



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 20/2013

In the matter between:

MOSES SIPHILA NDWANDWE

APPELLANT

V

REX

RESPONDENT

Neutral Citation: *Moses Siphila Ndwandwe v Rex (20/2013) [2014] SZSC13*
(30 May 2014)

Coram: RAMODIBEDI CJ, MOORE JA and DR ODOKI JA

Heard: 09 MAY 2014

Delivered: 30 MAY 2014

Summary

Criminal Appeal – Murder – Appellant Convicted of murder with extenuating circumstances – Sentenced to twenty years imprisonment without option of a fine – Appeal against sentence only a grudge of harshness and severity – No misdirection on sentence by the trial court – Sentence within the range of sentences imposed by this court – Appeal dismissed.

JUDGMENT

DR. B. J. ODOKI, JA

- [1] The Appellant was convicted of murder with extenuating circumstances and sentenced to twenty (20) years imprisonment without the option of a fine. The trial court ordered that the ten (10) months and three (days) the Appellant spent in custody be deducted from the sentence of twenty years imprisonment.
- [2] The Appellant accepts the conviction and appeals against the sentence only. He pleads for the deduction of the sentence by ten (10) years.
- [3] The brief facts of the case are that the deceased was the wife of the Appellant. On 26 December 2008 the Appellant returned home at about 12.00 midnight and a quarrel ensued between him and the deceased. The deceased ran to the house of her brother-in-law, Hynd Nxumalo (PW2), where the children slept.

- [4] When PW2 went to the children's house to check what was happening, he found there the Appellant who had also arrived. PW2 inquired from the Appellant what was the matter. The Appellant informed PW2 that he was upset because when he returned home, he found that the house smelt of sex, meaning that he suspected that his wife had recently had sex with another man. He had found the deceased fully dressed up instead of wearing a night dress. The deceased had not dished food for him. The Appellant also found extra money of E10.00 under the mattress over and above the E50.00 he had left at home. The Appellant therefore suspected infidelity by his wife.
- [5] The Appellant requested the deceased to go home with him but she refused. PW2 advised the Appellant to go home and sleep and resolve the matter with the deceased the following day.
- [6] The Appellant went out of the room and stood outside the house. When PW2 excused himself to go and relieve himself, the Appellant returned to the house where the deceased was sleeping. The Appellant found the deceased lying down on her right hand side. The Appellant lifted the deceased's left arm and stabbed her below her left armpit with a big knife. The deceased fell down bleeding. The Appellant then left the room.

- [7] The matter was reported to the PW2 who called the Appellant and they both went to look for transport to take the deceased to hospital. They took the deceased to hospital where she was pronounced dead on arrival.
- [8] Medical evidence revealed that the deceased sustained a large stab wound on the front and middle portion of the left side of the chest which was direct to the heart and which ruptured the structures around the heart. The cause of death was the stab wound caused by a sharp object.
- [9] In his defence the Appellant raised the defence of provocation based on his suspicion that his wife had committed adultery which evoked in him feelings of jealous and anger, which led him to kill his wife.
- [10] The trial judge in the court *a quo* accepted the prosecution evidence and rejected the Appellant's defence of provocation. However, the trial judge found the Appellant guilty of murder with extenuating circumstances.
- [11] In his application of appeal and in his submissions on Heads of Arguments, the Appellant who appeared in person, accepts the conviction and appeals against the sentence only. He prays that the sentence of twenty (20) years imprisonment be reduced by ten (10) years.

- [12] The grounds of appeal are that the sentence of twenty years is too harsh and severe for him to bear considering the fact that he killed his wife accidentally, without premeditation, and he pleaded guilty to the murder charge.
- [13] In his Heads of Arguments the Appellant contends that the sentence of twenty (20) years is more punitive than corrective, rehabilitative or restorative. He pleads that after stabbing the deceased he sought transport to rush her to hospital in a bid to save her life. He submits that his drunkenness contributed to his committing the offence. He became remorseful after committing the offence.
- [14] He states that his illiteracy contributed to his dismal failure to foresee the consequences of his irresponsible actions towards his wife. He submits that he is a first offender and the sole bread winner of his minor child.
- [15] Learned Counsel for the respondent supported the sentence imposed by the court *a quo*. He submitted that this court stated in ***Mancoba Lebogang Mokoena v Rex Criminal Appeal No. (10/2013) [2013] SZSC 55 at para 4***, that the imposition of sentence is a matter which lies within the discretion of the trial court, and this court will ordinarily not interfere, unless there is a material misdirection resulting in a miscarriage of justice.

[16] Counsel further submitted that there was no misdirection by the trial judge in the court *a quo* when imposing the sentence. He pointed out that that trial court accepted that the Appellant was intoxicated at the time he committed the offence even though the Appellant claimed that he was not drunk. Counsel argued that the court *a quo* took this factor as an extenuating fact in favour of the Appellant.

[17] It was the contention of Counsel that the trial court also took into account mitigating factors as well as aggravating factors to come to appropriate sentence. The Counsel pointed out that one of the factors against the Appellant was that he killed his wife and the court considered that killing of women by their partners had become prevalent.

[18] Learned Counsel for the Respondent cited the case of ***Mandla Mlondlozi Mendlula v Rex Criminal Appeal No. 12/2013 [2013] SZSC 60 at paragraph 18*** where this court stated:

“The court a quo also considered the interests of society particularly the upsurge in the killing of women, as well as the need to impose deterrent sentence which will provide the safeguard against this onslaught”.

[19] It was counsel’s contention that the above observation applies with equal force to the instant case.

[20] Finally, counsel submitted that the sentence of twenty years imprisonment is within the range of sentences that this court has confirmed or imposed. He relied on the decision of this court in the case of *Mandla Mlondlozi Mendlula v Rex, Criminal Appeal No. 12/2013 [2013] SZSC60*.

[21] I agree with the submissions made by the Counsel for the Respondent. I find that there was no material misdirection by the trial judge in sentencing the Appellant to twenty years imprisonment for the senseless murder of his wife. The trial judge took into account the relevant mitigating circumstances in favour of the Appellant, having considered the seriousness of the offence and the interests of society.

[22] The sentence of twenty years imprisonment is within the range of sentence of fourteen to twenty years that this court has confirmed, and therefore the sentence is not harsh or excessive.

[23] In the result I find that this appeal has no merit and it is accordingly dismissed.

DR B. J. ODOKI
JUSTICE OF APPEAL

I Agree

**M. M. RAMODIBEDI
CHIEF JUSTICE**

I Agree

**S. A. MOORE
JUSTICE OF APPEAL**

For the Appellant: In Person

For the Respondent: Mr. Brian Magagula