



**IN THE HIGH COURT OF ESWATINI**

**CASE NO. 497/2022**

**HELD AT MBABANE**

In the matter between:

**REX**

**VS**

**KHANYISILE NOPOPI MALINGA**

**NEUTRAL CITATION:**      ***REX VS KHANYISILE NOPOPI MALINGA  
(497/2022) SZHC – 283 [11/10/2023]***

**CORAM:**                      **BW MAGAGULA J**

**HEARD:**                      **06/07/23, 26/04/23, 08/06/23, 12/06/23, 19/06/23,  
04/07/23, 06/07/2023**

**DELIVERED:**              **11/10/2023**

*Summary: Criminal Law And Procedure – Murder – Mother feeding her two minor children with food which she laced with Methomyl Case No. 16752-77-5, Cypermethrin Case No. 52315-07-8 commonly known with a trading name of Master 900. Accused made a confession before a judicial officer.*

*Held: The intention of the Accused as ascertained from her conduct reflects that she appreciated that by ingesting food laced with the poisonous substance (Master 900) to her children was going to cause their death. Accused acted recklessly in that regard. Two minor children died as a consequence of her unlawful conduct. The murder is both dolus directus and dolus eventualis.*

*Held Further: Accused found guilty of murder.*

---

## JUDGMENT

---

**BW MAGAGULA J**

**BACKGROUND FACTS**

- [1] The Accused an adult female of Elugodvweni in the Shiselweni District, stands charged of two counts of murder. The victims are her own biological children, Senkhosi and Doctor Mabuza. At the time of their death the children were seven (7) and four (4) years respectively. Son and daughter.

- [2] When the charge was put to the Accused at the beginning of the trial, she pleaded guilty to a lesser offence of culpable homicide.
- [3] It is common cause that the following exhibits were admitted by consent.
- 3.1 The statement made by the Accused at her request under caution in terms of the judges Rules. Exhibit C.
  - 3.2 The album compiled by Detective Constable Thulani Gama.
  - 3.3 Exhibit 3 which is a report by Dr Violet David Mwajali, a medical specialist at the National Psychiatric mental health referral hospital in Manzini.
  - 3.4 The report on the post mortem examination compiled by Dr Komma Reddy in respect of the death of the deceased, Thulani Nkosikhona Mabuza which was admitted in court as exhibit 4. The report on post mortem examination done on the other child, Doctor Mabuza, by Dr Komma Reddy.
  - 3.5 The affidavit by Phiwayinkhosi Mcolisi Nhlengetfwa based at the Royal Swaziland Police Forensic Laboratory in respect of the substances that were handed to him for testing including the food sample, blood sample from the deceased, Doctor Mabuza and Senkhosi Mabuza.

#### **Evidence adduced by the Crown's witnesses**

- [4] PW1 testified that the Accused was emotionally unstable on the day of the incident. She had come to her house with glassy eyes. She conceded that the

Accused had on a previous occasion approached her to relay to her the problems she was facing with PW2.

- [5] PW1 Sibongile Dlamini gave evidence that on the 18<sup>th</sup> May 2020 and at her house, her granddaughter Sihlelo Malinga came to her running stating that she should come quickly to see the mother of the two (2) deceased children feeding the children and they collapsed. She quickly ran to the Accused's place and found the two children (deceased) lying down with foam coming out of the noses and mouths. She stated further that transport was organized and the two children and the Accused were rushed to the Nhlangano Health Centre. During her cross examination she maintained she is not aware that the Accused had ever been expelled by PW2 from his home.
- [6] PW2 was Sicelo Mabuza. He narrated to court that he was living with the Accused and their two (2) children (the deceased). The third child Musa, was born outside of their relationship. He stated that he was away when he was informed about the ordeal of 18<sup>th</sup> May 2020. He had left the mother of his children (Accused) at their residential place. She had earlier on told him that she was due to go to the clinic to clean her womb. This witness further told the court that he and the Accused person had an on and off relationship, which ensued after he impregnated the mother of his other son Musa Mabuza.
- [7] A photo album of the deceased, a confession statement, a psychiatric report, a forensic report and post mortem report was filed from the bar, by consent. PW3 was Detective Sergeant Nelisiwe Ndzinisa. She testified that she was the investigator of the case. She is a Police Officer attached to the Domestic

Violence and Children Unit since 2007. She told the court that after she had been detailed to investigate the case, she proceeded to Nhlango Health Centre where she found the Accused visibly sick and traumatized. She told the court that throughout their conversation the Accused was crying and she came to the conclusion that the emotional abuse the Accused was subjected to in the hands of PW2, catalyzed the events of the fateful day. She used the poisonous substance on her person as well as the deceased children. She spared the child that she did not give birth to.

- [8] PW4 is Dr. Mwajali, a psychiatrist doctor who examined the Accused after this incident. She concluded that the Accused was of a sound mind and could be taken to court for her trial as she was fit and proper for trial. PW4 testified that she examined the Accused and her findings were that she was mentally stable and competent to stand trial. She conceded that she was only called in to testify as to the Accused person's competency to stand trial. The doctor submitted the report she compiled after the psychiatric examination, which was admitted by consent and marked exhibit 3. In paragraph 3 of the report the Doctor states the following:-

8.1 On examination, the Defendant is well presented in age appropriate clothes. Her behavior and speech is well organized and appropriate for her age. She admits to kill her children after quarrelling with her bot/friend. She wanted to end her life and those off her kids to end suffering, unfortunately only kids died instantly and she survived. Mental status evaluation confirmed

that she is mentally stable. It is my judgment that Ms Khanyisile Nopopi Malinga is currently of sound mind, and does not have any mental illness. Generally, the Defendant is able to think clearly, make decision and put thoughts into words. Based upon this examination I conclude that the Defendant is competent to stand trial in the Court of Law.

[9] On Monday 19/05/2020 at about 0620hrs my husband Sicelo woke up and went to the shop to meet someone. As he left me behind, I thought of killing my two children and myself as well. I went to the garden down the river belonging to my husband and there I found a pesticide used to kill pests. I came back to the house and put it on top of the roof. I took a bath take care of my kids as I wanted to go to the clinic in town to do check-ups as I am pregnant. I left for town. As I was passing the shop ka-Matsebula my husband asked me where I was going, and I told him that I was going to the clinic since I anticipated that on Tuesday I might fail to get to town since it would be a lockdown. He ordered me to go back home. I did not object but I decided to buy milk and went home. On arrival at home I prepared porridge and milk for the children in the presence of their father. He then left for his garden. However, on his way out to the garden he reminded me that I must go and leave his homestead.

[10] PW4 added that anger and stress are emotions we are expected to control. Stress is a risk factor for mental illness and that stress (being an emotion) accumulative increases the risk of mental illness. Also that such stress that has

not been controlled or taken care of can lead to mental instability. Therefore, a person who has been emotionally abused for 8 years can be said to be emotionally unstable.

- [11] This witness was cross examined by Musa Hlophe, Defence Counsel. It was put to her that when the examination was done all the background facts were not placed before the Doctor.

### **The Accused defence**

- [12] The Accused person testified that the death of both children was not intentional but that it was an unfortunate response to her emotionally buttered self, caused by PW2's decision to expel her and the deceased persons out of his home. The father of her 2 children and 1 unborn child was severing ties with her after 8 years of living as boyfriend and girlfriend. The grandmother, PW1 referred to the Accused as her daughter-in-law. One cannot deny that the boyfriend's change of heart and wanting to marry another instead sent the Accused on an emotional ache. Such emotional paralysis led to the unintentional killing of her 2 children. The Accused also administered the poisonous substance to also kill herself and her unborn child so as to remove her and her children since they had become a burden to PW2 who wanted a life with another girlfriend.
- [13] The Accused and PW2's relationship though spanning 8 years, was marred with emotional and physical abuse. A child borne from another woman was

introduced into the 8 year relationship and the Accused was burdened with taking care of the new child as its mother was away in South Africa perhaps living her life free off the responsibility that comes with raising a child.

- [14] On the other hand, the Accused was left with the responsibility of raising 3 children while she was pregnant with her third child which she eventually delivered at the Nhlangu Correctional Facility. From the evidence brought before court the Accused person was seen as a mentally unstable person who was only good enough to bear and take care of children; simply because she was an orphan who had no home and PW2 was her savior and she was bound to endure any kind of treatment (abuse) from PW2 to sustain herself and her children. PW2 took advantage of her vulnerability, turned her into a baby making machine and thereafter decided that he wanted a wife and not the Accused.

### **The Law applicable**

- [15] The Accused stands arraigned with the charge of murder. What is her reason about the charge is that she murdered her own children, two minus aged 7 and 4 years respectively. This behavior is normal to animals generally not necessarily human being. Even in the world the mammals are generally known to protect their young ones especially the mothers hence, the behavior of the Accused necessitated psychiatric examination because on the face of it one would think it's an abnormal behavior for a mother to kill her own children. Infact what is normally obtainable is that a mother will get enriched when her young one are threatened by anything.



[16] Unfortunately the results of the psychiatric examination reflects otherwise. Dr Violet David Mwajali the specialist in Psychiatric Mental Health, in her written report dated the 17<sup>th</sup> July 2020 concludes as follows;

*“It is my judgment that Miss Khanyisile Nopopi Malinga is currently of sound mind, and does not have any mental illness. Generally, the Defendant is able to think clearly, make decisions and put thoughts into words. Based upon this examination I conclude that the Defendant (I suppose the Doctor meant to say Accused) is competent to stand trial in the court of law”.*

[17] It is on that basis that I will now discern to set out the law relating to murder applying to the Accused person as a person of sound mind.

[18] The court in **Rex v Blom 1938 Ad 188 at 202** a *locus classicus* in the law of inference pronounced that;

*“In reasoning by inference there are two cardinal rules of logic which cannot be ignored.*

- 1. The inference sought to be drawn must be consistent with proved facts. If not the inference cannot be drawn.*
- 2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then*

*there must be a doubt whether the inference sought to drawn is correct.”*

[19] In **Mazibuko Vincent v Rex** 1982-86 377 (CA) at 380 the court stated 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.”*

[20] In another case of **William Mceli Shongwe v Rex Criminal Appeal Case No. 24/2011** at page 21, the court addressed the element of intention to kill, stated the following;

*“The intention of an Accused person is to be ascertained from his acts and conducts. If a man without legal excuses uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased.”*

[21] In the matter of **Rex vs Mancoba Muzi Nhlabatsi**<sup>1</sup> the court described murder as follows;

*“Murder is the unlawful killing of a human being with intent to kill. Where this intent is absent the offence is culpable homicide. A definition of culpable homicide is the unlawful negligent causing of the death of a fellow being. See: R vs Mbekezeli Wiseman Dlamini*

---

<sup>1</sup> (344/09) [2014] SZHC 153 (17 July 2014)

*and others Criminal Case No. 370/09, R vs Nhlonipho Mpendulo  
Sithole Criminal Case No. 370/2011.*

[22] Although the Accused pleaded guilty to a lesser crime of culpable homicide, the court recorded a plea of not guilty, as the tender of culpable homicide was not accepted by the state.

[23] Hence, I had find it relevant to also traverse on the law pertaining to culpable homicide which is referred to in the above cases the one of **R vs Mbekezeli Wiseman Dlamini**. The evidence as I have related to it above, specially the one of Psychiatric negates the negligence on the part of the Accused as it clearly stated that she was of sound mind when she executed the act that led to the eventually death of her children. In the recent judgment of the Supreme Court of **Khumalo vs Rex**<sup>2</sup>. The court traversed on the law on the *dolus directus* and *dolus eventulis*. In paragraph 10.5 Her Ladyship J.M Van Der Walt JA who ordered the judgment states the following; the essential requirements of *dolus eventulis* was summarized as follows in **Thandi Digi Shlongonyane vs Rex**<sup>3</sup>

*“They are; 1. Subjective foresight of the possibility, however remote, of the Accused unlawfully conduct causing death to another; 2. Persistence in such conduct, despite such foresight; 3. The conscious taking of the risk of resultant death, not*

---

<sup>2</sup>

<sup>3</sup> Criminal Appeal Case No. 40/1997 at page 4 of the judgment.

*caring whether it ensues or not; 4. The absence of actual intent to kill.”*

[24] In the matter of the **State vs Celumusa Dube**<sup>4</sup> the court stated as follows;

*“Premeditation an intention are different in that premeditation involves a thought process that contemplates a certain outcome and the means to achieve that outcome. Intention in all of it’s forms (dolus directus, dolus indirectus and dolus iveniuntis involves the perpetrates state of mind before and while the criminal act is being committed.”*

## **Adjudication**

[25] The defense in the closing submissions submits that when the Accused administered the poisonous substance and put same into her children’s food she was not herself. Miss Hlophe Learned Counsel for the defense argues that the Accused was in an emotionally dissociative state so as not to appreciate the consequences of her actions at the time. It is argued on her behalf that she was frustrated on removing herself and her children from the husband’s life since she had nowhere else to go as she was an orphan.

[26] Therefore, she chose the easy way out so as to allow the husband to leave the life he wanted without her and the children. Miss Hlophe argued therefore that there was no evidence to suggest that the Accused had the necessary *mens rea*

---

<sup>4</sup> (CC 03/22) [2022] ZAMPMBHC 28; 2023 (1) SACR 513 (MM) (3 May 2022)

(intention to kill). The defence argues that the Accused person should not be found guilty of murder but of a lesser charge of culpable homicide.

- [27] The Crown has submitted differently. Mr Masango representing the Crown submits that if the Accused was suffering from anguish to such an extent that she wanted to end her life and her children. Her actions thereafter, which are exhibited by her selective thinking and execution of thought sell her out. She thought soberly, clearly and executed perfectly. Mr Masango argues that when she prepared the food, walked to the garden and took the master nine hundred walked back to the house, administered the food in the children's food, she intentionally excluded her husband's child which she did not give birth to. Therefore, the Crown argues that her motive was direct and calculative.
- [28] The Court is inclined to agree with the Crown in the matter. The arguments of the Crown are solid and are supported by the law and the evidence before court. If the Accused thought soberly that she wanted to take the life of her children, irrespective of the motive, she planned it. She had all the time to change her mind. She walked to the garden to get the pesticide. . The garden was not situated in the homestead it was situated down the river.<sup>5</sup> She took the poison and walked back home. Again she had the time to reason on what she was about to do. But since she had formed the intention to execute her plan, she proceeded to administer the poison on the food she had prepared for her own children. She then called them, she gave them the food and excluded the other one she did not give birth to. Her actions are consistent with what was

---

<sup>5</sup> Reference in this regard is made to paragraph 4 of the Accused person's statement.

foreseeable in her mind, being the administration of the pesticide to the food that she then gave to the children was in turn going to kill them. Infact, she had intended to kill them and herself.

- [29] The dicta in the matter of **Mazibuko Vincent vs Rex 1982-86 377 (CA) at 380** is applicable in the matter at hand. She deliberately administered poison into their food, whilst appreciating that when the children eat the food laced with the poison it will result in their death. She proceeded to act recklessly in that regard. Death as foreseeable as it were, was inevitable.
- [30] The court therefore, can discern from the actions and conduct of the Accused that she used a deadly chemical on her children and herself resulting in the unfortunate death of her children. Fortunately for her, she was spared. She has to be held accountable for her actions.
- [31] The fact that she was the biological mother of the deceased children, is no justification. Whatever anger and anguish she was laboring under in her mind and whatever anger she harbored against their father, gave her no right to take the children's lives. The fact that one is a mother of children, does accord the right of ownership over them. The law forbids one from taking the life of another person. The law protects anyone from taking the life of another, irrespective of the fact that you are the parent.

[32] The defense argued that the Accused must have been provoked to act in the matter in which she did and the court must consider that. The defence argues that when the Accused administered the poisonous substance which eventually her children, she was labouring under an extreme emotional irrationality. Such irrationality was caused by her husband and father of the deceased who had rejected her and wanted nothing to do with her and her children. He was chasing her from their home, so that he could get married to another woman. Hence, the Accused suffered from cumulative stress which had been left uncontrolled for a very long time. Such uncontrolled stress culminated in a mental instability that led to the unintentional killing of her children and a failed attempt of suicide on herself. This argument fails to provide probable support for it's conclusion. The evidence submitted by the Psychiatric expert has already been quoted earlier in the judgment. The state of mind of the Accused was stable. The issue of mental instability of a person is a technical issue. It cannot be argued through persuasion. The expert says she was mentally fit when she committed the crime. Therefore, the issue of mental instability is not supported by the evidence before court, hence it must fail.

[33] The commission of the crime was actuated by the belief that she would in turn die and their absence would leave her husband in peace. It is clear that the Accused was labouring under the belief that the elimination of both herself and the children would accord her some form of relief. This is a skewed and abnormal line of thought. It is possible that she would benefit from some sort of psychological intervention, if she has not already, at the Correctional Services Department. I would have taken this factor as an extenuating factor,

if the psychological report had indicated that she was not mentally stable at the time of the commission of the offence. However, the evidence points to the direction that there are aggravating circumstances in the manner the offence was committed. Which is the taking of lives of your own children, unwarrantedly. I therefore find that there were no extenuating circumstances in the commission of the crime. No evidence was actually led by the defence to prove the existence of extenuating circumstances. The court finds that murder of the two children was premeditated.

[34] Due to the foregoing reasons, the court finds the Accused guilty of murder without extenuating circumstances.

A handwritten signature in black ink, appearing to be 'BW Magagula', written over a horizontal line.

**BW MAGAGULA**

**JUDGE OF THE HIGH COURT OF ESWATINI**

For the Crown: Kingsley Masango (DPP)

For the Accused: Nosisa Hlophe (Mongi Nsibandze & Partners)