

IN THE HIGH COURT OF ESWATINI

CASE NO: 17/2021

HELD IN MBABANE

In the matter between

REX

And

LUCKY ALBERT MABILA

1ST ACCUSED

MAJAHEZITHENI DLAMINI

2ND ACCUSED

NEUTRAL CITATION:

**REX VS LUCKY ALBERT MABILA &
ANOTHER (17/2021) SZHC - 284
[24/02/2025]**

CORAM:

BW MAGAGULA J

HEARD:

17/02/2025

DELIVERED:

24/02/2025

Summary: Criminal Law – Sentencing subsequent to a conviction of murder – Accused 1 was convicted without extenuating circumstances, whilst Accused number 2 was convicted with extenuating circumstances – Sentencing consideration to differ.

JUDGMENT ON SENTENCE

BW MAGAGULA J

- [1] On the 21st November 2024, this Court convicted both Accused persons on a single count of murder. Subsequent thereto the matter was postponed for mitigation and aggravation of sentence. The parties opted to file written submissions in that regard.
- [2] The Court has now considered the mitigation and aggravation submissions advanced on behalf of both parties. I will start by setting out the summary of the mitigation submissions advanced by the Defence Counsel.
- [3] Accused 2 and his family believed that the deceased was bewitching their family so much that they contributed monies and engaged a traditional healer who would destroy the

deceased's *muti bag* "sikhwama". The evidence from the crown showed that indeed the muti bag was destroyed. On the other hand the accused further engaged his dagga friend one Mpendulo Mhlanga who escaped the arms of the law solely for purposes of him (Accused 2) to get strong traditional healer to cleanse him per the advice of the healer who destroyed the muti bag so that he could see progress in his life.

[4] Accused 1 on the other hand was simply engaged as a driver by the same Mpendulo Mhlanga and his role was that he was present at the disposal of the deceased's body and nothing more. He only first met Accused 2 on the day of disposal of the body and prior to that they had not had any interaction.

[5] It is trite in law that belief in witchcraft is not a complete defence however in light of the society we live in, it may be considered as an extenuating factor. *Mamba J as he then was held in Rex v Ndumiso Lawrence Shongwe (13/2022) [2022] SZHC41 that;*

"The suggestion that to regard a belief in witchcraft as a reasonable would plunge the law backward into the dark ages is with due respect and unreasonable in the context of the prevailing circumstances in this country..... in view of the overwhelming evidence of the rampant incidents of

witchcraft in our society, it is the duty of the courts to take a realistic and practical approach to the question of witchcraft and people's beliefs, norms and ethos thereon. He argued that by so doing the court would not be encouraging witchcraft but rather doing justice by addressing real and concrete issues rather than acting like an ostrich by burying its head in the sand and acting as if such a phenomenon does not exist."..... the courts when dealing with witchcraft cases should satisfy themselves that the accused genuinely and honestly believed in witchcraft applying the subjective standard and if satisfied to afford those beliefs such weight as may be appropriate in the circumstances of each particular case. It is now trite that a belief in witchcraft which is properly established constitutes an extenuating circumstance."

[6] *In casu, the Accused persons before court have not been evidenced as those who killed the deceased but that they were accessories after the fact as Mpendulo Mhlanga had killed the deceased. The accused had previously told him that he wanted a strong muti man to cleanse him after the destruction of the deceased's muti bag as he believed the deceased was bewitching him and that is why he was not progressing in life. After it being destroyed, he needed cleansing as advised by the traditional healer at his home. Accused 1, met Mpendulo Mhlanga at his lowest point in life and desperately looking for employment and he recruited him under Crime Stop*

Security and he would also drive him around whilst he Mhlanga did his errands. On the day of the incident that was the first time he met accused 1.

[7] In essence, the accused persons believed that the deceased was bewitching accused 2 and that such witchcraft led to his life being stagnant. He solicited assistance or services of a traditional healer from Mhlanga for purposes of his cleansing after the muti bag was destroyed and only saw the deceased when her body was disposed off.

[8] In the *Rex v Jabulani Easyway Thwala supra*, wherein the accused who believed that his aunt was bewitching him and his family, the accused using an axe hacked the deceased at the back of the head until she met her death. The accused was found guilty of murder with extenuating circumstances and sentenced to 15 years. His belief in that the deceased was bewitching him and that she had also killed her brother was found to be an extenuating circumstance by the court.

[9] Accused 1 is married and has 2 children. He is also self employed as a photographer and has no previous convictions and went up to standard 5 in terms of education. Whereas Accused 2 is unmarried and has no children he also went up to

form 3 and when he was rearrested he was working at a clinic in Ezulwini. The accused persons are very remorseful and they have expressed utmost contrition throughout the proceedings and their unsophistication and beliefs may be considered an extenuating circumstance combined with the fact that the other accused evaded trial and is still at large.

[10] The accused persons bail was revoked they have been in custody since and time spent in incarceration has served as a reformatory time and they have suffered the wrath of their wrongdoing. They undoubtedly learnt that all actions have consequences and punishment is not meted out solely to destroy an offender but to also deter other would be offenders that human life is sacred.

[11] Secondly, the accused have been in incarceration since February 2024 surely same should count in their favor in that the time spent prior and during trial may have served as a moment of reflection and rehabilitation on his part.

[12] The accused persons have had the death and or disposal of the deceased's body hanging over their lives for the past 4 years and there is no doubt that it has been a prison on its own. The defence submits that, there are varying degrees of culpability in

murder cases offences and that the Court while exercising its discretion in meting out sentence, its 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. The courts have also been lenient in such cases and have deviated from the usual stiff sentences imposed and we humbly plead this Honourable Court to do same.

[13] The Crown in a nutshell submitted the following with regards to aggravation of sentence;

13.1 It is humbly submitted that the fact that the crime was premeditated means that the accused persons had the direct intention to kill and that is an aggravating factor. Hiring hit men to kill your own mother or step mother is bizarre and shows that the accused is a danger to society. Clearly the accused persons have no regard for the sanctity of life if they can kill a 61 year old without any remorse. The court should also consider the fact that the deceased died a slow painful death by being choked. You slowly see your life flashing out of you and you do not have the power to fight back.

13.2 From the facts of the matter it is an inescapable fact that the murder of the deceased was planned, savage,

and dispensed with any form of consideration of human life by the convicted persons, it dispensed with any provocation at the instance of the deceased towards the accused person. The apparent lack of remorse from the accused persons for murdering the deceased in the manner they did was all too evident to see in the course of the trial; the convicted persons were arrogant and continued to tell the court false versions of what transpired. Never at any point during the trial did they show any form of remorse for their horrendous actions and the court is urged to take note of that when passing sentence.

13.3 It is humbly submitted that this is no ordinary murder, hit men/assassins/killers were hired to mercilessly take the life of a defenseless 61 year old women. This kind of thing does not happen every day in the jurisdiction of the Honourable court and this court has the duty to put a stop to it by meting out a sentence that would send a crystal clear message to other would be offenders who may try same. This is an extra ordinary and chilling case of young men who kill their mothers because they blame them for not being successful in life. What is sad is that this young man has known his step mother throughout his young life and in fact grew up right before her eyes

and he turns around to be her killer. This case deserves the maximum sentence that this court can impose. This baseless belief in witchcraft has put a lot of innocent people to an early grave and this court has the duty to intervene by imposing a sentence that will prevent others from making such unjustified claims.

13.4 It is humbly submitted that this is a very serious offence that has been committed by the convicted person herein. Accused two planned the whole thing and then bought accused 1 and his companions execute his plan. The court in passing sentence should consider the fact that there was a possibility of accused 1 killing the wrong person as they did not know the deceased.

13.5 The court when passing sentence should also consider the fact that the deceased had dependents who relied on her for sustenance. The deceased had a whole family is was responsible for, being her ailing an aged husband, children and grandchildren, she played the role of a caregiver and provided stability for her family, which the accused persons have brutally shattered. I would urge this Honourable Court to pass a sentence that would speak to other

young men that the taking a life comes with a heavy burden to bear and that they should always respect the sacredness of life and which will serve as a lesson to the accused persons.

The Law

[14] The Honorable court having found the accused guilty of murder, has a duty to mete out sentence. In sentencing, the court has to consider the triad, that is, the accused's personal interests, the interests of the society and the peculiar facts and circumstances of the case.

[15] *In Rex v Jabulani Easyway Thwala (189/2022) [2023] SZHC 50 (28 April 2023) where Judge S.M Masuku cited His Lordship M.C.B. Maphalala citing Schreiner JA in R v Fundakubi 1948 (3) stated that;*

"...when we find a case like this where there is profound belief in witchcraft and that the victim practiced it to grave harm, and when we find that this has been the motive of the criminal conduct under consideration, we feel bound to regard the accused as a person laboring under a delusion which, though

important in any way to alter their guilt legally, does in some measure palliate the horror of the crime and thus provide an extenuating circumstances.”

[16] In **R v Maziya 87/2005 [2007] SZHC 176 (18 July 2007)** it was held that;

“In passing sentence the Court is implored to consider the triad being the crime, the offender and the interest of justice”

ADJUDICATION

[17] Sentencing is an essential function of the court, requiring a balance between the gravity of the crime, the personal circumstances of the accused, and the interests of society. This principle is well established in Eswatini jurisprudence, as illustrated in **R v Maziya (87/2005) [2007] SZHC 176**, where the Court emphasized the importance of considering the triad: the crime, the offender, and the interests of justice.

[18] In this case, the Court must consider the nature and circumstances of the offense, the degree of moral blameworthiness of the accused persons, their personal circumstances, and whether there exist any mitigating or

aggravating factors justifying deviation from the prescribed sentence.

Analysis of the Accused's Submissions and Cited Authorities

Extenuation Based on Belief in Witchcraft

[19] The defense has placed significant reliance on the accused's belief in witchcraft, arguing that it should be considered an extenuating factor. The Court acknowledges that belief in witchcraft has been recognized as an extenuating circumstance in some cases. The decision in **Rex v Ndumiso Lawrence Shongwe (13/2022) [2022] SZHC 41** supports the view that where an accused genuinely believes in witchcraft, such belief may be considered in mitigation. Similarly, in **Rex v Jabulani Easyway Thwala (189/2022) [2023] SZHC 50**, the Court recognized that a profound belief in witchcraft, if properly established, can palliate the horror of the crime.

[20] However, these authorities are distinguishable from the present case. In Shongwe, the accused directly attacked and killed a person whom he believed to be practicing witchcraft against him. The same was true in Thwala, where the accused personally carried out the attack. The distinguishing factor in the present case is that Accused 2 did not act spontaneously or in the heat of passion. Instead, he actively sought the services

of a third party Mpendulo Mhlanga to eliminate the deceased. This demonstrates a level of premeditation and calculation that removes the case from the category of those where extenuation is readily applicable.

[21] Moreover, Accused 1 had no personal belief in witchcraft and was not motivated by any such considerations. His involvement was purely transactional, driven by financial gain, which nullifies any argument for extenuation on his part. The defenses reliance on the aforementioned cases is therefore misplaced, as the factual circumstances in those matters differ significantly from the case before this court.

The Role of Each Accused Person

[22] The defense has argued that neither accused directly participated in the killing and that their role was limited to being accessories after the fact. This argument, however, is inconsistent with the evidence. The court found that Accused 2 was the architect of the murder plot, having sought out Mhlanga to orchestrate the killing of the deceased. Accused 1, despite not having prior knowledge of the deceased, willingly assisted in the disposal of the body, showing clear complicity in the offense. The fact that Accused 1 was recruited as a driver

does not diminish his culpability, as he knowingly participated in the cover-up of a serious crime.

Remorse and Personal Circumstances

[23] The defense has submitted that both accused are remorseful and have learned from their incarceration. While personal circumstances are relevant in sentencing, the weight given to these factors is limited where the crime is of a particularly heinous nature. In **R v Maziya**, the court held that the punishment must fit both the crime and the criminal, but it must also serve as a deterrent to other would-be offenders. The brutal and premeditated nature of the offense weighs heavily against any significant mitigation.

[24] The Court is not convinced that the accused have demonstrated genuine remorse. Throughout the trial, their explanations were riddled with inconsistencies, and their primary focus was on minimizing their involvement rather than taking full responsibility for their actions. The Court must therefore approach their claims of remorse with caution.

The Interests of Society

- [25] Society has a vested interest in ensuring that justice is served, particularly in cases of premeditated murder. The Crown has correctly pointed out that this was no ordinary case of murder. It involved an orchestrated plan to eliminate an elderly woman based on an unfounded belief in witchcraft. The murder was deliberate, cruel, and unnecessary.
- [26] The Courts have consistently held that where an offense shocks the conscience of society, a deterrent sentence is warranted. In **Rex v Simelane (2004)**, the Supreme Court of Eswatini emphasized that the courts have a duty to impose sentences that send a clear message that the taking of human life will not be tolerated. This is particularly relevant in cases involving witchcraft-related killings, which have become alarmingly prevalent.

Findings and Sentence

- [27] In view of the above considerations, the Court makes the following findings:

Accused 2 was the principal instigator of the crime, having actively sought the services of Mpendulo Mhlanga to execute the murder. His belief in witchcraft does not provide sufficient extenuation to significantly reduce his moral blameworthiness.

Accused 1, while not the mastermind, willingly assisted in the disposal of the body, thereby playing a critical role in concealing the crime. His financial motives negate any claim of diminished culpability.

The murder was premeditated, cruel, and executed with complete disregard for human life.

The accused have not demonstrated genuine remorse that would warrant a lesser sentence.

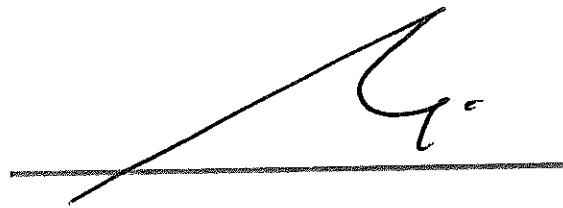
The interests of society demand a sentence that reflects the gravity of the offense and acts as a deterrent to others.

[28] Having considered all relevant factors, including the time spent in custody, the Court imposes the following sentences:

Accused 2: You are sentenced to 25 years imprisonment, with no option of a fine. The period spent in custody shall be deducted from this sentence.

Accused 1: You are sentenced to 20 years imprisonment, with no option of a fine. The period spent in custody shall similarly be deducted.

[29] The sentences imposed are intended to reflect the seriousness of the offense, the moral blameworthiness of each accused, and the need for deterrence. Let the message be clear: the Courts will not tolerate the unlawful taking of human life, particularly in cases driven by superstition and baseless accusations of witchcraft.

A handwritten signature in black ink, consisting of a long diagonal stroke followed by a stylized 'G' with a horizontal bar, positioned above a solid horizontal line.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Crown: B. Ngwenya (The Director of Public Prosecutions)

For the Accused: N. Hlophe (Mongi Nsibande & Partners)