



**IN THE HIGH**

**COURT OF ESWATINI**

**JUDGMENT**

CASE NO.319/2016

In the matter between:

**THE KING**

And

**MARIO FANYANA ZAVALÉ**

**Neutral citation:** *The King v Mario Fanyana Zavale* (319/2016) [2020] SZHC 79 (11 April 2023)

**Coram** : **T. Dlamini J**

**Delivered** : 11 April 2023

**[1]** *Criminal law – Murder – Definition – Elements thereof considered*

**Summary:** *The accused is charged with the offence of murder – At trial he pleaded not guilty to murder but guilty to culpable homicide – The plea was confirmed by the defence attorney but was rejected by the attorney for the crown who elected to lead evidence in proof of murder – The crown paraded six (6) witness to prove its case while the accused is the only witness that gave evidence for the defence.*

**Held:**            *That the crown proved its case beyond reasonable doubt – The accused is found guilty of murder.*

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## JUDGMENT

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- [1] The accused, Mario Fanyana Zavala, is charged with the murder of January Muthuki. The indictment states that on 23 July 2016 at Madonsa area in the Manzini region, he unlawfully and intentionally killed JANUARY MUTHUKI. At trial for the offence, the crown paraded six (6) witnesses who gave evidence to prove the charge preferred against the accused. The only witness who testified for the defence's case is the accused. Below I give a summary of the evidence of the witnesses in chronological order.
- [2] The first witness for the crown (PW1) is Magistrate P. Simelane. She is a Magistrate who recorded a Confession that was made to her by the accused. She testified that she first informed the accused of his rights when making a confession. She asked him questions that are in a *pro forma* statement made to judicial officers. She recorded his answers. The *pro forma* statement was read into the record and was admitted as part of the crown's evidence and marked as annexure "ZMA".
- [3] PW1 also testified that the accused made a confession and she recorded it down. The confession was also read into the record and marked as annexure "ZMB". The confession is recorded as shown hereunder:

On Saturday morning, I left home going to town. I was with January and Michael. I got a lift from a motor vehicle driven by a certain man but Michael preferred to walk. We alighted in town with January from the

motor vehicle and we parted ways to our respective work places and destination. ... When I finished what I was doing I went to Michael ... We went to Mangiphilile bar but we found that they did not have alcohol at the time. ... We then went to a bottle store near Shoprite and its called Mabhunwini since it is owned by a Boer. We then bought two beers there, and then went to Mangiphilile bottle store where we sat and enjoyed our beer together with Michael.

While we were drinking with Michael, January entered the bar, he sat at a different spot with his friends who were also drinking. ... After drinking some time Michael then suggested that we go to the house but I refused and told him that I wanted to remain behind and continue drinking. He insisted until I agreed to go with him as he was telling me that I was drunk and had to go to the house.

We proceeded to Michael's house and carried more beer ... so that we continued drinking in the house and sleep there when we got too drunk.

We met Michael's girlfriend inside the kombi ... and we came with her to the house. While in the house, one of Michael's friends joined us, and his name is Celumusa, we enjoyed our alcohol with him. We continued drinking until around 7PM when we got hungry. Michael then told us that he did not have paraffin in his stove and I then offered to get my stove so that we could cook some food to eat.

I came back with the stove and Michael's girlfriend prepared the food for us and we ate. When we finished eating I told Celumusa that he should come with me to my house to sleep there since he could not spend the night at Michael's house because his girlfriend was present. ... We left Michael's house with two beer bottles ... We entered my house with Celumusa, continued drinking the beer and at around 9PM a certain lady Maninya came to my house. ... She came in and I locked the door after her, it was now me, Maninya and Celumusa inside my house. ...

Hardly five minutes after Maninya's arrival January came and knocked on the door. Knowing that he was violent when drunk, I responded by telling him that I was already in bed and asked him what he wanted. I also told him that I was not going to open the door for him since I was already in bed. He responded by telling me that I was being disrespectful and mocking him and that he was going to force his way into my house. He then started kicking my door until the door was broken and it opened.

This made me angry and when he entered the house, he charged at me. I then took an iron rod that I was using to lock the door. I hit January with the iron rod once before Celumusa took it from me. January then strangled me and threw me on the bed. I tried to force myself from his grip by running out of the house, he followed me outside. I tried to run away from him back into the house, he followed me again, that is when I took a knife wielding it in

front of me trying to discourage him from coming to me. Celumusa then got hold of January trying to calm him; Celumusa was pulling him out of the house. While January was being dragged out of the house by Celumusa he got hold of me and pulled me along with him. We continued fighting outside and Celumusa was trying to call Michael to inform him that we were fighting in my house where January had found us. While we continued fighting I felt something in my right thigh which made me realize that January had stabbed me. I then retreated to the house and that is when I realized that I was bleeding, my trousers were wet with blood and I was dripping with blood.

I did not close the door when inside the house. I was in pain and raised an alarm. Michael and Sifiso arrived. They called the Police and reported but I could not hear what they were saying to the Police. The Police arrived at my house. I could not walk hence I was taken into the Police van. Sifiso ran after January, who tried to flee the scene and he was then taken into the Police van too. While inside the Police van, I realized that January was also bleeding. The Police took both of us to hospital at RFM. At the hospital we were taken into different rooms for treatment. I was stitched on my right thigh and my wound was dressed. The doctor told me to go home and come back on Monday for medication.

I went into my house, spent Sunday inside my house and on Monday morning the Police came to fetch me while I was preparing to go to hospital to get my medication. The Police took me to Manzini Police Station where they informed me that January had passed away. I was then kept in custody, my friends went back home.

That is all.

- [4] According to PW1, the *pro forma* statement was signed by herself, the clerk of court and the accused. The recorded confession was initialed and signed by herself, the clerk of court and the accused, and was made an annexure to the *pro forma* statement made to a Judicial Officer.
- [5] PW1 was not cross-examined by the defence. Her evidence, and the Confession, were accordingly undisputed and remained unchallenged.
- [6] PW2 is Celumusa Mgwahlaza Dlamini. He testified that he resides at Madonsa. He was called on a Friday by Michael for a drink. He arrived at Michael's house at around 18:00 hours and found Michael, Fanyana and

Michael's girlfriend. At the time, January had not yet arrived. He joined them and they drank two beer bottles. Afterwards they ate food and he then left with Fanyana because Michael wanted to sleep. They went past a drinking place and bought one more beer bottle which they drank upon arrival at Fanyana's place.

- [7] They were joined by one Maninya who asked for a cigarette and smoked. About three to five minutes after Maninya's arrival, January knocked at the door. Fanyana then asked who was knocking and the response was that it is January (the deceased). Fanyana told January that he won't open for him because he was already sleeping. January then started kicking the door and Fanyana took out his iron rod. January kicked the door until it broke open and he came inside the room. While coming inside, January was hit by Fanyana using the iron rod. January and Fanyana fought and PW2 separated them by holding January and forced him outside. They continued fighting outside and PW2 separated them again. PW2 also testified that Fanyana then shouted and said "*my knife*" and he went back inside the room.
- [8] Fanyana came out from the house with the knife and January picked up a brick but was pushed by PW2 and fell before he could hit Fanyana with the brick. January got up and picked the brick again but PW2 continued to intervene by pushing January for a distance estimated at plus/minus five metres away. PW2 then called out for his phone and then left to his house to fetch it in order to call Michael. When he came back, he met the accused coming from where the deceased was and was carrying a knife on his hand. The accused was limping and said to him "*ingigwazila lenja*", meaning that the dog has stabbed him.

- [9] PW2 further testified that he found the deceased with stab wounds and took him to the road where the deceased sat down upon arrival. PW2 then called Michael and informed him that Fanyana and the deceased have injured each other. He shouted for help and ran to Michael's house as he thought that Michael might have a telephone number for the police. He met Michael on the way and they returned to the road where he left the deceased. On arrival, they found people already gathered there and those people had already called the police. The deceased was lying down at that time and he thought that he had died.
- [10] The police from Manzini police station arrived and took January and Fanyana to RFM hospital. January was admitted while Fanyana was treated and discharged.
- [11] PW2 further testified that he was called by the doctor who attended to Fanyana in order to see how much Fanyana was injured. The injury was not that much, according to PW2. He then went to see January whose doctor showed to him two stitched wounds, one on the head and the other on the neck. He thereafter went to seat outside where he was joined by Fanyana, and they took a taxi (cab) back to Madonsa.
- [12] It was the further evidence of PW2 that on Monday morning while he was at work, the police came. They were in the company of Michael, Fanyana and Maninya. He was taken with them to the police station where they were asked to relate to the police all that happened. It was then that the police informed them that January had died and arrested Fanyana.
- [13] During cross-examination, it was put to PW2 that the deceased was stabbed while the accused was trying to dispossess the deceased of the knife. This was

denied by PW2 who insisted that the deceased was not carrying any knife but it was the accused who carried the knife. It was also put to the witness that the accused went back into the house but was followed inside by the deceased and that is when the deceased got stabbed. The witness' response was that the deceased was not stabbed while inside the house but was stabbed while outside of the house. It was further put to PW2 that he is bitter because his friend was stabbed by the accused who was not known to him but saw him for the first time on that day. PW2 denied this and stated that the deceased was not his friend but someone he only knew. His friend was Michael and not the deceased.

[14] PW3 is Michael Andreas Zandamela. He testified that it was a Saturday and he was with Fanyana and January. Fanyana arrived in the house carrying a bag. It was in the morning at around 09:00 hours and they proceeded to town. While in town the accused told them that he forgot his cellphone battery in the house. He however, first opened the bag he carried to check if the battery was not inside, and fortunately he found it. He also testified that a knife was inside the bag and he asked the accused if it was his habit to carry a knife when going to town. The response he got was that he uses the knife when eating oranges. They then separated and he went to his place of work where he was a street vendor.

[15] Late in the afternoon the accused came to where PW3 worked and PW3 suggested that they should go back to his flat and he (PW3) called his girlfriend. They bought three bottles of beer that they drank while relaxing inside the flat of PW3. Then at around 18:00 hours PW2 came and joined them. Later on the accused said that he wanted to go to his room and PW3

asked him to go with PW2 as he was with his girlfriend and had invited PW2 to come on Friday but came on Saturday.

[16] Later, but just before PW3 slept, PW2 came and informed him that the accused and January have stabbed each other. PW3 woke up his neighbour Sifiso and they proceeded to the accused's room. They found January lying down and there were other people there. PW3 testified that he urinated in January's ear and January stood up but staggered. The police then arrived and left with January, Fanyana and PW2.

[17] At around 01:00 hours Fanyana and PW2 hired a taxi that brought them to where Fanyana stayed and PW3 paid the taxi man fifty emalangen (E50). PW2 and PW3 assisted Fanyana to get into his room. Inside the room there was knife on a table which PW3 took to his room after being asked by PW2 to take it. In the next morning of Sunday, PW3 woke up and went to check on Fanyana and found him with PW2. It was at this point that PW2 said he wanted to go to hospital to check on January and that is how they separated.

[18] PW3 further testified that on Monday morning he went to Fanyana's flat as Fanyana had asked for pain killers. The iron rod that Fanyana used to hit January was placed under the bed and PW3 also took it with him to his flat. Whilst at his flat and shortly after his arrival, the police came with Fanyana and asked if PW3 knew the whereabouts of PW2. He told them that he was at his place of work and he went to show them. The police also asked for the knife and the iron rod and PW3 took out these items and surrendered them to the police. They all drove to the police station thereafter. It was at the police station that the death of January was revealed and Fanyana was arrested and remained at the police station.



- [19] It was put to PW3 during cross-examination that the knife that was used belonged to the deceased and not the accused. In response, PW3 denied this allegation and emphatically testified that the knife belonged to the accused and that he had seen it earlier in the possession of the accused.
- [20] PW4 is Dr. R.M. Reddy. He is a pathologist and conducted a post-mortem examination on the body of the deceased. He testified that he undertook the post-mortem examination on 29 July 2016. According to his evidence, the deceased was injured on the right lung and the left side cheek was swollen and the face was pale. He had six (6) antemortem injuries, and the cause of death was haemorrhage as a result of a penetrating injury to the right lung. He testified that injury no.2 was fatal and was caused by a sharp cutting object.
- [21] PW4 handed-in the post-mortem examination report and it was admitted as part of the crown's evidence and marked Annexure "ZMC". This witness was not cross-examined by the defence.
- [22] PW5 is Maninya Da Silva. She testified that she went to Fanyana's flat where she found him with Celumusa (PW2). It was on a Saturday at around 21:00 hours. In about less than five (5) minutes someone knocked at the door and Fanyana asked who it was. The person said he is January but Fanyana told him that he has already retired to bed and cannot open for him. January then kicked and broke open the door and forcefully entered.
- [23] Fanyana took out an iron rode and hit January with it. They fought and Celumusa tried to intervene and calm them down. Celumusa managed to push them out of the flat. PW5 testified that she then got the opportunity to get out and run away, and doesn't know what happened immediately after she ran away. She was asked if January was carrying anything when he entered the

flat and her response was that he was not carrying anything. She testified that they exchanged words with Fanyana as the deceased entered. PW5 was asked if she knows Fanyana and her response was in the affirmative. She stated that they would spend a lot of time with him and that even Fanyana's girlfriend would spend time with her (PW5).

[24] She testified that she again saw Fanyana on the following Monday when the police came looking for him. The police took her and Fanyana to Michael's house where the iron rod that the accused used, and a knife, were retrieved taken away by the police. The three (PW5, Fanyana and Michael) went with the police to the work place of Celumusa who also joined them. They were taken to the police station where PW5 was placed in a separate office where she recorded a statement.

[25] During cross-examination, PW5 was asked about how much alcohol she had consumed on that evening and her response was that she had taken a lot. She was asked if she is aware that when January forcefully entered into the flat he was carrying a knife. This was denied by PW5 who emphatically stated that January was not carrying any knife. It was put to PW5 that when the accused hit January with the iron rod he was defending himself. This was denied by the witness who emphasized that January was not carrying a knife.

[26] The sixth witness (PW6) for the crown is officer 5281, D/Const. Musa Khumalo. He is the investigating officer. He testified that the deceased, a Mozambican national, was assaulted using an iron rod and was also stabbed using a sharp object on 23 July 2016. The deceased was assaulted and stabbed whilst at Madonsa in the Manzini region. He was rushed to the RFM Hospital where he died while undergoing treatment.

[27] PW6 testified that he went to Madonsa on investigation and thereafter proceeded to the RFM Hospital where he inspected the body of the deceased. The body had a stab wound on the neck and some bruises on the head. Having gathered that the suspect is the accused person, he proceeded to Madonsa with officers 2130 Inspector Mamba, 6511 Const. Dlamini and 6852 Const. Tfwala on investigation. He interviewed Celumusa Dlamini (PW2) and Maninya DaSilva (PW5). The interviews led him to the accused and to whom he introduced himself and the other police officers. The accused freely and voluntarily led them to Michael Zandamela's (PW3's) flat after having been cautioned according to the Judges' Rules. They proceeded to PW3's flat in the company of PW2, PW5 and another community member.

[28] They introduced themselves to PW3. The accused and PW3 then spoke to each other and PW3 then went into his flat and took out an iron rod and a three stars okapi knife and gave them to the police. The iron rod is about the size of the second finger in circumference, and about 1.2 metres length. The knife is about 23 cm with a blade of about 10 cm. The knife and iron rod were handed-in as part of the crown's evidence. The iron rod was marked as EXHIBIT ZM1 while the knife is EXHIBIT ZM2.

[29] According to the evidence of PW6, the knife had visible blood stains. The accused was then taken to the police station where he was further interviewed. PW6 also testified that the accused had an injury on the right leg. The accused was thereafter charged with the murder of January Muthuki.

[30] During cross-examination, the witness was asked if he investigated the cause of the injury that the accused sustained. In response he testified that he tried but it was not clear. The witness was also asked if he is aware that the injury

on the accused was caused by the deceased using the knife that has been handed-in as an exhibit. In response he said he is not aware but stated that this version is not true. He said he heard this version from the accused and there was no evidence to support it. When asked, the witness conceded that the knife was not subjected to DNA analysis. The crown then closed its case.

[31] The accused is the only witness who testified for the defence. He testified that it was on a Friday, 22 July 2016, that he woke up, took a bath and then proceeded to the flat of Michael (PW3). He went there so that they could go with Michael to town. On arrival he found Michael with January standing by the door of Michael's flat. The three of them proceeded to a bus stop where they boarded a kombi to town. Michael, however, decided to walk to town as he wanted to sell his cigarettes along the way. The accused testified that when in town he then proceeded to his place of work at Village Bakery and January also went to his place of work.

[32] Having knocked off work, they again reunited and had alcoholic drinks (beers) in town. At around 17:00 hours, Michael said they should go to his flat. Michael then received a call from his girlfriend Duduzile who informed him that she is onboard a kombi to Madonsa and they will find her in it. They then proceeded together to Madonsa where they continued to drink more beers and were joined by Celumusa (PW2). Later they ate food that had been prepared by Michael's girlfriend

[33] While getting ready to go to his flat to sleep, the accused testified that Michael asked him to accommodate Celumusa as he (Michael) was with his girlfriend. They proceeded to his flat with Celumusa and had two beers with them which they continued to drink in the flat. At around 12 midnight they

were joined by Maninya (PW5) who asked for cigarettes and was given. Whilst the three were drinking, someone knocked at the door and when asked by the accused who he was the person said he was January (the deceased). The accused testified that he refused to open for the deceased because he becomes troublesome once drunk. He told him that he was already sleeping but the deceased responded by saying that the accused is mocking him, and said *ungijwayela kabi*, meaning that the accused is taking him for granted.

[34] The deceased, according to the accused, then kicked and forcefully opened the door and charged towards him with a knife on his hand. The accused took some steps backwards and then retrieved an iron rod and hit the deceased. He testified that he used the iron rod to lock the door. Celumusa hid by the corner of the bed. The deceased fell down and they fought. They grabbed each other and both fell on the bed. The accused, according to his evidence, managed to dispossess the deceased of the knife and they continued fighting. Celumusa then tried to separate them but was unable. Celumusa then went out to call Michael. They continued fighting with the deceased until they pushed each other outside of the flat.

[35] The accused also testified that he tried to run back into the flat but the deceased picked a brick and tried to hit him with it but he blocked that attempt. They continued fighting until Celumusa and Michael arrived and separated them. He then left and went inside his flat to sleep. That is when he discovered that he was injured and his trouser had blood stains. The police arrived later on and took the accused and deceased to the RFM Hospital. The accused was treated and discharged whilst the deceased was admitted.

[36] The police came back on Monday, according to the accused, and found him preparing to go back to hospital to change the dressing (bandages). He was then taken to the police station together with Michael and Maninya where they were interviewed, and the accused was then formally charged for the murder of the deceased.

[37] When led in-chief, the accused denied that he carried a knife while at Michael's flat before they went to town. He also denied that he ever carried a knife on that day.

[38] During cross-examination, the accused was reminded that his evidence was that Celumusa went to call Michael whilst the accused and the deceased were fighting, and that it was Michael who intervened and separated them on his arrival. He was also reminded that the evidence of Celumusa was that he went to call Michael after noticing that the deceased was lying on the ground and was bleeding profusely. Michael gave first aid to the deceased on his arrival. This was denied by the accused who maintained that Celumusa went to call Michael after failing to separate the two, and that it was Michael who arrived and separated them.

[39] It was put to the accused that this was an afterthought as this version was not put to Celumusa when he testified that he went to call Michael when the deceased was lying down and bleeding. The accused stated that it was not an afterthought but he only forgot to tell his attorney about this aspect of the evidence as he had already told him too many things.

[40] It was further put to the accused that he was reckless when inflicting the stab wounds upon the deceased which led to his death. The accused stated that it was not intentional to kill the deceased but was trying to defend himself

following the forceful entry by the deceased who was armed with a weapon. On re-examination, the accused testified that he does not know when and how the deceased was stabbed, just as much as he does not know when he got injured himself.

[41] Now, I will first discuss the law applicable. *Murder is the unlawful and intentional killing of another person. In order to prove the guilt of an accused person on a charge of murder, the state must therefore establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill, known as **dolus**. See: Director of Public Prosecutions, Gauteng vs Pistorius (96/2015) [2015] ZASCA 204 (3 December 2015), paragraph [25].*

[42] There are two forms of *dolus* in murder cases, viz., *dolus directus* and *dolus eventualis*. The former occurs when the death of the deceased was desired by the accused person. *See: Rex v France Dodo Mthembu & Another (46/2014) [2020] SZHC 228 (5 March 2020)*, paragraph 48. In other words, it occurs when a person (accused) acts with the object and purpose of killing the deceased. The latter, on the other hand, occurs when the accused foresees the possibility of his act resulting in death but he persists in it reckless whether death ensues or not. *See: Rex v Thandi Tiki Sihlongonyane (40/97) [1997] SZSC 11 (24 September 1997).*

[43] In analyzing the facts, the pathologist (PW1) testified that the deceased had six antemortem injuries. He was injured on the right lung and the left side cheek was swollen and the face was pale. The cause of death was haemorrhage resulting from a penetrating injury to the right lung. This injury was fatal and was caused by a sharp cutting object.

- [44] PW2 testified that after the deceased started kicking the door of the accused person's flat, the accused retrieved an iron rod. He used it to hit the deceased after the deceased had managed to forcefully enter the flat. He testified that having been unsuccessful in stopping the accused and deceased from fighting, he ran to his flat to get his cellphone in order to make a call. On his return he met the accused who was holding a knife on his hand and was coming from the direction where the deceased was. He found the deceased with stab wounds and that both the deceased and accused were taken to hospital by the police. The deceased died at the hospital while undergoing treatment.
- [45] PW3 testified that PW2 came to inform him that the accused and January have stabbed each other. He woke up his neighbour Sifiso and they proceeded to the flat of the accused. On arrival they found January lying down and there were people nearby. He had been stabbed and police came and took him together with the accused to hospital, and were accompanied by PW2. At around 01:00 hours the accused and PW2 were brought back from the hospital by a cab (taxi) whose fare he paid.
- [46] According to PW3, the accused was limping and they helped him to get into his flat. The knife that the accused used was placed on a table and he took it to his room after being asked by PW2. He went back to check the accused on Monday morning as he had asked for pain killers. On this day he took the iron rod that the accused used to strike January with and kept it in his flat as well. Shortly thereafter the police came and asked for both the knife and the iron rod and he surrendered them.



- [47] PW5 testified that when the deceased kicked and forcefully entered the flat, the accused took out an iron rod and hit the deceased. The deceased and the accused fought and PW2 tried to separate them but was unsuccessful. Maninya got an opportunity to run out of the flat and left the two fighting.
- [48] The investigating officer (PW6) testified that the deceased was assaulted using an iron rod and was also stabbed using a sharp object whilst at Madonsa in the Manzini region. He was rushed to the RFM hospital where he died while undergoing treatment. He further testified that he interviewed PW2 and PW3 concerning the assault and they both implicated the accused. The accused surrendered both the iron rod and the knife after leading them to PW3's flat from where they were retrieved. The knife had visible blood stains.
- [49] The accused testified that the deceased kicked and forcefully opened the door and entered his flat unwelcomed. He charged towards him and was armed with a knife. The accused took some steps backward and then retrieved an iron rod that he used to lock the door and hit the deceased with it. The deceased fell down and they grabbed each other as they fought. During that fight he managed to dispossess the deceased of the knife. They fought until Michael came with Celumusa and separated them. He however doesn't know, according to his evidence, how the deceased and himself were injured but were taken together to the RFM Hospital by the police. He was treated and discharged but the deceased was admitted.
- [50] On Monday morning the police arrived and found the accused getting ready to go back to the hospital to change his bandage. It was on this day that the accused heard from the police that the deceased succumbed to death while

still undergoing treatment at the hospital. The accused was therefore arrested and charged with the murder of January Muthuki.

- [51] Based on the evidence of PW4 who conducted a post-mortem examination on the body of the deceased, the deceased died from a penetrating injury to his right lung. It was caused by a sharp cutting object. He had six antemortem injuries. His left side of the cheek was swollen and the face was pale.
- [52] On the evidence placed before court, the deceased died from the injuries that were inflicted upon him by the accused person. The Confession made by the accused before PW1 confirms how the fight between the accused and the deceased started. It also confirms that an iron rod and a knife were used during the fight, and that the accused and the deceased ended up in hospital. The accused was treated and discharged whilst the deceased was admitted and died whilst undergoing treatment.
- [53] The evidence of PW2, PW3 and PW5 corroborated each other and revealed how the fight started up to the point where the accused was arrested and charged with the murder of the deceased.
- [54] It is my finding that intention has been proved by the evidence tendered by the crown. According to **Kotze JA**, the intention of an accused is to be ascertained from his acts and his conduct. He stated that “*if a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased*. See: **Rex v Jollyand 1923 AD 176 at 187**.
- [55] In **R v Mndebele 1970-1976 SLR 188 at 189**, **Nathan J** cites the case of **S v Mini 1963 (3) SA 188** where **Hoexter JA** states that it is “*well established in*

*our law that a person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and nevertheless inflicts that injury, reckless whether death will ensue or not”.*

- [56] The accused first assaulted the deceased with an iron rod. When the fight continued whilst they were outside the flat, the evidence of PW2 who was present is that the accused shouted and called for his knife and went inside the flat and took out the knife that he used to stab the deceased. The accused knew that the knife could kill his adversary but became reckless as to whether he is killed or not.
- [57] The submission of the defence denying that the accused shouted and called for his knife, and that PW5 ought to have heard him as she was present (per paragraph 7 of the defence submissions) is not supported by the evidence. The evidence of PW5 is that when PW2 pushed the deceased and the accused outside of the flat, she obtained an opportunity to sneak out and she ran away. She testified that she did not witness the fight that took place outside the flat and did not witness the stabbing of the deceased. She further testified that she doesn't know how and when the deceased was stabbed. It therefore is incorrect that PW5 was present when the fight took place outside. She therefore could not have heard when the accused screamed and shouted for his knife.
- [58] On the question of who owned the knife, it is my finding that the evidence of PW2 and PW5 is credible. They denied that the deceased was armed with the knife when he kicked the door and forcefully entered the flat they were in. They emphatically denied, even under cross-examination, that the

deceased was carrying the knife as alleged by the accused. There is the further evidence of PW3 that the knife was in a bag that the accused carried earlier in the day.

[59] In the seventh paragraph of the confession made by the accused, below is what he states:

“... I tried to run away from him back into the house, he followed me again, that is when I took a knife wielding it in front of me trying to discourage him from coming to me.”

[60] The evidence tendered in court by the accused that the deceased came with the knife is therefore rejected by this court. The confession was not challenged by the defence and the Judicial Officer before whom it was made was not asked even a question when it was time for cross-examination. The confession corroborates the evidence of PW2, PW3 and PW5 on the issue of the possession of the knife.

[61] It is a finding of this court that the accused had the necessary *mens rea* in the form of *dolus eventualis*. The court therefore finds that the crown proved its case beyond reasonable doubt. The accused is found guilty of the murder of January Muthuki.

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**T. DLAMINI**  
**JUDGE – HIGH COURT**

For the crown : Mr. M. Mbingo

For the accused : Mr. L. Dlamini