

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 407/2019

In the matter between:

REX

v

LUCAS SANELE MABILA ("1st ACCUSED")

THABO ANDILE MAVUNDLA (2nd ACCUSED")

Neutral citation : *Rex v Lucas Sanele Mabila & Another (407/2019)*
[2023] SZHC 06 (07/02/2023)

CORAM: B.S. DLAMINI J

DATE HEARD: 16 December 2022

DATE DELIVERED 07 February 2023

Summary: Criminal proceedings-Accused persons charged with the offences of murder and robbery. Both accused persons pleading guilty to the charges. Crown leading evidence of several witnesses to prove commission of the offences.

Held; The evidence led by the Crown is sufficient to hold both accused persons liable for the offences of murder and robbery. Accused persons found guilty of murder and robbery.

JUDGMENT

INTRODUCTION

[1] The Accused persons in this matter are Lucas Sanele Mabila and Thabo Andile Mavundla. They are facing charges of Murder and Robbery. In Count 1, being the charge of murder, it is alleged by the Crown that “*upon or about the 10th September 2019 at or near Sidvokodvo area in the Manzini Region, the said accused persons and*

each or all of them acting jointly and or in furtherance of a common or shared purpose did unlawfully and with intent to kill, kill Fransisco Isaac Chichongue (hereinafter referred to as "the deceased") and did thereby commit the crime of Murder."

- [2] In Count 2, the Crown alleges that the accused persons are guilty of Robbery in that *'upon or about the 10th September 2019, at or near Sidvokodvo area in the Manzini Region, the said accused persons and each or all of them acting jointly and in furtherance of a shared or common purpose did unlawfully and intentionally use force and violence to subdue and induce submission by one Fransisco Isaac Chicongue and did take and steal from him a motor vehicle, to wit, VW Polo, registered VSD 233 BM valued at E 22,000.00 the property of or in lawful possession of Fransisco Isaac Chicongue and thus did commit the offence of Robbery'*

- [3] When the charges were put to the accused persons, they both pleaded guilty. This notwithstanding, the position of the law is that the Crown is still required to prove commission of these offences by the accused persons beyond reasonable doubt.

CROWN'S CASE

- [4] Thulani Mavuso (PW1) was the first witness to give evidence on behalf of the Crown. This witness is employed in one of the farms at Sidvokodvo which is around Luvuvhu area. The witness was travelling in a company vehicle with a colleague in the early morning hours around 7:00 am. As they were driving along the public road, the witness and his colleague noticed something lying next to the road after passing certain advertising boards. Since the witness and his colleague had already passed the suspicious object, the witness, who was driving the vehicle, decided to reverse the vehicle in order to take a closer look at the object.
- [5] After reversing the vehicle towards the object and upon taking a closer look, they realized that it was a human being lying motionless next to the road. The witness stated that the person was lying facing upwards and seemed to be not well. The witness dialed 999 and a certain lady responded to the call. The lady who answered the 999 call instructed the witness to touch the body of the person lying on the ground and feel for a pulse around his neck. Indeed PW1 touched the person lying on the ground as instructed and realized that he was not

alive as there was no pulse. According to PW1, there was a rope tied around the neck of the person who was lying on the ground. There was also blood coming out of his mouth and his tongue was out. The face of this person was swollen and the witness also noticed some sandals next to his body.

[6] PW1 and his colleague waited for the police to arrive. When the police eventually arrived, there were already some other community members and community police of the area. The witness eventually left the scene and they proceeded on their journey.

[7] PW2 was an old lady by the name of Lomasontfo Mabila. This witness resides at Bhekinkhosi area and is the biological mother of the first accused person. The second accused person is a grandchild of the witness. PW2's testimony was that accused no.1 was working in South Africa. When schools in the country took a break, accused no.2, who was still a scholar went to visit his uncle (accused no.1) in South Africa. PW2's evidence was that when it was time for examination in the country, accused no.2 was called to come back in order to sit for his examination.

[8] According to PW2, both accused no.1 and accused no.2 came back into the country in the company of another male person who was unknown to her. The three, upon arriving in the country, passed by this witness at her home on a Tuesday evening. Accused no.1, according to this witness later returned to South Africa.

[9] PW2's testimony was that at a certain point, she received a call from one Annah Nkomonde who enquired from her as to when she had last seen accused no.1 to which she replied that it was on a Tuesday evening. The said Annah Nkomonde informed PW2 that accused no.1 had been heavily assaulted by community members in South Africa and was in a hospital in that country. PW2 was advised by the caller to urgently visit her son in South Africa.

[10] According to PW2, accused no.1 was handed over to a certain local police officer to be transported into the country. PW2 stayed with accused no.1 for some days while nursing his injuries and was thereafter taken by her to the police to be investigated on allegations of murder that they had allegedly committed with accused no.2.

[11] PW2 stated that accused no.1 informed her that he and accused no.2 had killed someone and placed his body next to a dam at Sidvokodvo around Luve area. PW2 stated that accused no.1 informed her that the reason they killed the person was because they wanted to rob him of his motor vehicle which he had recently purchased in the country.

[13] PW3, Party Mfanukhona Dlamini, is a resident of Bhekinkhosi area and has his home situated at a place called Mdayane. This witness stated that he knows both accused persons. According to PW3, accused no.1 and 2 arrived at his drinking spot driving in a red VW Polo in order to purchase alcohol. The motor vehicle was being driven by accused no.1. The witness stated that it had been a long time since he met accused no.1 and, upon seeing him driving in a VW Polo, he congratulated him for the purchase and reasoned that accused no.1 must be having a successful career in South Africa. PW3 stated that he earns his living by selling alcohol and that he was the owner of the place where accused no.1 and 2 had come to purchase alcohol.

[14] PW4 (Ncamsile Mavundla) is a sister to Accused No.2 and Accused No.1 is also a member of her close family. PW4 stated that in November 2019, schools were still closed but were about to be

opened. Accused No.2 had visited Accused No.1 in South Africa. In that year (2019) Accused No.2 was doing Form V in one of the local schools. According to PW4, Accused No.2 came back home on a Tuesday but she never got to see him on that day but only saw Accused No.1. PW4's testimony was that Accused No.1 found her doing laundry at her home. The witness enquired from Accused No.1 as to where Accused No.2 was. The response given by the former was that Accused No.2 was at his grandmother's place and was asleep.

[15] PW4 was disturbed on learning that Accused No.2 was asleep yet he was supposed to be at school on that day. According to PW4, Accused No.2 came home the following day and was not his usual self. The evidence by PW4 was that Accused No.2 was always in a happy mood and that they would spend considerable time chatting and discussing on diverse topics.

[16] PW4 informed the Court that she normally attends church services every evening. On this particular day while on her way to church, the witness received a call from Accused No.2 who enquired if she was going to church. The witness responded to the affirmative whereupon

Accused No.2 requested to meet her before she went inside the church. The witness agreed to wait for Accused No.2.

[17] When Accused No.2 eventually arrived to meet PW4, he held her hand and informed the witness that he wanted to relate to her about something bad he and Accused No.1 had done. Accused No.2 then informed the witness that they had killed someone who was a friend to Accused No.1. Accused No.2 related to the witness that the person they had killed had requested Accused No.1 to assist him in finding a good car to buy in Eswatini. Accused No.2 narrated how they had purchased a rope with which to strangle the deceased after he (deceased) had bought a car of his choice in the country. The intention, according to the narration made by Accused No.2 to PW4, was to rob the deceased of the motor vehicle he had just purchased in the country.

[18] After narrating everything to PW4, Accused No.2 requested to be taken to PW4's Pastor, one Bandzile Shongwe with the aim of making a confession and requesting to be prayed for. Indeed PW4 took Accused No.2 to her Pastor before whom Accused No.2 again related

everything that had taken place leading to the death of the person from South Africa.

[19] According to PW4, Accused No.2 explained to her in detail how they had killed the deceased who is referred to in the indictment as Mr Chicongue. The witness stated that Accused No.2 related to her that the plan was that after purchasing the rope, Accused no.2 would sit at the back of the motor vehicle and wait for a signal from Accused No.1 which would be through the driver's rear-view mirror. The arrangement between the parties was that Accused No.1 would be the one driving the motor vehicle purchased by the deceased. The deceased was occupying the front passenger seat.

[20] When Accused No.2 got the signal from Accused No.1 which was in the form of a nod, Accused No.2 tied the rope around the deceased's neck and pulled the neck back against the passenger seat. Accused No.1 who was still driving, parked the car and assisted Accused No.2 in suffocating the deceased using the rope they had earlier bought until he stopped breathing. According to PW4, Accused No.2 informed her that before taking his last breath, the deceased told the

two accused persons that they can kill him but should remember that back at home they knew that he had left home for Eswatini with the two accused persons.

[21] Detective Constable P. Mdluli (PW5) was the last witness for the Crown. This witness is from Mliba Police Station and was the main Investigator in the matter. On the 18th September 2019, the witness was on duty at Mliba Police Station and received a docket about a human body that had been found at Sidvokodvo area. The deceased had been found with a rope tied around his neck. During his investigation, the witness established that the body was that of Isaac Chicongue, a Mozambican national residing in South Africa.

[22] PW5 also discovered during his investigation that the deceased had left South Africa in order to buy a motor vehicle in the country. The deceased, according to PW5 eventually found a motor vehicle of his choice and it was a VW Polo red in colour with registration number VSD 233BM.

[23] PW5's evidence was that his investigation pointed to Accused No.1 and 2 as being the prime suspects in the death of the said Mr. Chicongue. After conducting his investigation, the witness ended up arresting Accused No.1 and 2 for the murder of the deceased. Upon arrest, the accused persons showed the witness where the VW Polo was parked and same was taken to Mliba Police Station. The accused persons also opted to make confessions and they were taken to a judicial officer at the Magistrates Court where they recorded statements effectively admitting to the offences of murder and robbery.

[24] After conclusion of the evidence by PW5, the Crown applied to hand over several documents as part of its case. These documents included a photo album (exhibit "1") containing several pictures of the deceased lying facing upwards with a green rope loosely tied around his neck. There are also pictures of a red VW Polo registered as VSD 233 BM. Exhibit "2" is a post-mortem report prepared by Dr. Komma Reddy, a pathologist with the Police Service. The report indicates that one Isaac Fransisco Chicongue, an adult male about 24 years died "*due to strangulation by ligature around the neck.*" Exhibits "3" and

“4” are the confessions made by Accused No.1 and 2 respectively before a Judicial Officer. In their recorded statements, both Accused No.1 and 2 admit to have participated in the killing of the deceased with the aim of robbing him of his motor vehicle. The defence counsel did not object to the admission of all these documents which were introduced as part of the Crown’s evidence in Court.

DEFENCE CASE

- [24] Accused No.1 (Lucas Sanele Mabila or “DW1”) was the first to take to the witness stand. His evidence was that he, Accused No.2 and one Isaac Chicongue left South Africa and came to Eswatini in order to help Chicongue buy a car from the local market.
- [25] DW1 stated that after trying several cars, they finally settled for a red VW Polo which was in Matsapha near Pick ‘N Pay. The parties decided to test-drive the motor vehicle before making payment. When test-driving the car, Accused No.1 was the one driving and Chicongue occupied the passenger seat next to the driver. DW1 stated that when driving the car, he noticed that it had problems in changing gears even though it was an automatic car. When they told the owner of the car

about this problem, he responded by saying the car only needed transmission oil and would be alright once filled with it.

[26] According to DW1, after attending to a few issues on the car, they decided to buy a rope so that they could tow it in the event that it later developed mechanical problems. Chicongue was happy with the car and they took it. By this time it was already dark and they proceeded to drive towards Mphisi Farm. DW1 was the one driving the motor vehicle with Chicongue occupying the front passenger seat. Accused No.2 was seated at the back of the car.

[27] DW1's testimony was that as they were driving along the public road, Accused No.2 wrote a message on his (Accused No.2's) phone, and thereafter touched this witness on his shoulder and made him read the message written on the cellphone. According to DW1, Accused No.2 asked him to slow down the car as he wanted to 'put it.' DW1 told Accused No.2 to stop as he thought the latter wanted to tie a rope around deceased's neck. DW1 had the belief that Accused No.2 wanted to tie a rope around deceased's neck because he had mentioned this idea whilst they were in South Africa and he (DW1) was against it. DW1's testimony was that Accused No.2 had informed

him that he wanted to kill Mr Chicongue and take his car because all of his friends at school were driving in cars.

[28] According to DW1, after having driven for some distance, he heard Mr. Chicongue asking him if he was seeing what the boy (Accused No.2) was doing to him. When DW1 turned to look, he saw that Accused No.2 had tied a rope around the neck of Chicongue and was pulling his neck against passenger seat. DW1 stated that he touched the rope around Chicongue's neck and felt that it was too tight around his neck. DW1's testimony was that he thought of stopping the car but feared that it would veer off the road and crash. In his evidence, DW1 stated that when he eventually stopped the car, Chicongue was already dead and there was nothing more he could do to save him.

[29] It was DW1's evidence that when he enquired from Accused No.2 why he had killed the person, the latter responded by apologizing and saying that he had mentioned it while they were in South Africa that he needed the car for his personal use. According to DW1, they then drove towards Sidvokodvo around Luve and decided to dump the body near the dam. The two thereafter went home. After sometime, DW1 went back to South Africa. While in South Africa, one Mzondi

came to DW1 accompanied by a crowd of around 60 people. The people wanted to know the whereabouts of Chicongue as he had left South Africa with DW1. DW1 was assaulted by the crowd until he was rescued by one of the people in the crowd who told the crowd that he was taking him to the rail-line but instead drove him to the police station.

[30] Accused No.2 (Thabo Andile Mavundla or “DW2”) also took to the witness stand. DW2’s version on the events leading to the death of Chicongue was slightly different from that of Accused No.1. According to DW2, after writing a message on his phone in which he was informing DW1 that he was now putting their plan to kill Chicongue into motion, DW1 did not immediately respond. It was only upon reaching Mphisi Farm that DW1 looked at DW2 and, looking at the rear-view mirror, signaled to DW2 to put their plan into action.

[31] According to DW2, he placed the rope around Chicongue’s neck and started to pull back. At that point, DW1 immediately applied brakes on the vehicle and stopped it by the side of the road. DW1 alighted

from the driver's seat and went to the back passenger's side, opened the door, and assisted DW2 in pulling back the rope against the neck of Chicongue. DW2's testimony was that Chicongue subsequently became weak and later died from the strangulation. DW1, according to DW2, went to the front passenger seat, pushed back the legs of the deceased inside the car and closed the door of the front passenger seat.

[32] The duo then drove with the deceased until they reached the Sidvokodvo route within Luve area. They then dumped the body of the deceased near the edge of the road. According to DW2, before dumping the body of the deceased, DW1 searched the pockets of the deceased and removed all the money that was in his pockets. DW2's evidence was that they later went home and he was traumatized by the whole incident. It was DW2's evidence that upon realizing the distress that he was in, DW1 comforted him and patted him on the shoulder, assuring him that there would be no trouble for them as no one had witnessed the whole episode.

[33] DW2 confirmed the narration given by his sister Ncamsile Mavundla (PW4). In cross-examination, DW2 denied that the plan to kill the

deceased was his plan alone. According to DW2, it was DW1 who came up with the plan to kill the deceased as he (DW1) needed his car. DW2, denied that he wanted the car because most of his friends at school were driving in cars. According to DW2, none of his friends at school drove a car.

ANALYSIS AND CONCLUSION

[34] In **Rex v Maziya (119 of 2010) [2018] SZHC 192 (15 August 2018)**, the Court held as follows;

“In Mphikeleli Dlamini v R 1979-1981 SLR 195 at 198D-H the Court of Appeal stated as follows:

“The law in cases of this nature has been authoritatively laid down in Swaziland in the case of Annah Lokudzinga Mathenjwa v R 1970-1976 SLR 25. The test there laid down is as follows, and I see no reason for complicating the situation in this country in the manner in which it has been complicated in the opinion of many people in South Africa. In Annah’s case, the law is stated as follows, at 30A: ‘If the doer of the unlawful act, the assault which causes the death, realized when he did it that it might cause death, and was reckless whether it would do so or not, he committed

murder. If he did not realize the risk he did not commit murder but was guilty of culpable homicide, whether or nothe ought to have realized the risk, since he killed unlawfully.”

[35] In another local case of **Rex v Thokozani Joseph Samson King Mngomezulu (481/10) 2018 SZHC 125 (12 June 2018)**, the Court stated the law as follows;

“In *R v Jabulane Philemon Mngomezulu 1970-76 S.L.R Page 7 at B-C*, the Court per Troughton ACJ, cited with approval the following passage from the South African Appellate Division case *S v Mnisi 1963 (3) SA 188 (A) at page 192 F-G*, with regards how the court construes the question of intention;

“A person in law 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.”

[36] In the case at hand both Accused No.1 and 2 orchestrated a plan while in the Republic of South Africa to kill the deceased in order to rob him of his motor vehicle. This Court rejects without hesitation the narration given by Accused No.1 suggesting that Accused No.2 acted

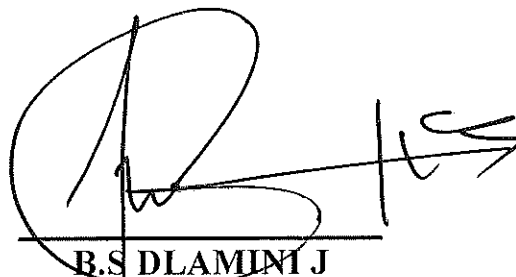
alone in the killing of the deceased. This narrative by Accused No.1 is outrageous, illogical and constitutes a distortion of the highest order. Just like the ill-fated plan to kill the deceased went horribly wrong, the explanation given by Accused No.1 seeking to implicate Accused No.2 as the sole doer of such a heinous crime is bound to dismally fail.

[37] The desired plan or intention of both accused persons was to kill the deceased in order to rob him of the motor vehicle. They succeeded in putting this plan into action by intentionally strangulating the deceased by means of a ligature until he stopped breathing. The elements of murder are completely fulfilled by the actions of the accused persons. The accused persons are found guilty for the murder of the deceased by the name of Isaac Fransisco Chicongue.

[38] On the charge of robbery, the evidence led in Court clearly shows that the killing of the deceased was for the purpose of robbing him of his motor vehicle. In **Tilayi v S (CA 22/2020) [2021]ZAECMHC 13; [2021] 3 All SA 261 (ECM); 2021 (2) SA SACR 350 (ECM) (9 March 2021)**, it was held by the Court that;

“Robbery is the theft of property through the use of violence or the threat of violence.”

[39] The accused persons employed extreme violence in robbing the deceased of his prized asset which ended up in their possession. The single act of the accused persons resulted in the death of a person and also amounted to theft of property through the use of violence. The accused persons are equally guilty of the offence of robbery and are accordingly found guilty on this charge.

A handwritten signature in black ink, appearing to be 'B.S. Dlamini J.', written over a horizontal line. The signature is stylized with a large loop and a long horizontal stroke.

THE HIGH COURT OF ESWATINI

For Accused Persons: *Miss. N. Hlophe (Mongi Nsibande & Partners)*

For the Crown: *Mr. K. Mngomezulu (DPP's Chambers)*