

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 207/2021

In Matter between:

REX

And

BANELE MFANZILE BHUTERI FRAIZER

Neutral citation: Rex v Banele Mfanzile Bhuteri Fraizer (207/2021)
SZHC 313 [2021] (06.11.2023)

CORUM: Magagula Z

Date heard: 26.06.23, 27.06.23 & 17.07.23

Date delivered: 06.11.23

Summary: Criminal law: accused charged with murder – Prosecution evidence establishing all the elements of the offence – Accused electing not to give evidence in his defence – Accused found guilty of murder.

JUDGMENT

- [1] The accused person stands charged before me with the crime of murder. The indictment alleges that on or about the 25th April 2021 and at or near Msunduza area in the Hhohho region, the said accused person did unlawfully and intentionally stab one Machawe Siza Msibi with a sharp object several times on the upper body and did thereby commit the crime.
- [2] When the charge was put to the accused person, he pleaded not guilty and the plea was confirmed by his counsel, Mr S.Zwane.
- [3] By consent of the parties the following were admitted into evidence:

The first is the Post-mortem report prepared by Dr RM Reddy which was marked exhibit "A". According to Dr Reddy the cause of death was **"due to complications subsequent to injury over [the] neck"** the report further noted the following ante mortem injuries;

- (a) Sutured wound over neck left side obliquely placed present 3.4 cm length above medial end of clavicle on dissection, it involved muscles, nerve, blood vessel vein effusion blood in neck structures retropharyngeally mixed with pus.*
 - (b) Sutured wound over left-forearm 2.7 cm deep present and back of arm 1.4 cm muscle deep.*
 - (c) Sutured wound outer aspect of right chest 5cm length muscle deep.*
 - (d) Sutured wound obliquely placed above left nipple outer aspect 7.5 cm muscle deep present.*
 - (e) Sutured wound below left nipple 4cm cavity deep present outer aspect and 2 cm length muscle deep.*
- [4] Second, a compilation of photographs showing the deceased in various "poses" during the post –mortem examination was also admitted in evidence and marked exhibit "B"
- [5] Third, the court was informed that the accused made a confession freely and voluntarily before a magistrate. There was no objection to the handing in of the same nor was the free and voluntaries of the statement challenged on behalf of the accused person. The statement was

accordingly marked exhibit "E". In short the accused person, in his statement stated that the deceased was proposing his girlfriend. That he had done so with a previous girlfriend and they sorted the matter out , with the deacease undertaking not to court, the accused person's girlfriend again. The accused stated further that he stabbed the deceased twice on the neck because the deceased had earlier on that same evening threatened him with a bush knife and at the time he stabbed him he was carrying a knife and a beer bottle. The deceased died from the injuries.

[6] **EVIDENCE**

The Crown led the evidence of three witnesses. Pw1 was Philisiwe Temhlanga Masuku. She told the court that she resides at Msunduza, within the Mbabane urban area, Hhohho region. Pw1 was the accused person's girlfriend. In April 2021 she was 20 years old. She told the court that on the 25th April 2021, she went to visit the deceased at his house after he had called her. The deceased lived at Msunduza Township. She was also in a relationship with the deceased.

- [7] While Pw1 was with the deceased, outside his house, the accused came along and a quarrel ensued between the accused person and the deceased. They were shoving each other. Thereafter the accused left and the deceased went to purchase some alcohol together with one Thandolwethu. Later the accused confronted Pw1 about her relationship with the deceased, to which Pw1 responded that she was cheating on the accused because he also cheated on her.
- [8] When the deceased came back from purchasing alcohol, he found the accused still talking to Pw1. After a brief altercation between them, she saw the accused making a gesture if he was hitting the deceased with a fist, but then saw the deceased bleeding from around the heart and from the neck. Pw1 said she saw then that the accused was carrying a green knife which she was able to identify positively when she was shown one by the Crown Counsel.
- [9] Pw1 also identified a brown shirt and Addidas track pants that were worn by the accused on the night.
- [10] In cross-examination it was put to Pw1 that she was the cause of the death of the deceased by dating both men at the same time. She put the blame on the accused. Below is the question and answer on the issue.

Defence Counsel Q: You were dating two guys at the same time?

Pw1 A: "Correct"

Defence Counsel Q: Did it bother you that dating two guys at the same time might cause a problem?

Pw1 A: "No it did not"

D.C Q: "I put it to you that you were the sole cause of the problems? We wouldn't be here otherwise"

Pw1 A: "I realize that"


- [11] What perhaps struck me was the casual way and complete lack of remorse that such a young person in her early 20's would approach what I would consider a very weighty matter.
- [12] It was further put to Pw1 that the accused would lead evidence that the deceased would on many occasions in the past fight the accused over Pw1, she denied ever witnessing such. It was further put to the witness that evidence will be led that on the day deceased was stabbed, he had chased the accused with a bush knife with the intention to assault him. Pw1 denied this. This again she denied.
- [13] Pw2 was Thandolwethu Sihlongonyane, a resident of Mgababa, within the Mbabane urban area. Pw2 told the court he knew both accused and the deceased. That he actually grew up with the accused and they attended the same primary School.
- [14] On the 25th April 2021 he visited the deceased who was with other friends drinking alcoholic beverages in deceased's house. The deceased went out of the house to talk to Pw1 and they, that is Pw1 and the deceased were confronted by the accused and an altercation ensued between the accused and the deceased. They started pushing each other as if in readiness to start a physical fight. They were separated by deceased's drinking mates who also instructed the accused to leave.
- [15] Pw2 testified that when the fight between the accused and the deceased was broken up, the deceased went into his house where he retrieved a leather cane (insilane) and chased after the accused. The deceased was dispossessed of the cane by his friends and they continued with their drinking. When they ran out of alcohol deceased asked Pw2 to accompany him to a place where they could buy more alcohol. They were accosted by

the accused along the way who was armed with a knife. The deceased drew his own knife and they started shoving each other but nothing serious happened.

- [16] On their way back they found accused talking to Pw1. The deceased called Pw1 to follow him which she did. Right there and then the accused came screaming and stabbed the deceased twice on the back, on the neck, on the breast and twice on the left hand. The deceased was taken to hospital where he passed on. Pw2 denied that the accused was chased by the deceased with a bush knife.
- [17] In a brief cross – examination of Pw2, the defence did not elicit any significant evidence other than the witness simply recited his evidence in chief.
- [18] Pw3, was Detective Nimrod Motsa who told the court that he was a police officer attached to the scenes of the crime department at the Hhoho Regional Police headquarters. He narrated briefly that he was called on the 5th May 2021 to the Mbabane Government Hospital where he found the deceased lying dead on a metal gurney. Pw3 took pictures of the deceased's injuries and these were presented to the court.
- [19] The last Crown witness, Pw4, was detective Constable Zakhele Gamedze of the Mbabane Police Station. He testified that on the 4th May 2021 he was given a docket relating to the death of Machawe Msibi and it was suspected that he was killed by Banele Fraizer. Pw4 together with other police officers they went to Fonteyn when the accused was arrested and detained at the Mbabane Police Station. After the accused was warned according to the Judges Rules he opted to say something and he was taken to the Magistrates court where he made a statement before a magistrate.
- [20] The accused was again warned according to the Judges Rules that he was not obliged point out anything, but anything he pointed out and would be taken and may be produced before court as evidence against him. The accused freely and voluntarily led the Police officers to Msunduza where he pointed out the following items:

- (a) *A long knife with a green handle*
- (b) *A khakhi shirt*
- (c) *Black Addidas track pants with blue stripes*

- [21] All these items were admitted into evidence and marked as exhibits. The knife was marked exhibit "C" and the shirt and the pants collectively marked exhibit "D".
- [22] At the close of the Crown case Counsel for the accused indicated that the Defence was closing its case without leading evidence. Both the Crown and Defence Counsel filed written submissions which I found to be very helpful.
- [26] I find that the Crown's evidence is largely credible and I have no hesitation in accepting it. The only discrepancy with the Crown's evidence appears where Pw1, denied that the deceased was at some point carrying a knife and/or that the deceased chased after the accused. Pw2, Thandolwethu Sihlongonyane on the other hand told the court that the deceased drew his knife when they met the accused on their way to purchase alcoholic beverages and that later on in the evening, he chased after the accused with a leather cane. It could be Pw1 did not see the knife or the chase. In my view this does not mean I should reject her evidence in its entirety. The fact that two Crown witnesses or one of them may have been shown to have lied on this point would not justify or warrant a total rejection of their evidence on the rest of the matter – See the Judgement of Mamba J (as he then was) with Banda CJ (as he then was) concurring in **Lucky Nhlanhla Khumalo v Rex Criminal Appeal case no.19/08**.
- [27] The evidence of both Pw1 and Pw2 is in my opinion unaffected by this slight inconsistency, as it was pointed out in R v Khumalo 1964 AD 480 at 484, that the triers of fact are entitled, while rejecting one portion of the sworn testimony of a witness to accept another portion.
- [28] A striking feature of this matter is that in the face of the evidence against him the accused chose to lead no evidence. This inspite of the fact that it was put to at least Pw1 and Pw2 that the accused would lead evidence to refute certain aspects of their evidence.
- [29] In the circumstances, I find the accused guilty of the murder of Machawe Msibi.


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Z. Magagula
Judge of the High Court

Appearances:

For the Crown – Bhekiwe Ngwenya

For the Respondent – Siyabonga Zwane