



IN THE HIGH COURT OF ESWATINI

CASE NO. 280/2022

HELD AT MBABANE

In the matter between:

THE KING

APPLICANT

And

SIPHO SIYABONGA DLAMINI

1ST RESPONDENT

MBONGENI ALEX VILAKATI

2ND RESPONDENT

NKOSIKHONA DLAMINI

3RD RESPONDENT

**NEUTRAL CITATION: THE KING VS SIPHO SIYABONGA
DLAMINI & 2 OTHERS (280/2022) [2022] SZHC - 150 (20/06/2023)**

CORAM: B.W. MAGAGULA J

HEARD: 26th April 2023

DELIVERED: 20th June 2023

SUMMARY: Civil Law and Procedure – Indictment on a charge of murder – Plea of guilty to culpable homicide entered by all Accused. The plea was further confirmed by their Counsel – Plea accepted by the Crown – Post mortem reflects the cause of death as due to choking. No fatal injuries appreciated by the pathologist. In as much as the Accused have pleaded guilty to culpable homicide, the report of post-mortem examination reflect that the injuries inflicted on the deceased were not fatal – This points to the direction that the charge that the Accused have pleaded guilty to may be on the lower side of the scale.

Held: The Accused are sentenced to three years imprisonment with a option of a fine of E3 000. Half of the sentence is suspended, and it should take into consideration the period they have already spent in custody.

JUDGMENT ON SENTENCE

B.W. MAGAGULA J

Back ground

[1] The three (3) Accused persons were charged with the crime of murder in that its alleged that upon or about the 3rd September 2016 and at or near Gucuka area in the Manzini District the Accused persons, each or all them

acting jointly in furtherance of a common purpose, did wrongfully, unlawfully and intentionally kill one Bhunywana Mkhalihi by assaulting him with sticks. They are further alleged to have kicked him all over the body.

- [2] The Accused persons pleaded guilty to culpable homicide. The Crown accepted the plea in terms of **Section 155 of the Criminal Procedure and Evidence Act No 67 of 1938**. The court will proceed and deal with the matter as one of Culpable Homicide.
- [3] The Crown submitted a statement of agreed facts signed by both counsel for the Crown and the Defence. The post mortem report was also handed by the Crown as well to form part of the evidence. The Court duly admitted same as evidence.

AD PERSONAL CIRCUMSTANCES

- [4] The court is implored to consider the following, before it metes out the appropriate sentence.
- [5] The court was referred to the case of **Rex v Sifiso Mathambo Vilakati High Court Criminal Case No. 91/2011**, His Lordship Hlophe J (as he then was) stated the following;

“In order to ensure that the sentence I pass met the delicate balance required of a sentence imposed by a judicial officer, I had to consider the triad which is a notion that consists of a consideration of the three competing interest in a matter being those of the Accused, those of society and the offence itself.”

[6] It is submitted on behalf of the Accused persons that they were relatively young and at the prime of their lives when they committed the offence. It is submitted that the first Accused was nineteen (19) years at the time of commission of the offence. The second Accused was eighteen years at the time of commission of the offence. The third Accused was seventeen (17) years at the time of commission of the offence. It is submitted that considering their ages, the Accused persons still have a future ahead of them and that they deserve a chance to contribute positively to society.

[7] The court is also urged to consider that the Accused persons have not lived a sophisticated life. They all dropped out of school due to financial constraints. The highest level of education they attained is secondary education. The first Accused went as far as Form 2 level. The second Accused reached Form 3 and the third Accused was only able to reach Grade 7. It is further submitted that the Accused persons prior to their arrest, were not employed but merely herd boys.

[8] It is submitted that all the Accused persons were first offenders who have always avoided committing crime, until the fateful day pertaining to the

matter before court. They are also said to be remorseful for the offence they committed. This is based on the plea they have tendered and the general manner in which they handled themselves from the period of their incarceration.

[9] It is submitted further that the Accused persons co-operated with the investigating officers during the investigations. They did not evade arrest but were arrested on the following day of the occurrence of the offence. They left the incident scene whilst the deceased succumbed to death. The Accused persons are remorseful for their actions and the loss of life in their hands has weighed heavily on their conscience, and will continue to do so for a long time.

[10] Further, it is submitted that the Accused persons pleaded guilty to Culpable Homicide which was accepted by the Crown, thus not wasting the Court's time. The above Honourable Court is urged to consider that the above are all indication of remorse on the part of the Accused persons, to the extent that the Court is urged to blend their sentence with some degree of mercy.

[11] The court was asked to consider the dicta espounded in the case of **Mlungisi Mhlanga v Rex Appeal Case No. 10/06 (unreported) at page 4; Steyn JA** – *“in assessing the propriety of the sentence imposed, the court has to have regard not to only to these personal circumstances but also assess the degree of moral guilt of the Appellant”*

[12] The defence submitted that it has been a trend for our courts to blend with a degree of mercy the sentence of a person who is a first offender and who has shown great remorse for his unlawful deeds.

[13] In the case of **Rex v Nhlanhla Mdaka Motsa, High Court Criminal Case No. 78/05**, His Lordship Simelane J. citing the case of **S v Rabiie 1975 (4) SA 855 (A)** stated as follows;

“Punishment should fit the criminal as well as the crime, be fair to the society and be blended with a measure of mercy according to the circumstances.”

[14] The acceptance of a plea of guilty to a lesser offence is sanctioned by Section 155 (2) (a) of the Criminal Procedure and Evidence Act 67/1938 (as amended). The Act provides that the Accused when pleading may do so in a manner quoted below;

“Section 155 (1)...

(2) If he pleads, he may plead either –

(a) that he is guilty of the offence charged or, with the concurrence of the Prosecutor, or any other offence of which he might be convicted or such in that mend of summons.

[15] This in effect means if the Accused is charged with murder, he could still be found guilty of culpable homicide. If on the evidence is found he caused the death of the person without an intention to do so. This is in terms of Section 186 (1) of the Act it provides as quoted below;

“186 (1) any person charged with murder in regard to whom it is proved that he wrongfully caused the death of the person whom he is charged with killing, but without intent, he may be found guilty of culpable homicide”.

[16] It is common course that a statement of agreed facts was prepared, signed by both parties and read into the records. Subsequent to which this court found all the Accused persons guilty as per their own plea. Their bail was revoked immediately and they remained in custody pending the judgment on sentencing.

[17] The Crown has submitted before court that the court when considering the appropriate sentence should take into consideration that a life was lost in the matter at hand. The death of any person is a loss to society and to the families who depend on that individual for sustenance.

[18] The Crown proceeded to argue that the families of the deceased are the most affected as they have to bury their loved one and adjust to live an everyday life without that family member. What makes matters worse, in the matter at

hand as per the submissions of the defence is that, the deceased was an elderly man of about seventy two (72) years old and a family man and an important member to the Gucuka community.

[19] The Crown also submitted that the Accused persons are very young men and they had no business in beating up an old man who was old enough to be their grandfather. They assaulted him for no apparent reason. The evidence, especially the statement of Lungile Makhanya reflect that the deceased was too drunk to walk. She took him to one of the houses to sleep. However, after a while, the deceased came out of the house and seat outside the room. She then left him there.

[20] The court is alive to the *dicta* expressed in the matter of **Musa Kenneth Nzima Vs Rex Criminal Appeal Case No 21/2007** where the court of Appeal had the following to say;

“There are obviously varying degrees in culpability in culpable homicide offences. This court recognize this and in confirming sentence of 10 years imprisonment described as an extra ordinarily serious case of culpable homicide, said that the sentence was proper for an offence “at the more serious end of the scale of such a crime”...a sentence of 9 years seems to me also to be warranted inculpable homicide convictions, only at the more 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 apart from misdirection to which I earlier referred, it seems to me that

insufficient weight was given to the individual facts of the case and to personal circumstances of the Appellant”.

[21] What comes from the above decision is that there are varying degrees of culpability in culpable homicide offence. It therefore places a duty on a court to look at the facts and the evidence of the particular circumstances of the case. I now discern to do so in the matter before me. The Criminal Procedure and Evidence Act, allows the use of medical reports signed by medical practitioners as evidence in respect of an injury or concerning the condition of the body of a person. This is provided for in Section 221 (1) (a) which is quoted hereunder;

Reports by medical or veterinary practitioners

Section 221 (1) in any criminal proceedings in which any facts are ascertained –

- a) By a medical practitioner in respect of an injury to or a state of mind or condition of the body of a person including the results of any forensic tests or his opinion as to the cause of death of such person;*
- b) Such facts may be proved by written report signed and dated by such medical or veterinary practitioner as the case maybe, and that report shall be prima facie evidence of the matter stated therein;*

[22] It is common course that there is a post mortem report that was filed by Dr Reddy. It was admitted as evidence by consent. The report reflects that the cause of death was due to choking. The doctor stated though, that the blood was preserved for chemical analysis. The report of the chemical analysis is not before court.

[23] What also is stated explicitly in the post mortem report, is that no fatal injuries were appreciated by the doctor when he examined the body of the deceased at the Manzini mortuary on the 8th September 2016.

[24] It is also common course that the doctor observed the following external appearance and conditions of the limbs of the deceased;

- ***Blood, mud stains, vegetation over the body in few areas present.***
- ***Blackish, green food particles seen at the nose, mouth***
- ***Eyes congested***
- ***Faecal matter discharge present.***

[25] Dr R.M Reddy observed the following antemotherm injuries;

- ***Contused abrasion laceration above the left eyebrow 1.2cm x 0.7cm, below lower eye lid 2.1cm x 0.4cm skin deep present.***
- ***Contused scalp frontal region 3.2cm present with abrasion 1.4cm***

- *Contused abrasion back of right arm 7cm x 1.2cm with gaping present.*
- *Small abrasion back of left elbow 6.3cm area present*
- *Abrasion over right hand 0.3cm, 0.5cm present*
- *Abrasion back of trunk 1.2cm contusion intercostal structures*
- *Small abrasion sacral, left iliac crest region 7.2cm area present with linear faint contusion 16cm area over both buttocks no effusion blood in soft tissues.*

[26] In as much as the Accused persons have pleaded guilty to culpable homicide which is basically unintentional cause of death. However, the evidence as I have captured above, shows that the injuries they may have inflicted on the deceased were not the cause of the deceased's death. The cause of death was due to choking. As to what caused the deceased to choke is not clear.

[27] It is therefore not clear whether the choking was caused by the food combined with the position in which the Defendant was found lying, as he was lying in a strange position as one of the witness captured. But what is clear is that the assault and the injuries inflicted by the Accused persons did not eventually cause the death of the deceased.

[28] The doctor stated explicitly that there were no fatal injuries appreciated when he examined the body of the deceased. PW1 in terms of the statement of agreed facts, told the court that on the 3rd September 2016 when he went to get his cellphone from Accused 2's homestead, they saw Accused 1 who

called out to them. They walked together to the mountain where they were later joined by Accused number 3. Accused number 3 told them that they assaulted the deceased with tree branches (*tinswati*). ***Tinswati*** in *siswati* refers to small tree branches which the Accused did not think may cause fatal injuries to the deceased as they did not assault him severely.

[29] This account is consistent with the observations by the doctor that the injuries inflicted by the Accused could not have been fatal.

[30] Having said so, their own contribution in assaulting the deceased in one way or the other was wrong. They have also pleaded guilty to Culpable Homicide. The court will sentence them as per their own plea of guilty. I observe as I have set out above that the offence appears to me to be on the lowest end of scale, given the evidence based before this court. In the matter of **Rex vs Mpendulo Bonny Ginindza**¹ Hlophe J as he then was, stated that the sentencing trend of this court. In cases of Culpable Homicide, range from zero to ten years. With each sentence placed at a point within the range that reflect its seriousness or otherwise. In my view, in light of the evidence before court the appropriate sentence that must be meted out in the matter at hand must definitely be on the low range.

[31] The Accused are first offenders, they are relatively young men. In as much as they were reckless in their conduct, which obviously the court should look and associate it with the juvenile nature of their age, they were drunk

¹ High Court Case No 167/2017 [2020] SZHC 77 (29 April 2020)

excited by alcohol. I admonish them for their disrespect of an elderly men. They had no business in assaulting an old man of 72 years. As such, they must bear the consequences of their reckless and disrespectful behavior.

[32] I take into consideration that they must have learnt their lesson by now. They have spent some time already in custody. First, when they were arrested and also during the period after which their bail was revoked. They must definitely have learnt their lesson by now. The Accused persons are young men, they must be rehabilitated. This is one of those cases where I am of the view that despite the fact that they are first offenders an option of a fine must be given to them. This will allow them to be ushered back to society and be given a chance to contribute positively.

[33] The court is also mindful and will not lose sight of the fact that a life was lost. Had it not been for the loss of life it seems to me that this is one of those matters which would have qualified for a caution and discharge.

[34] Due to the foregoing reasons I find it not to be just that the Accused persons be given a custodial sentence, without the option of a fine. I will therefore make the following order;

- a) The Accused will all be sentenced to a fine of E3 000-00 (**Three Thousand Emalangeni**) or 3 years imprisonment each.

- b) Half of the sentence is suspended for a period of 3 years, on condition that the Accused persons are not convicted of an offence in which violence is an element.
- c) The sentence is backdated to take into account any period that the Accused persons may have spent in custody in respect of this offence.
- d) The bail amount which they paid should be converted to form part of the fine.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Crown: Bhekiwe Ngwenya: Prosecuting Counsel

For the Accused: M. Shongwe: (Simelane, Shongwe Attorneys)