



**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO: 425/2020**

In the matter between:

**REX**

**RESPONDENT**

And

**DUMSANI NJABULO MATSENJWA**

**1<sup>ST</sup> ACCUSED**

**SIPHIWO PHILANE SIMELANE**

**2<sup>ND</sup> ACCUSED**

*NEUTRAL CITATION:*

*REX V DUMSANI NJABULO MATSENJWA AND  
ANOTHER (425/2020) [2024] SZHC - 125  
(16/10/2024)*

**CORAM:**

**BW MAGAGULA J**

**DATE HEARD:**

**15/08/2024**

**DATE DELIVERED:**

**16/10/2024**

*Summary:*

*Criminal Law – Murder – Sentencing – Consideration of  
aggravating factors including brutality of the killing and  
post-crime behavior – First offender status, lack of  
remorse, and role of accused weighed in sentencing.*

*In this case, the Court found both accused guilty of murder, following evidence that the deceased had been hacked multiple times with a bushknife, resulting in a painful and gruesome death. Despite the defense's reliance on prior case law to mitigate the sentence, the Court distinguished the current case based on the severity of the crime and the conduct of the accused after the killing, which included consulting a traditional healer for cleansing. This act demonstrated the accused's consciousness of guilt and lack of remorse.*

*The Court applied the sentencing principles from S v Zinn (1969), balancing the seriousness of the crime, the personal circumstances of the accused, and the interests of society. The brutality of the killing and subsequent efforts to evade moral responsibility were viewed as aggravating factors. While the accused were first offenders, the severity of their actions necessitated a strong deterrent message to society. The Court ultimately imposed a sentence of 25 years imprisonment, with 5 years suspended, provided that the accused undertakes community service at a primary school near his home.*

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## **JUDGMENT ON SENTENCE**

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**BW MAGAGULA J**

[1] On the 1<sup>st</sup> August 2024, this Court found both Accused persons guilty for the single count for murder. This Court is now called upon to pass a befitting sentence. The Court has had the benefit of both written and oral submissions from the crown and the respective counsel of both Accused.

[2] In summary the crown has made the following submissions with regard to sentencing pertaining to both Accused;

2.1 The deceased suffered a painful death caused by the Accused person. The doctor's opinion on the cause of death is that deceased was hacked several times on the body with a sharp object. We submit that we have shown this Court that deceased was killed by using a bushknife. He suffered a gruesome death.

2.2 The deceased suffered a painful death, as evidence show that he was hacked several times on numerous parts of his body with a sharp object. A bush knife was part of the exhibits handed in Court as representing the sharp object.

2.3 The Accused persons during the trial did not show any remorse for the offence they committed. Instead the justification was that as a community police member in the area, he was troublesome.

### **Submissions in Mitigation by Accused Number 1**

[3] In sentencing the 1<sup>st</sup> Accused in *casu*, the Court is urged in mitigation to consider the following;

- 3.1 That he is a first offender and has no previous criminal record and/or convictions. His alleged involvement in this matter must be treated as an isolated incident and not a pattern of his behavior.
- 3.2 He fully co-operated with the police when he was arrested. During investigations he was not even made to make a confession before a judicial officer.
- 3.3 The extent of his role in the commission of the crime is minimal.
- 3.4 Prior to his arrest he had a steady employment as an assistant mechanic at a certain Robert's garage and had family responsibilities.
- 3.5 He has two children who before his incarceration, were solely dependent on him as the breadwinner. The children are now struggling to survive, as they are still young and their mother is unemployed.
- 3.6 He is capable of being rehabilitated.

[4] It is further submitted that this Honourable Court also takes into account the period which the 1<sup>st</sup> Accused has already spent in custody since his arrest and backdate the sentence it imposes to commence on that date.

#### **Submissions in Mitigation by Accused Number 2**

[5] Accused 2 was of great help in the community as he would provide transport to and from home whenever his neighbours requested. It is a common practice in rural areas especially those near the borderline to request lifts or transport as most of them do their shopping in Phongola and surrounding areas and it

would have been absurd to ask each and every one of them what they were going to do back home. He would simply offer a lift when requested by anyone or an elder from his area.

- [6] The Accused person is a breadwinner who takes care of his unemployed and frail mother. He has three school going children between the ages of 14, 11 and 8. They are wholly dependent on him for their means of survival and upkeep as their mother passed away a few minutes after giving birth to the last born son in 2016. There is no doubt that he has been reeling from the death of their mother.
- [7] Accused 2 further submits that he has been diagnosed with a kidney malfunction and the doctor's progress reports are readily available at the Sidwashini Correctional Facility. Should his condition persist he may need to be dialyzed and further obtain treatment at pharmacies as the hospital is currently experiencing shortages in medication and patients are required to obtain their own from local pharmacies and same requires considerably high amounts to purchase. In light of his incarceration and the fact that his mother is unemployed he may very well be unable to much to his detriment.
- [8] The Court is further implored when meting out sentence to take into account the 34 (Thirty Four) months that the Accused person has already spent in incarceration which have been reflective and rehabilitative on his part.
- [9] There is no direct, circumstantial or forensic evidence linking Accused 2 to the crime however there is evidence that one Nduna Msibi admitted to have paid out a sum of E600-00 for a done deed and further made known and

confirmed the existence of bad blood between himself (Nduna) and the deceased. He also alluded to the fact that the deceased was a menace to the community and in light of the evidence adduced by him connecting him to the crime, his charges were withdrawn.

### **The Law**

[10] Generally in exercising their discretion during sentencing, trial Courts are required to consider the broad guiding principles of the triad. In **S v Zinn AD 1969** the Court held that;

*“In imposing a sentence what has to be considered is the triad consisting of the crime, the offender and the interests of society.”*

- [11] This gave rise to the practice of considering the three legs supporting an appropriate sentence, the seriousness of the offence, the personal circumstances of the offender and the interests of the public.
- [12] The interest of justice dictate that in atrocious cases which involve the loss of life, the Courts are enjoined to discourage same in a bid to save lives through the passing of deterrent sentences. It is also common cause that violent crimes devastate the families affected, including the community at large. See **Mndeni Brother Dladla v Rex Criminal Case No.258/2019 at paragraph 18.**
- [13] The death of a person affects his family and the community in which the deceased was living. Many a times, a wrath of the communities have been manifested after a death or deaths of people. In **Rex v Nhlonipho Mpendulo**

**Sithole (370/11) [2012] SZHC cites R v Motoutous Mosilwa CA No. 124/05.**

*“It is the public interest particularly in the case of serious and prevalent offences, that the sentence’s message may be realized, and that the public may be satisfied that the Court has taken adequate measures within the law to protect them from serious offenders. By the same token, a sentence should not be of such severity as to be out of the proportions to the offence, or to be manifestly excessive or to break the offender or to produce in the mind of the public the feeling that he has been unfairly and harshly treated.”*

[14] In the case of **The King v Ntokozo Kenneth Simelane Case No.42/2016** quoting **S v Letsolo 1970 (3) SA 476 AD** at page 476, the following was stated;

*“Extenuating circumstances have more than ounce been defined by this Court as any fact bearing on the commission of the crime which reduces the moral blameworthiness of the Accused, as distinct from his legal culpability. In this regard the trial Court has to consider;*

- a) Whether there are facts which might be relevant to the extenuating such as immaturity , intoxication or provocation (list is not exhaustive)*
- b) Whether such facts in their cumulative effect, probably had a bearing on the Accused’s state of mind in doing what he did;*

c) *Whether such bearing has sufficient appreciable to abate the moral blameworthiness of the Accused in doing what he did.*”

[15] In the case of **Bhekumusa Mapholoba Mamba v Rex Criminal Appeal No. 17/2010** at page 11 paragraph [18] the Supreme Court stated the following;

*“In considering an appropriate sentence it is always necessary to have regard to the triad consisting of the offence, the offender and the interests of society.”*

[16] The Supreme Court also stated as follows at page 12 paragraph [18];

*“One must be careful not to approach the question of sentence in a spirit of anger. The reason for this is that such an approach can only deter one from keeping the delicate balance between the triad consisting of the crime, the offender and the interests of society.”*

[17] In **Meiniseli Jomo Simelane v Rex Criminal Appeal Case No. 03/2014** at page 6 paragraph [9] the Supreme Court, per MCB Maphalala JA (*as he then was*), stated the following about extenuating circumstances;

*“[9] This Honourable Court has on numerous cases quoted with approval the South African case of S v Letsolo 1970 (3) SA 476 (A) at 476 G – H where Holmes JA defined extenuating circumstances as any facts bearing on the commission of the crime which reduce the moral blameworthiness of the Accused as distinct from his legal capability. The trial Court has to consider three factors, firstly, whether there are*



*any facts which might be relevant to extenuation such as drug abuse, immaturity, intoxication or provocation, the list is not exhaustive. Secondly, whether such facts, in their cumulative effect probably had a bearing on the Accused's state of mind in doing what he did. Thirdly, whether such facts were sufficiently appreciable to abate the moral blameworthiness of the Accused in doing what he did; and, in deciding this factor, the trial Court exercises a moral judgment."*

### **Summary of Submissions made on behalf of Accused Persons**

[18] It has also been submitted on behalf of Accused number 2 that this matter is distinguishable from the **Muzi Petros Khumalo v Rex** case which our Courts have fervently relied upon in recent judgments. The context of which is on gender based violence yet not all murderers are gender based and each one should be treated on its distinguishable facts. The Accused person in *casu* simply offered a lift upon the instruction of an elderly neighbour and it is common in the community they reside in to offer lifts especially from outside the country to their homes in Nsalitje. Any reasonable man in his position and community would have given people a lift without enquiring about the purpose of their visit. That is the context within which the range of sentence should be considered and the fact that a role player and orchestrator being Nduna Msibi was turned a state witness and had his charges withdrawn.

[19] On behalf of Accused number 1, the Court has been urged to apply the legal principle as stated in **Bhekumusa Mapholoba Mamba v Rex**<sup>1</sup> which is to

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<sup>1</sup> Criminal Appeal No. 17/2010

consider the famous Triad Principle and also not to approach the question of sentence in a spirit of anger.

### **Adjudication and Sentence**

[20] In respect of Accused number 1 the Court is now tasked with imposing a fitting sentence in light of the submissions made by both the Crown and the defense. In arriving at an appropriate sentence, it is essential to balance the interests of society, the gravity of the offense, and the personal circumstances of the accused<sup>2</sup>. The crime of murder, particularly in the violent and gruesome manner in which it was committed, calls for serious consideration. The brutal nature of the killing, as evidenced by the hacking of the deceased with a sharp object multiple times, highlights the gravity of this offense.

[21] The Court is guided by precedent, notably the case of **S v Zinn [1969]**<sup>3</sup>, which laid down the triad principle in sentencing: considering the crime, the offender, and the interests of society. The crime in this case was brutal and senseless, leading to the loss of human life, which naturally causes great anguish to the family of the deceased and the broader community. The severity of the crime weighs heavily against the accused in terms of sentence.

[22] However, the Court also notes the mitigating factors presented by the defense. Accused 1 is a first-time offender with no prior convictions, and he has shown cooperation with the authorities throughout the investigation. His personal circumstances, including being the sole breadwinner for his children, and his stable employment history, are significant factors to consider in mitigation. In

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<sup>2</sup> See *Bhekumusa Mapholoba Mamba v Rex* (supra)

<sup>3</sup> *Supra*

light of these factors, the Court is also tasked with balancing the possibility of rehabilitation with the need for a sentence that serves as a deterrent.

- [23] The case law cited, including **R v Letsolo [1970]** and **Bhekumusa Mapholoba Mamba v Rex (17/2010)**, reinforces the need for the Court to carefully weigh extenuating circumstances in determining the moral blameworthiness of the accused. While the crime committed is severe, the Court acknowledges that Accused 1's role in the offense, his personal circumstances, and his potential for rehabilitation must be given due consideration. However, in the facts of this particular case, it appears that this Accused participated in the commission of this offence in his sound and sober senses. Otherwise submissions could have been made to the contrary. The Court has not found any facts bearing on the commission of the crime which reduces his moral blameworthiness.
- [24] The interests of society demand that such violent crimes be met with deterrent sentences to prevent similar future occurrences. This is well-captured in the judgment of **Rex v Nhlonipho Mpendulo Sithole (370/11) [2012]**, where the Court underscored the importance of imposing sentences that reflect the seriousness of the crime and send a clear message that the courts are committed to safeguarding lives and ensuring justice. Society must be protected from such offenders, and the punishment should serve to deter both the accused and others from committing similar offenses.
- [25] That said, the Court is mindful of the legal principle established in the Botswana Court of Appeal case **R v Motoutou Mosilwa CA No. 124/05** that a sentence should not be so severe as to be out of proportion to the offence or

to be manifestly excessive or to break the offender. The Court is tasked with ensuring that while justice is served, the sentence imposed remains fair and proportionate to the crime.

[26] The Court notes the submissions made in relation to Accused number 1 having two children whom he is responsible for. Unfortunately he has not submitted any birth certificate to support his assertion.

[27] The deceased was killed in an inhumane and violent way. He was ambushed and hacked with bush knives all over the body. This Accused must bear the consequences for his extent of participation in such a heinous act. The deceased served his community. He was a community police. He had a family, his children and wife have now been deprived of him. The offence itself is reprehensible. It is haircusing that at this day and age people out there still think killing another is an acceptable way of settling scores. That line of thinking must be deterred.

[28] The Court will therefore sentence Accused number 1 to 20 years imprisonment.

### **Adjudication and Sentence for Accused 2**

[29] Turning now to the sentencing of Accused 2, the Court must again balance the crime, the offender, and the interests of society, as established in the case of **S v Zinn**<sup>4</sup>. In as much as the conviction was based on common purpose it has been submitted in mitigation that his role was facilitative or minimal as

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<sup>4</sup> Supra

there is no direct forensic evidence linking him to the crime. The involvement of another individual, Nduna Msibi, who has been granted immunity as a state witness was more direct.

[30] Further Accused 2 in mitigation, has put forward several compelling personal circumstances that should be considered by the Court. He is the sole caregiver for three young children, aged 14, 11, and 8, following the tragic death of their mother. Additionally, he provides for his elderly, frail mother, who is dependent on him for care and support. The Court also notes the accused's deteriorating health condition, particularly his diagnosis of a kidney malfunction, which requires ongoing medical attention. The Court takes seriously the evidence that Accused 2 has been unable to receive adequate treatment during his incarceration due to shortages at the hospital.

[31] Again, it has been submitted that Accused 2 had spent 34 months in custody awaiting trial. These months, during which he reflected on his actions, should be considered in mitigation. While the Crown has argued that the community expects a sentence that reflects the gravity of the crime, the Court must also weigh the interests of justice and avoid a punishment that would be disproportionately harsh given the accused's limited involvement in the crime.

### **Why the Cited Cases on Behalf of Both Accused Cannot Be Considered in Their Favor in Light of the Facts and Circumstances of the Case**

[32] The defense for both Accused 1 and Accused 2 has relied on various precedents in an effort to mitigate the sentences that this Court should impose.

While case law such as **S v Letsolo [1970]**, **Bhekumusa Mapholoba Mamba v Rex (17/2010)**, and **Muzi Petros Khumalo v Rex** have been cited to highlight extenuating circumstances and moral blameworthiness, these cases are distinguishable from the present case in significant ways, and thus cannot be considered favorably in support of the accused's positions.

[33] In **S v Letsolo [1970] (3) SA 476 (A) at 476 G - H** extenuating circumstances such as intoxication, immaturity, or provocation were considered in reducing the moral blameworthiness of the accused. However, in the present case, no such factors were convincingly proven. Neither of the accused has claimed intoxication, immaturity, or any form of extreme provocation that might have influenced their actions. On the contrary, both Accused 1 and Accused 2 were fully aware of their actions, and there is no indication that their ability to appreciate the wrongfulness of their conduct was compromised.

[34] In **Bhekumusa Mapholoba Mamba v Rex<sup>5</sup>, (11/2022) [2023] SZSC 36 (3 October 2023)** the focus was on maintaining a delicate balance between the crime, the offender, and the interests of society. However, the circumstances of the present case—where the deceased was hacked multiple times with a bushknife—demonstrate a level of brutality that distinguishes it from the cited case. The nature of the violence inflicted on the deceased in this matter far exceeds what could be considered in the realm of reduced moral culpability. Therefore, while the triad principle from **S v Zinn<sup>6</sup>** remains relevant, the heinousness of the crime in this case requires a sentence that appropriately reflects its severity.

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<sup>5</sup> Supra

<sup>6</sup> Supra

[52] The defense has also sought to distinguish the present case from the precedent of **Muzi Petros Khumalo v Rex**, arguing that this case involved gender-based violence and should not be applied to all cases of murder. While it is true that not all murders are motivated by gender-based violence, the critical issue here is the level of violence and premeditation involved. The extreme and senseless nature of the violence inflicted upon the deceased in this case demands a stringent sentence, regardless of whether it was motivated by gender-based issues or other factors. Furthermore, the argument that Accused 2 merely offered a lift, as is common in rural areas, does not negate the fact that his actions facilitated the crime.

[36] The cited cases have been carefully considered; however, the distinguishing factors in the present case—namely the level of brutality involved, the lack of remorse shown by the accused, and the impact on the community—make it impossible to apply these cases in a manner that would favor the accused. The interests of justice and society must take precedence in ensuring that such violent acts are met with a sentence that deters similar behavior in the future and conveys the seriousness of the crime committed.

[37] For these reasons, the cited cases cannot be applied to reduce the sentences of the accused in the current matter. The Court will consider in their favour though, their age and that they are both first offenders.

### **The Brutality of the Killing and Subsequent Consultation of a Traditional Healer for Cleansing**

[38] The Court cannot overlook the sheer brutality of the killing in this case. The evidence presented shows that the deceased was hacked multiple times with a

bushknife, a weapon inherently designed for inflicting severe harm. The post-mortem report confirmed that the deceased suffered multiple deep wounds to several parts of his body, indicating that the attack was not a spur-of-the-moment act but rather a prolonged and gruesome assault. This level of brutality elevates the seriousness of the crime, necessitating a sentence that reflects the gravity of the offense and its devastating impact on the deceased's family and community.

[39] Additionally, the evidence revealed that following the murder, the accused consulted a traditional healer for cleansing. This act, particularly in the context of local customs, signifies an attempt to spiritually cleanse or distance oneself from the crime, which implicitly acknowledges the gravity of the wrongdoing. The consultation with a traditional healer is significant for several reasons:

**Premeditation and Consciousness of Guilt:**

The accused's decision to seek cleansing demonstrates that they were fully aware of the severity of their actions. Instead of showing remorse or attempting to assist the authorities in any way, they sought to rid themselves of the spiritual or psychological burden that the act of killing had placed upon them. This behavior suggests not only a consciousness of guilt but also an attempt to evade personal responsibility for the crime through traditional means.

**Lack of Remorse:**

The act of cleansing after the killing underscores the lack of remorse exhibited by the accused throughout the trial. Rather than owning up to their actions and showing contrition, they engaged in practices aimed



at absolving themselves of the consequences, at least in a traditional or spiritual sense. This lack of remorse is a key aggravating factor in sentencing, as it suggests that the accused may not be fully rehabilitated or aware of the moral reprehensibility of their actions.

**Aggravating Factor in Sentencing:**

The consultation with a traditional healer for cleansing after a murder, especially one as brutal as this, is an aggravating factor in the sentencing process. In the case of **S v Mkhize (2002)**<sup>7</sup>, the court held that actions undertaken after a crime, which demonstrate an attempt to evade moral or legal responsibility, should be weighed against the accused during sentencing. This case echoes that sentiment. The accused did not act out of panic or in a state of emotional distress but instead took deliberate steps to absolve themselves of spiritual guilt without addressing the legal and moral wrong they had committed.

[40] The brutality of the crime, combined with the post-offense actions of consulting a traditional healer, necessitates a more severe sentence to serve as a deterrent. The community must understand that such actions—both the initial violent crime and the subsequent efforts to evade justice—are condemned by the law. In **R v Motoutous Mosilwa CA No. 124/05**, it was emphasized that the sentence must send a clear message to society that the law does not tolerate violent offenses, particularly when compounded by further actions that suggest a lack of responsibility or remorse.

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<sup>7</sup> Supra

[41] In light of these factors, the Court finds that the brutality of the killing, coupled with the traditional cleansing, amplifies the seriousness of the offense. Therefore, the sentence must reflect not only the need for punishment but also the need to deter others from resorting to such violence and attempting to cleanse themselves of guilt through traditional practices rather than confronting the legal consequences of their actions. This is critical for maintaining the rule of law and upholding justice in society.

[42] For these reasons, the brutality of the killing and the subsequent cleansing are considered aggravating factors that warrant a stringent sentence in this case.

### **CONCLUSION AND SENTENCE**

[43] In light of the foregoing considerations, this Court is of the view that a sentence of 20 years imprisonment is appropriate for Accused 1. This reflects the seriousness of the crime, the need for deterrence, and the interests of society. However, taking into account the mitigating factors, including the accused's potential for rehabilitation, the fact that he is a first-time offender, and his family responsibilities, the Court will depart from the 30 years as meted out in the Petros Khumalo judgment by the Supreme Court.

### **ORDER**

1. Accused 1 is sentenced to 20 years imprisonment.
2. The sentence is backdated to the date of his arrest, in line with the period already spent in custody.

### **Conclusion and Sentence for Accused 2**

[44] After careful consideration of the mitigating factors, including Accused 2's role in the crime, his health condition, his responsibilities as a father and caregiver, and the time already spent in custody, the Court is of the view that a custodial sentence is still warranted, given the severity of the crime and the need to uphold justice.

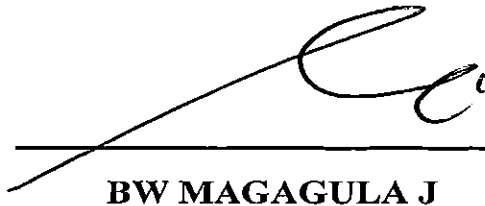
[45] Accused 2 is also sentenced to 20 years imprisonment, without the option of a fine.

### **Order for Accused 2**

1. Accused 2 is sentenced to 20 years imprisonment.
2. The sentence is backdated to the date of his arrest, taking into account the time he has already spent in custody.

### **FINAL JUDGMENT**

[46] The sentences imposed on both Accused 1 and Accused 2 reflect the seriousness of the crime of murder, balanced with their personal circumstances, roles in the crime, and the broader interests of society. This is the judgment of the Court.



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**BW MAGAGULA J**

**THE HIGH COURT OF ESWATINI**

For The Crown:	M. Masango (Director of Public Prosecutions)
For Accused One:	P.M Dlamini (P.M. Dlamini Attorneys)
For Accused Two:	N. Hlophe (Mongi Nsibande & Partners)