

IN THE HIGH COURT OF ESWATINI

JUDGEMENT

CRIMINAL CASE NO. 48/18

In the matter between:

THE KING

VS

SIBONISO PEABO KUNENE

Neutral Citation: *Rex Vs SIBONISO PEABO KUNENE*
SZHC (15TH August 2023)

Coram: DV KHUMALO A.J.

Heard: 11th August, 2023

Delivered: 15th August, 2023

Summary: 1. *Criminal Law – Accused charged with murder.*
2. *Criminal Procedure – Accused pleads not guilty to murder but guilty to culpable homicide – accordingly convicted and sentenced to ten (10) years imprisonment of which two (2) years are suspended conditionally.*

JUDGMENT ON SENTENCE

- [1] The accused person appeared before this court on the 11th August 2023 facing a charge of murder – being alleged that upon or about the 28th October, 2017 and at or near Duze area in the Lubombo District, the said accused did unlawfully and intentionally kill one Kgotsi Ndzimandze and did thereby commit the crime of murder. The accused person pleaded not guilty to murder, but guilty to culpable homicide – which plea was confirmed by his attorney and accepted by the prosecution.
- [2] A statement of agreed facts was handed in by consent between the crown and the defence. Annexed to the statement of agreed facts was the postmortem report which reflected the nature and extend of the injury inflicted by the accused on the deceased. The factual background as reflected in the statement of agreed facts can be summarized as follows:

The deceased came into the homestead of a certain lady by the name of Ncamsile to demand money as payment for installation of a steel gate. The said Ncamsile was allegedly the overseer of the project and had the mandate to pay the deceased who claimed that he wanted to use part of the money to buy electricity units. Ncamsile is said to refused to give the money to the deceased as she believed that the latter will

misappropriate the money because he was drunk. She undertook to personally buy the units for the deceased.

- [3] The deceased allegedly rejected the proposal and threatened to use violence in coercing Ncamsile to heed to his demand. In that regard, he took two stones in an attempt to assault Ncamsile. When the accused person tried to stop him, he could not cooperate which led to a verbal confrontation between them – coupled with threats. It was then that the accused produced a knife and stabbed the deceased on the left side of the chest. The deceased was rushed to the local clinic where he later died.
- [4] In light of the above, the accused person has admitted in his statement that he inflicted the stab wound that caused deceased's demise. He has as well conceded that he was negligent in his actions and that his conduct was without any legal justification. It was also his concession that there was no intervening factor between his conduct and the death of the deceased.
- [5] In its detailed form, the statement reads as follows: -

“The accused person stands charged with murder, it is alleged by the crown that upon or about the 28th October 2017 and at or near Duze area in the Lubombo Region, the accused person did unlawfully and intentionally kill one Lucky Kgotso Ndzimandze.

2.

Now the accused pleads guilty to a lesser charge of Culpable Homicide, which plea the crown accepts.

3.

The accused further confirms and agrees to the following to have transpired giving rise to the loss of life.

4.

On the 28th October, 2017 at around 0930 hours the deceased one Lucky Ndzimandze was stabbed on his upper body by the accused person and subsequently died upon arrival at Siphofaneni Clinic. The stabbing took place after a verbal conflict between deceased and one Ncamsile Matsenjwa.

3.2

The deceased who was in a questionable state of sobriety arrived at Ncamsile Matsenjwa's homestead and demanded money to purchase electricity units from Ncamsile as he (deceased) was engaged to mount and install a steel gate. Ncamsile Matsenjwa who was mandated to oversee the installation work refused to hand over the money but offered to purchase the units herself as she felt accused will misappropriate the money. The deceased was overly opposed to this suggestion and lashed out at Ncamsile Matsenjwa demanding to be given the money (cash).

3.3

The commotion drew the attention of the accused, a relative to Ncamsile Matsenjwa. The deceased at the point was insulting and threatening Ncamsile Matsenjwa demanding to

be given the money. As all this happened the accused was trying to reason with deceased to desist from the threat of violence. Ncamsile then briefly left the homestead leaving the deceased with accused and whilst walking with another Ncamsile (Motsa), the deceased arrived and informed them (both Ncamsiles) that the deceased was about to assault Ncamsile Matsenjwa. While accused alerted Ncamsile Matsenjwa about the imminent danger, the deceased threateningly appeared armed with two stones advancing towards Ncamsile Matsenjwa who refused to bulge to the deceased person's demand to hand over the money in cash. The accused again tried to restrain deceased from assaulting Ncamsile Matsenjwa with the stones. An exchange of words then ensued between deceased and accused threatening each other with violence, it is at that point the accused stabbed deceased.

3.4

Deceased was then conveyed to a nearby clinic where he later died, accused was arrested and an exhibit retrieved from a pit latrine toilet after a pointing out by the accused person. The exhibit is an okapi knife about 10cm to 15 cm blade length.

4.

The accused agrees that: -

4.1

He inflicted the stab wound leading to the death of the deceased.

4.2

He acted negligently in the circumstances and that his conduct was without legal justification.

4.3

As between his conduct and the death of the deceased there was no *novus actus intervenes*.

5

The accused further agrees that the following be handed in as evidence:

5.1 Autopsy report

5.2 Statement of agreed facts"

- [6] Having satisfied itself about the bona fides of the accused's plea of guilty and the sufficiency of the evidence against him, the court proceeded to find him guilty of culpable homicide. It was submitted on behalf of the accused in mitigation of sentence that he cooperated with the police at all material times including demonstrating remorse during the trial. He is also alleged to have surrendered himself to the police immediately after learning that the deceased had passed on. Further submissions were that the accused person was 26 years of age when he committed the offence and was under the influence of alcohol. The court has also been informed that the accused person has one child to maintain and that he is expecting a second one the next three months. It was also submitted that he fends for his mother who is old and ailing. The court was also told that the

deceased was a friend to the accused and further that his family made a financial contribution towards funeral expenses of the deceased. Having listened to the address in mitigation, this court postponed the matter to today for sentencing.

- [7] Having considered all the above, it must be acknowledged that sentencing is discretionary to the court and that such a discretion must be exercised judiciously. See **Elvis Mandlenkhosi Dlamini vs. Rex – Criminal Appeal Case No. 30/2011 at paragraph 29**. In this regard, the court is called upon to consider the interests and circumstances of the accused, the interests of the society, including the nature and seriousness of the offence. It must also then strike a balance between the competing interests of the offender and the society. See **Rex vs. Julius Madlazi and 3 others – Criminal Case No. 86/1999 at page 2**. See also **Sibusiso Gcina Mchuni vs. Rex – Criminal Appeal Case No. 4/2014 at page 7**.

- [8] In this regard, the court takes into account that the accused has pleaded guilty and demonstrated remorse during the trial. He is also a first-time offender. The court also considers that the accused has dependents to maintain including a child and his parent. It is however not in dispute that offences of violence are currently on the rise – especially those involving loss of lives. The accused administered the stab wound on the most critical

and dangerous part of the deceased's body – which led to the latter's death. He was brutal and reckless in the manner he stabbed the deceased – not bothering whether or not death occurred. He stabbed the deceased on the left side of the chest where the heart is located and where death could be reasonably anticipated. The stab wound was so serious such that it penetrated and ruptured both the heart and lung.

- [9] It is the responsibility of the courts to pass proper sentences that will have the deterrent effect on the offender – hence protecting innocent people in the process. See **The King vs. Mduduzi Vilakati and Another – Criminal Case No. 20/2009 at paragraph 24**. It is common cause that violent crimes, especially those that give rise to death, are devastating not only to the friends and relatives of the deceased, but also to the entire community. Proper and effective sentencing by the courts give reassurance to the community members about their protection and safety. It is incumbent upon the courts to pass effective sentences so as to give reassurance to the community members about their protection and safety. However, much as a sentence must be deterrent, it must also have the effect of reforming and rehabilitating the offender. See **Ntokozo M. Dlamini vs. The King – Appeal Case No. 10/2001**.

- [10] It is also trite law that the court bears the burden to establish existence or otherwise of extenuating factors before passing

sentence. See **Sibusiso Kukuza Dlamini vs. The King – Criminal Appeal Case No. 18/2019 pages 11- 15**. In this regard, it has already been shown that the accused was still young and had consumed alcohol at the time of commission of the offence. It is also trite law that youthfulness especially when combined with other factors, does constitute an extenuating factor. See **Nkosi Sifiso vs. Rex – 1987-1995 (4) SLR 303 at 309 F**. Also see **Ntokozo Adams vs. The King - Criminal Appeal Case No. 16/2010 at page 13**. It is also trite law that drunkenness does constitute both a mitigating and an extenuating factor. See **Mandla Bhekithemba Matsebula vs. Rex – Criminal Appeal Case No.2/2013 pages 28 – 32**. It has however been stated in the case of **Mbuso Sipho Dlamini vs. The King Criminal Appeal Case No. 34/2010 at paragraph 11** that voluntary intoxication carries very little weight as a mitigating factor.

- [11] The court has not overlooked that the deceased was an aggressor in that at that time of the stabbing, he was attacking Ncamsile who was the accused's relative. The deceased threatened the accused with violence while he was trying to protect his relative. It is therefore apparent that the deceased's conduct was provocative. In our law, provocation is an extenuating factor. See **Rex vs. Nhlengetfwa Wandile Grey – Criminal Case No. 405/2016 at page 23**. It therefore follows

that much as this case is serious, it is accompanied by extenuating factors.

- [12] Our courts have over the years passed varying sentences in culpable homicide cases, depending on the circumstances and seriousness of the case. The trend shows that the most serious cases of culpable homicide have attracted stiffer sentences. In **Rex vs Sipho Gamedze – Criminal Case No.5/2002 at page 4** the High Court sentenced the accused person to seven (7) years imprisonment without an option of a fine for a serious case of culpable homicide. In another serious case of culpable homicide – being **Mpiyakhe Albert Shongwe vs Rex – Criminal Appeal Case No.5/09** the Supreme Court confirmed a sentence of seven (7) years imprisonment without an option of a fine. The Supreme Court also confirmed a sentence of eight (8) years imprisonment without an option of a fine in the case of **Mbhasobhi Mamba vs. Rex – Criminal Appeal Case No.1/2015 at page 11.**

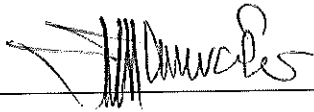
- [13] In a much more serious case of culpable homicide – being **Rex vs. Maurice Gcina Ndzabukelwako – Criminal Trial No. 63/05 at page 6** the High Court sentenced the accused person to ten (10) years imprisonment without an option of a fine. In the case of **Sandile Mbongeni Mtsetfwa vs Rex – Criminal Appeal Case No.45/11 at page 6** the Supreme Court confirmed a sentence of twelve (12) years imprisonment without an option

of fine for a very serious case of culpable homicide. In **Rex vs. Lucky Mbongiseni Mndzebele – Criminal Case No. 239/2016** – a case where the accused was convicted for culpable homicide involving killing of his wife, the court sentenced him to 15 years’ imprisonment without an option of a fine of which 3 years were suspended.

[14] In an even more serious case of culpable homicide – of **Sabelo Ntsholo Ndlangamandla vs. Rex – Criminal Appeal Case No. 35/2014 at page 10** the Supreme Court confirmed a sentence of sixteen (16) years imprisonment without an option of a fine – four (4) years of which had been suspended conditionally. In effect, culpable homicide cases have a varying degrees of seriousness which determine the sentence to be passed.

[15] Having said all the above and having struck a balance between the interests of the accused person and the society, and having considered the seriousness of the offence as already alluded to above, together with the mitigating and extenuating factors, I find that a sentence of ten (10) years imprisonment without an option of a fine, 2 years suspended for 3 years on condition the accused is not convicted for committing culpable homicide, attempted murder or assault with intent to cause grievous bodily harm within the 3 years, befits the accused and the crime. I hereby hand it down.

[16] Six Hundred and Seventy-three (673) days – being the number of days spent in custody before liberation on bail including those spent in custody after judgment but before sentence shall be deducted from the accused's sentence.



D.V. KHUMALO
ACTING JUDGE OF THE HIGH COURT

For the Crown: Mngometulu K.
For the Defence: Nxumalo N.