

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 495/2019

In the matter between:

REX

VS

OSCAR METHULA (1st ACCUSED)

MACHAWE NDWANDWE (2nd ACCUSED)

Neutral citation : *Rex v Oscar Methula and Another (495/2019)*
[2023] SZHC 24 (28/02/2022)

CORAM: B.S. DLAMINI J

DATE HEARD: 25 November 2022

DATE DELIVERED 28 February 2023

Summary:

Criminal trial-Accused persons facing a charge of murder. During trial, plea of not guilty entered by accused persons. Court required to determine whether or not the accused persons are guilty of the offence of murder.

Held;

The evidence led by the Crown shows that the accused persons are guilty of culpable homicide and not murder. Accused accordingly found not guilty of murder but guilty of culpable homicide.

JUDGMENT

INTRODUCTION.

[1] The Accused persons in this matter are Oscar Methula and Machawe Ndwandwe. Oscar Methula is Accused No.1 and Machawe Ndwandwe is Accused No.2. The Crown preferred a charge of Murder against the accused persons who are said to have been acting in

common purpose in the commission of the said offence. The Crown alleges that the accused persons unlawfully and intentionally killed one Thubelihle Maphanga on or about the 16th November 2016.

- [2] At the trial, the accused persons entered pleas of not guilty thereby requiring the Crown to prove commission of the said offence beyond reasonable doubt. At the close of the Crown's case, the accused persons moved an application for acquittal in terms of Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938. This application was declined by the Court and the reasons therefore were fully explained in a written judgment issued on the 14 July 2022.

CROWN'S CASE

- [3] Busisiwe Dlamini (PW1) was the first witness to testify on behalf of the State. This witness is the biological mother of the deceased. Her testimony was that on 16th November 2016, she and her daughter (hereinafter referred to as "the deceased") left the Manzini Bus Rank in a public transport, a Toyota Quantum, also known as a 'kombi'. The witness and the deceased occupied the back seat of the kombi.

- [4] As PW1 and the deceased were on route to their destination, she (witness) received a call on her mobile phone. While the witness was talking on her phone and after passing William Pitcher College, the bus conductor who is accused no.2 began to collect bus fare from the passengers. PW1 gave Accused No.2 a E 20.00 note as bus fare while she was still talking on her phone and indicated that she was paying for herself and the deceased.
- [5] After paying to accused no.2 the witness was given change by the former and she sought to put the change in her hand-bag. The deceased however held her hand and informed her that the change given by Accused No.2 was short of E 2.00. Accused No.2 had given change of E 6.00 instead of E 8.00. PW1 noticed the anomaly and indicated to Accused No.2 that the change he had given to her was short of E 2.00. Accused No.2 dismissed PW1's protest and indicated to her that the correct amount of change was given to her.
- [6] When the kombi reached their destination, a place called Canaan (past Fair View area), PW1 alighted from the kombi and stood on the ground, waiting for her daughter to also alight. The deceased however declined to alight from the kombi and demanded that Accused No.2

must give her or her mother (PW1) the missing E 2.00. PW1 asked the deceased to alight from the kombi but the latter refused, arguing that kombi operators were used to short-changing them and that this practice had become a norm. Accused No.2 refused to budge and insisted that he had given the correct change.

[7] PW1's testimony was that Accused No.2 got back into the kombi and it immediately took off at high speed and the witness had to quickly jump out of the way in order to avoid being bumped. According to PW1, when the kombi took off, the deceased was still inside and was standing behind the seat normally occupied by the conductor. The kombi sped off to a place called 'Mpholi' which is the final destination of all kombis servicing this particular route.

[8] The evidence by PW1 was that she, together with Tengetile Shongwe and Nomzamo Dlamini who had also alighted from the kombi waited for the kombi to return from Mpholi. There was also another female who was a friend to the deceased by the name of Gugu waiting with the trio at the bus station.

- [9] The kombi which had taken off with the deceased later came back driving at high speed. PW1 thought the kombi was not going to be able to stop looking at the speed at which it was being driven. Immediately after passing them while they were standing in the opposite direction, the witness saw the deceased falling off from the kombi while it was being driven at high speed. After a while the witness saw the plastic bags which were being carried by the deceased before the fall also being thrown out of the kombi.
- [10] PW1's testimony was that she saw the deceased falling head-first onto the tarred road. The witness estimated the distance between the spot where the deceased fell and where the plastic bags landed to be about 15 metres. The kombi or 'Quantum', according to PW1, continued to drive away until it came to a stop at a certain corner along the way to Manzini.
- [11] According to PW1, the deceased was lying motionless on the tarred road and people around her were screaming after noticing the incident. The witness, who at the time was sitting down and crying heard Gugu calling the name of her son to urgently come to the bus station. The witness later came closer to the deceased and noticed one

foot of the deceased moving but the rest of her body was not moving. Gugu also called paramedics on her mobile phone. The witness called the deceased's father to relate to him on what had just happened. Police arrived at the scene and the deceased was loaded in a van and rushed to the Raleigh Fitkin Memorial Hospital ("RFM hospital").

- [12] PW1's evidence was that as they were transporting the deceased to hospital, they came across an ambulance and they signaled for it to stop. The deceased was transferred from the van to the ambulance and the para-medics administered first aid to her. The witness noticed that the health condition of the deceased was deteriorating. On reaching RFM hospital, the deceased was placed on a bed and taken to an emergency room. As the deceased was being treated, her father arrived at the hospital. PW1 was called aside by the Medical Practitioner attending to the deceased and was informed that the injuries sustained during the fall were severe. The Doctor suggested that deceased be taken to Manzini Clinic where she would receive treatment under the Phalala Fund. Indeed the deceased was taken to an ambulance and transported to Manzini Clinic.

[13] At Manzini Clinic, the deceased was placed in an emergency room where she was treated and put on a scan. After receiving treatment at Manzini Clinic, deceased was taken back to RFM hospital and placed at the Intensive Care Unit (ICU). The deceased, according to PW1, remained at the ICU from the 16th November 2019 up until the 19th of that month. On the 20th of the month, the deceased was brought to the ward and was unconscious. The deceased was also mentally unstable as she was fighting and tearing papers she could lay her hands on. The injuries, according to PW1, were on the left side of her face and stretched up to the left ear. PW1's testimony was that the deceased eventually died on the 24th November 2016. This was approximately one week after the incident.

[14] The witness was cross-examined at length by the Accused persons' legal representative. The defence raised on behalf of the accused persons during cross-examination was that the deceased was the one who had opened the kombi passenger door while the vehicle was in motion and had thrown herself out of the moving vehicle together with her groceries. The defence sought to establish that the kombi was not speeding as alleged when it came back from Mpholi. It was also

the defence's contention that Accused No.1 intended to drive with the deceased to the police station in order that the impasse between her and Accused No.2 be resolved.

[15] PW2 (Khumbuzile Bongiwe Sikhondze) is a resident of Mbekelweni area. This witness was one of the passengers who boarded the same kombi with PW1 and the deceased on the 16th November 2016 from Manzini Bus Rank. PW2's testimony was that along the way to Mpholi, the bus conductor (Accused No.2) began to collect bus fare from the passengers. As Accused No.2 was collecting bus fare, the witness heard two passengers who were seated at the back seat of the kombi complaining that their change was short of E 2-00. According to PW2, the passengers complaining of being short-changed were related.

[16] The evidence by PW2 was that the passengers complaining of being short-changed were supposed to alight from the kombi at Canaan Bus Station. When the kombi reached Canaan Bus Stop, the mother alighted from the kombi but the deceased remained behind. The deceased according to PW2, refused to alight from the kombi until the

correct change was given to her mother (PW1). The deceased and Accused No.2 exchanged heated words as the latter insisted that he had given the correct change to PW1. At that moment the kombi took off at high speed whilst the deceased was still standing behind the conductor's seat.

- [17] The witness stated that the final destination of the kombi is a place called Mpholi. PW2 was the last person to alight from the kombi at Mpholi area. According to PW2, when it was her turn to disembark from the kombi, the deceased had to give way to her. The deceased, according to PW2, was standing behind the conductor's seat. The conductor's seat had to be folded to allow PW2 to pass and exit the kombi. When the kombi turned back to Manzini from Mpholi, there were only three people left inside, being the driver (Accused No.1), the conductor (Accused No.2) and the deceased. PW2's evidence was that after dropping her off at Mpholi, the kombi took off at high speed and the witness reasoned that the driver was in a hurry since it was already the rush hour.

[18] PW2 was also cross-examined by accused person's legal representative.

It was put to this witness that after dropping off at Mpholi, she could not see what was later to take place at Canaan. It was also put to this witness that after alighting from the kombi, she could not see the sitting arrangement inside the kombi particularly between Accused No.2 and the deceased. It was also put to PW2 whether it was not possible that the deceased and Accused No.2 exchanged seats after the kombi left Mpholi. PW2 responded by stating that in order for that to happen, the kombi needed to first come to a complete stop as the chair occupied by the conductor needed to be folded first and kombi's door opened in order for the two to exchange seats. Accused persons' legal representative put it to PW2 that in fact the kombi did stop but the latter's response was that it did not stop after dropping her off and turning towards the Manzini direction.

[19] PW3, Tengetile Bongiwe Shongwe, is a resident of Bethany area and used to stay at Fairview area in the Manzini Region. This witness was also a passenger who boarded the same kombi from Manzini Bus Rank to Mpholi area on the 16th November 2016. The witness confirmed that there was an altercation between the deceased and

Accused No.2 involving a sum of E 2.00 which was allegedly withheld from the change given to PW1. The witness stated that she got off from the kombi at Canaan bus station and also waited with PW1 for it to return from Mpholi area.

[20] PW3 confirmed that when the kombi took off at high speed from Canaan bus stop, the deceased was standing behind the seat occupied by the bus conductor. The testimony by PW3 was that when the kombi came back from Mpholi, she enquired from PW1 if it will be able to stop in light of the speed it was travelling at. When the kombi was on the other side of the road, almost opposite to where they were all standing, the witness saw the kombi door opening while the kombi was still travelling at high speed. Almost immediately, the witness saw the deceased falling from the kombi. The plastics bags which were carrying groceries fell off from the kombi after the deceased. PW3 stated that when the kombi came back from Mpholi, there were only three people inside.

[21] According to PW3, when the deceased fell from the kombi, people started shouting and went closer to where the deceased was lying.

PW3 was not able to see the deceased's sitting or standing position when the kombi came back from Mpholi. This witness left the scene after the deceased had been loaded into a van which was to take her to hospital.

[22] PW4 was Gugulethu Simelane, a resident of Canaan area in Manzini. This witness described herself as the deceased's best friend. On the 16th November 2016, PW4 received a call from the deceased while she (deceased) was at Manzini Bus Rank. The deceased informed PW4 to meet her at Canaan bus stop so that she (deceased) could buy roasted maize for her. The arrangement between the two was that the deceased was to call this witness when the kombi was nearer the bus station. Indeed the deceased called PW4 when it was about to reach Canaan bus stop and the witness left her home in order to meet with the deceased.

[23] When the kombi got to Canaan bus station, PW4 was already at the bus station waiting for the deceased to alight. PW's testimony was that only the deceased's mother and other passengers alighted from the kombi. This witness could see the deceased standing behind the

conductor's seat inside the kombi. When PW4 enquired from PW1 as to why the deceased was not getting off from the kombi, PW1 informed this witness that the deceased was demanding to be paid E 2-00 which Accused No.2 was withholding as change. Both PW4 and PW1 laughed as they thought the money involved was too small.

[24] As PW4 and PW1 were waiting for the kombi to come back from Mpholi area, they saw it coming back and being driven at a high speed. PW4 saw Accused No.2 opening the kombi door and then pushing the deceased out of the moving vehicle. The evidence by PW4 was that before the push, the deceased was still standing behind the conductor's seat. According to PW4, Accused No.2 held the deceased around the shoulder area and then proceeded to push her out of the moving vehicle with the result that the deceased fell head-first onto the tarred road. The groceries in the possession of the deceased were then thrown out of the kombi after the deceased had already fallen or pushed out.

[25] In summing up her evidence, PW4 stated that it is not true that the deceased had attempted to commit suicide in the past. The witness

stated that she saw blood coming from the deceased after she fell on the ground. There was also an injury on the deceased forehead when PW4 went to look at her as she was lying on the ground.

[26] PW4 was cross-examined at length by the accused persons' legal representative. The defence raised during the cross-examination of PW4 was that the latter could not see what was happening inside the kombi from where this witness was standing. It was disputed that Accused No.2 was the one who pushed the deceased out of the moving vehicle. The defence also sought to point out a discrepancy regarding the relationship between the deceased and PW4. It was pointed out that in a recorded statement with the police, PW 4 had stated that she was a sister to the deceased and yet in her testimony in Court she stated that she was a best friend to the deceased. In response, PW4 stated that the close relationship between them led her to take the deceased as her own sister.

[27] The defence also sought to point out that PW4 could not see inside the kombi as its windows were tinted. PW4 insisted that the windows were clear and she could clearly see what was happening inside the

kombi. It was further put to PW4 that evidence had been led to the effect that in order for the deceased to be able to come out of the vehicle, the kombi had to first come to a stop and the conductor's chair folded. PW4's response was that Accused No.2 did not fold his chair but simply held the deceased on her shoulders and proceeded to force her out while the vehicle was in full motion.

[28] Dr Swapnika Enugala was called by the Crown as PW5. This witness is employed as a Police Pathologist and has been working in this position since the year 2016. The witness stated that when the deceased was brought to RFM hospital on the 16th November 2016, she was unconscious and had multiple bruises and superficial abrasions on the forehead, left arm, right hip, right supraorbital region and had a swelling on the right orbit.

[29] The evidence by PW5 was that the main injury inflicted on the deceased during the fall from the vehicle was on the head and on the right side of the face. The cause of death according to PW5 was bleeding in the skull due to excessive traumatic injury. The injury, according to PW5 was capable of causing the death of the patient.

[30] PW6, Bongani Matse, is a resident of Fairview and a half-brother to the deceased. The witness confirmed to have received a call in the afternoon hours on the 16th November 2016. The call notified this witness that his sister had been injured at the bus stop. When the witness arrived at the bus stop, he found that there were many people who had converged around his sister who was lying on the ground. When the witness enquired as to what had happened to his sister, he was informed that she had been pushed out of a moving vehicle and they showed PW6 the kombi responsible for his sister's injuries.

[31] PW6 decided to go to the kombi to enquire on what they had done to his sister. The witness approached the kombi on the driver's side where he found Accused No.1 sitting on the driver's seat. The driver's window was half-opened. When PW6 enquired from Accused No.1 on what had happened, the latter pointed to Accused No.2 as being the person responsible for the accident. Accused No.1 alighted from the vehicle and they both went to Accused No.2 who was seated on the back bumper of the kombi playing with a chain in his hands. PW6

enquired what happened to his sister and Accused No.2 gave him an attitude and did not answer.

[32] The witness went back to the crowd which was surrounding his sister. PW6's evidence was that he then counted the steps from where his sister was lying motionless on the ground to where the kombi had come to a stop. He established that the distance was 32 steps. PW6 confirmed that at the bus station (Canaan) there was indeed an uphill such that a person standing at the top can see below the bus station.

[33] PW7, 5721 Constable Banele Zewula testified that he is based at Manzini Police Station within the traffic department. This witness has been working in the traffic department for 12 years at the time of giving testimony. The evidence by PW7 was that upon receiving a report about an accident that took place around Canaan area in Manzini, he together with 4546 Constable Sihlongonyane attended to the scene of the accident.

[34] Upon arrival at the scene, the two officers did not find the motor vehicle involved in the accident and also did not find the person who

was said to have been injured by the vehicle. PW7 and his colleague proceeded to RFM hospital and on arrival, were informed that the deceased was at the ICU. At the ICU the witness found the deceased and observed that her head was swollen. The witness and his colleague later proceeded to the police station in Manzini where they found the motor vehicle involved in the accident parked. The motor vehicle was a Toyota Quantum registered as ESD 666 CM. The two accused persons were also at the police station.

[35] The two police officers introduced themselves to the two people responsible for the vehicle that had caused the accident. PW7 took Accused No.1 and 2 back to the scene of the accident. The scene of the accident was at a place called Canaan, past Fairview towards Mbekelweni. Accused No.1 showed the police officers the spot where the accident took place. The witness proceeded to draw a sketch plan of the accident. The sketch plan was introduced as part of PW7's evidence in Court. PW7 explained in detail the drawing or markings on the sketch plan showing how the accident happened. Upon completing their investigation, PW7 and his colleague handed over

the docket to the Criminal Investigation Department (CID) for the latter to take the matter to the next level.

[36] PW8, Dr. Petros H. Mengistu testified that he is based at the RFM Hospital. This witness stated that he attended to the deceased on the 16th November 2016. The patient, according to PW8, was not able to speak as she was unconscious. It was stated by the witness that the deceased had bruises on her forehead, left arm, right hip and a swelling on her right orbit. The evidence by PW8 was that after conducting several medical procedures on the deceased including conducting an assessment of the brain function, eye movement, functioning of the body and limbs,, measuring of oxygen levels in her body, testing of sugar levels in her blood system, neurosurgical analysis of the brain, the deceased was discharged to the general ward on the 21st November 2016. PW8 stated that the head injuries on the deceased were so severe that they had to assist her by placing her under incubation.

[37] PW9 was 5041 Constable Ngwenya, a police officer based at the Manzini Regional Head Office. This witness was part of the

investigation team in the case at hand. PW9 stated that on the 16th November 2016 he was on duty and was patrolling using a police van around Fairview area. The witness was with 5418 Constable Sifiso Dlamini when they received a report about an accident at Canaan area in Manzini. On arrival at the scene of the accident, they found a group of people surrounding a person who was lying on the ground. The witness noticed bags of plastics carrying groceries scattered next to the victim. The plastic bags were about five paces away from the victim.

- [38] The person lying on the ground had injuries on the head and there was blood coming out from the open wounds. There was also blood coming out of the victim's mouth. PW9 later got to know the name of the victim as Thubelihle Maphanga. The evidence by this witness was that there was a kombi parked about 15 metres away from the scene of the accident. There were two people standing next to the kombi. Later a white van from the Ministry of Public Works came by and stopped at the scene. The victim was loaded into the van and taken to the RFM hospital.

[39] The evidence by PW9 was that they called the traffic department in Manzini and reported about the accident. PW9 and his colleague then went to the two people who were standing next to the kombi in order to interview them. Upon introducing themselves as police officers to the two people standing next to the kombi, the officers noticed that the group of people who had been surrounding the victim were starting to come closer to the kombi operators. Sensing danger, the witness and his colleague instructed the kombi operators to drive the kombi to the traffic department at the Manzini Police Station and wait there for them.

[40] The police officers waited for traffic officers to arrive at the scene. Eventually the group of people who were surrounding the victim gradually dispersed. PW9 stated that on the 12th December 2016 he received a docket while at the CID room which was of a murder case. The witness also received the two suspects who were said to have been involved in the murder case. According to PW9, the two suspects were the two people who were standing next to the kombi on the 16th November 2016. The two people were the driver and

conductor of the kombi which was said to be responsible for the accident.

[41] The evidence by PW9 was that his investigation established that the victim had been pushed out of the moving vehicle by Accused No.2. The witness stated that his investigation led to him establishing that the victim had been standing behind the conductor's seat. According to PW9, it would have been impossible for the victim to open the kombi door on her own standing from the position she was said to have been standing when the accident took place. According to the evidence of PW9, it was Accused No.2 who had access to the kombi door handle and it is the latter who could open it. The evidence by PW9 was that there was no way that the deceased could have been in a position to open the kombi door on her own without being assisted.

[42] It was also the evidence of PW9 that the windows of the kombi were clear and not tainted. Any person standing outside could clearly see the inside of the kombi.

[43] PW10 was Nomzamo Zwakele Dlamini, a resident of Fairview area in Manzini. This witness knocked off from work and proceeded to board a kombi at the Manzini Bus Rank. PW10 boarded the same kombi as the deceased and her mother from Manzini Bus Rank to Mpholi. The witness testified that she sat at the back seat just like PW1 and the deceased. When Accused No.2 started to collect bus fare from the back seat, PW1 and the deceased complained that they had been short-changed by E 2.00. Accused No.2 however insisted that he had given the correct change to PW1.

[44] PW10 also alighted from the kombi at Canaan bus station. On disembarking at the bus station, there was a lady by the name of Ngeti who was standing at an uphill just above the bus stop. According to PW10, upon explaining to Ngeti what had happened after the kombi took off with the deceased on board, they all waited for the kombi to return at the station from Mpholi. The kombi, according to PW10, came back driving at high speed and they were expecting it to stop but it did not. The witness saw the kombi door opening and the deceased fell down while the kombi was still in motion. Later plastics bags also

fell from the moving kombi. The kombi came to a stop a distance away from where the deceased had fallen.

[45] It was PW10's evidence that she then went to where the deceased had fallen in order to check on her. According to PW10, when the kombi left Canaan bus stop with the deceased, the latter was standing behind the conductor's seat. PW10 stated that the deceased could not be in a position to open the kombi door from where she was standing. According to PW10, the deceased had been injured on the head, breast area and had a swollen face when she was lifted from the ground.

[46] PW11, 5440 Constable Bongiwe Simelane testified that she is employed as a Police Officer and is attached to the scenes of crime department. On the 9th May 2022, this witness was asked by Detective Constable Ngwenya to go and take pictures of the crime scene and also pictures of the kombi involved in the accident. The registration number of the kombi involved is ESD 666 CM. Indeed the witness took pictures of the crime scene and also of the kombi involved in the accident. The witness presented a photo album of the place where the accident took place and also of the kombi involved in the accident.

The pictures of the kombi showed both the exterior and interior and in particular the arrangement of the seats as well as the interior of the kombi door.

[47] PW12 introduced herself as Cynthia Du Pont and told the Court that she works for NTT, a motor vehicle garage or dealer in Manzini. The witness was requested by the police to retrieve documents of the Toyota Quantum when it was bought as a new vehicle from the garage. The witness was requested to clarify to the Court on the conditions of the windows when it was bought from the Toyota garage. PW12's evidence was that the documents of the vehicle showed that the windows of the vehicle were clear and not tainted when bought from the garage as a new vehicle. The crown closed its case after this witness completed her testimony.

DEFENCE CASE

[48] The accused persons took to the witness stand and gave testimony in their defence. First to testify was Accused No.2 (Machawe Ndwandwe) who is referred to as "DW1" in this judgment. Accused No.2 stated that on the 16th November 2016 he was in Manzini

working as an Assistant Driver or bus conductor. The kombi loaded customers until it was full and ready to leave the bus rank. The testimony by Accused No.2 was that along the way and as he was collecting bus fare from the passengers, there were certain passengers who were seated at the back of the passenger seat. One of the passengers at the back seat gave him a E 20.00 note and paid for herself and her daughter who was seated next to her. DW1 stated that he gave the passenger E 8-00 as change. The passenger, according to DW1, was busy on her phone when she was given the E 8-00 change by him.

- [49] It was DW1's evidence that after a short while, the passenger who testified in Court as PW1, protested and told him that her change was short by E 2-00. DW1 however told her that he had given her the correct amount of change and told her to check properly. When the quantum reached the passengers' destination, a place called Canaan, some passengers disembarked from the kombi but the deceased remained behind. According to DW1, the deceased stood by the kombi door. DW1 stated that the deceased was called by PW1 to disembark from the kombi but she refused to do so. The evidence by

DW1 was that the deceased stated that they (kombi operators) were crazy and that she would show them who she was.

[50] The kombi, according to DW1, continued on its journey while the deceased was still inside sitting behind the conductor's seat. The driver of the vehicle (Accused No.1), according to DW1, stopped the kombi and enquired what must be done. The door of the kombi was opened at that point and the deceased changed seats and proceeded to sit where the witness (Accused No.2) had been sitting. According to DW1, he then went to sit at the third row of the seats, meaning he sat behind the deceased. According to DW1, when the kombi was about to reach the station where the deceased's mother had dropped off, he went further back to sit on one of the seats just behind the back seat.

[51] It was DW1's evidence that when the kombi got to Canaan bus station after coming back from Mpholi, the deceased opened the kombi door and jumped out with her plastic bags while the kombi was in motion. The kombi came to a stop a few distance away from where the deceased had jumped out. As the witness and Accused No.1 were standing outside the kombi after it had stopped, the deceased's brother

approached them and held this witness by his clothes and, at that moment, a police officer came and restrained him from assaulting this witness.

[52] DW1 and his colleague alerted the owner of the kombi on what had happened and the owner informed them to call the police. On calling the police, the two were told to drive the kombi to the police station and indeed drove it to the Manzini Police Station and left it there. On the 16th December 2016, DW1's testimony was that they were called by a certain police officer and, once at the police station, they were told that they were being charged for the murder of the passenger who had boarded the kombi on the 16th November 2016. After arrest on the 16th December 2016, this witness was released on bail in October 2017.

[53] DW1 was cross-examined by the Crown's representative. It was put to DW1 that the deceased could not have opened the door by herself as she had been seated behind the seat occupied by this witness when the kombi came back from Mpholi. It was put to Accused No.2 that he is the one who opened the kombi door and pushed the deceased out

while the kombi was in full speed. DW1 denied this version and stated that it was impossible to open the kombi door while at the same time pushing the deceased out. It was further put to DW1 that PW2 and PW4 who are independent witnesses corroborated each other regarding the sitting arrangement when the kombi left Canaan bus stop. DW1 denied the sitting arrangement as stated by the crown's witnesses. DW1 was also told that he is the one who pushed the deceased out of the moving vehicle and later threw out the plastic bags which were carried by the deceased. This version of events was also denied by DW1 who argued that the deceased jumped out of the moving vehicle on her own while carrying her plastic bags.

- [54] DW2, Oscar Methula, who was indicted as accused no.1 also took to the witness stand and gave testimony in his defence against the charge of murder against him. DW2 stated that on the 16th November 2016 he was the driver of a Toyota Quantum registered as ESD 666 BH which was written 'criminal' at the front and this writing was in maroon colours. The Toyota Quantum or kombi had stripes of a South African flag on the sides. The windows of the kombi, according to DW2, were tinted.

[55] DW2 testified that as he was driving the kombi, he heard Accused No.2 arguing with one of the passengers regarding the correct amount of change. When it was time for the passengers to disembark at their destination, some passengers including the deceased's mother disembarked but the deceased refused to get off from the kombi. The deceased's mother called on the deceased to alight but she refused and stated that the kombi operators were mad ('bayahlanya').

[56] According to DW2, the deceased sat on the second row of seats from the seat occupied by the conductor. Accused No.2 closed the main passenger door and DW2 continued to drive towards Mpholi. Upon arrival at Mpholi which was the final destination of the kombi, all other passengers alighted from the kombi except for the deceased. When the passengers were disembarking from the kombi, Accused No.2 was standing on the ground. The kombi made a turn to Manzini and, according to DW2, he stopped the vehicle and enquired what was to happen to the deceased. Accused No.2, according to DW1, once the kombi turned to Manzini alighted and stood on the ground. According to DW2, the deceased refused to alight from the kombi and demanded

to be given the correct amount of change. DW2's testimony was that he then told the two (Accused No.2 and the deceased) that he would drop them off at the police station so that they could discuss their differences there.

[57] It was DW2's evidence that the deceased alighted from the vehicle and proceeded to sit where Accused No.2 had been sitting with her plastic bags. Accused No.2 boarded the kombi and went to sit on the row just before the back seat. DW2 stated that he drove the kombi towards Manzini at around 60 km per hour and was followed by a motor vehicle which was a van in white colour. As DW2 was driving, upon reaching Canaan bus stop, he heard the kombi door opening and when he turned back to look, he saw the deceased jumping out with her plastic bags. DW2 stated that he was in shock and could not believe what was happening.

[58] The evidence by DW2 was that after the incident, the quantum drove for about 40 metres and came to a stop. DW2 stated that he enquired from Accused No.2 on what had just happened and the latter could not answer him. At that moment the witness observed that some people

had gone to attend to the deceased who was lying on the ground. The witness and his colleague alighted from the kombi and stood behind it. The deceased's brother approached them and spoke to this witness, enquiring on what had happened. DW2 explained to deceased's brother on what had happened. The deceased's brother proceeded to confront Accused No.2 and held the latter by the neck, wanting to beat him up. At that moment a police officer came by and restrained the deceased's brother from assaulting Accused No.2.

[59] DW2 stated that they later drove the kombi to the police station in Manzini and left it there. This was for purposes of checking whether or not it was road worthy. After some time, DW2 was informed by the owner of the kombi that they had gone to deceased's family in order to pass their condolences after learning that the passenger had died. DW2 requested to be relieved from his duties as the incident had affected him emotionally. The evidence by DW2 was that they were later charged by the police for the murder of the passenger who had boarded the kombi on the 16th November 2016. The witness spent 3 months in custody and was thereafter released on bail.

[60] The cross-examination of DW1 and DW2 sought to establish that the two were responsible for the death of the passenger in that she (deceased) could not have been in a position to reach and open the handle of the kombi door from where she had been standing. It was also put to the two accused persons that it was Accused No.2 who opened and pushed the deceased out of the speeding vehicle.

ANALYSIS OF EVIDENCE AND CONCLUSION

[61] The accused persons are facing a charge of murder in that it is alleged that the two persons wrongfully and intentionally caused the death of the passenger by the name of Thubelihle Maphanga on the 16th November 2016. The Crown alleges that when the accused persons committed the offence of murder, they were acting in common purpose. The Crown has referred the Court to the case of **Thebus & Another v The State (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC)** in which it was that;

“The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The

liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.”

[62] According to the Crown, the liability of Accused No.1 and Accused No.2 on the basis of the ‘common purpose’ principle arises on account of the fact that;

- (a) Accused No.1 drove the kombi at a high speed when coming back from Mpholi whilst the deceased was in the kombi and with the full knowledge that her drop off zone was at Canaan bus stop.
- (b) Accused No.1 did not stop at the bus station to drop off the deceased but continued to drive at high speed.
- (c) Accused No.2 opened the kombi’s passenger door whilst Accused No.1 continued to drive the kombi at speed.
- (d) Accused No.2 pushed the deceased out whilst Accused No.1 continued to drive at high speed.
- (e) Accused No.1 failed to immediately apply brakes to mitigate the impact of the fall on the ground by deceased.

[63] It is alleged by the Crown that the accused persons possessed the necessary *mens rea* in causing the death of the deceased. The Crown referred the Court to the case of **Katlego M. Maarohanye & Another v The State (A378/2013) [2014] ZAGPJHC 251; 2015 (2) SA 73** in which the Court held that;

“One of the early expositions of *dolus eventualis*, and in my opinion, appropriately apt with respect, is that by Holmes JA in **S v De Bruyn & Another 1968 (4) SA 498 AD 510** that: “...*dolus eventualis* which is subjective foresight of possibility, however remote, of death ensuing, and yet persisting in the act reckless of whether death ensues or not.” In more recent times Shongwe JA (In **S v Makgatho 2013 (2) SACR 13 (SCA)** described *dolus eventualis* as: “[9] A person acts with intention, in the form of *dolus eventualis*, if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result [of death] may ensue, and he reconciles himself to this possibility.”

[64] In another case of **Jacob Humphrey's v The State (424/12) [2013] ZASCA 20 (22 March 2013)**, the Supreme Court of South Africa, in analysing the standard to be used in determining the element of *dolus eventualis* stated that;

“On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.”

[65] The Crown also referred the Court to a local case of **Mazibuko Vincent v Rex 1982-86, 377 (CA) at p.380**, in which it was held by the Appeal Court of Eswatini that;

“A person 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.”

[66] It is the Crown’s submission that all factors taken into account, the accused persons should be found guilty of the crime of murder of the passenger who was on board their vehicle on the 16th November 2016.

In conclusion the Crown submitted that;

“There was further evidence by most of the witnesses pertaining to the arrangement of the sits [seats] of the kombi which is to the effect that the deceased would not have been in a position to open the door for herself form [from] where she was positioned. The photos brought by the scenes of crime [officer] showed the sits [seats] as described `by the witnesses even though they were taken [at] a later stage during the trial.

In attempting to cast doubt on the evidence of PW4 the eye witness, the accused persons alleged that the kombi windows were tinted. All the witnesses indicated [that] the windows were clear. It was put to them that they were tinted at the factory. A witness from the dealer was called and she reflected that the file of the

kombi reflects that it had no such extra feature. It was then that the story changed that the kombi windows were tinted by the owner who owns a tinting company.”

[67] On behalf of the accused persons, it was submitted that the Crown is relying on circumstantial evidence in seeking to hold the accused persons guilty of the offence of murder. The defence argued that in order for the Court to properly and legally rely on circumstantial evidence, the requirement of the law is that;

“The proved facts should be such that they exclude every reasonable inference save for the one to be drawn. If they [facts] do not exclude other inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

[68] A reasonable inference to be drawn from the evidence presented in Court, according to the accused persons, is that it was the deceased who opened the kombi door while seated on the conductor’s seat. The submission made on behalf of the accused persons is that there is sufficient evidence to prove that the deceased changed seats with the conductor when the kombi was coming back from Mpholi.

[69] In their written heads of argument, it was further submitted on behalf of the accused persons that;

“In *casu*, PW9 mentioned that he made the arrests based on the evidence of PW4. He testified that on face value this was a traffic offence. Even when the docket was brought to the CID department [sic] by the traffic officer he never bothered himself with launching a full investigation. He made arrests upon the media coverage of this incident and nothing else. PW4 and PW1 corroborated each other in that they told the Court that had the deceased fallen on her own she would have landed on the fence or drainage however all other witnesses did not mention same yet PW1 and PW4 insisted that it was common knowledge.

The crown failed to call the Neurosurgeon who would have given an account of what transpired at the ICU. Instead it paraded PW8 who during his testimony made references to the report made available to him by the Neurosurgeon. The very same report which stipulated that the victim did not require an operation for her brain injury. Such evidence was crucial in ascertaining

whether there existed a *novus actus intravenes* which would have negated the charge of murder laid on the accused persons. Such failure leads to the inference that the prosecution fears that such evidence will expose facts which are not favourable to him [prosecution]. Further to, the production of the medical summary by PW8 instead of the original medical record of treatment administered to the deceased begs the question [of] whether the Court will be able to elucidate facts on what actually transpired at the hospital and if the victim was in fact given the required emergency treatment reserved for brain injuries.”

[70] The accused persons have raised a number of issues as their defence which can be summarised as follows;

- (a) They are not responsible for the fall of the deceased from the moving vehicle. The accused persons argue that it was the deceased who actually opened the kombi door after having taken occupation of the conductor’s seat when the kombi came back from Mpholi bus station.
- (b) All facts considered, it is unclear as to who actually opened the kombi door whilst the kombi was in full motion and, because of

this doubt, the Court ought to decide this issue in favour of the accused persons.

- (c) Even if the accused persons were to be held liable for pushing the deceased out of the vehicle, there were other intervening factors which ultimately caused the death of the deceased. These intervening factors were either that the deceased was operated badly on his brain or that there already existed problems in the brain of the deceased.
- (d) The evidence of PW4 ought to be rejected as this witness could not see what was happening the kombi on account of the fact that the windows of the kombi were tinted.

[71] The elements of murder were fully analyzed by the Court in **S v Dube (CC03/22) [2022] ZAMPMBCH 28 (03 May 2022)** in which the Court held as follows;

“[13] The concepts of premeditation and intention are different. Premeditation involves a thought process that contemplates a certain outcome. Intention in all of its forms (*dolus directus, dolus indirectus and dolus eventualis*) involves the

perpetrator's state of mind before and while the criminal act is being committed.

[14] Premeditated murder is more blameworthy than murder committed at the spur of the moment or when death results after an assault. Premeditated murder remains the crime of murder. It does not constitute a special species of murder. The circumstances under which the murder was committed must show that the murder was premeditated so that the court is able [to] consider an appropriate sentence. If premeditated murder is proven a court is obliged to impose a minimum sentence of life imprisonment unless exceptional circumstances exists to deviate from that sentence.

[72] In the *De Bruyn* case (referred to herein above, par. 68), His Lordship Holmes JA, described *dolus eventualis* in a crime of murder as meaning subjective appreciation of death (on the part of the perpetrator), no matter how remote the possibility of death actually taking place may be. The difficulty with this interpretation is that it somehow blurs the distinction between the offences of murder and

culpable homicide. In *S V Naidoo and Others* (321/2001) [2002] ZASCA 136; [2002] All SA 710 (SCA) (14 November 2002), the Supreme Court of Appeal stated as follows as regards the distinction between the two offences of murder and culpable homicide;

“[27] What the crimes of murder and culpable homicide have in common is a fatal outcome for a human being. Absent a death, absent the particular crime. What they do not have in common is that absent a death, they may be a conviction of attempted murder but not a conviction of attempted culpable homicide. The reason for the difference lies in the distinction between the two forms of *mens rea* which are essential elements of the respective crimes of murder and culpable homicide.

[28] The crime of murder cannot be said to have been committed unless the act or omission which caused death was intentionally committed or omitted and death was the desired result, or, if not the desired result, at least actually foreseen as a possible result the risk of occurrence of which the accused recklessly undertook and acquiesced in. In short, *dolus* in one or other of its manifestations (*directus*,

eventualis, indeterminus etc) is the kind of *mens rea* which must have existed. Where the act or omission is accompanied by such *dolus* but death does not in fact ensue, it is easy to understand why the accused's conduct should be visited none the less with penal sanctions. A deliberate attempt to commit the crime of murder cannot be ignored and left unsanctioned simply because the perpetrator has failed to achieve his or her objective.

- [29] The crime of culpable homicide, on the other hand, (certainly as regards the consequence (death) of the impugned act or omission) postulates an absence of *dolus* and the presence of *culpa*. The fact that the crime of culpable homicide may be committed even where the act which causes death is an intentional act of assault should not be allowed to the essential truth. In such a case, the perpetrator is not convicted of culpable homicide simply because he or she deliberately assaulted a person as a consequence of which it so happened that the person died. If the perpetrator could not reasonably have foreseen that

death might ensue, a conviction of culpable homicide cannot be justified. *Aliter*, if death should have been foreseen as a possible consequence. What this shows is that it is the perpetrator's culpable failure to foresee the possibility of death in cases where an assault has resulted in death and, in cases not involving assault, that failure coupled with a further culpable failure, namely a failure to do what could and should have been done to prevent the occurrence of death, that is the rationale for the conviction of culpable homicide. *Culpa* is therefore always present in the crime of culpable homicide. Sometimes it is also associated with *dolus* (as an intentional assaults resulting in reasonably foreseeable but actually unforeseen death). Sometimes it is not (as in negligent conduct resulting in reasonably foreseeable death). For a penetrating and instructive analysis of these matters see Professor Roger Whiting's article "Negligence, Fault and Criminal Liability in (1991) 108 SALJ 431."

[73] In terms of the judgment in *S v Naidoo (supra)*, *culpa*, as opposed to *dolus*, is present when the perpetrator brings about death of another human being in a negligent manner without him or her (perpetrator) appreciating that death might actually arise. The test, as the authorities have pointed out, is a subjective one. All facts considered, the paramount consideration must therefore be the particular circumstances of the perpetrator at the relevant time.

[74] On the facts of the present matter, it was argued on behalf of the accused persons that there is no evidence upon which it may be said that the deceased fell from the moving vehicle through an act or omission of one or both of the accused persons. However, PW1, PW2, PW3, PW4 and PW10 all spoke in one voice that the deceased was standing behind Accused No.2's seat when the kombi left Canaan bus stop to Mpholi. PW1, PW3, PW4 and PW10 confirmed that when the kombi came back from Mpholi bus station and before the deceased fell out, the latter was still standing behind Accused No.2's seat. PW2 confirmed that when the kombi reached Mpholi bus stop and turned back to Manzini, the deceased was still behind Accused No.2's seat. The Court was shown pictures of the seats inside the kombi. If indeed

the deceased was standing or sitting behind the seat said to have been occupied by Accused No.2, the deceased would not have been in a position to reach the handle of the passenger door in order to open it on her own.

[75] Accused No.1 told the Court that the kombi was travelling at around 60 km per hour when coming from Mpholi bus station and going back to Manzini. This witness denied that the kombi was travelling at a high speed as stated by the witnesses of the crown. Even if the Court can accept that indeed the kombi was travelling at 60 km per hour, it still baffles the mind how any right thinking person can seek to jump out of a moving vehicle travelling at this speed. This narration is improbable and it defies logic and reason. The accused persons in cross-examination, sought to establish that the deceased was a suicidal person. There is no evidence whatsoever to support this narrative by the accused person. It was simply an attempt to justify the unlawful act.

[76] In the local Supreme Court case of **Malinga v Rex (41 of 2012) [2016]**

SZSC 54 (30 June 2016), as regards the doctrine of common purpose, it was held by the Court that;

“[46] This Court in the words of Tebbutt JA in Phillip Wagawaga

Ngcamphalala and Others v Rex, Crim. Appeal Case

No.17/2002 identifies the definitive elements of ‘common

purpose’ as being firstly the physical and vicarious factor of

an ‘association’ of two or more persons in a joint unlawful

enterprise; each thereby being responsible for any acts of

his fellows which fall within their common design or object’

and secondly the mental element of a common intent to

assist one another in committing an offence; which can take

the form of a shared specific purpose arising by prior

agreement or spontaneously to assist one another in

committing the offence. In this instance it would either be to

commit the robbery or the murder. In that case the learned

Tebbutt JA stresses the point that for the requirements of

common purpose to be found there need not be proof that

there existed a prior conspiracy or premeditated motive to

commit the crime on the part of the accused persons.”

[77] In the Court's conclusion, and as submitted by the Crown, the elements of common purpose in the commission of this offence have been established in this matter. Accused No.1, as the operator of the kombi, had more responsibility in ensuring that disputes and misunderstandings arising in the transportation of members of the public are resolved in a proper manner. The liability of Accused No.1 started when he took off from Canaan bus stop with the deceased still on board. Accused No.1 had the responsibility of engaging the mother of the deceased (PW1), the deceased and accused No.2 with a view of resolving the dispute involving a sum of E 2-00. When accused No.1 left off with the deceased at Canaan bus stop, the Court is left wondering what he was thinking and how his taking off with the deceased still on board would have resolved the problem. Accused No.1 started the chain of events that would ultimately lead to the death of the passenger.

[78] When the quantum was coming back from Mpholi, it was Accused No.1 who had the responsibility to stop the vehicle at

Canaan bus station. The failure or omission by Accused No.1 to stop the vehicle at the relevant bus stop makes him equally liable for the death of the passenger on the basis that the two operators acted spontaneously in causing the death of the passenger. The Court rejects the explanation given by Accused No.1 which was that he intended to take both Accused No.2 and the deceased to the police station. When the first police officer approached the accused persons upon the accident taking place, Accused No.1 did not inform the police officer that his intention was to take the disputing parties to the police station. When the deceased's brother approached the two just after the incident, similarly it did not come out from Accused No.1 that he was intending to take the disputing parties to the police station. Instead, Accused No.1 pointed to Accused No.2 when confronted by deceased's brother.

- [79] As already indicated herein above, it was simply impossible for the deceased to open the kombi door from where she was positioned. As there were only three people inside the kombi when it came back from Mpholi, Accused No.2 was the only

person in a position to open the kombi door whilst it was driving at full speed.

[80] The evidence by PW4 was that she was standing at an elevated position and that she could clearly see what was taking place inside the kombi. Her evidence to the effect that she saw Accused No.2 holding the deceased around the shoulder area and then forcing her out of the moving vehicle is the most probable and believable explanation of what took place on the day in question, resulting in the death of the passenger. A person pushed from the upper side of the body from a moving vehicle is more likely to fall head first to the ground. This tallies with the pathologist report to the effect that the death of the deceased came about as a direct result of the head injury sustained by the deceased when she fell on the ground.

[81] In seeking to discredit PW4's testimony, the accused persons sought to establish that the kombi windows were tinted and therefore that this witness could not be in a position to see what could have happened inside the kombi from where she was

standing. The evidence by PW12 however dispelled any notion that the windows of the kombi were tinted from the day of purchase at the dealer.

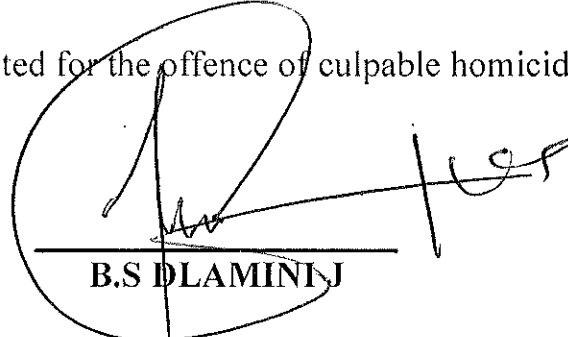
[82] If the allegation by the accused persons was that the windows of the kombi were tinted by the owner on a later date after purchase, then the *onus* was on them to summon the person or persons who were involved in having the windows of the kombi tinted. In the absence of such relevant testimony, the Court is bound to reject the allegation as being untrue. In any event, the pictures of the kombi were presented in Court and there was no objection from the defence. The pictures show that the windows are crystal clear such that anyone standing outside can clear see the inside of the kombi. PW4's evidence taken with all other evidence from the Crown's witnesses therefore remains unshaken.

[83] The final question requiring the Court's determination is whether the actions of the accused persons fulfil all the elements of murder. On the facts and evidence presented in Court, the Court

is unable to conclude that the accused persons are guilty of murder. The evidence shows that the deceased was an irritation to the accused persons. It was the rush hour and they needed to rush back to town to ferry more passengers.

[84] All that the accused persons wanted to do was to get rid of the deceased so that they could carry on their normal business. Regrettably, they got rid of the deceased recklessly and in a manner that ultimately caused her death. This, in the Court's view constitutes culpable homicide as opposed to murder. It must be emphasized that the primary distinction between *culpa* and *dolus* is not the result (death) but the subjective state of mind of the doer at the relevant time.

[85] In the circumstances, it is the Court's conclusion that the accused persons are not guilty of murder but are found guilty and convicted for the offence of culpable homicide.



B.S DLAMINI
THE HIGH COURT OF ESWATINI

REPRESENTATIVES OF THE PARTIES:

For the Crown: Miss. E. Matsebuala (D.P.P's Chambers)

For the Accused persons: Miss N. Hlophe (Mongi Nsibande & Partners)