



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 299/2016

In the matter between:

THE KING

And

MAKHOSONKHE DLAMINI

ACCUSED NUMBER 1

GOODMAN MAGAGULA

ACCUSED NUMBER 2

BONGINKHOSI DLAMINI

ACCUSED NUMBER 3

NEUTRAL CITATION:

**THE KING V MAKHOSONKHE DLAMINI &
2 OTHERS (299/2016) SZHC – 374 (14/12/2023)**

CORAM:

BW MAGAGULA J

HEARD:

24/10/2023

DELIVERED:

14/12/2023

SUMMARY:

Criminal Law and Procedure – Accused charged with murder – The crown and the defence signed a statement of agreed facts and the Accused persons pleaded guilty to culpable homicide – Court finds Accused persons guilty on their own plea – Submission on aggravation and mitigation made by the respective counsel – Judgment on sentencing – Considerations thereof – All Accused made statements before judicial officers in terms of the CP&E – Accused No.1 was presented with numerous opportunities to cool down his anger – The assault meted out on the deceased which eventually caused the injuries that led to his death occurred after all the stolen items had been found – Reckless conduct on the part of the Accused – No need to have assaulted him. All Accused persons sentenced to 9 (nine) years without the option of a fine.

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

- [1] This matter appeared before court on the 12th October 2023 when the trial was meant to commence. All Accused persons were represented by Counsel S. Gumede. The court was informed that an agreement had been reached that a statement of agreed will be prepared, which will eventually be signed by the parties¹. This then necessitated that the matter be postponed to the 18th

¹ This procedure is provided for in terms of Section 272 of The Criminal Procedure and Evidence Act No. 67 of 1938

October 2023, to allow for this exercise. Indeed, when the matter came back to court on the 18th October 2023, the parties filed a dully signed statement of agreed facts, which was admitted in court.

- [2] The charge was then put to all the Accused persons. For clarity, the charge they were facing is the following;

“In that upon or about the 28th September 2016 and at or near Nkamanzi area, the said Accused persons each or all of them acting jointly in furtherance of a common purpose, did unlawfully and intentionally kill one Sibusiso Hlawe and this did commit the crime of Murder”.

- [3] The Accused persons pleaded not guilty to murder, but pleaded guilty to culpable homicide. The defence counsel confirmed their plea to be in line with his instructions.

- [4] The following documents were admitted by the court as exhibits by consent between the parties;

4.1 Statement of agreed facts – Exhibit A

4.2 Report on post-mortem examination – Exhibit B

4.3 Statement made before a judicial officer by Bongo Dlamini – Acc No.3 – Exhibit C

**4.4 Statement made to a judicial officer by Makhosonkhe Dlamini
Accused number 1 – Exhibit D**

**4.5 Statement made to a judicial officer by Goodman Magagula –
Accused number 2 – Exhibit E**

**4.6 Photo album compiled by D/Constable Nimrod Motsa – Exhibit
F.**

[5] The crown also read the contents of the post-mortem report into the record by consent. The Defence Counsel Mr Gumede confirmed that the Accused do not wish to open their case and they will not lead any evidence as they have pleaded guilty to culpable homicide. The crown accepted the tendered plea.

[6] The court then proceeded to find all the Accused persons guilty of culpable homicide as per their own plea. The matter then proceeded to the mitigation and submissions stage.

[7] The Defence Counsel made the following submissions;

7.1 All the Accused persons do not have previous criminal records.

7.2 In respect of Accused number 1, the court was informed that, over and above being a first offender, the Accused is 25 years of age and he is married with 5 children.

7.3 In respect of Accused number two, the defence submitted that he is a first offender as well. At the time of commission of the

offence he was 27 years of age. He also has a wife and two minor children.

7.4 Pertaining to Accused number three, the court was told that over and above being a first offender, he is 35 years old. He is married and has six minor children.

7.6 All the Accused persons are bread winners employed by Nkulu Investments, a construction company based at Buhleni. They are general labourers, all earning E2 000-00 (**Two Thousand Emalangeni**) per month each.

[8] The Defence Counsel took the court through a detailed comparison of how the courts have dealt with sentencing in other comparable culpable homicide cases before. In the matter of **Mbatha Thabani v Rex**², the court meted out a sentence of 6 (six) years.

[9] **Nhlanhla Mdaka Motsa vs Rex Appeal Case No. 27/2014**; the court sentenced the Accused to 6 (six) years imprisonment and 3 (three) years suspended.

[10] **High Court – R v Mtsetfwa 360/2019**

² Criminal Appeal Case No. 9/2007

The sentence was 5 (five) years; 3 (three) years of which was suspended.

[11] **R vs Barney Meshack Masangane Case No. 134/2008**

The sentence there was 2 (two) years.

[12] In the **Nhlanhla Mdaka Motsa** the Supreme Court sought to lay a guideline in Culpable Homicide cases para 15, it says our law recognizes a heart of passion in Culpable Homicide and such cases should be treated less harsh.

[13] The Court must accept that as part of the items that were stolen from Accused number 1 were the keys to his own house which was locked. So, there was insufficient time for him to cool off, considering the sequence of how the events unfolded.

[14] In a number of cases, it has been stated that it is improper for the court to approach a matter on an arm chair basis. A person cannot be confined to think in a particular way.

R v Ginindza Case No. 107/2017 (High Court),

[15] In the matter of **Hlophe J** meted out a sentence of 5 (five) years with an option of a fine of E5 000-00 (**Five Thousand Emalangeni**). In reaching the decision, the court stated that there is no law that prohibits a sentence with an

option of a fine. In the **Ginindza case**, a stabbing was the cause of death where a knife had fallen down. Approaching it from the angle that when a knife fell down, an opportunity was availed for the Accused to run away thus equaled to an arm chair critique.

[16] The Defendant's Counsel contends that in the matter at hand there was a provocation in a form of theft. Comparing with the usual cases while alcohol is a factor, the weapon used was a stick cut from a branch of a tree. The areas of the body where he was assaulted was on the buttocks. The injury on the fore-head came about as a result of the falling.

[17] Accused 2 and 3 were restraining the deceased. Accused 1 was the one inflicting the injuries.

[18] The sentence can be at variance despite the common purpose.

Defence Submissions

[19] The Accused have been convicted of a serious offence involving a death of life. It is common cause that the Accused persons took the law into their own hands. The matter had already been reported to the deceased's father. They could have reported such a clear case of theft to the police.

[20] The court must take into consideration that the deceased was tied and he could not escape or defend himself.

[21] The post-mortem report reflects the extent of the injuries. Accused no.1 assaulted him whilst he was held by the other two Accused persons. This is a serious case of Culpable Homicide.

[22] The crown distinguished the case of **Barney Ginindza, by Hlophe J** which the defence relied on where the court there meted out a sentence with an option of a fine of E5 000-00 (**Five Thousand Emalangeni**). The crown argues that two or more cases may share similarities, however each case has it's own peculiar circumstances. In the Barney Ginindza case the deceased had a habit of bullying the Accused. The Accused were herding cattle which strayed. The deceased despite that the Accused was reasoning with him started to assault the Accused by slapping him on the face. The deceased is the one that produced a knife which then fell on the ground. The Accused then took the knife and stabbed the deceased. Also in that case, the Accused was younger than the deceased. Yet in this case, the Accused were much older than the deceased who was only 18 (eighteen) years. This makes it a serious case of Culpable Homicide. They deliberately took the law into their own hands. The father had already offered to assist. There are no compelling facts warranting that this court must give an option of a fine.

[23] In reply, Mr Gumedze submitted that when the convicted persons realized that the deceased was getting weaker, they implored means to take him to hospital. They carried him with a wheelbarrow. The court must take into consideration the heat of the moment under which the assault took place.

[24] Before I consider the submission made by both parties, it is proper that a survey of the evidence placed before court be made for context.

EVIDENCE NOT DISPUTED

MAGISTRATE SIFISO VILAKATI (who is PW16 in the summary of evidence)

[25] This witness is the judicial officer who recorded a statement from Accused no.3 on the 25th September 2016. Before recording the statement, the judicial officer put certain questions to determine whether the Accused was making the statement freely and voluntarily and without any undue influence and recorded the questions and answers in the profoma form. He satisfied himself that the Accused was not promised anything or induced to make the statement and also that he was not assaulted by the police since his arrest and that he did not incur any injuries whilst in custody. He thereafter recorded him the statement where he stated as follows;

“On Saturday the 24th September 2016 at about 9.00pm the deceased Matjeni arrived at the Dlamini homestead at Nkamanzi. He opened one of the houses and took two cellphones together with keys and left. On the Sunday

Makhosonkhe Dlamini from whose house cellphones were taken arose and contacted his neighbor Goodman Magagula. Together they proceeded to a Nkhosi homestead to search for the suspect. When they apprehended the suspect he told them that he was not the one who committed the offence and that they should go to Matjeni. As they approached Matjeni realized that they were coming for him and he ran towards the mountain.

Makhosonkhe Dlamini then informed Matjeni's father that two of his cellphone had been stolen and that Matjeni had ran away when they approached him. Matjeni's father informed Makhosonkhe Dlamini and Goodman Magagula that he would assist them look for the stolen items and upon Matjeni's return he was going to call them. Matjeni never returned from the mountain. Makhosonkhe's wife Thobile saw Matjeni sitting by the mountain and she phoned her husband giving him directions on Matjeni's whereabouts. Makhosonkhe Dlamini then called me and Goodman to assist him apprehend Matjeni. We proceeded to the mountain looking for Matjeni and we did not find him at the place Thobile had seen him. We then approached the mountain at a different direction and when Matjeni saw us he ran down the hill. We then caught him and took him up the mountain. Makhosonkhe then broke a stick from a tree and he began to assault Matjeni whilst me and Goodman held him. Makhosonkhe assaulted Matjeni on his

buttocks. Matjeni had given us two (2) cellphones prior to the assault except for the keys.

Matjeni managed to escape our grip and he ran. Goodman chased after him and caught him next to a field. When we arrived we asked for the keys and he led us to where he left the keys up the mountain. Makhosonkhe began to assault him whilst we held him. We realized that Matjeni was becoming weak and we asked Makhosonkhe to stop assaulting him. Matjeni sat down and when we suggested that he should stand up so that we proceed down the mountain he fell down and hit against a stone on his chin. At that time Matjeni could not walk and we decided to fetch a wheelbarrow. We put him into the wheelbarrow and took him home. Matjeni's father was not home when we arrived and Machamkela Dlamini phoned a community police who came and waited for us. The community police phoned the Indvuna informing him about the assault. When we went to check Matjeni since we had placed him on the floor we found that he was dead. We then went left Matjeni's homestead and he community police on his own subsequently called the police. We were then arrested on the following Monday".

- [26] Accused 1 and 2 also made statements before two separate judicial officers. Their version is along the same lines as that of Accused number 3. What is

glaring though in particular with the statement made by Accused number 1, is that he says as they were looking for the deceased the following day, they met his father at a Magagula homestead. The deceased father assured him of his co-operation and even vouched that his son will come back. He also emphasized that they should not hurt his son.

SUKULWENKHOSI SIPHO DLAMINI – (who is PW2 in the summary of evidence)

[27] This witness states that on the 25th September 2016 was at his homestead. He saw the Accused persons chasing the deceased. They caught him and tied him with a rope, thus restraining and immobilizing him. The Accused persons then left with the deceased taking the route to Magidza Mountain, this witness followed them. Along the way, they question the deceased about items he allegedly stole from Accused 1's homestead. The items include two (2) cellphones and a bundle of keys. They assaulted the deceased with sticks repeatedly all over his body. This was done to encourage and force him to produce the stolen items. The deceased then led the Accused person to a certain field where he retrieved the gadgets and the keys. As he was watching this witness then received a call from his mother, who instructed him to report home. He then left the scene and went home, leaving the deceased with the Accused. He later gathered that the deceased had died.

PHUMLANI SIBONISO MASUKU – (who is PW3 in the summary of evidence)

[28] This witness in his summary states that on the 25th September 2016, he also saw a person chasing the deceased. The Accused persons accused the

deceased of stealing two cellphones and a bundle of keys from Accused 1's homestead. They chased and managed to catch the deceased, tied him with a rope and assaulted him severely with sticks all over his body. They took the deceased to Magidza Mountain and would assault him along the way. When they reached the foot of the mountain, they proceeded to assault the deceased to the extent that he became unconscious. After that, the Accused then organized a wheelbarrow and transported the deceased to his homestead.

DR. KOMMA REDDY – (who is PW10 in the summary of evidence)

[29] This witness is the police pathologist who conducted a post-mortem examination on the body of the deceased on the 30th September 2016. He thereafter compiled a report. The Doctor opines in paragraph 10 of the report that the cause of death was due to multiple injuries.

4625 DETECTIVE CONSTABLE NIMROD MOTSA - (who is PW17 in the summary of evidence)

[30] This witness is a Police Officer at Piggs Peak Police Station under the Scene of Crime Department. He took pictures of the scene of crime and compiled a photo album.

5713 DETECTIVE CONSTABLE MPENDULO NXUMALO - (who is PW18 in the summary of evidence)

[31] This witness is a Principal Investigator in the matter. He investigated this matter and arrested the Accused persons. He also seized exhibits. The Accused persons specifically admit the following;

- a) They inflicted the fatal injuries to the deceased which eventually caused his death, as shown at page 1 of the Post Mortem Report by the pathologist that death was due to Multiple Injuries.
- b) They acted unlawfully in the circumstances.
- c) They also acted negligently when they inflicted the injuries on the deceased.
- d) There was no legal justification for their conduct.
- e) There was no legal *novus actus intervenes* between their unlawful conduct and the death of the deceased.

ADJUDICATION

[32] The evidence before court reveals that at the time the deceased was assaulted even on the first incident of the assault, he had already handed over to the Accused persons the two cellphones. This evidence transcend through all the recorded statutes of the Accused persons before the judicial officers. In particular, Accused number 2 says, even before the deceased could be tied with the rope, he was asked about the whereabouts of the cellphones. At that time, it is said the deceased took out the two cellphones and gave them to Accused number 3. The latter then confirmed at that point, that indeed, those were the cellphones that were stolen from his house.

[33] It therefore begs the questions why did the Accused continue to severely assault the Accused and injure him to the extent that he then died? Was it only for him to produce a bunch of keys? Were the keys so valuable and important to the extent that it should have cost the life of the deceased?

[34] The court accepts and takes it into consideration that Accused number 1 may have been angered by the invasion of his house and by the criminal act of the deceased. However, he had ample time to cool off. The alleged theft, happened on the 24th September 2016, the assault that caused the deceased's death took place the following day on the 25th September 2016. He could not have been maintaining the same level of fury even the following day. He was presented with a lot of time to cool down and reflect sensibly.

[35] The defence has argued that the court must consider it as a mitigation factor especially against Accused number 1, that as part of the goods that were stolen by the deceased were keys to his own house which was locked. The latter part of this submission is inaccurate and is not supported by the evidence before court. In the statement made before Magistrate Simangele Mbatha, Accused number one states that when he came to his homestead accompanied by his niece Zamokuhle Mamba, he found the door to his house opened. After he called his wife on her cellphone, she confirmed that she had placed the keys on top of a bucket. The Accused concludes in his statement that he then realized that whoever opened the door used the very same keys, it is just that he then left with them. This is clear evidence that the house was not locked. The court therefore fails to appreciate how an open house provided

insufficient time to cool off. Infact, Accused number one slept at his homestead, the deceased was captured the following day, there was definitely sufficient time to cool off.

[36] The defence submission that the deceased was assaulted on the buttocks is also factually incorrect. PW2, Sukulwenkhosi Sipho Dlamini in the summary of evidence is said to have observed the Accused assaulting the deceased with sticks all over the body. His summary also state that he was heavily assaulted. The version of PW2 is also corroborated by exhibit B, which is the Report on post-mortem examination by Dr Kamma Reddy. The following is listed as the ante-mortem injuries present on the deceased:-

- 1. Contusion of 7x3cms, present on the forehead.*
- 2. Abraded contusion of 3x1cms, present on the chin.*
- 3. Abraded contusion of 12x5cms, present on the front and middle portion of the left upper arm.*
- 4. Abraded contusion of 11x5cms, present on the left forearm.*
- 5. Abraded contusions of 8x3cms, 6x2cms, 5x2cms and 4xcms present on the back.*
- 6. Abraded contusions of 5x1cm, 4x2cms and 2x2cms present on the abdomen.*
- 7. Abraded contusions of 3x1cm present on the front and middle portion of left thigh.*
- 8. Abraded contusion of 8x2cms present on the back side of the right thigh.*

9. Abraded contusion of 5x3cms present on the back side of the left thigh.

[37] The above list of injuries appears to be all over the body, not confined to the buttocks. Exhibit "F" which is the photo album, in all the photos the deceased is seen with injuries all over his body. The arrows point at injury number 4 which is on his head. The forehead is a delicate part of the body to injure. What is particularly concerning with conduct of Accused number 1, is that it appears he apportioned to himself of the right to punish the deceased for stealing his properties. Despite that he had got back his keys. In his own words as per the recorded statement, he says he again assaulted the deceased repeatedly until he got tired himself. It is this viciousness that negates his mitigation of provocation. This happened for a prolonged period of time and at intervals. Surely, Accused number 1 in particular, must have cooled off at this stage. More especially because he had found all his stolen goods.

[38] There is a rise in the commission of this type of offences in our society. It appears that it is becoming a norm to take the law into one's own hands to punish alleged perpetrators. If such a conduct is left unabated and undeterred, it may spread like cancer in the country. This may cause anarchy, where only the fittest will survive. It is for this reason that deterrent sentences must be meted out.

[39] The defence has submitted that **Hlophe J** (as he then was) in the matter of **R v Ginindza**³ meted out a sentence of 5 (five) years with an option of a fine. The facts of this case are different from the facts of that matter. There is evidence in the Ginindza case, that the deceased was a bully. He is the one that took out the knife, which means he was the aggressor. There was little opportunity presented to the Accused to defend himself from the bully. Which is not the case in the matter at hand. The Accused persons pursued the deceased who had initially fled. They caught him and repeatedly and heavily assaulted him, even after all the stolen goods had been recovered.

[40] This court is cognizant that a heat of passion is considered in culpable homicide cases. However, the conduct of the Accused in this matter was very reckless. Infact they must consider themselves lucky that the Director of Public Prosecutions accepted their plea of guilty to Culpable Homicide. Otherwise a murder charge was befitting of the Accused conduct. Hence it is my finding that the Culpable Homicide which the Accused have been convicted of is on the more serious end of the spectrum. The provocation alleged is not commensurable with the vicious assault meted out on the deceased even on delicate parts of the body⁴.

[41] In the matter of **Rex v Sanele Sithembile Dlodlu**⁵, **Hlophe J** extracted an excerpt from **Gardnor and Landsdonw J** book; **The South African**

³ High Court Case No. 107/2017

⁴ See **R v John Ndlovu** 1970 – 76 SLR 389

⁵ High Court Case No. 392/2014

Criminal Law and Procedure Vol1, General Principles and Procedure,
juta and company page 101 where the following was stated;

“On a charge of murder, intention may be negated by evidence that the Accused was subjected to provocation by his victim. The only requirement there is, is that the act of provocation should have had the ability to upset the balance of mind of a reasonable person and deprive him of that time, the power of self-control or of the ability to realize the probable consequences of his act...”

[42] When applying the above dicta, to the facts of the matter at hand one arrives at the conclusion that, the act of the alleged provocation, did not deprive the first Accused of the power of self-control. He had an entire night and part of the morning to realize the consequences of his intended action. He could have involved the community police or report the theft at Buhleni Police Post. Instead, he decided to play top detective and assembled his own investigation team in the persons of Accused number 2 and 3. After they captured the deceased, they elected not to take him to the police station, but assumed the role of the courts and punished him themselves. In the process he died. This was reckless to the extreme.

[43] On the aspect of what maybe an appropriate sentence, the court was persuaded through representatives from the defence to pass a lenient sentence.

[44] I agree that the court has to be guided by the principle of triad on the appropriate sentence to be imposed. I am mindful of the competing interests of the Accused, the state and the society. In the matter of **Musa Kenneth Nzima v Rex**⁶, the court of Appeal stated the following:-

“There are obviously varying degrees of culpability in culpable homicide offences. This Court has recognized this and in confirming a sentence 10 (ten) years imprisonment in what it described as an extraordinarily serious offence “at the most serious end of the scale of such a crime” (Bongani Dumsani Amos Dlamini vs Rex CA Case No. 12/2005) sentence of 9 years seems to me also to be warranted in culpable homicide convictions only at the most 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 the misdirection’s which I earlier referred, it seems to me that insufficient weight was given to the individual facts of the case and to the personal circumstances the Appellant.”

[45] The Accused persons have been charged with common purpose. The defence has submitted that Accused number 2 and 3 were restraining the deceased and it is Accused number 1 that was the one inflicting the injuries. As such, the sentence can be at variance despite the common purpose. Again, this submission is not supported by the evidence before court. PW3 Phumlani

⁶ Criminal Appeal Case No. 21/2007

Sibusiso Masuku, PW4 Gwalagwala Dlamini and PW5 Kenneth Mamba have all stated in the summary of evidence that all the Accused persons at some point assaulted the deceased heavily with the sticks all over the body at different times. This makes it difficult to apportion the injuries to a particular Accused persons or person. I suppose that is why they were charged with common purpose.

[46] The deceased was relatively young when he met his death. He was 18 (eighteen) of age. He still had presumably a long life ahead of him to contribute meaningfully to society. The court also takes into consideration the pain that his death must have caused to his parents. His father in particular, because he warned Accused number one, not to hurt his son in the event he finds him.

[47] The manner in which the culpable homicide was committed in the matter at hand, appears to be on the higher scale of culpable homicide, in light of what the evidence has revealed. In the matter of **S v Rabie 1975 (4) SA 855 (A)**, it was stated that serious consideration must be given to the fact that punishment should fit the criminal as well as the crime. It has to be fair to society and be blended with a measure of mercy, according to the circumstances of the matter. To say the Accused persons must be given the option of a fine does not fit the criminal and the manner in which the crime was committed. The Accused persons conduct was reckless to the extreme. Not only did they show absolute disregard of the rule of law, they exhibited animalistic behavior. The deceased was assaulted viciously and repeatedly despite that the stolen items had already been retrieved. I am in total agreement with the sentiments

expressed by Hlophe J (as he then was) in **R v Ginindza**⁷, that members of society looks up to the courts to pass sentences that uphold order in society, as to enable it's members to distinguish conduct that is acceptable from that which is frowned upon. It will definitely not send a good deterrent message to society those who commit such atrocious acts are allowed to mingle with society post-conviction. A custodial sentence is best suited for the conduct of the Accused persons in the matter at hand.

[48] I have taken into consideration all the personal circumstances of the Accused persons. It appears that all of them have families. They are married with young children who will definitely be affected by their custodial sentences. Unfortunately, all this was known to the Accused before they embarked on this unnecessary unlawful conduct. This state of events is a direct consequence of their own conduct. They should have acted more responsibly as breadwinners. Unfortunately, the interest of the society and the seriousness of the crime they have committed, must trump their personal circumstances. It crossed my mind to mete out a sentence of 12 (twelve) years on each of the Accused persons. However, I was immediately engulfed with a sense of pity and decided to blend the sentence with mercy as I am enjoined to do by law. I have come to the considered decision that 9 (nine) years fits the degree of severity in which the culpable homicide was committed. A 9 year sentence accords with the purpose of punishment, which is deterrence, retribution, prevention and rehabilitation.⁸

⁷ Supra

⁸ See Director of Public Prosecutions, KwaZulu Natal v P. 2006 (1) SA 243 (SCA) para 13

[49] Due to the foregoing reasons, all the Accused persons are sentenced to 9 (nine) years imprisonment without the option of paying a fine. Any period that they have already spent in custody should be taken into consideration.

BW MAGAGULA J
HIGH COURT OF ESWATINI

FOR THE APPLICANT:

S. Gumede: VZ Attorneys

FOR THE DEFENDANT:

**S. Phakathi: The Director of Public
Prosecutions**

[49] Due to the foregoing reasons, all the Accused persons are sentenced to 9 (nine) years imprisonment without the option of paying a fine. Any period that they have already spent in custody should be taken into consideration.



BW MAGAGULA J
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**S. Phakathi: The Director of Public
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