

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 166/2022

In the matter between:

THE KING

And

MTHOKOZISI NKHOSIKHONA MOTSA

NEUTRAL CITATION: *THE KING V MTHOKOZISI NKHOSIKHONA
MOTSA (166/2022) [2024] SZHC – 237
(15/10/2024)*

CORAM: **BW MAGAGULA J**

DATE HEARD: **22/08/2024**

DATE DELIVERED: **15/10/2024**

*Summary: Criminal Law – Sentencing following a conviction for murder –
Accused, a young first offender, convicted for strangling his
girlfriend in a crime of passion – Consideration of mitigating and
aggravating factors – Balancing the interests of society, the
seriousness of the offence, and the personal circumstances of the
accused – Extenuating circumstances acknowledged, including
youth, remorse, cooperation with authorities, and lack of prior*

criminal record – Accused sentenced to 20 years imprisonment, with 5 years suspended on conditions of community service.

Held: The Accused's young age, remorse, and lack of criminal history are mitigating factors, meriting a partly suspended sentence. While the crime is grave, the potential for rehabilitation and reintegration into society is recognized. The Accused will serve community service at Good Shepherd College for Nurses in Siteki, reflecting on his actions and learning respect in a nurturing environment, with conditions that should he fail to comply with the community service, the suspended sentence will be enforced.

JUDGMENT ON SENTENCE

BW MAGAGULA J

[1] On the 30th July 2024, this Court found the Accused guilty on a single count of murder. The victim was one **Nosipho Titi Dlamini**, who at the time of her demise was a young lady of only eighteen (18) years old. The evidence shows that this was a crime of passion because the Accused and the victim were at some point in a love relationship.

[2] Pursuant to the conviction, the Court is now called to pass a sentence that fits the crime. As per the procedure, before the Court can undertake such an unenviable task, it must have the benefit of aggravating and mitigating submissions from both the crown and the defense. This has been done through written submissions from both parties.

Crown's Submissions

[3] It is common cause that women are generally weak and defenseless; and this Court has to recognize its constitutional obligation to protect the rights of women against pervasive, cruel and ruthless men who have no regard for the rights of other human beings. It is submitted that a person who kills another person without any justification as provided for in our law should be punished.

[4] The Court should take into account that the Accused caused the death of the deceased by strangulating her and left her without any assistance in a forest. It is submitted that the conduct of the Accused was gruesome. The Accused did not demonstrate any signs of being remorseful about his action.

[5] The Accused has been convicted of a very serious crime. There is a growing trend of committing violent crimes against other human beings in our society. The offence of Murder is a very serious one and prevalent nowadays having been committed against innocent and defenseless women. The Court has a duty to consider that one's life was taken away by the Accused person. The Court has a duty to meet out a deterrent sentence that would send a clear message to those who would be offenders that a threat against one's life is not tolerated and will never be taken lightly.

[6] When the offence was committed, the Accused person was twenty one (21) years and was old enough to understand the consequences of committing a crime and the deceased was eighteen (18) years old. The crown submits that whatever personal circumstance of the Accused maybe, it cannot outweigh the demands of the society and the seriousness of the offence. The Court is implored to meet out a sentence that will fit the severity of the offence.

Mitigation on behalf of the Accused

[7] The following have been submitted as mitigating factors on behalf of the Accused;

- 7.1 The Accused was youthful being 21 at the time of commission of the offence.
- 7.2 He is a first offender.
- 7.3 The incident will haunt him for the rest of his life as he killed his beloved girlfriend.
- 7.4 He is remorseful as he was restless immediately after the incident on the prospect that the deceased may have died. He cried upon discovering the death. He also asked his father to accompany him to the police and he co-operated with the police to the end.
- 7.5 He is relatively unsophisticated as he grew up in the rural areas of Msabane.
- 7.6 At no point did he have a direct intension to kill the deceased, as the killing happened accidentally.

- 7.7 He did not use any weapon.
- 7.8 He never did any serious bashing to the deceased.
- 7.9 He pleads for lenience which also counts in mitigation.
- 7.10 He was in a serious love affair with the deceased, he was all of a sudden double crossed.
- 7.11 He had invested so much financially on the deceased.
- 7.12 He was provoked by awareness of the double crossing.
- 7.13 He was even more provoked when the deceased paraded the rival in front of him.
- 7.14 He was made to wait for the whole day for a lover that is kept in-house by a rival which was provocation.
- 7.15 Despite the setback of the crumbling love affair, the Accused still managed to exercise restraint as he kept his cool until they met and set on the rocks.
- 7.16 He was all of a sudden provoked by the arrogant replies by the deceased which led to the altercation.
- 7.17 In the middle of the strangling, the deceased still announced the break-up despite that the Accused thought she would be scared and change her decision. That in itself was further provocation leading to the second phase strangulation.
- 7.18 Despite the shock, the Accused still did not bash the deceased, nor push her, nor used a weapon on her. He used only bare hands on her.

7.19 It is to be noted that an attempt at plea bargaining for culpable homicide was rejected by the crown, this also counts as extenuating.

[8] The Defense further argues that the Court in its judgment, has already pronounced that extenuating circumstances exist. The Defense persuades this Court to hold that more extenuating circumstances exist in this case and that the requirements of the law have been satisfied on this point. The cumulative effect of the above had a bearing on the Accused's mind when committing the offence to the extent of reducing his moral blameworthiness.

The Law

[9] Section 15, of the Constitution of the Kingdom of Eswatini Act, 2005 states that a person shall not be deprived of life. In the **King versus Zama Augustus Simelane Criminal Case No.279/2015 [207/15] [2019] SZHC 154 (15 August 2019)**, a judgment on sentence, M Langwenya J at page 3 paragraph 6 had this to say;

“Murder is a serious crime which negates another person's right to life. Your conduct was a violation of the deceased's right to life....”

[10] It is trite law that the imposition of a sentence solely lies within the discretion of the Court; however, such discretion should not be exercised in a vacuum. The Court has to consider the triad principle which entails the following;

i) The offence;

- ii) The interest of the society;
- iii) The personal circumstances of the Accused.

[11] In the case of **Rex vs Mletsi Zakhele Mbhamali Criminal Case No. 192/2000 (unreported) at page 3 paragraph 5** a judgment on sentence, S.B Maphalala J, quoting with approval the case of **R vs Swanepoel 1945 AD 444 at 454** said;

“The ends of punishment are four in number, and in respect of the purposes to be served by it, punishment maybe distinguished as;

1. *Deterrent,*
2. *Preventative,*
3. *Reformative,*
4. *Retributive of these aspects he first is the essential and all important one, the others being merely accessory.”*

[12] In the case of **The King v Mlungisi Terrence Dlamini (200/17) [2022] SZHC 43, page 6 at paragraph 15.** The Learned Judge had this to say regarding interest of society;

“The Courts have, time without number expressed their disapproval and shock in many judgments on sentence about the prevalence of murder incidentsThe prevalence of the crimes of murder has undoubtedly caused widespread outrage in our society against the senseless killing of people. The respect for life

as such and the rights of fellow human beings has become non-existent to those criminals who, as the Accused in this instance, only serve their own interest or need. These criminals are much as anyone else part of society and when they transgress and become a threat to society, the natural indignation of interested parties and the community at large should receive some recognition in sentences the Courts impose, lest the administration of justice may fall into disrepute. When it comes to punishment, there is need for the Courts to fully take into account the important need of society to root out the crimes of murder...”

Legal Arguments by the Crown

[13] The imposition of a sentence solely lies within the discretion of the Court; however, such discretion should not be exercised in a vacuum. The Court has to consider the triad principle which entails the following;

- i) The offence;
- ii) The interest of the society;
- iii) The personal circumstances of the Accused.

[14] The Court stands at a better footing to protect society from the commission of such serious offences by meting out a deterrent sanction that will send unequivocal message to other would be offenders that any person contemplating to commit acts of this kind must know that he will face the full might of the law.

[15] The range of sentences in cases of Murder is from twelve (12) years to thirty (30) years imprisonment depending on the peculiar circumstance of the case. The range has all along being at the ceiling of twenty-five years imprisonment due to the judgment of the Supreme Court on the **Samkeliso Madadi Tsela vs Rex, Criminal Appeal No. 20/2010** (*unreported*). Due to the prevalence of murder cases in our society for the past thirteen (13) years, the Supreme Court has moved from twenty-five (25) years to thirty (30) years imprisonment where extenuating circumstances has not been considered by the Court *a quo*.

The Defence Submissions

[16] In balancing the triad interests as described in the case of **Nhlonipho Mpendulo Sithole 2012** by OTA J¹, the personal interest, the interest of society and the peculiar facts of the case, the Court has been urged to maintain an equilibrium in the balancing act and avoid the common danger of placing the society interest above those of the Accused. It has been submitted that in favour of the Accused, as a person, he never showed any violent tendencies towards the deceased, apart from the spontaneous throttling which ended up being prolonged with fatal consequences. He therefore cannot be equated with an Accused who has actually attacked the deceased. The Court has also been asked to note the range of sentencing between seven years and fifteen years. Recently up to twenty-five years has been imposed by the Supreme Court, all relate to cases of actual attack on the victim. The Defense has further argued that this case is expectational in that the Accused fell in to the cross fire

¹ Supra

momentarily and still maintained some discipline under the above-mentioned circumstances which should be extenuating.

[17] The Defense therefore submits that the Accused deserves a sentence that will give him second chance in life in accordance with the peculiar discipline displayed by the Accused under odd circumstances. The lowest sentence of 12 years without an option of a fine in the Sithole case was meted out to a convict that actually brutalized the deceased. A proper sentence for the Accused would be in the region of 12 – 15 partly suspended or peculiarly so with an option of a fine or partly finable in its uniqueness. Wherefore the Defense humbly prays.

[18] In sentencing the Accused, the Court must balance the triad of considerations: the seriousness of the offence, the personal circumstances of the Accused, and the interests of society, as established in **Rex v Swanepoel 1945 AD 444 and Nhlonipho Mpendulo Sithole 2012**. These factors are intertwined, requiring careful assessment in determining an appropriate sentence.

Mitigating Circumstances

[19] The Court recognizes several mitigating factors in this case. The Accused was only 21 years old at the time of the offence and is a first-time offender. His youth suggests the possibility of rehabilitation. In **S v Khumalo 1984 (3) SA 327 (A)**, the courts emphasized that the youth of an offender is a significant mitigating factor, as young people have the potential to be rehabilitated and reintegrated into society.

[20] Moreover, the Accused displayed cooperation with the police by surrendering himself and providing a full confession. In **S v Rabie 1975 (4)**.

[21] The Court will also take into consideration the interest of society, being that gender based violence is on the rise. The Courts must pass deterrent sentences for such crimes of passion. The deceased was a young lady who still stood to contribute to society. Her mother has been immensely affected by her death.

Distinguishing this Case from Petros Khumalo v Rex

[22] In **Petros Khumalo v Rex**², the Supreme Court handed down a 30-year sentence in a case where the Accused in a premeditated manner had killed his wife, buried her in their compound, and later exhumed her remains only to discard them in a nearby forest, where the body was subsequently eaten by dogs³. The facts in Khumalo are strikingly different from the present matter, warranting a distinction in both the circumstances of the offence and the sentencing approach.

[23] In the **Khumalo** case, the heinousness of the crime was amplified by the deliberate and calculated actions of the Accused to conceal the murder by burying the body, then exhuming it, leading to a further act of desecration when the body was left to be scavenged by animals. Such post-murder conduct showed a complete lack of remorse or regard for the victim, her dignity, or

² (11/2022) [2023] SZSC 36 (3 October 2023)

³ The manner in which the killing was done is hair-raising. He murdered her with an axe blow to her neck and beheaded her.

the law. The Accused in Khumalo was significantly older, his actions far more premeditated, and his conduct more egregious.

[24] By contrast, in the present case, the Accused, Mthokozisi Nkhosikhona Motsa, was 21 years old at the time of the offence, much younger than Khumalo. The evidence suggests that he throttled her and realized that she was not throttling her back. His youth, combined with his status as a first-time offender, suggests a greater potential for rehabilitation. Furthermore, unlike Khumalo, the Accused has demonstrated genuine remorse by voluntarily surrendering himself to the police, fully cooperating with the investigation, and providing a confession. These are significant mitigating factors that point to the possibility of reform, as recognized in cases such as **S v Nkosi 2002 (1) SACR 135 (W)**, where youth and remorse were seen as indicators of potential for rehabilitation.

[25] Additionally, the present case lacks the direct intention to kill. Although the Accused's actions led to the death of the deceased, there was no deliberate or premeditated effort to hide the body or inflict further indignity upon it. The crime occurred in the context of a heated emotional altercation, unlike the calculated and cold-blooded nature of the Khumalo murder.

[26] Given these significant distinctions, a sentence of 15 years' imprisonment is more appropriate in this case, with 3 years suspended on condition that the Accused serves community service as part of his sentence. This Court directs that the Accused be ordered to serve at Good Shepherd College for Nurses in Siteki where he will perform manual labor as directed by the Principal of the College in conjunction with the Commissioner of Correctional Services. He

will be surrounded by young women training to become nurses in this environment. This will not only allow the Accused to contribute meaningfully to society but also give him an opportunity to reflect on his actions. It will foster a deeper understanding of the need to respect women, allowing him a path towards healing and reformation.

[27] Additionally, this approach aligns with the aim of alleviating congestion at Correctional Facilities. By commuting from his home area in Msabane in the Lubombo region to the Good Shepherd College for his community service, the Accused will remain integrated within his community, balancing both retributive and reformatory justice.

[28] This sentencing strikes a balance between the gravity of the offence, the personal circumstances of the Accused, and the interests of society, ensuring that justice is served while still offering the Accused an opportunity for rehabilitation and reintegration.

Suspension of Part of the Sentence

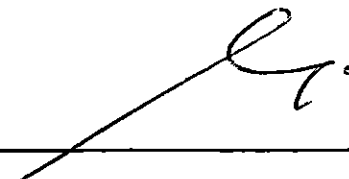
[29] In light of the mitigating circumstances and the potential for rehabilitation, 3 years of the 15-year sentence will be suspended on the condition that the Accused performs community service at Good Shepherd College for Nurses in Siteki. The Accused must report timeously and regularly at the designated place to undertake manual labor, as assigned by the Principal of the college. This will allow him to serve a community of young women, reflecting on his actions while contributing to society in a meaningful way.

[30] Should the Accused fail to report on time or absent himself without valid reason from the designated community service, the Principal of the college must promptly report such failures to the Commissioner of Correctional Services. Upon receiving this report, the Commissioner shall ensure that the suspended 3-year portion of the sentence is immediately activated, and the Accused will return to serve the remainder of his sentence in custody without further suspension.

[31] Furthermore, recognizing that the purpose of the sentence is to correct and rehabilitate, if during this period of community service the Accused finds employment, the remaining period of the 3-year suspension shall be computed in hours. These hours should then be served on weekends, allowing the Accused to maintain his employment while continuing to serve his sentence through the community service as aforesaid, until the full sentence is completed. This approach seeks to reintegrate the Accused seamlessly into society while ensuring he fulfills the punishment imposed by this Court.

ORDER

- a) The Accused is sentenced to fifteen (15) years imprisonment, three (3) of which will be suspended on condition he does community service as directed in the judgment.
- b) Any period he has already spent in custody should be taken into consideration when computing the sentence.



BW MAGAGULA J
THE HIGH COURT OF ESWATINI

For The Applicant:

P.D Msibi (Sandile G Dlamini Attorneys)

For The Crown:

S. Mdluli (Director of Public Prosecutions
Chambers)