

IN THE HIGH COURT OF ESWATINI

Held at Mbabane

Case No. 110/2019

In the matter between

THE KING

AND

MFANIMPELA SKHWEHLE MABUZA

Neutral Citation: *The King Vs Mfanimpela Skhwehle Mabuza (110/2019)*
 [2019] SZHC 78 (21st March 2023)

Coram: **S.M. Masuku J.**

Date Heard: **21st March 2023**

Date Handed Down: **21st March 2023**

Fly Note: *Criminal Law and Procedure – Indictment on a charge of culpable Homicide – the accused pleaded guilty to the charge of culpable Homicide and the Crown accepted the plea – Effect thereof. Statement of agreed facts prepared and handed in*

concerning the accused, read into the record, confirmed by the accused as correct, this constituted sufficient evidence as contemplated by section 272 of the Criminal Procedure and Evidence Act.

Held: The accused found guilty of culpable Homicide for unintentional killing of the deceased on his own plea, statement of agreed facts and post - mortem examination report filed by consent of the parties.

Held further: The accused sentenced to 6 years imprisonment or a fine of E6000.00 (Six Thousand Emalangen) half the sentence suspended for a period of 3 years backdated to take into account the 3 months in custody spent by the accused. Bail paid in cash by the accused converted to form part of the fine.

JUDGMENT

S.M. MASUKU J

- [1] The Accused Mfanimpela Sikhwehle Mabuza of Nyakatfo area in the Hhohho District is faced with an indictment alleging that the said accused did unlawfully and negligently kill one Veli Magagula and did thereby commit the crime of culpable Homicide.

- [2] Upon his arraignment, the accused entered a plea of guilty to the charge of culpable Homicide which plea was accepted by the crown.
- [3] A statement of agreed facts was prepared and handed in concerning the accused by the crown and counsel for the accused. It was read into the record and confirmed by the accused as correct. It therefore constitute sufficient evidence as contemplated by section 272 of the Criminal Procedure and Evidence Act. It takes the place of *Viva Voce* evidence. It provides:-
- “272 (1) In any Criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue, and any such admission shall be sufficient evidence of such fact”*
- [4] The statement of agreed facts was accompanied by a post – mortem examination report which was admitted and marked exhibit “B” and a statement made by the accused to the Judicial officer admitted and marked exhibit “C”. I hasten to say that, although a statement was made by the accused to the Judicial Officer, it served no useful purpose in this judgment considering that the statement of agreed facts and the post-mortem report provided acceptable and sufficient evidence for the Court to come to a verdict. Though not rejected, it was not considered to have influence on the Court’s finding.

- [5] The Act also allows the use of medical reports signed by medical practitioners as evidence in respect of an injury or concerning the conditions of a body of a person. The provision is section 221 (1) which reads;

221. (1) In any criminal proceedings in which any facts are ascertained;

(a) by a medical practitioner in respect of any injury to, or state of mind or condition of the body of, a person, including the result of any forensic test or his opinion as to the cause of death of such person; or

(b)...

*Such facts may be proved by written report signed and dated by such medical or veterinary practitioner, as the case may be, and that report shall be **prima facie** evidence of the matter stated therein".*

- [6] The post-mortem examination report (exhibit "B") is admitted evidence of the cause of death. In *casu* the report describes the cause of death to be "*due to complications consequent to head injury*". The accused admitted in the statement of agreed facts that he struck the deceased once on the head with a short log during a fight they had with him. The deceased fell down and he then assaulted him on the legs. The deceased bled profusely. A hemorrhagic thin clot over the brain about 120 ml brain *oedematous* is recorded in the pathological findings of the police pathologist in exhibit "B".

- [7] The balance of the agreed facts relevant to the judgment are that the accused, with one Malijane Ndwandwe and Colani Dlamini were at Tsadedze's homestead drinking marula brew. This was around 17h00. They were joined by the deceased and Phinda Ndwandwe. They stayed up drinking until around midnight when Phinda suggested they should leave because the accused and deceased were not giving each other peace. The accused was about 21 years of age at the time whilst the accused is older (being around 25 years of age at the time).
- [8] Phinda called the accused out of Ndwandwe homestead and told him they should go and sit at a nearby waiting room a distance from the homestead. This was around 02h00 on a Friday. As they sat there the deceased came with Ndoda Dlamini and Colani Dlamini. The deceased, Ndoda and Colani had a chat with them and left. Someone had taken their drinking jar. The deceased party came back to the accused after walking a short distance. Colani requested Phinda for a cigarette to smoke and Phinda did not have. Colani then took out money for them to buy cigarettes from Phinda's homestead. Phinda took the money and went to purchase the cigarettes.
- [9] Before Phinda could arrive at the homestead, the deceased then said "*Skhwehle wena ufuna impama*" to the accused. Meaning that the accused needed to be beaten up with an open hand. When the accused asked what he had done, the deceased assaulted him with an open hand. When the accused stood up, the deceased clenched his hand into fists and attempted to assault

the accused. The accused managed to avoid the deceased. The accused went back and sat down.

- [10] As the accused was sitting down, the deceased came running and assaulted him with fists telling him “*uyedzelela wena mfana wena*” (you are full of it young man or boy). At that moment the accused fought back. Colani came running to retrain the accused. The accused asked Colani why he was restraining him instead of the deceased. The deceased then assaulted the accused with a fist.
- [11] The accused freed himself and ran away, as he ran he came across a short log. The accused was angry and took the log, ran towards the deceased who happened at that time to be also running towards the accused (pushing him). The accused got to the deceased and assaulted him with the log once on the head. The deceased fell and accused continued to assault him on the legs. He bled profusely and there was no ambulance to take him to hospital immediately, he was taken to his parental home in a wheel barrow.
- [12] The accused was informed a day later that the deceased had died. The accused was eventually arrested and he was later on to admit that his negligent conduct led to the death of the deceased and that there was no intervening factor which could have interrupted his infliction of the injury and the deceased death. The post-mortem report as stated earlier reveals that the deceased died in hospital due to complication consequent to the head injury.

- [13] On the basis of his own plea, the statement of agreed facts and the post-mortem examination report, the Court finds the accused guilty of culpable homicide for the unintentional killing of Veli Magagula.
- [14] In mitigation, counsel for the accused submitted that the accused was a first offender (which was confirmed by the Crown). That the Court should take into account that the accused demonstrated his remorse by pleading guilty and by confessing to the crime. He is Twenty Nine years (29) of age with one child of Eight years (8) of age, going to school at grade three (3). He maintains the child by doing piece jobs and co-operated with the police in their investigations. He pleaded for a lenient sentence and implored the Court to suspend the sentence.
- [15] On the other hand the crown submitted that sentencing in such cases was largely left to the discretion of the Court, be that as it may life had been lost in this case. The sentences imposed for such an offences range from four (4) years to Eleven (11) years starting from less to boarder line cases of murder. The accused was midway along that line. The Court has a discretion to even suspend the sentence it may impose.
- [16] The Court in *casu* took its time to consider the range of sentence in similar cases. Hlophe J (as he then was) in **Rex V Mphendulo Bonny Ginindza (167/2017) (2020) SZHC 77** (29th April 2022) had this observation; “*the*

sentencing trend of the Courts is that sentences for culpable homicide range from zero (0) to ten (10) years, with each sentence being placed at a point within the range that... reflects its seriousness or otherwise”.

- [17] Without getting too much on to the punishment debate, the Court has observed the following *dictum* that it finds appropriate in the circumstances, “*punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances*” See S V Rabie 1975 (4) SA 855 (a) at 862 (G); “*The penalty is discretionary and culpable homicide is most hospitable crime embracing circumstances in which the proper sentence may range from imprisonment to a small fine or less*” JRL Milton South African Criminal Law and Procedure Vol II Page 425; Generally in the absence of recklessness or some other high degree of negligence, an unsuspended sentence of imprisonment, without the option of a fine, should not be imposed on a first offender, See Dawis AJA in R V Swanepoel 1945 Ad 444 at 248.

- [18] From the agreed statement of facts, the Court should take into account the fact that the deceased was the aggressor as he repeatedly told the accused that he needed to be assaulted with an open hand. The accused had asked what he had done when the deceased started to assault him openly by clapping him and using fists. Even after Colani and Mdoda restrained the deceased, he came back running to assault him whilst telling him “*uyedzlela wena mfana wena*” meaning you don’t have any respect boy. It was at that moment that the accused fought. Colani restrained the accused who was then angry asking why

Colani was restraining him instead of the deceased. The deceased continued to assault the accused with fists. The accused managed to free himself from Colani and ran away. He came across a short log which he took, ran back towards the deceased who was pursuing him. He hit the deceased on the head with the log, He fell down bleeding profusely.

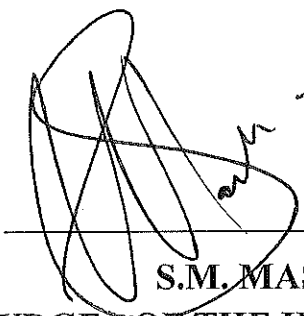
[19] The accused tried all he could to avoid the fight and to run away from the deceased. The deceased was in my view the author of his own misfortune (See Rex V Simelane and Another (95 of 2019) [2021] SZHC 179 (12 October 2021))

[20] The Court will however take into account that there is life that was lost. As said earlier on in this judgment that in the absence of recklessness or some other high degree of negligence an unsuspended sentence of imprisonment, without an option of a fine should not be impose on a first offender. (See R V Swanepoel (*supra*) and Rex V Simelane and another (*supra*)).

[21] For all the reasons as set out above the court makes the following order;

[1] The accused is sentenced to 6 years imprisonment or a fine of E6000.00. (Six Thousand Emalangeni).

- [2] Half of the sentence is suspended for a period of three (3) years on condition the accused is not convicted of an offence where an object such as a log is an element.
- [3] The sentence is backdated to take into account the three (3) months in custody that was spent by the accused.
- [4] The bail money paid by the accused is to be converted to form part of the fine.



S.M. MASUKU
JUDGE - OF THE HIGH COURT

For the Accused person:

Mr S.P. Motsa

For the Crown:

Mr B. Magagula (DPP'S Chambers)