

IN THE HIGH COURT OF ESWATINI

CASE NO. 309/2021

HELD AT MBABANE

In the matter between:

REX

V

COLANI WONDER NTJWELE KUNENE

NEUTRAL CITATION: **REX VS COLANI WONDER NTJWELE
KUNENE (309/2021) [2024] SZHC – 315
(28/03/2024)**

CORAM: **BW MAGAGULA J**

HEARD: **17/08/2023**

DELIVERED: **28/03/2024**

SUMMARY:

Accused convicted for the offence of murder without extenuating circumstances – Factors amount to extenuating circumstances re-stated – Consideration of extenuating circumstances on the evidence – Sentence guidelines – Principle of parity and probabilities of sentences – Applicant to serve 40 years imprisonment for murder – The sentence is backdated to the date of arrest.

JUDGMENT ON SENTENCING

BW MAGAGULA J

[1] Having convicted the Accused for murder, the Court is now called upon to pass an appropriate sentence. It is common cause that the victim Vusi Nkosingiphile Kunene succumbed to injuries inflicted by the Accused.

[2] It is trite law¹ that when passing sentence the Court should consider three factors being;

- 1) The Crime which may include its seriousness and prevalence in the society.
- 2) The Accused, inclusive of his personal circumstances.

¹ See *S v Zinn* (1969) (2) SA 525. Also see *The King v Polycarp Dlamini* – Case No. 403/2011 (unreported) at page 6-7.

3) The Interest of society. The Court must then strike a balance between the interests of the Accused against those to the society.

- [3] Sentencing is pre-eminently a matter for the discretion of the trial Court which discretion must be exercised fairly and judiciously. See **Makwakwa v Rex – Criminal Appeal Case No. 2/2006**. See also **Mfanimpela Mlungu Mkhwanazi and 2 Others Criminal Case No. 211/2020** at paragraph 8. Each case must be decided on its own merits. Cases may share similar basic similarities but there have never been any two or more cases sharing the exact set of facts. It is on this premise that each case must be dealt with and decided on its own peculiar facts which renders it distinct from other cases. See **Mandla Tfwala v Rex Criminal Appeal Case No. 36/2011** at page 13.

SUBMISSIONS MADE BY THE CONVICT IN MITIGATION

- [4] The Accused having been convicted of murder, implores the Court to consider the following mitigating factors on behalf of the Accused person;
- 4.1 He has one child who is two and a half years.
 - 4.2 His education level was form three when he committed the offence.
 - 4.3 He is remorseful and has learnt a hard lesson.

CROWNS SUBMISSIONS

- [5] The crown has submitted that the interest of justice dictate that in atrocious cases, especially those involving loss of life the Courts are enjoined to discourage same in a bid to save lives through the passing of deterrent

sentences. In so doing, the Courts should ensure that the sentence passed is not overly harsh or manifestly excessive. See **Mduduzi Vincent Vilakati and Another v The King Criminal Appeal No. 20/2009 at paragraph 24**. It is also common cause that violent crimes devastate the families affected, including the community at large. Especially if the crime involves the loss of life. Reference in this regard is made to the case of **Mndeni Brother Dladla v Rex Criminal Case No. 258/2019 at paragraph 18**.

- [6] The crown also argues that the evidence of the convicted person during the course of the trial revealed that he lacked remorse for the offence he committed; whereas evidence established that he is the one who sliced the deceased's throat that was used to cut firewood, without any provocation whatsoever. The post mortem report of Dr Reddy tendered in evidence in Court revealed that when he examined the body, it had multiple injuries.
- [7] The crown also submits that the manner of the killing was not only inhumane and so gross but it further indicated a will on the part of the convicted person herein to murder the deceased in the manner he did. It is without a doubt that the deceased person endured the most unimaginable excruciating pain prior to meeting his eventual death at the hands of the convicted person herein, who was his brother and was supposed to be the one protecting him from harm.
- [8] It is further submitted that the amount of harm inflicted on the deceased by the convicted person herein demonstrates the level of atrocity of the killing upon the helpless body of the deceased person. The manner in which this

crime was perpetrated is indicative of the premeditation to kill on the part of the Accused.

THE LAW

[9] This Court in **Xolani Zinhle Nyandzeni v Rex (Criminal Appeal Case No. 29/2010 decided on 31/05/2012)** stated per Ramodibedi CJ that;

9.1 *“This Court has repeatedly stressed the fundamental principles that the imposition of sentence is primarily a matter which lies within the discretion of the trial court. This is however, a judicial discretion which must be exercised upon a consideration of all the relevant factors. In particular, the trial court is enjoined to have regard to the triad consisting of the offence, the offender and the interest of society. This Court in **Musa Kenneth Nzima v Rex (Criminal Appeal Case No. 21/2007 delivered on 14th November 2007)** approved and adopted the often – quoted and celebrated statement of the South African Court of Appeal per Holmes JA in **S v Rabie (1975) 45 CCA 855 (A) at 862 (9)** that “punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.” In **Thapelo v Motoutou Mosilwa v R (Criminal Appeal Case No. 0124/05 -)** the Botswana Court of Appeal per Moore JA stated that –*

“It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentence’s message should be crystal clear so that the full effect of deterrent sentences 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 all proportion to the offence, or to be manifestly excessive or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated."

- [10] In **Musa Kenneth Nzima v Rex (Criminal Appeal Case No. 21/07 delivered on 14/11/2007)** this Court per Tebbutt JA adopted and applied the statement of Corbet JA in the South African Court of Appeal Case of **S v Rabie** (*supra*) that;

"A judicial officer should not approach punishment in a spirit of anger nor should he strive for severity. Nor on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contribute to criminality."

- [11] The Botswana Court of Appeal in **Ntesang v The State (2007) 1 BLR 387 at 390** stated per Lord Coulsfied that;

“One of the fundamental principles of justice in sentencing is that the Courts should strive to impose the right sentence for the particular circumstances of the case.”

- [12] These are general guidelines applicable in all cases. Through the cases, special guidelines have been developed to deal with the peculiarities of each case.

*S. 296(1) of the Criminal Procedure and Evidence Act provides that the maximum sentence for the offence of murder is death by hanging. But the High Court has the discretion to impose a lesser sentence by virtue of S. 15 (2) of the 2005 Constitution of the Kingdom of Swaziland which provides that the death penalty is not mandatory. This point is judicially settled in **Ntokozo Adams v The King (Criminal Appeal Case No. 16/2010)** by this Court per Twum JA.*

- [13] The trial Court then went on to consider the nature of the crime and the interest of the society in the following words-:

“Both of these crimes are very serious, they involve the loss of an innocent human life. The unlawful possession of firearms has brought about misery, suffering and the death of many innocent people; those in possession of the firearms use them at the slightest possible provocation even when their lives are not in danger. The Courts have a duty to protect members of society against the unlawful possession of deadly firearms which result in unnecessary loss of human life. In arriving at the appropriate

sentence, I will also take into account the personal circumstances of the Accused."

[14] As stated in **Tfwala v Rex, Supreme Court Case No. 36/2011** that;

*"It is also our law that in addition to the triad of punishment and the legally recognized objectives of sentencing, judicialism in Swaziland has developed a further criterion that will enable the Courts, while fulfilling the triad of punishment in pursuance of the objectives of sentencing ensure uniformity, parity, consistency and certainty of sentences. This pathway was cleared by the famous, oft-quoted and celebrated formulations of the very erudite Moore JA in **Mgubane Magagula v The King (Criminal Appeal Case No. 32/2010 delivered on 3/11/2011)** that a trial court in imposing a sentence and appellate courts in assessing the appropriateness of sentence imposed by a trial courts, should have regard to the range of sentences imposed by other courts for the same offence being in mind the peculiar circumstances of each case. This formulation was adopted and used by this court in **Bhekizwe Motsa v Rex (Criminal Appeal Case No. 37/2010 delivered on 31/05/2012)**. The underlying idea of this formulation is that a sentence imposed should not be disturbingly outside the range of sentences previously imposed for a similar offence."*

[15] This Honourable Court has itself observed that a sentence of fourteen (14) years imprisonment in respect of Murder with extenuating circumstances was not sufficiently severe in **Siyabonga Motsa v The King, Criminal Appeal Case No. 25/2010**. The Court of Appeal (as it then was) approved a sentence of twenty (20) years imprisonment in respect of Murder in **Kenneth Gamedze and 2 others v The King, Criminal Appeal Case No. 1/2005**. This Honourable Court has itself confirmed a sentence of twenty (20) years imprisonment in respect of Murder in **Mbongiseni Bobo Nkomondze v Rex, Criminal Appeal Case No. 32/2011** (available in Swazilii.org). This Honourable Court has confirmed sentences of fifteen (15) years imprisonment in respect of Murder in **Mbuso Likhwa Dlamini v Rex, Criminal Appeal Case No. 18/2011**, **Themba Dlodlu v Rex, Criminal Appeal Case No. 22/2011** (both available in Swazilii.org). In **Sibusiso Goodie Sihlongonyane v The King, Criminal Appeal Case No. 14/2010** this Honourable Court reduced a sentence of twenty-seven (27) years imprisonment to fifteen (15) years imprisonment in respect of Murder with extenuating circumstances.

[16] These cases state a range of sentences imposed for murder by the Court of Appeal and this Court.

[17] Reliance on the range of previous sentences for the same offence must be subject to the peculiar facts of each case especially the personal circumstances of the Accused and the circumstances of the commission of the offence. According to the Swaziland Court of Appeal in **Musa Kenneth Nzima v Rex**

(supra) per Tebbutt JA *"Each case must be decided on its facts and therefore a bench-mark of a certain number of years imprisonment designed as an indication of the Court's aim to ensure severity in sentences in cases where knives are used and lives are in consequence lost, without individualizing the facts of the case and the personal circumstances of the offender, is not an appropriate approach to sentencing."*

[18] When relying on sentences imposed in a series of cases as a bench mark of the range of appropriate sentences for an offence to show that the circumstances of the commission of the offences and the personal circumstances of the Accused in those cases bear much similarity to the circumstances in the case at hand. Cases with dissimilar facts must be treated differently. This Court in **Bhekizwe Motsa v Rex** (supra) had cautioned that *"the practice of being guided by the range of sentences previously imposed by Courts for the same offences does not impair in any way the discretionary power of sentencing vested on a court by statute. So that a Court can in justifiably compelling circumstances impose sentence outside the existing range of custodial sentences for that offence."*

[19] Let me consider the facts of some of these cases to see their similarity or dissimilarity to this case. The case of **Musa Likhwa Dlamini v Rex** (supra) bears a lot of similarity to this case. The High Court convicted the Accused of murder with extenuating circumstances and sentenced him to fifteen (15)

years imprisonment. He appealed against the sentence of 15 years imprisonment on the ground that it was harsh, severe and unbearable. The Accused ambushed and stabbed an unarmed man to death. The deceased did not provoke the attack. The trial court took account of the facts that the convict was an unmarried young man of 21 years of age at the time of the commission of the offence, that he had no previous convictions and had surrendered himself to the police. On the other hand, the Court considered the fact that the convict attacked the deceased who was unarmed without provocation. This Court held that murder was a serious offence for which imprisonment of 15 years was amply warranted in the circumstances. The above case is substantially similar to our present in material particulars. It is therefore a very useful guide here. In the case of **Mbongiseni Bobo Nkomondze v Rex** (*supra*) in which the Accused was indeed sentenced to 20 years imprisonment for murder, the appeal did not turn on the issue of the appropriateness of the sentence. Rather the issue decided was whether the sentence was back dated to include the period of pre-sentence detention.

- [20] In **Sibusiso Goodie Sihlongonyane v The King** (*supra*), the High Court convicted the appellant of murder with extenuating circumstances and sentenced him to 27 years imprisonment. The appellant using a knife, hacked to death his unarmed grandmother who had not provoked him in any way. He believed that the woman might kill him with witchcraft. He appealed against his sentence on the ground that it was too harsh and severe for him to bear as a young man. He also said he had two little children to provide for and that he was the breadwinner of his family. This Court held that the 27 years sentence was disturbingly inappropriate and reduced it to 15 years imprisonment. This

case offers useful guide here too on account of substantial similarity with the facts of this case, particularly the number of years finally imposed by this Court.

- [21] In checking the proportionality test the court therein considered the case of **Rex v Adams** *supra* where the killing was described as gruesome, viz, the Accused having stabbed his heavily pregnant girlfriend several times with a spear (there were 13 stab wounds in total). In finding that there were no extenuating circumstances the trial court sentenced him to 30 years imprisonment without an option of a fine. The appeal court, finding the existence of same, reduced the sentence to twenty (20) years imprisonment.
- [22] In the matter of **The King v Sibusiso Kukuza Dlamini (242/17) [2018] SZHC (156) 17th July 2018** per Mlangeni J, the Accused was sentenced to twenty five (25) years imprisonment for Murder. Therein, the court found that the Accused showed no remorse for the murder of a young man by beating him with an iron rod. The Court held that the crimes of violence have become the order of the day and life has now been regarded without value and that it is the duty of the Courts to protect society against those who have little or no regard to the lives of others. We submit that even this Court is enjoined to take the same stance with regard to this matter.
- [23] In **Mandla Mlondolozu Mendlula v Rex Criminal Appeal Case No. 12/2013**, the Court had this to say;

“Needless to say that there is, regrettably, growing trend in this county in the killing of women by their spouses and male friends with impunity and without lawful cause. It is frightening development against the women folk requiring the urgent attention of the Courts as well as society as a whole. In all these deaths the women are not armed, and being the weaker sex, they are unable to defend themselves. In the present case as in many others, the assailant has no remorse for what he has done. The Courts have a duty to uphold the constitution by protecting the right to life.”

- [24] In the above case, the Court confirmed a twenty year sentence. Similarly, in **James Mthembu v Rex Criminal Appeal Case No. 23/2011** the Court confirmed a twenty year sentence. Also in **Thembinkosi Marapewu Simelane and Another v Rex Criminal Appeal Case No. 15/2010**, a sentence of twenty five years was reduced to twenty years on the basis that such sentence was within the acceptable range in murder cases.

EXTENUATING CIRCUMSTANCES

- [25] Extenuating circumstance is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the convict's guilt. .
- [26] Based on the provided facts, it appears that the Accused's actions were driven by suspicion and anger rather than premeditation or malicious intent.

However, there are several factors to consider as potential extenuating circumstances;

- [27] The accused had recently suffered a financial loss, which may have heightened his emotional distress and contributed to his actions.
- [28] The accused had no concrete evidence that the deceased stole the money, aside from suspicion based on shoe marks. This suggests lack of blameworthiness on the part of the deceased.
- [29] The accused sought guidance from traditional healers, indicating a possible attempt to resolve the situation through non-violent means initially.
- [30] Despite confronting the deceased multiple times, including during a family meeting, the accused's suspicions were consistently denied. This could have escalated feelings of frustration and desperation.
- [31] The Accused's actions may have been impulsive rather than premeditated, as evidenced by the escalation from tying the deceased with a rope to ultimately causing their death with a hacksaw.
- [32] Overall, while the Accused's actions resulted in a tragic outcome, there are factors present that could be considered extenuating circumstances, such as the emotional distress caused by the financial loss and the lack of clear intent to commit murder.

CONCLUSION

[33] Extenuating circumstance is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the convict's guilt.

[34] In considering the aggravating circumstances of the case of Wonder Kunene, the court finds several factors that contribute to the severity of the offense and warrant a significant sentence:

[35] Mr. Kunene's actions were not impulsive but rather pre-meditated, as evidenced by his decision to tie the deceased with a rope before ultimately cutting his throat with a hacksaw. The use of such a tool demonstrates a callous disregard for human life and a willingness to inflict extreme pain and suffering.

[36] Despite lacking concrete evidence, Mr. Kunene took matters into his own hands and resorted to violence to address his suspicions regarding the theft of his money. His actions demonstrate a lack of respect for the rule of law and a failure to seek peaceful resolution to conflicts.

[37] The victim in this case was Mr. Kunene's own cousin, highlighting a betrayal of trust and the breakdown of familial bonds. The murder took place in the context of a family meeting, further emphasizing the disruption and trauma caused within the family unit.

- [38] The violent and gruesome nature of the murder has undoubtedly left a lasting impact on the victim's family, causing immense grief, trauma, and psychological harm. The loss of a loved one in such a brutal manner exacerbates the pain and suffering experienced by the victim's relatives.
- [39] The manner in which the murder was carried out, with blood splashed as the neck was being cut, shocks the conscience and offends societal norms and values. Such acts of extreme violence are abhorrent and cannot be tolerated in a civilized society.
- [40] In light of these aggravating circumstances, it is clear that Mr. Kunene's actions warrant a significant punishment to reflect the severity of the offense and to deter others from engaging in similar acts of violence.
- [41] The court acknowledges the seriousness of the offense committed and the dastardly manner in which the murder was carried out. The accused's actions resulted in the tragic loss of life, and the court recognizes the heinous nature of using a hacksaw to cut the deceased's throat, causing blood to be splashed in a gruesome manner.
- [42] However, in considering extenuating circumstances, the court takes into account the personal background of the accused. Mr. Kunene is a fairly young man who has experienced significant hardship in his life, including the loss of

his parents at a tender age. Additionally, he is a father himself, which adds a layer of complexity to the situation.

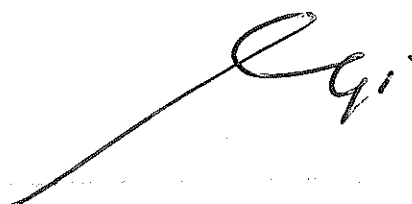
[43] The court acknowledges that Mr. Kunene may have been emotionally affected by the loss of his money, even though he lacked concrete evidence implicating the deceased. While this does not justify his actions, it provides some context for understanding the circumstances leading up to the crime.

[44] It is imperative to send a clear message to society that such violent acts will not be tolerated, and the sentence imposed serves as a deterrent to others who may contemplate similar actions. Additionally, the court encourages Mr. Kunene to use his time in prison for reflection and rehabilitation, with the hope that he may one day contribute positively to society upon his release.

[45] The court carefully considered the argument put forth by the defense regarding the events leading up to the altercation between the accused and the deceased. While it is acknowledged that tensions escalated during the confrontation and that the deceased mentioned another individual who may have been involved in the alleged theft, this does not absolve the accused of responsibility for his actions. The defense's assertion that the accused was provoked or acting in the heat of the moment does not excuse the deliberate and calculated decision to resort to violence. Furthermore, the accused's persistence in strangulating the deceased, even after a brief pause for conversation, demonstrates a clear intent to harm. The court cannot condone vigilante justice or the use of excessive force, particularly when there were

alternative avenues for resolving the dispute. Therefore, while the circumstances surrounding the altercation may provide context, they do not mitigate the severity of the accused's actions or warrant a reduction in sentencing.

[46] The Court has taken into consideration the interests of the accused, the seriousness of the offense, and the interests of society. In arriving at the appropriate sentence, the Court has taken guidance from the Supreme Court decision of **Rex vs Petros Khumalo**² which has set a new precedent regarding the range of sentences. The court will accordingly impose a sentence of 40 years imprisonment. It will be backdated to the date of his arrest. This sentence reflects the gravity of the crime committed while also considering the mitigating factors present in Mr. Kunene's personal circumstances.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Crown:

Mr S. Phakathi (DPP Chambers)

For the Applicant:

Mr N. Mabuza (Nduduzo Mabuza Attorneys)

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