



**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

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

*Sentence: 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.*

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- [1] The accused, Sebenele Fano megongo is charged with crime of Culpable Homicide. It is alleged in the indictment as follows;

*"In that upon or out the 16<sup>th</sup> March 2022 and at or near Mbadlane area in the Lubombo Region, the said accused person did unlawfully and negligently kill one Thabi so Magongo by strangulating him and did thereby commit the crime of Culpable Homicide"*

- [2] When the accused was arraigned in court on the 22<sup>nd</sup> August 2023 duly assisted by Counsel, he pleaded guilty to the charge.

- [3] The Crown accepted the plea and informed the court that a statement of agreed facts would be filed. On the 19<sup>th</sup> September the statement of agreed facts was filed and the Crown further submitted a photo album with pictures taken from the scene, a post-mortem examination report, a statement made by the accused before judicial officer, Lungile Shongwe of the Siteki Magistrate court, the affidavit of 7379 Detective Constable Theminkhosi Hlandze, two Samsung cellphones and all these were admitted into evidence by consent.

- [4] The statement of agreed facts whose contents were confirmed by both the accused and his counsel is read into the record as follows:

The accused and the deceased are brothers. The accused was home with his mother when the deceased came home with one Ncamiso Ndzinisa. The deceased borrowed the accused's house key and went to the house. The accused who wanted to charge his phone followed him and proceeded to retrieve the charger from his bedroom. At that time the deceased was in the kitchen when accused asked for his key back, the deceased refused to hand over the keys and picked up a "brick" hammer with which he poked the accused and challenged him to a fight.

- [5] The deceased proceeded to strike the accused on the head with the hammer. A struggle ensued between the two until they were separated by Ncamiso Ndzinisa and accused's mother.

- [6] The deceased who was suffering from some sort of mental disorder was encouraged by the mother to take his medication and also admonished to refrain from taking alcohol because he was noticeably drunk.
- [7] Accused went back into the house and locked himself in. The deceased managed to unlock the main door, entered into the house, armed himself with a bush knife and went to the accused's bedroom demanding that they fight until either of them died. Sadly, that is what happened. The deceased went on to attack the accused who lost his temper and fought back. He strangled the deceased until he died.
- [8] When the accused realised that the deceased was no longer struggling, he informed the elders who came to see for themselves and concluded that the deceased was dead. The alarm was raised, neighbours came to assist and members of the Police Service were called.
- [9] The report on post-mortem examination concluded that the cause of death was "death due to manual strangulation".
- [10] I am of the considered view that the Crown has in the statement of agreed facts as well as the accused's own plea of guilty, proved its case beyond reasonable doubt. The accused is accordingly found guilty of the offence of Culpable Homicide.
- [11] The verdict was pronounced in court on the 19<sup>th</sup> September 2023. The accused's bail was then terminated in accordance with Section 145 of the Criminal Procedure and Evidence Act 67/1938 and remanded into custody pending sentence.

### **JUDGEMENT ON SENTENCE**

- [12] In mitigation of sentence it was submitted on behalf of the accused that he is a first offender, had shown remorse by pleading guilty and not wasting the court's time, he had a wife and two very young children who all depended on him for maintenance; this he did by doing odd jobs for a living.
- [13] It was further submitted that the court should take into account the fact that the deceased was the aggressor who first struck the accused with the brick hammer then challenged him to a fight while brandishing a bush knife.

[14] In considering what is appropriate sentence, the court is guided by the wise words of **Holmes JA in S v Rabbie 1975 (4) SA 855** where he said;

*"Punishment should fit the Criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances"*

[15] Against the accused's circumstances, the court must balance the person interest of society. A person in circumstances where perhaps had the life was accused acted differently such as being alive to the fact that it is an "arm-chair critic".

[16] In **S v Zinn 1969 SA (2) at 54** the court admonished that;

*"A Judicial officer should not approach punishment in a spirit of anger because spirit being human, that will make it difficult for the delicate balance between the criminal and the crime, the interests of society which is his object of sentencing"*

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

[18] In this jurisdiction sentencing trends are such that sentences for Culpable Homicide range from zero to ten years with each sentence reflecting the seriousness of the offence. The appeal court had this to say in **Musa Kenneth Nzima v Rex Criminal Appeal no. 21/2007**:

*"There are obviously varying degrees of culpability in Culpable Homicide offences. This court has recognised this and in confirming a sentence of 10 years imprisonment in what it described as an extraordinarily serious case of culpable homicide said that the sentence was proper for an offence "at the most serious end of the scale of such a crime" {See **Bongani umsani Amos Dlamini v Rex case no.12/ 2005** }. A sentence of 9 years seems to me also to be warranted in culpable homicide conviction only at the most serious end of the scale of such crimes. It is certainly not one to be imposed in every such conviction. The present appeal is*

one such case. A  
 referred, it  
 seem  
 instances of the  
 individual  
 approval by Hlophe Appellant"

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

[20] It seems to me that the offence in this matter is on the lowest end of the scale and a custodial sentence without the option of a fine may not be the appropriate sentence. As observed by Hlophe J (as he then was) in *Mpendulo Bonny Ginindza* (para) "Even though life cannot be bought with money, there are instances where an alternative sentence to a custodial one should be seriously considered and perhaps even imposed"

[21] The present matter is, in my opinion, once such instance and I believe the circumstances of the case that thereafter, the personal circumstances of the accused and interests of society may not best be served by a wholly custodial sentence. Factors such as that the deceased was the initial aggressor, had armed himself with a bush knife and declared himself ready to fight to the end, the accused pleaded guilty to a very serious offence and though his act may have fallen short of the defence of self defence, he was defending himself.

[22] In the result the following sentence is passed against the accused.

1. The accused is sentenced to a fine of E 7 000.00, in default of which the sentence is imprisonment for a period of 5 years.
2. Half the sentence is suspended for a period of (3) three years on the condition that the accused is not convicted of an offence in which violence is an element .

[23] On application by Counsel for the accused, there being no objection from the Crown the bail deposit in the sum of E 3 000.00 paid by the accused on 25<sup>th</sup> March 2022 is conveyed to be part of the fine.

  
 .....  
 J. Magagula  
 Judge of the High Court

**Appearances:**

For the Crown - B.Fakudze (DPP's Chamber s}

For the Defence - M. V Nxumalo