

IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:

Case No. 272/2018

THE KING

VS

SIKHUMBUZO GULWAKO

Neutral citation : *The King v Sikhumbuzo Gulwako [272/2018] (2024) SZHC 266 (25th October, 2024)*

Coram : **M. Dlamini J**

Heard : **8th May, 2024**

Delivered : **25th October, 2024**

Indictment and Plea

- [1] The accused stands indicted for murder in that on or about 26th August, 2018 at or near Mhlume, the accused did unlawfully and intentionally kill Sibongiseni Khumalo.

- [2] The crown led five witnesses. PW1 was Appan Joseph who on oath testified that on 26th August, 2028, he was at Hambanathi bar at about 8:00p.m. visiting his friend, DJ Andile who later passed on. At about 2200 hours or thereabout, while chatting with Andile, he heard Precious Dlamini who was coming out of the lavatory shouting "Jesus! Jesus!" Precious Dlamini was behind him. He turned to look. He saw a gentleman assaulting another gentleman with a knobkerrie. He jumped up and dispossessed him of the knobkerrie. The gentleman who was assaulted had been seated by the counter. As he was assaulted, he fell on the ground and lay in a pool of blood.

- [3] The bar lady responded by bringing a first aid kit. Andile had first aid knowledge. He assisted the injured person. He was put into PW1's motor-vehicle and conveyed to Mhlume clinic. He was attended to shortly and put in an ambulance. He was conveyed to Good Shepherd hospital. Three days later, he learnt that the gentleman was deceased. He testified further that when deceased was assaulted, he was drunk and lying against the counter table. He never retaliated.

- [4] PW1 was cross-examined. It was put to him that deceased initiated the fight. PW1 said that he was not aware of such and he disputed that deceased retaliated. He explained that when accused assaulted deceased, deceased had his hands on the counter and was sleeping. His head rested on his hands. He

did not wake up to retaliate. As it was a Sunday about 2200 hours, there were very few people in the bar. Precious screamed because blood was oozing from deceased. The deceased was dead drunk on that day. Deceased was assaulted on the head.

[5] PW2, Mbonisi Ignitius Tshotsho, on oath told the court that it was a Sunday. He had earlier on left accused in the house as he was residing with him. He first went to Etingwenyeni bar and later to Hambanathi bar to imbibe in liquor. He did earlier on see accused with deceased at Hambanathi bar drinking together. He did not noticed when accused left the bar to the house. By then deceased was in the bar, having a black out from over drinking. He stood up to go to the lavatory. He returned and found accused carrying a knobkerrie assaulting the deceased who was still unconscious. Deceased bled profusely through the nostrils and ears. He spoke that accused should not assault deceased. He advanced to dispose accused of the knobkerrie. Out of fear of the extent of the injuries sustained by deceased, he left the bar and remained outside.

[6] Accused called the police. He left accused with the police. There was no fight between the duo before the assault'as deceased was asleep due to the black out. Accused had retrieved the knobkerrie from the house. He pointed at accused as the person who assaulted deceased. He also identified the knobkerrie and testified that it belonged to the accused.

[7] PW2 was cross-examined. It was stated:

Defence Counsel : "When the accused started assaulting the deceased, deceased was still asleep?"

PW2 : "Yes"

[8] He was asked as when he returned from the lavatory, deceased had already been assaulted. He responded that even the assaults could not wake up deceased. He confirmed that there were few people in the bar on the fateful day. It was said that accused would deny that when he started the assault deceased was asleep. He responded that he would not be telling the truth. When challenged that his observation was impaired as he was very drunk, he responded that as he was able to see his way home, he was not so drunk as not to observe what transpired.

[9] When it was pointed out that accused started assaulting deceased after deceased had slapped him, PW1 told court that with regard to the assault which took place inside the bar, deceased was fast asleep when he was assaulted by accused. Any slapping could have been outside the bar. He wondered though how deceased could have clapped accused while inside the bar as he was asleep.

[10] It was said that deceased woke up within the two to three minutes while PW2 was in the loo. PW2 disputed that and insisted that deceased was unconscious. He had a black out. He could not have awoken even in two to four hours. When he left for the toilet accused was not in the bar. He had left. He returned after up to three minutes and found accused having returned.

[11] It was pointed out that the reason accused assaulted deceased was because deceased had taken accused's horn which he used to store liquor and sold it. It was also said that deceased was an aggressor. PW2 agreed that from the issue of the horn, it was correct to say deceased was a bully. He was asked where the accused was when PW2 went to the loo. PW2 responded that accused went to the house to fetch the knobkerrie. He disputed the disposition that accused was carrying the knobkerrie when he was at Hambanathi.

[12] PW3 was Dr. R.M. Reddy, the pathologist. I will refer to his evidence later herein.

[13] PW4, 4930 Detective Constable Mthunzi Manyatsi gave evidence under oath. He was a crimes of scene officer. He was directed by 6452 Constable Gule to attend to a scene of crime at Mhlume, Hambanathi bar. He obliged. They were attended by the bar lady who was then late. They found her cleaning the bar, about to open. The scene was thereby tempered with. His colleague collected a knobkerrie and a greyish hat.

[14] On 27th August, 2018, he attended a post mortem examination at Good Shepherd Hospital. He identified the body of deceased through the help of deceased's brother. Deceased had a bandage on his head. He took photographs of the body. The bandage was soaked in blood. Blood was oozing from the nostrils. He marked the injuries in the body by placing scales. The pathologist then took over after his work. He presented exhibit B.

[15] It was, through cross-examination, said that accused contended that the injuries on deceased's were not part of the injuries inflicted by him. PW4 maintained that the marked injuries were identified by him at the hospital.

[16] PW5, 6452 constable Mbuso Gule was the last witness from the Crown. He testified that on 26th August, 2018, he was on duty at Tshaneni police station where he was based with Nomcebo Matsenjwa. They received a report about a person at Hambanathi bar. They rushed to the scene. The time was about 2300 hours. They did not find the deceased who had been taken to hospital. They found the bar lady, Ncobile Mavuso and accused. They introduced themselves to accused. They cautioned him on an assault charge. They cautioned him on a pointing out. He led them inside the bar. They observed blood on the counter and the floor. They found a knobkerrie and a hat. They seized the exhibits. PW4 presented the knobkerrie as exhibit 1 and the hat exhibit 2. They later received a call that the victim died. Constable 6011 Siphon Dlamini charged him with murder. PW5 pointed at accused in the dock as the accused.

[17] It was disputed under cross-examination that accused pointed or led them to the crime scene. PW5 maintained his evidence-in-chief.

Defence

[18] Accused took the witness stand and testified under oath. He said that in August, 2018, he was working as a sugar cane harvester at Mhlume. He was a harvester for about ten to eleven years. He ended up at Standard 4 as his father died while he was five years old. He grew under a single parent, his

mother. His mother could not afford financing his further education. His Counsel led as follows:

“Witnesses testified that on 26th August, 2018 at Hambanathi bar you were seen assaulting the deceased with a knobkerrie. What was the bone of contention?”

[19] DW1 responded; *“We were fighting over a horn he had taken. He explained that deceased borrowed the horn and took it to Tshaneni. When he returned in the evening around 10 pm, he was not carrying the horn. When he asked him about the horn, he became violent and slapped him. He queried on how he could borrow his horn and fail to return it. Deceased said that the horn did not belong to DW1. He further testified, “By the disturbance of my heart, I took the knobkerrie which was nearby and hit him. I had no intention of killing him but he accidentally died.”*

[20] DW1 testified further that he was shocked. He called the Tshaneni police. They took him to the police station. After three days he learned that deceased had died. He carried the knobkerrie as he always carry it. He never intended to assault anyone that day. He carried the knobkerrie as they were moving up and down following that it was a campaigning day.

[21] His Counsel asked: *“Why did you become so vicious when assaulting the deceased as one witness said that he saw you and deceased drinking together?”*

DW1 responded : *“It is because he was not buying the alcohol but he took it forcefully. But when I rebuked him to go*

and buy his own alcohol he did go and buy it and we were seen drinking together."

[22] He testified that he was afraid of deceased as he was a violent person who assaulted people and if a person had a fight with him, it would be endless.

[23] Under cross-examination he pointed out that the knobkerrie before court was not his. He collected it from his friend's flat which was about 50 meters away from the bar. His knobkerrie was in his house. The defence closed its case.

Determination

[24] The evidence of the eye witnesses, particularly PW1 and PW2 was that accused assaulted deceased who was unconscious, lying with his face over the counter of the bar. This evidence was strenuously disputed. It was contended that deceased was the aggressor and the initiator of the fight that ensued. However both witnesses were adamant that deceased could not have initiated the fight as there was no fight but an assault over deceased. When PW4 the scenes of crime officer testified, it was pointed out that the injuries marked were not inflicted by accused. However, when accused took to the witness stand, his evidence changed completely. As clear from paragraph 21 above, accused admitted that he inflicted the injuries on the deceased. This evidence was in line with the evidence of PW1 and PW2.

[25] Further, not only did accused admit to the assault, he admitted that the assault upon deceased was vicious. This again, corroborated PW1's and PW2's evidence that accused assaulted the deceased heavily such that blood oozed out of deceased and he fell to lie in a pool of blood. His responses under

cross-examination by the Crown Counsel put the matter to rest. The questions were as follows:

Crown Counsel : *“Before assaulting deceased, did you enquire about the horn?”*

DW1 : *“Yes.”*

Crown Counsel : *“Are you saying that when you enquired about the horn deceased responded?”*

DW1 : *“I enquired while we were both outside. When I entered the bar carrying the knobkerrie, I found him seated at the counter. I assaulted him.”*

Crown Counsel : *“So you did not say anything while he was by the counter?”*

DW1 : *“Yes, I just assaulted him.”*

[26] From both the crown’s witnesses (PW1 and PW2) and accused’s own evidence in-chief and under cross-examination, it is clear that accused assaulted the deceased. The next question is, with what?

[27] The crown’s witnesses PW1 and PW2 testified that accused used a knobkerrie. PW2 identified the knobkerrie as belonging to accused. The said knobkerrie was collected by accused from his house. It was not denied per se that accused assaulted deceased with a knobkerrie. It was however put

to PW2 that deceased had carried this knobkerrie while at another bar. He first arrived at the scene of crime carrying the knobkerrie. PW2 was adamant that deceased did not carry the said knobkerrie. He only collected it later and returned with it to assault the unconscious deceased.

[28] When testifying in chief, DW1 said that he retrieved the knobkerrie from nearby. In cross-examination he said that he collected it from a friend's house which was 50 meters away from the bar. This evidence was contrary to what was put to PW2. It was further not put to any witnesses that the knobkerrie before court belonged to accused friend. Worse still, PW2 identified the knobkerrie as belonging to deceased. This evidence was not challenged.

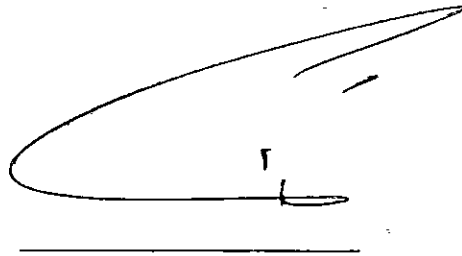
[29] In the final analysis, the court accept the evidence of PW2 that accused collected the knobkerrie from their house and entered the bar to assault the deceased who had a black out.

[30] The next line of defence was that deceased initiated the fight. It was put to PW1 and PW2 that deceased clapped the accused and both witnesses maintained their testimony that accused pounced on deceased while he was asleep. Under cross-examination, accused testified that at the bar, he merely assaulted the deceased. The court stands to accept the evidence of PW1 and PW2 as accused under cross-examination confirmed it as well.

[31] From the above, it is clear that accused assaulted deceased while he was unconscious. Accused had through cross-examination of the crown witnesses stated that the reason he assaulted the deceased was because he had taken his horn and sold it. When he asked for his horn the deceased assaulted him.

[32] It is the court's view that even if accused had taken his horn and sold it and later clapped him, the subsequent assault upon deceased were not justified in law for a number of reasons. Firstly, the assault, if any, happened while both were entering the bar. There was a period of cooling off. When deceased entered the bar to fall into a deep sleep, the law views such, as a period of cooling off. Secondly, the conduct of accused leaving the bar to collect the lethal weapon from his house is evident of intention to cause the consequences which in *casu* is death. In law this demonstrates intention to kill.

[33] In the totally of the above, I must enter that the Crown has proved its case beyond reasonable doubt and therefore, Accused is guilty as indicted.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left side that tapers to a point on the right, with a small vertical stroke and a horizontal line at the bottom right.

M. DLAMINI J

For the Crown : **L. S. Dlamini from the Director of Public
Prosecutions Chambers**

For the Defence : **P. Dlamini of Professor M. Dlamini Attorneys
C/O Bhembe & Nyoni Attorneys**