a wife and two very young children who all depended on him for ma1 t enance ; t his he did by doing odd jobs for a living.

[13) It was further submit t ed th the court should take into account the fact that the deceased w as the a r esso r who first st ruck the accused with the brick hammer then challen d him to a fight while brandishing a bush knife.

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* 1. In considering what is appro riate sentence, the court is guided by the wise words of **Holmes JA in S Rabbie 1975 (4) SA 855** where he said;

*"Punishment sh Id fit the Criminal as well as the crime, be fair to society d be blended with a measure of mercy acco rding to the* I *ircumstances"*

## Against the accused's person interest of society. A life was accused acted differently su being alive to the fact that t an "arm-chair critic.

circumstances, the court must balance the st in circumstances where perhaps had the loss could have been avoided . This, I say court shou ld avoid taking the position of

* 1. In **S v Zinn 1969 SA (2) at 54** he court admonished that;

# *11 A Judicial offic* of anger becaus him to achieve t criminal and the object of senten

*should not approach punishment in a spirit being human, that will make it difficult for t delicate balance between the crime, the terests of society which is his task and the ng"*

[17) And in S v Rabbie (supra) a 865, the court cautions that punishment should not be approached in spirit of anger ***"because he who comes to punishment with a wrath* w *never hold that middle course which lies between* too *much and* too *I tie"***

## [18) In this jurisdiction sentencin rends are such that sentences for Culpable Homicide range from zero to en years with each sentence reflecting the seriousness of the off ence. he appeal court had this to say in Musa Kenneth Nzima v Rex Crimin I Appeal no. 21/2007:

*"There are ob*· *usly varying de gree s of culpability in Cul pable Hamic e offences. This court has recognised this and in confirmi a sentence of 10 year's imprisonment in what it de scri d as an extraordinarily serious case of culpable homici* I *said that the sentence was proper for an offence "at "he ost serious end of the scale of such a crime"*

***{See Bongani umsani Amos Dlamini v Rex case no.12/ 2005 ).*** *A ntence of 9 year's seems to me also to be warranted in cu able homicide conviction only at the most serious end oft scale of such crimes. It is certainly not one to be imposed i very such con viction. The present appeal is*

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# *one such case. A* re fe rred , it seem the individual

*rt from the misdirection to which I earlier*

o *me that insuffi cient weight was given to cts of the case and to the personal e Appellant"*

[19] Also quoted with approval by ophe J (as he then was) in **Re x v M pendulo Bonny Ginindza {1 67 /2017)** [ 1 **20] SZHC 77 .**

## [20]

[21]

## It seems to me that the offen scale and a custodial senten the appropriate sentence. A Mpendulo Bonny Ginindza ( with money, there are inst custodial one should be serio

The present matter is, in my the circumstances of the accused and interests of so custodial sent ence. Factors aggressor, had armed hims ready to fight to the end, t offence and though his acti self defence, he was defendi

in this matter is on the lowest end of the s without the option of a fine may not be bserved by Hlophe J (as he then was) in pra) "Even though life cannot be bought ces where an alternative sentence to a ly considered and perhaps even imposed"

inion, once such inst ance and I believe that tt er, the personal circumstances of the ety may not best be served by a wholly uch as that the deceased was the init ial with a bush knife and declared himself accused pleaded guilty to a very serious s may have fallen short of the defence of

himself.

1. In the result the following se enced is passed against the accused.
	1. The accused is s tenced to a fine of E 7 000.00, in default of

isonment for a per iod of 5 years.

* 1. Half the senten is suspended for a period of (3) thre e years on the conditi that the accused is not conv ict ed of an offence in whic violence is an elem ent .
1. On application by Counsel f the accused, there being no objection from the Crown the bail deposit i the su m of E 3 000.00 paid by the accused on 25t h March 2022 is conveIed to be part of the fine.

**e High Court**

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### Appearances:

For the Crown - B.Fakudze (DPP's Cham ber s} For the Defence - M. V Nxumalo