



IN THE SUPREME COURT OF SWAZILAND

RULING

Criminal Appeal Case No. 20&21/2016

In the matter between:

MFANIMPELA KHOWE MBUYISA
SONTO NKOSI

1st Appellant
2nd Appellant

And

REX

Respondent

Neutral Citation: *Mfanimpela Khowe Mbuyisa and Another v Rex*
(20-21/2016) [2016] [SZSC] 73 (30 June 2016)

Coram: **R. J. CLOETE AJA**
 C. MAPHANGA AJA
 M. LANGWENYA AJA

Heard: **26th May, 2016**

Delivered: **30th June, 2016**

Summary: *Criminal Appeal-Procedure.*

RULING

MAPHANGA AJA:

- [1] The Appellants were charged with and convicted of the murder of one Nongoza Hezekiah Masuku on the basis that on or about 24th December, 2010 acting in furtherance of common purpose they unlawfully and intentionally killed the deceased at or near Ngelane area in the Shiselweni District.
- [2] They had initially been charged jointly with one Swazi Mdluli who was designated 1st Accused but the latter turned accomplice witness and as a result the proceedings were prosecuted against the Appellants only.
- [3] The trial court having convicted both Appellants of the charge of murder with extenuating circumstances on the 7th July, 2010, sentenced them to a term of imprisonment of 15 years to run from the date when they were arrested.
- [4] The Appellants have both appealed against their conviction and sentences.
- [5] At the inception of the hearing it appeared that the appeal was beset with a series of difficulties pertaining to the preparedness of the Appellants through their Counsel to proceed with the matter on account of late instructions and conflicts in Counsel's mandate to act as Pro-Deo counsel due to administrative challenges in the run up to the enrolment and hearing of the matter.

- [6] For these reasons Mr Mabila, appearing for the 2nd Appellant, moved an application from the bar for this Court to bear with and condone the late filing by his office of the 2nd Appellant's Heads of Argument, his reason being that he had only received instructions and brief to act as Pro Deo Counsel in the matter on the eve of the hearing of the Appeal upon the late withdrawal of the 2nd Appellant's erstwhile attorneys. That application for condonation was not opposed by the Respondent's Counsel. On that basis Mr Mabila urged the court to consider the application for condonation favourably in light of the exceptional circumstances which were due to administrative constraints.
- [7] However, as it turned out, that was the least of the difficulties in the matter. A further impediment was presented by an apparent conflict of interests on account of the appearance of two counsel each claiming to act on authority of appointment as Pro-Deo Counsel by the Registrar of the High Court in terms of the established procedures for such appointments.
- [8] This emerged after Mr B. Dlamini rose to move a similar application as Mr Mabila seeking an indulgence and leave to hand in late Heads of Argument pleading he had only received instructions only two weeks before this session of the Court. It emerged however that there was a conflict in the representation of the 1st Appellant on account of the fact that, as it became apparent at the hearing, there was another attorney, Mr Motsa, who was on record as representing the 1st Appellant and had filed heads of argument on the 20th May 2016.
- [9] In view of the apparent conflict and ensuing confusion regarding the 1st Appellant's legal representation, the Court deemed it necessary to call as it did the 1st Appellant in person and ascertain from him the

circumstances and true facts pertaining to the appointment and brief of pro-deo Counsel on his behalf.

[10] It emerged from Mr Mbuyisa's representations before the Court; which representations were elicited under oath, that he had been originally allocated Mr Dlamini to Act as his pro-deo Counsel but for some obscure reason Mr Dlamini did not diligently act on that appointment to do the necessary preparatory arrangements including taking fuller and proper instructions in order to timeously prosecute the appeal. It turns out that although the Appellant knew of Mr Dlamini's appointment as his pro-deo Counsel, the latter failed to attend to the necessary consultations to take instructions from the Appellant.

[11] When asked about Mr Motsa he confirmed that he had met Mr Motsa who had come to consult him at the Correctional facility and informed him of his appointment to act as his counsel for purposes of the appeal. During the Appellant's examination by the court it became apparent that he was confused by the state of affairs as he had at all times been under the impression that Mr Dlamini was the pro-deo Counsel appointed to represent him.

[12] The court was to learn from the Appellant that notwithstanding Mr Dlamini's appointment he had failed to take up the matter and had only telephoned the Appellant after Mr Motsa's visit and consultation with the Appellant in preparation for the matter.

[13] It emerged that it was only after the enrolment of the matter for hearing that Mr Dlamini made efforts to consult with the Appellant; well after the Appellant's new pro-deo Counsel had already been appointed in light of Mr Dlamini's failure to take up the mater. Needless to say the

Appellant himself was not aware of the melodramatic change due to his original counsel's lack of diligence in the matter.

[14] From the court's enquiry at the hearing with the benefit of the examination of the Appellant himself the court learned that Mr Dlamini's representations were not entirely correct and he had failed to disclose the full circumstances and facts pertaining to his mandate. It emerged that the 1st Appellant had during the trial been represented by Mr Manana who served as his original pro-deo counsel but in the intervening period after the trial Mr Manana had left practice to take up formal employment as a case officer with the Commission for Mediation Arbitration and Conciliation (CMAC). It was for that reason that the Registrar then appointed Mr Dlamini as the Appellant's new Counsel.

[15] It is clear that Mr Dlamini was duly appointed in good time to undertake service as pro deo counsel for the Appellant. As it happens the only thing that Mr Dlamini did upon his assignment was to file the Notice of Appeal on the 21st September 2015, but took no further interest nor action in the matter until Mr Motsa's appointment.

[16] It is indeed regrettable that despite the best of efforts in the Registrars office for the provision in this instance of the pro-deo service in the present circumstances there was a palpable failure on the part of the attorney to act diligently and professionally in fulfilment of his mandate with the result that adversely impacted on the prosecution of the appeal as enrolled. It was rather late in the day that alternative arrangements for new Counsel could be made and sadly to add to the confusion Mr Dlamini saw it fit, despite his shortcomings to show up at the brink of the hearing to plunge the matter into further confusion.

[17] The Court has found itself constrained for the above reasons to have the matter postponed to the next session to enable proper arrangements for the legal representations to be sorted out and confirmed.

[18] Accordingly we therefore order that this Appeal is postponed to the next session and the Registrar is to make firm arrangements to properly revoke the Appellant's erstwhile attorneys mandate and accordingly appoint and confirm a brief for the Appellant's pro-deo Counsel in good time.

C. MAPHANGA
ACTING JUSTICE OF APPEAL

I AGREE

R. J. CLOETE
ACTING JUSTICE OF APPEAL

I ALSO AGREE

M. LANGWENYA
ACTING JUSTICE OF APPEAL

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| For the 1 st Appellant: | Mr Motsa |
| For the 2 nd Appellant: | Mr Mabila |
| For the Respondent: | Mr Nxumalo |