

**IN THE HIGH COURT OF ESWATINI**

**JUDGEMENT**

**CRIMINAL CASE NO.153/19**

In the matter between:

**REX**

VS

1. **VICTOR MASEKO**
2. **VUSI SIPHO MASEKO**

**Neutral Citation:** *Rex Vs. Victor Maseko  
and Another  
SZHC (11<sup>th</sup> August, 2023)*

**Coram:** D.V. KHUMALO A.J.

**Heard:** 01<sup>st</sup> August, 2023

**Delivered:** 11<sup>th</sup> August, 2023

**Summary:** *1. Criminal Law – Accused persons charged with murder.*

*2. Criminal Procedure – Accused persons plead not guilty to murder but guilty to culpable homicide – accordingly found guilty of culpable homicide.*

*3. Criminal procedure – sentencing – principles of sentencing considered – mitigating and extenuating factors found to be existent – accused persons sentenced to five (5) years imprisonment each for culpable homicide – sentence wholly suspended conditionally.*

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### **JUDGMENT ON SENTENCE**

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[1] The accused persons appeared before this court on the 01<sup>st</sup> August, 2023 facing a charge of murder - being alleged that upon or about the 23<sup>rd</sup> April, 2019 and at or near Mbekelweni area in the Manzini region, the accused persons, each or both of them, acting jointly and in furtherance of a common purpose did unlawfully and intentionally kill **Bheki Maseko**.

[2] When the charge was read to them, they both tendered pleas of not guilty to murder but guilty to the lesser charge of culpable homicide. Their pleas were confirmed by their attorneys and

Acting on that report this witness went to deceased homestead. Upon arrival he witnessed accused 2 beating deceased who was lying down with a wooden hoe handle. He also saw accused 1 beating deceased and he shouted at accused 1 to beating deceased as he would die but accused 1 did not listen.

This witness then ran towards accused 1 and accused 2 and intervened and tried to protect the deceased from being assaulted by accused persons. The deceased was unconscious on the ground and was tied with a rope; he was wet and muddy. This witness then called the police and he waited at the scene until the arrival of the police who took the deceased away from the scene.

Lesaya Matsebula is the mother of both accused persons and the deceased. She gives her evidence as follows: on the 23<sup>rd</sup> April 2019 at around 0800 hours she woke up and proceeded to the toilet. On her way to the toilet she saw deceased standing at the entrance to the main house "lichiba". As she looked at him (Bheki) he then insulted this witness saying "golo, malebenja, don't look at me because today I will kill you because you don't want to pack your belongings and go. She went to the toilet and returned back again.

Again on her return deceased insulted her and told her that today there is no one to be left at the homestead except for him. On that process laMnisi came to her mother – in – law's

house. Deceased then insulted LaMnisi "malebenja wenta nebuso ngatsi belikati." This witness told laMnisi not to bother deceased but instead to go to her house. Deceased continued threatening and insulting them almost all day up until around 1500 hours. When her two sons Victor and Vusi both Maseko (accused persons) were back from work and they were inside their houses.

At around or after 1500 hours she sent her grandson Prince Maseko to go and fetch water for her using a wheelbarrow. Deceased then told Prince that he wanted to kill him and he even took up some pieces of bricks and threw them at Prince, and Prince then ran away and hide at a neighbour's homestead. Accused 1 then came out of his house and wanted to know as to what was going on outside because deceased was making noise, threatening and chasing everyone he come across. Accused 1 then called Prince and asked as to what was the problem between him and deceased. Prince could not reply then he started crying.

Accused 1 then turned to deceased and asked as to what was the problem between him (Bheki) and his son Prince. Deceased then insulted accused 1 and as well insulted his wife laKhumalo as laKhumalo told accused 1 that deceased used to chase Prince away from the homestead every time when returns from school. Accused 1 then entered inside deceased's house. This witness followed deceased inside the house. Accused 1 kept on asking deceased as to what wrong

with him and why he not voice out his problems does so that it can be solved.

Deceased then took a bush knife and tried to hack accused 1 with it and accused 2 came inside the house too and they both disarmed deceased the bush knife and threw it outside. Both accused 1 and accused 2 then got hold of deceased and overpowered and took him out of the house. They called for a rope and tied deceased. This witness assaulted deceased with her walking stick. Accused 1 assaulted deceased with a hoe handle "umphini welikhuba" and accused 2 assaulted deceased with fists and once the hoe handle broke accused 2 took the broken piece of the hoe handle and assaulted deceased with it.

They both continued assaulting deceased all over his body until he started bleeding. He bled on the left upper eye and on the knees. On the process of the assault the people of the homestead were watching and Sabelo Shongwe too arrived. By the time deceased was being assaulted he was crying. The two accused persons assaulted deceased until they satisfied themselves. Deceased continued crying and then asked to be given water. Prince brought water in a 25 litres container and accused 1 poured the water over deceased and then Bheki rolled down and on the process the police were called and while waiting for the police deceased was still tied and down and their mother did not know as to when did he die because during the arrival of the police deceased was dead.

**7399 D/Constable Maqhawe Mtsetfwa of Matsapha Police Station** together with **8087 Detective Constable Derrick Dlamini of Matsapha Police Station** were among the first officers who took first action in this matter after a report of assault of the deceased was reported by on the 23<sup>rd</sup> April 2019. They examined the scene and discovered a man lying down facing one direction with no movements, he was wet and muddy. They also collected exhibits in relation to the case which items were handed to the police by accused persons in the presence of **Thokozani Kunene** an independent witness in the matter. The deceased was taken to Raleigh Fiktin Memorial Hospital (RFM) where he was certified dead on arrival. **7399 D/Constable Maqhawe Mtstfwa** formally charged accused 1 and accused 2 with the murder of the deceased after being duly cautioned after they handed themselves to the Matsapha Police Station.

**6756 Detective Constable Thandeka Dlamini of Matsapha Police Station** conveyed the deceased body to Manzini Mortuary where he was examined by **DR. KOMMA REDDY**, a police pathologist who then compiled a Post Mortem Report **PM 187/2019**. According to Dr. Reddy report that the deceased's body was brought and identified to him. The Pathologist states that the cause of death was due to **MULTIPLE INJURIES**.

The accused persons specifically admit the following;

a) Accused 1 and accused 2 admits that they inflicted the fatal injuries to the deceased which eventually caused his death as shown at page 1 paragraph [10] of the Post Mortem Report compiled by the Pathologist that death was due to **MULTIPLE INJURIES**.

b) That they acted unlawfully under the circumstances.

c) That they acted negligently when they inflicted the injuries on the deceased.

d) There was no *novus Actus inter viniens* between his unlawful act and the death of the deceased.

It is further agreed that the following be handed in by consent to for part of the Crown's evidence.

- i. Statement of Agreed Facts.
- ii. Post Mortem Report showing the cause of death of the deceased (**PM 187/19**).
- iii. Photographs album
- iv. Sticks and hoe handle

Accused 1 and accused 2 are saying they are very remorseful for their actions.

Statement made, signed and agreed to by both the Crown and the Accused/Defence Attorney being statement read and understood by the accused.

Dated at **MBABANE** this 01<sup>st</sup> day of **AUGUST** 2023.

NOLWAZI MABILA  
NDLANGAMANDLA

**(FOR THE CROWN)  
PERSONS)**

NONCEDO

**(FOR THE ACCUSED**

- [8] Having considered the pleas of guilty by the accused persons and their admission of the allegations against them, this court found them guilty of Culpable Homicide. The case was then postponed to today for sentencing.
- [9] When passing sentence the court considers that the accused persons are first time offenders. They demonstrated remorse by pleading guilty to Culpable Homicide. They handed themselves over to the police immediately after realizing that the deceased had passed on. Both of them are married with dependents to maintain. It has been considered by this court that the killing of the deceased by the accused had not be premeditated. The deceased may be viewed as having been the author of his fate. It was very serious and most shocking for the deceased to insult and issue death threats to his mother at her own matrimonial home. The attack was very senseless as the mother had not provoked the deceased in anyway.
- [10] It has also been shown that other family members fell prey to the deceased's rage. Evidence has shown that the deceased was of a violent disposition and such conduct was an order of the



day in the family. The deceased had also insulted and threatened to kill the accused's wives. It has also been taken into account that the accused persons had been under attack when they overpowered and ultimately assaulted the deceased. The deceased was carrying a bush knife and further attempted to brutalize one of the accused. In fact, the whole family was enduring a great sense of insecurity and danger at the hands of the deceased.

[11] This court has also not overlooked the seriousness of the offence and its prevalence in the country. The accused persons used a hoe handle and fists to continuously assault the deceased all over the body and killed him in the process. They assaulted him on critical areas of the body where death was reasonably foreseeable. The court has considered that when the accused started to assault the deceased, they had already overpowered and tied him with a rope. There was therefore no need to start assaulting him. He was no longer a danger to them. All what they were expected to do was to surrender him to the police for the law to take its course.

[12] It must also be acknowledged that it is discretionary to the trial court to determine an appropriate sentence. See **Sam Dupont vs. Rex – Criminal case no. 4/2008 at paragraph 13**. Such a discretion must be exercised judiciously as was held in the case of **Jabulani Mzila Dlamini and another vs. Rex – Criminal**

**Appeal no. 16/2011 at paragraph 20.** In this regard the court must consider the seriousness of the offence, the interests of the society, including those of the offender. It must be then strike a balance between those interests. See also **Sibusiso Gcina Mchunu vs. Rex – criminal Appeal case no. 4/2014 at page 7.**


- [13] It is however a principle of the law that each case must be decided on its own merits and special circumstances. See **Mandla Tfwala vs. Rex- criminal appeal case no 36/2011 at page 13.** In the instant case the court considers that the accused persons had not pre-meditated the killing of the deceased. The killing was triggered by the accused's unprovoked violent behaviour towards his family members. It is apparent that both accused persons were infuriated by the deceased who was not only insulting, but was also threatening to take lives of their mother and wives. They also felt in great danger as the accused was attempting to hack one of them with a bush knife. The deceased's conduct posed as a serious act of provocation, not only to the accused, but to the rest of the family members. Even though the accused may be viewed as having acted excessively when assaulting the deceased, the situation was highly tempting. It is trite law that provocation is an extenuating factor. See **S vs. Letsolo 1970 (3) SA 476 AD.** Also see **Rex vs. Linda Nkosinathi Matsebula and Another – Criminal Case number 322/17 paragraph 25.** This court has

considered the circumstances leading to the killing of the deceased as a strong extenuating factor.

[14] In as much as this case involves an irretrievable loss of life, which ordinarily attracts a deterrent sentence, the special circumstances involved do not warrant a stiff sentence. It is in fact not in the interest of justice to give the accused an uninterrupted custodial sentence in the circumstances of the case. Much as the courts have mainly imposed custodial sentences in culpable homicide cases, in exceptional and justifiable cases, fine options have been considered. See **Rex vs. Bonny Mpendulo Ginindza – Criminal Case No. 167/17 paragraphs 46 – 47.** See also **Rex vs. Ntokozo Patty Simelane and Another – Criminal Case No. 95/19 at paragraph 34.** See as well **Linda Nkosinathi Matsebula and Another – Criminal Case No. 322/17 at paragraph 26.** In the case of **The King vs. Justice Fana Earnshaw – Criminal Case 210/2020 at paragraph 19** the court gave the accused a wholly suspended sentence in circumstances similar to the ones prevailing in the instant case.

[16] Having said all the above and having struck a balance between the interests of the accused and the society, I find it fair and just to sentence the accused to five (5) years imprisonment without a option of a fine wholly suspended for three (3) years

on condition the accused is not found guilty of murder, attempted murder or culpable homicide within the period of suspension of the sentence.



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**D.V. KHUMALO**  
**ACTING JUDGE OF THE HIGH COURT.**

For the Crown:       Mabila N.

For the Defence:     Ndlangamandla N.