

IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:

Case No. 457/2020

THE KING

VS

SIBUSISO MPENDULO LOKOTFWAKO

Neutral citation : *The King v Sibusiso Mpendulo Lokotfwako [457/2020]*
(2024) SZHC 265 (25th October, 2024)

Coram : **M. Dlamini J**

Heard : **9th July, 2024**

Delivered : **25th October, 2024**

- [1] The accused faces an indictment of murder in that about 7th November, 2020 at Mathangeni area, region of Manzini, he did unlawfully and intentionally kill Mncedisi Wandile Mbingo. He pleaded not guilty.

Crown's Case

- [2] PW1 was Dr. R.M. Reddy the government's pathologist. He concluded as the cause of death: *Haemorrhage as a result of penetrating injury to subclavian blood vessels right upper lobe of the lining.*" He further observed about five deep cut wounds, most in the upper part of the body. Injury number one was fatal while others, although serious due to their depth, affected the muscles and therefore not fatal in nature.
- [3] PW1 was cross-examined in that injury number four was reflective of a struggle between the parties. PW1 responded that it was due to a fall from the nature of the scratches. The victim fell with his face on the ground and he scratched from the surface. Counsel on behalf of accused insisted that there was a struggle between deceased and accused. The doctor concluded saying that the nature of the injuries depicts a struggle.
- [4] PW2 was 8114 Detective Constable Melusi Maziya who on oath testified that he was a police officer and in November, 2020, he was based at Matsapha under the scenes of crime department. On 12th November, 2020, he attended to the body of the deceased at Releign Fitkin Memorial Hospital in Manzini. The deceased body was identified by his brother Thembinkosi Mbingo.

- [5] He took photographs of all the injuries and compiled a photo-album. He handed it to court and was marked exhibit B by consent. He was not cross-examined.
- [6] PW3 was Zinhle Winile Mbingo. On oath she told the court that the deceased was her brother. On 7th November, 2020 in the evening, her instincts told her to go to the homestead below where she was. As she proceeded along the way she met up with the deceased and accused. She was behind the duo which was having a conversation. Deceased told accused to give way as the path was narrow. The accused's companion, a lady responded. Deceased went straight to his house, returned with a spade and assaulted the lady with it, enquiring why she was responding badly to him. Accused was angry. He retaliated. There was a fist fight between deceased and accused.
- [7] Following that deceased was able to overcome accused, accused ran to his house. He returned carrying a knife. Deceased wife ventured. She tried to lock deceased in the house. Deceased over empowered her and came out. He met accused who was carrying the knife. Accused stabbed deceased who fell on the ground. He continued to stab deceased several times while on the ground. He stabbed him until he died. All that happened in the presence of PW3, the minor child and her sister-in-law. Her sister-in-law became mentally ill. She too had to attend a psychiatrist due to the trauma. PW3 then pointed at accused as the perpetrator. I shall turn to her cross-examination later herein.

- [8] PW4 was Musa Sunnyboy Ndzinisa. On oath, he testified that in 2020, he was residing at Mbingo's homestead, at Mathangeni area. On 8th November 2020, at about 1450 hours, he was approached by Sigodvweni police officers. Accused was in their company. The police told him that accused had shown them something but he was not forced to show them anything. They proceeded to the Mbingo's yard and a search began. Accused retrieved from the grass yard, a three star knife. He showed the court the said knife and also pointed at accused. PW4 was not cross-examined.
- [9] PW1, Dr. Reddy was recalled. Nothing turned on his evidence.
- [10] PW6 was 7718 Constable Thulani Robert Magagula based at Manzini Regional Headquarters under the Serious Investigation department. On 7th November, 2020 around 2045 hours, he was on duty. He received a report of a murder incident at Mathangeni area. He, together with his colleagues, proceeded to Mathangeni at Mbingo's homestead. They found constable 4496 Mswane and constable 5293 Ngwenya who were attending to the body of the deceased, which was lying in a pool of blood. They took the body and rushed to RFM Hospital. The doctor certified it dead.
- [11] Their investigation led them to the house of accused. They found that his house had a broken burglar door and windows. They entered his house and found that there were no occupants. They retrieved his travelling document which had his mobile number. They called him, he undertook to come. He did come at about 2345 hours at the police station. He introduced himself and his colleague. They informed him they were investigating a murder charge and cautioned him accordingly.

- [12] On 8th November, 2020 they went to the crime scene. They found a number of persons including PW1 and accused's wife. They took them to the police station for an interview. Accused wife laid a charge of assault with intent to cause grievous bodily harm against deceased. She reported that she was assaulted with a fork, which was a second charge of malicious injury to property.
- [13] They returned to the cell where accused was called to the criminal investigation office. He was advised of his constitutional rights and cautioned as per judges' rules. He was cautioned on a pointing out. He led them to the Mbingo's homestead. Upon reaching Mbingo's homestead he was again cautioned. The scenes of crime officers were called. An okapi three star knife, brown in colour, was retrieved. It had been hidden in a green grass in the yard. Under another caution at the police station, accused handed to PW6 his torn T-shirt which he was wearing on the fateful day. Accused further said that he was willing to record a statement to a judicial officer. He handed accused to constable 8128 Mxolisi Dlamini who took him to PW5. He was then taken for a remand.
- [14] PW6 handed to court the knife and was marked exhibit 1, accused torn T-shirt and torn brown trouser which were marked exhibit 2a and 2b respectively.
- [15] PW6's cross examination revealed that accused confession was consistent with his statement recorded before PW6.
- [16] At the close of the crown's case, the defence moved a section 174 (3) application.

Issue

[17] Has the Crown established a *prima facie* case?

Determination

- [18] Only one eye witness was paraded in court in this matter. That was PW2, the sister to the deceased. The wives of the deceased and the accused, although eye witnesses, were not brought to testify. Turning to PW2's evidence, she testified that she decided to go to her second parental homestead which was below where she was eventually residing. Along the way, she caught up with the deceased, accused and wife. The deceased demanded a right of way from the accused. The deceased did not take kindly to accused wife's response. In her evidence in chief, she was not clear on what exactly were the exchanges between deceased, accused and his wife which infuriated the deceased to react by assaulting the accused wife and further go to his house to retrieve a shovel to assault accused's wife further. All she said and maintained was that, "*I think the wife (accuseds) responded badly.*" In her cross-examination, she succinctly testified "*Deceased said accused should move away from the path. Accused said he was not a boy. He, would not move.*" She was reminded by Counsel for the defence that deceased knocked accused as he passed. Accused enquired if deceased was anticipating robbing him. PW2 confirmed seeing deceased knocking against accused by the shoulder as he passed him. However, she said that she did not hear such conversation.
- [19] It was further stated by the defence that deceased asked accused if he had a problem. PW2 confirmed this. It was further contended on behalf of the defence that it was then that deceased punched accused on the forehead. She confirmed this and said that it is then that a fight ensued. PW2 confirmed

that a third person whom she described as her cousin, intervened to separate the two. She pointed out further that her brother was stronger than the deceased. Having been separated, deceased ran into his house which was about 50 metres away from the scene and came back carrying a shovel. Accused used the shovel to assault accused's wife. Accused's wife sustained an injury.

[20] When seeing all that, accused who was also in the company of his minor child picked up the child and ran with him to his own house. He returned and found his wife injured. At that juncture deceased emerged again from his house carrying by then a garden fork. He was about to land a blow using it on accused when his wife alerted him to escape. Accused ran to his house to retrieve the three star okapi. He came and finished deceased off. His wife was down in a pool of blood.

[21] From the above evidence, more particularly the confirmation by PW2 and explanation tendered by PW2 under cross-examination, it is clear that the deceased was an aggressor. It is further clear that deceased was not willing to have the fight end. PW2 revealed again under cross-examination that deceased's wife who was at the house attempted in vain to stop the deceased from returning to the scene of the fight. Deceased would hear none of his wife's endeavours.

[22] It is clear that deceased collected on two different occasions lethal weapons to attack both accused's wife and the accused. I must with due respect conclude that accused seeing his wife bleeding on the ground and hearing a shout from his wife that he ought to be careful as deceased was advancing

towards him with a garden fork this time around, was with due respect pushed to the limit. His subsequent conduct of rushing to the house to collect a lethal weapon was expected. This is fortified by PW2's evidence under cross-examination that deceased was stronger than accused.

[23] PW6 in cross-examination testified that accused having gone to his house ought not to have returned. Unfortunately, he ought to have returned as he had left behind his wife. He had gone to the house to take away the minor child. On his return he was not carrying the knife. He only retrieved the knife upon seeing deceased pouncing on him with a garden spade over and above the shovel. By then his wife (accused's) was bleeding from an assault from the deceased.

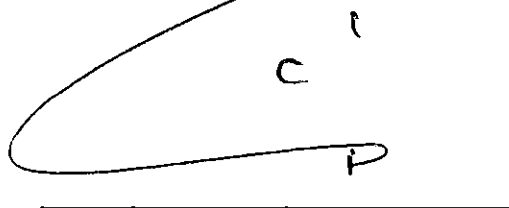
[24] It is not clear why the shovel and the garden spade were not presented to court to assess their sharpness. However, it is well known that these garden tools used against a person are lethal in nature. The accused was under ordinary circumstances expected to defend himself and his wife therefore.

[25] The evidence of a fight between accused and the deceased was confirmed by PW1, Dr. Reddy. He observed that there was only one fatal injury. The rest of the injuries were from the struggle (fight) by the duo.

[26] In the circumstances, I must find for the defence and I enter as follows:

[26.1] The defence's application in terms of section 174 (3) of the Criminal Procedure and Evidence Act No. 67 of 1938 is hereby granted.

[26.2] Accused is acquitted and discharged.



M. DLAMINI J

For the Crown : **T. Mamba of Director of Public Prosecutions
Chambers**

For the Defence : **N. E. Ginindza of N.E. Ginindza Attorneys**