IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 27/2015

In the matter between:

ZANELE VILAKATI (BORN DLAMINI) Appellant

And

REX Respondent

Neutral citation: Zanele Vilakati (born Dlamini) v Rex *(27/2015)* [2017] SZSC 09 (31 May 2017)

Coram: DR B.J. ODOKI JA, S.P. DLAMINI JA, and M.J. DLAMINI JA

Heard: 16 February 2017

Delivered: 31 May 2017

Summary: *Criminal Law – Application for condonation for late filing of cross-appeal – cross-appeals not different from appeals and the rules apply similarly – Dismissal of application for condonation and the cross-appeal – Appellant convicted of culpable homicide – Alleged contradictions in prosecution evidence regarding participation of the Appellant in the commission of the offence – Whether Appellant acted negligently – Whether culpable homicide proved – Held negligence of the Appellant proved – Held further that Crown proved the case against the Appellant beyond reasonable doubt – Held further that appeal against conviction and sentence dismissed – and Held further that no order as to costs is made.*

JUDGMENT

S.P. DLAMINI JA

[1] The Appellant was charged with murder but was convicted of the competent lesser offence of Culpable Homicide at the High Court. The Appellant was sentenced to **"seven (7) years imprisonment without an option of a fine, two (2) years of which are suspended for two years on condition the Appellant is not convicted for any offence which assault is an element"**. (Paragraph [8] at page 29 of the judgment). The *court a quo* delivered the judgment on conviction on the 9th July 2015 and judgment on sentence on the 3rd September 2015.

[2] The Appellant appealed against both the conviction and sentence of the judgment of the *court a quo* on 16th October 2015. The appeal is opposed by the Crown.

[3] The Crown also filed a cross-appeal against the said judgment together with an application for condonation of the late filing of the notice of the cross-appeal on the 26th May 2016. Both were opposed by Appellant.

[4] I will proceed to consider the application for condonation for the late filing of the cross-appeal and the cross-appeal.

[5] The Crown, in the application for condonation, sought an order in the following terms:

"1. Condoning the Appellant, Respondent in the main appeal for failure to comply with time limits prescribed by rules 35 and 36 (a) of this Honourable Court for lodging a cross appeal.

2. Granting the Appellant further and/or alternative relief."

[6] The Crown relied on the affidavit of Mr Nkosinathi Macmillan Maseko, the Director of Public Prosecutions, in his capacity as the representative of the Crown in criminal matters.

[7] Mr Maseko, in his affidavit, relies on Rules 14 (1) 35 and 36 (a) of the Court of Appeal rules 1971 for the relief sought. Furthermore, Mr Maseko alleges that the late filing of the cross-appeal was caused by the late notification of the trial date attributable to the office of the Registrar of the Supreme Court.

[8] Condonation applications are covered under Rule 17 of the court of Appeal Rules. *Rule 17 provides that;*

"The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these rules and may give such directions in matters of practice and procedure as it considers just and expedient."

[9] In the present case, the Crown did not bring the application under the applicable Rule 17 but inexplicably relied on Rules 14(1), 35 and 36 (a). The Rules relied on by the Crown provide as follows;

Rule 14 "(1) *The Registrar shall, after obtaining directions from the Judge President, cause notice of the date of hearing to be served upon the appellant and respondent";*

Rule 35*"(1) It shall not be necessary for a respondent to give formal notice in terms of rule 6 of a cross appeal but every respondent who intends to apply to the Court of Appeal for a variation of the order appealed against shall within the time specified in rule 36, or such time as the Court of Appeal may order, give notice of such intention to any parties who may be affected by such variation.*

(2) The respondent shall deliver such notice together with four copies thereof to the Registrar of the High Court and shall serve a copy thereof on the appellant.

(3) On receipt of such notice the Registrar of the High Court shall forward it together with three copies thereof to the Registrar.

(4) The respondent shall state fully in such notice the particulars in respect of which he seeks a variation of the order and the grounds therefor.

(5) The omission to give such notice shall not diminish the power of the Court of Appeal to vary such order but it may, in the discretion of the Court, be a ground for an adjournment of the appeal, or for a special order as to costs"; and

Rule 36 (a); *"Subject to any special order which may be made, notice by a respondent*

under rule 35 shall be given –

(a) In the case of an appeal from a final judgment, not less than twenty-one days;"

[10] It is clear that the Crown relied on the wrong rules for its application for condonation. Rules 14(1), 35 and 36 (a) are not relevant to the application. Additionally, this Court agrees with advocate Mabila for appellant that the said rules only apply to civil and not criminal proceedings. Accordingly, the court finds in favour of the appellant on this point. The application for condonation ought to have been instituted in terms of Rule 17 as stated above.

[11] In our law, criminal appeals are regulated by Section 6 of the Court of Appeal Act (the Act) read with Rule 9 of the Court of Appeal Rules, 1971 (Rules).

[12] Section 6 (1) of the Act provides as follows;

> *"The Attorney-General or, in the case of a private prosecution, the prosecutor, may appeal to the Court of Appeal, against any judgment of the High Court or made in its criminal origin or appellate jurisdiction, with leave of the Court of Appeal or upon a certificate of the Judge who gave the judgment appealed against, on any ground of appeal which involves a question of law but not a question of fact, nor against severity of sentence";* and

Rule 9 provides as follows;

> *9 (1) "An application for leave to appeal shall be filed within 6 weeks of the date of judgment which it is sought to appeal against and shall be made by way of*

petition in criminal matters or motion in civil matters to the Court of Appeal stating shortly the reasons upon which the application is based and where facts are alleged they shall be verified by affidavit."

[13] Appellant argued that the Crown by not seeking leave to lodge its cross-appeal committed a breach of the applicable rules. On the other hand, the Crown sought to make a distinction between appeals and cross-appeals.

[14] The Crown failed to substantiate its claim that there is a distinction between an appeal and a cross-appeal either in terms of the rules or authorities. This Court has searched for authorities in support of the Crown claim without any success. In fact, the rules only refer to cross-appeals separately only in respect of civil matters in rule 35.

[15] Rule 35 provides that;

"(1) It shall not be necessary for a respondent to give formal notice in terms of rule 6 of a cross appeal but every respondent who intends to apply to the Court of Appeal for a variation of the order appealed against shall within the time specified in rule 36, or such time as the Court of Appeal may order, give notice of such intention to any parties who may be affected by such variation.

(2) The respondent shall deliver such notice together with four copies thereof to

the Registrar of the High Court and shall serve a copy thereof on the appellant.

(3) On receipt of such notice the Registrar of the High Court shall forward it together with three copies thereof to the Registrar.

(4) The respondent shall state fully in such notice the particulars in respect of which he seeks a variation of the order and the grounds therefor.

(5) The omission to give such notice shall not diminish the power of the Court of Appeal to vary such order but it may, in the discretion of the Court, be a ground for an adjournment of the appeal, or for a special order as to costs."

[16] A proper reading of Rule 35 does not support the Crown's position. Apart from addressing the issues of convenience, Rule 35 does not absolve a party launching a cross-appeal from complying with the relevant rules. Furthermore, it is my view that nothing in terms of the rules and/or authorities absolves the Crown from complying with section 6 (1) of the Act read with Rule 9 (1) that regulate criminal appeals as stated above. This is not to suggest that it is not possible for the Crown to seek and obtain condonation in circumstances where there has been non-compliance with the rules of court. If a case is made out to justify condonation in terms of the rules, condonation will be granted. In the present matter the Crown has failed to provide any justification for the non-compliance with the rules.

[17] In my view, a cross-appeal must be viewed as arising from the fact that the other party has noted an appeal first where a genuine intention to appeal exists on the part of another party. Therefore, it is not a knee-jack reaction to an

appeal. The Crown ought to have obtained a certificate from the trial Judge or sought leave to appeal before this Court. In view of the failure by the Crown to observe the requirements of Section 6 (1) of the Act read with Rule 9 (1), the point raised by the appellant on this issue is upheld.

[18] The case of **Arnold Nono Ndlovu vs Rex Appeal Case No. 14/2000** supports the view that there is no distinction between appeals and cross-appeals. His Lordship Justice Beck J.A. at page 2 states the following;

> "*Not only is a submission advanced in Heads of Argument not the way in which a cross-appeal, any more than an appeal,*(my own understanding) *is to be noted, but this so-called noting of a cross-appeal by the Crown was grossly out of time and no formal application for condonation was made. Nevertheless the High Court condoned these irregularities, accepted the above quoted paragraph in Crown counsel's Heads of Argument as notice of a cross-appeal and postponed the hearing of the appeal so that the magistrate could give written reasons for conviction and sentence and so that the appellant could prepare himself to meet the Crown's cross-appeal.* "

[19] Furthermore, as it appears above, the noting of an appeal, has nothing to do with the notification of the dates of hearing as erroneously claimed by the Crown.

[20] There were other points raised by the appellant regarding the application for condonation of late filing of the cross-appeal and the cross-appeal itself. It is not necessary to deal with them in view of what is already stated above. Accordingly, both the application for condonation and the cross-appeal by the Crown are dismissed.

[21] The appellant applied for costs including the certified costs of Counsel to be awarded in the event the Crown was unsuccessful. This Court has considered the application by the appellant regarding costs. Section 7 (3) of the Act allows for consideration and award for costs in such matters as this one. In view of the general inclination of the courts against awarding costs in Criminal matters and the provisions of Section 28 of the Act, this court is of the view that it is not appropriate to award costs in this matter. There was nothing wrong for the Crown to decide to launch a cross-appeal against the

judgment of the c*ourt a quo* per se but the problem lay in the prosecution of the cross-appeal itself.

[22] I now turn to the appeal. The grounds of appeal against the conviction are as follows;

" 1. The court a quo erred both in fact and in law by convicting the Appellant when the evidence led by the crown was contradictory.

2. The court a quo erred both in fact and in law by relying on the evidence of PW1 to sustain the Appellant's conviction yet the same was inconsistent and/or contradictory with the evidence of the other Crown witnesses.

3. The court a quo erred both in fact and in law by accepting the evidence of PW1 when, as evidenced by the observation at the inspection in loco, when he never witnessed the unfortunate incident due to his positioning when the same occurred.

4. The court a quo erred both in fact and in law by failing to find and hold that PW1 could not have witnessed the incident from a distance in excess of 50 metres and shielded by a permanent structure at the homestead and when it was at night with no proper lighting system.

5. *The court a quo erred both in fact and in law by not accepting the corroborative evidence of pw2, 3, 4 and 5.*

6. *The court a quo erred both in fact and in law by not accepting the Appellant's version when in actual fact it had been corroborated by PW2, 3 and 4.*

7. *The court a quo erred both in fact and in law by failing to appreciate that had the deceased not sought to put out the fire, he would not have been burnt."*

[23] The ground for appeal against the sentence is as follows;

"The court a quo erred both in fact and in law by failing to take into account that the deceased was the initial aggressor in the confrontation."

[24] Appellant's Heads of argument reflected the issues falling for determination by this Court in paragraph 2.1 and 2.2 as follows;

"2.1 Whether or not the prosecution has proved its case beyond reasonable doubt to secure a conviction of Culpable Homicide in view of the contradictions in the evidence of PW1 and the other three witnesses.

2.2 Whether the Appellant was negligent in his conduct, and whether the reasonable foreseeability test has been proven in the circumstances."

[25] In addressing the aforesaid issues, the Appellant contends that;

(a) The Crown did not prove its case beyond reasonable doubt in order to sustain the conviction of culpable homicide in view of the contradictory testimony; and

(b) It was not established by the Crown that there was negligence on her part; therefore, she could not be held that she reasonably foresaw that her conduct would cause the death of the deceased.

[26] According to the Appellant, the evidence of the Crown did not meet the requirements for the verdict of culpable homicide passed by the *court a quo*. Therefore, the Appellant contends that she ought to have been acquitted and discharged. In her appeal, the Appellant prays for both the conviction and sentence to be set aside.

[27] The Crown's case was that on the 2nd June 2006 at Phonjwane area the Appellant committed the crime of murder by dousing her father in law, Mabukwa Timothy Vilakati, with paraffin and setting him alight thereby causing his death. The Crown in part, relied on the post-mortem report which states the death of the deceased was caused by the burns he had sustained.

[28] The Appellant did not challenge the results of the post mortem report which revealed the death of the deceased was a result of serious **"burns present all over the body (100%)…"**.

[29] However, in her defence, the Appellant denied intentionally setting the deceased alight. The Appellant admitted that she in advertently poured paraffin on the deceased. Her version is contained in both the statement made to a Judicial Officer found at pages 20 to 21 of the Record of Proceedings at the High Court and her evidence in - chief. The statement made to the judicial officer is largely in line with the Appellant's evidence - in chief. Appellant stated the she had no intention to burn or kill the deceased. According to her, all she wanted to do was to burn the deceased's

belongings and the hut he was staying in. She claimed that she had been angered by the deceased and his other relatives whom she alleged had contributed to the strained relationship between her and her husband.

[30] The main issue raised in this appeal whether the Crown proved its care beyond reasonable doubt in the light of the contradictions in the evidence.

[31] From the evidence and the judgment of the *court a quo*, it is clear that the marriage between the Appellant and her husband was strained and that the relationship between the Appellant and her in laws including the deceased had badly soured. Appellant, as already stated, was of the view that the deceased and other members of his family bad-mouthed her to her husband hence the strife in her marriage.

[32] It is not in dispute that on the fateful day of the incident that caused the death of the deceased, there had been a prolonged altercation between the Appellant and the deceased. The facts reveal that the chain events actually started on the day before, the 1st June 2006. On that day, the Appellant who

is a teacher by profession, came home from work and performed some home chores. An altercation started between the Appellant and the deceased concerning the former sweeping the yard at dusk. The deceased did not take kindly to this and in the past he had apparently admonished the Appellant for sweeping the yard at dusk. When the Appellant's husband returned home from work, the deceased called for him and they spoke. On the next day, the 2nd of June 2006, which was the day of the incident the Appellant's husband did not return home. The Appellant concluded that it was because of something bad that the deceased had said to her husband the day before when they spoke that caused him not to come home.

[33] Furthermore, it is not in dispute is that the Appellant on the 2nd of June 2006 had confronted the deceased about the events of the day before which, in her view, caused her husband not to return home. It worth mentioning at this stage that her version of the chronology of events and what took during and thereafter differ in varying degrees with that of PW1, PW2, PW3 and DW2. As a result of the confrontation, the chain of events leading to his death continued. What is disputed is who caused the altercation and the circumstances regarding the setting alight of the deceased. The Appellant stated that deceased was the instigator of the altercation. On the other hand,

the Crown contends that the Appellant was the instigator and relied largely on the evidence of PW1.

[34] At the hearing of the matter in the *Court a quo* 4 witnesses testified for the Crown (PW1, PW2, PW3 and PW4) and 2 witnesses (including the Appellant) testified for the Defence (DW1 and DW2). The Doctor's report was admitted by consent and the Judicial Officer's recorded statement was accepted to have been done freely and voluntarily hence the Doctor and the Magistrate were accordingly excused from giving evidence.

[35] A further point is worth mentioning regarding the witnesses;

(a) PW1, Abednigo Bheki Vilakati, is a son of the deceased;

(b) PW2, Sikhulile Vilakati, is last-born child (daughter) of the Appellant;

(c) PW3, Lomkhisi Lungile Vilakati, is second-born child (daughter) of the Appellant; and

(d) PW1, Senzo Bongane Vilakati, is the first-born (son) of the Appellant.

[36] Needless to say, it must have been challenging for the siblings and relatives to testify in the case and to give evidence on behalf of the two opposing sides. There are both suttle and glaring difference in their evidence particularly in relation to the setting alight of the deceased. The evidence of PW2, PW3 and DW2 was largely similar and in line with the version of the Appellant (DW1) whereas the evidence of PW1 was grossly at variance to that of these witnesses and is in line with the Crown's version. In particular, the evidence of DW2 in complete in variance to that of the Appellant regarding the setting alight of the deceased. DW2 had no reason whatsoever to be against the Appellant (his mother.)

[37] After hearing the evidence, which included an inspection in *loco*, the *court a quo* as per Her Ladyship Justice Q.M. Mabuza came to the conclusion that;

> *"[66] I have no doubt in my mind that the accused threw the paraffin onto the deceased while she was in his house and she knew that he was in his house. It is a lie that she threw the paraffin onto his clothes. That when she threw the lit newspaper she knew that he was wet with paraffin and that he would be set alight.*

[67] She says that she wanted to set the house alight so that the deceased would no longer have a place to stay. Even if that were true, she ought to have known that the deceased was in the house and ought to have foreseen that her action would have fatal consequences upon the deceased."

[38] In my view, a reading of the judgment by her Ladyship Justice Mabuza shows that she came to the above conclusion upon carefully evaluating all the evidence and applying the applicable legal principles. As a result she was not satisfied that a case of murder had been made out by the Crown against the Appellant. However, the Learned Judge concluded that the Appellant was guilty of the competent verdict of Culpable Homicide and correctly so in my view.

[39] Appellant, in her evidence in – chief, stated that around 8pm on the 2nd February 2006 (clearly in error because it was supposed to be June and not February) DW2 arrived home without the Appellant's husband as expected. When Appellant enquired about the whereabouts of her husband from DW2, She was informed by DW2 that he left him at bus stop and he had told him to inform her that he was not coming home.

[40] Appellant further stated that she approached the deceased to talk to him about her husband not coming home. Appellant claims that the deceased got angry and armed himself with a bush-knife, knob-stick and a spear. She claimed that she ran to her house and the deceased followed her and that when she peeped through the door which was ajar, the deceased hit her with the knob-stick on the head. I find elements of this testimony highly improbable as well as the other elements of her testimony that the *Court a quo* also found improbable.

[41] Appellant claims that she was further assaulted by the deceased who remained at the door of the house. Appellant stated that she found a bush-knife and a container with paraffin in it. She poured the paraffin in a bucket and exited the house armed with the bush-knife and carrying the bucket with the paraffin. She cut off the electricity cable supplying electricity to the deceased hut. Appellant then approached the deceased hut. She got hold of an iron rod and broke the windows of the deceased's hut. Appellant then through the door poured paraffin on to deceased belongings and to the corner where she claims the deceased's weapon were. She heard the deceased move around inside the house but she was not sure of the direction. She left the deceased and proceeded to her house.

[42] Appellant decided to drive in her car but it is not clear to where. When she was reversing the car, she saw the deceased who was armed with a spear. She drove towards him. The deceased ran away towards his hut. Appellant stopped when he was at the door step. Appellant got out of the car and the confrontation between them continued resulting in a scuffle. PW2, PW3 and DW2 arrived at the scene. DW2 tried to stop the fight. Appellant stated that she got hold of a piece of paper and matches which she used to lit the piece of paper with. Appellant then threw the burning piece of paper intending for it to land inside the hut of the deceased and burn it down with its contents. The next thing she saw the deceased on fire she froze. PW2 and PW3 assisted DW2 to put out the fire. PW2 managed to wrap a blanket around the deceased. This version is different from the evidence of DW2 particularly regarding the burning of the deceased.

[43] Then Appellant drove away to one of his in-laws but returned later to her home. She left her minor children alone to attend to their dying grandfather.

[44] The question of the test to applied in determining whether an accused is guilty of culpable homicide on the basis of negligence appears to be settled in our law.

[45] In the case of **Malangeni Raphael Dlamini vs Rex Criminal Appeal Case No. 25/2014**, this Court per Justice Dr B.J. Odoki JA at pages 11 -13 stated the following;

"[24]… it seems to me that the true test when determining whether an accused is guilty of culpable homicide on the basis of negligence is whether a reasonable person would have foreseen that death would be caused by the conduct of the accused. The accused must have failed to take steps to guard against such consequences. See ***Principles of Criminal Law*** *by Jonathan Burchell, and John Millin, 3rd Edn. 2004 page 159-160.*

[25] The above view is supported in ***South African Criminal Law and Procedure****, Volume I, 3rd Edn by J. M. Burchell 1997 at page 273 where it is stated as follows:*

"In determining liability on a criminal prosecution in which the fault of the accused consists in negligence, the South African courts have traditionally applied the following test to determine whether the accused had been negligent:

(a) would a reasonable person in the same circumstances as the accused have foreseen the reasonable possibility of the occurrence of the consequences or the existence of the circumstance in question, including its unlawfulness;

(b) would a reasonable person have taken steps to guard against that possibility; and

(c) did the accused fail to take the steps which he or she should reasonably have taken to guard against it?

If all the three parts of this test receive an affirmative answer, then the accused's conduct can be regarded as negligent."

[26] The law on culpable homicide in Swaziland should be the same as the law in South Africa; as stated above.

[27] In the present case, the Appellant was charged with unlawfully and negligently causing injuries on the deceased from which he died. As I have explained above the prosecution evidence was riddled with such grave inconsistencies and contradictions that the Crown failed to prove that the Appellant could reasonably have foreseen that his conduct would cause the death of the deceased. The Crown therefore failed to prove the case against the Appellant beyond reasonable doubt.

[28] The Crown Counsel rightly did not support the conviction.

[29] Accordingly, this appeal is allowed and the conviction set aside.

[30] As the conviction has been set aside it is unnecessary to consider the appeal against sentence, which must be set aside as a consequence thereof."

[46] I am satisfied that in applying the test per his Lordship Justice Odoki in the case of **Malangeni Raphael Dlamini vs Rex** (Supra), the evidence in the matter before this court shows that Appellant is guilty of culpable homicide on the basis of negligence. The *Court a quo*, therefore, did not misdirect

itself in anyway in find her guilty accordingly. The Appellant foresaw that by throwing a burning substance in a hut whose contents were doused with paraffin and having doused the deceased with paraffin the deceased could be burnt and she took no steps to prevent this.

[47] Contrary to the Appellant's version, when she approached the deceased for the first time on 02 June 2006 at his hut it appears from the evidence that an argument ensued immediately and they were overheard by PW2,PW3 and DW2 in the main house. DW2 testified that he "**heard raised voices from the accused and the deceased at this stage"**. After the initial skirmish, Appellant went and destroyed the windows of deceased hut. There is no explanation for her conduct because she ended up pouring the paraffin inside the deceased hut through the main door. Also contrary to her version, in terms of the testimony of DW2 the Appellant threw the burning paper at the deceased inside the hut and not outside. According to PW3 and DW2 immediately before the incident, Appellant had left the area where the scuffle was taking place furious and went to the main house and came back with the burning piece of paper. PW3 in her evidence in-chief at page 27 of the transcribed record of hearing stated the following; **"I noticed that the accused was very, very angry but I did not see where she went while we**

were trying to find out what was going on. After a short while I saw the accused carrying a lit newspaper. As we were standing at by the deceased door, she threw a lit paper and it fell on the ground. The deceased caught fire from the lit paper and we tried to put out the flames." Regarding this aspect of the matter, DW2 had this to say; **" I heard mystery saying "no mother, no mother!!! (hhayi Make, hhayi Make)", asking her to stop. I turned around to see what was happening, I saw her carrying a Times Newspaper which was already lit but she was already close to the door step right next to me. She tried to throw the newspaper above me over my head into the door. I raised my hands to try and block it, she then threw it through my legs into the house. I tried to pull the paper out of the house and the deceased also bend towards the paper, trying to deflect it away from the house outside. As he was doing this he caught fire."** (DW2's evidence in-chief). She claimed that she had found the matches near the hut of the deceased where she had left it earlier and lit the piece of paper there. There is also no explanation as to why she left the matches there in the first place.

[48] On the Defence's own evidence, the Appellant intentionally poured paraffin inside the hut where the deceased was. It is of no help to the Appellant to

claim that she did not know that the deceased was inside the hut. She had cut the capable supplying the electricity to ensure that his hut was dark. The skirmish took place well into the night. In any event DW2 in his recorded statement testified that he had earlier heard the deceased shouting something to the effect that **"you disrespect me to the point that you come and pour paraffin on me in my hut."** (my translation from Siswati to English). When DW2 heard this words he says that he was inside the main house. Therefore, it does not make sense at all that the Appellant who was outside with the deceased at the time could not have known that she had poured paraffin on the deceased.

[49] Therefore, when the Applicant threw the burning paper at the deceased she had doused with paraffin and inside the hut where she had also poured paraffin on the belongings of the deceased she acted negligently. As a result of her negligence the deceased was set on fire and sustained injuries that led to his subsequent death. The evidence actually does not exclude intention on her point to set alight the deceased. However, in the view of the Learned Justice Mabuza such intention was negatived by the long acrimonious relationship between the Appellant and her in-laws including the deceased as well as the fighting that had taken place hitherto the burning of the deceased.

In view of the fact that cross-appeal has fallen though, it is not necessary to consider the presence or lack of intention on the part of the Appellant as for the conviction is concerned. But her wilful conduct in setting the deceased alight is relevant considering the appropriate sentence. In the circumstance of this case the view of this court is that *Court a quo* exercised leniency in favour of the Appellant in passing the sentence it imposed. Therefore, I am of the view that in the circumstances it is not appropriate to interfere with the sentence imposed by the *Court a quo*. My conclusion on this point is fully dealt with in the latter part of this judgment.

[50] Due to the delay in bringing the Appellant to trial and of course her exercise of her rights regarding the appeal, it so happens that matter that started over a decade ago when Appellant was in her 40s is only now approaching its end. The Appellant is now a sixty year old woman and probably a grand mother and a mother in-law. Her children who were minors at the time of incident and testified at the hearing at the *Court a quo* are now adults. Her husband is dead, we were told by her Counsel at the hearing. In this country there is one law for all and in the theological saying, there cannot be one law for Peter and another law for Paul.

[51] Therefore, it is with a heavy heart that I find her appeal against both conviction and sentence to be without merit. Furthermore, since she was admitted to bail pending the outcome of her appeal and the appeal being not successful, her bail is revoked and the Appellant is to commence serving her a sentence without delay.

[52] The Court takes judicial notice of the ever increasing violence in both the domestic and other spheres of Swazi life. More often the violence is directed at women and girls. In this case, however, the violence was directed against an elderly man as a result he lost his life. The only ground for appeal against the sentence advanced by the Appellant is that **"The *Court a quo* erred both in fact and in law by failing to take into account that the deceased was the initial aggressor in the confrontation."** However, the facts of the case suggest the opposite as it appears in the presiding paragraphs. It was the Appellant who confronted the deceased about her husband not returning home. Therefore, Appellant's ground for appeal against sentence cannot be sustained and it is according rejected.

[53] This Court finds no misdirection in the judgment on sentence by the *Court a quo*. Her Ladyship Justice Mabuza, in sentencing the Appellant, took into consideration the well established triad approach. The Learned Judge considered the interests of the society, the severity of the crime and the personal circumstances of the Appellant. Therefore, this Court finds that there are no good grounds justifying the interference with the sentence imposed by the *Court a quo*. In the case of **Elvis Mandlenkhosi Dlamini vs Rex Appeal Case 30/2011** had occasion to set out the way in which sentencing should be approached as follows;

> *"[30] The Trial Court was alive to the caution made by* Ramodibedi JA, *as he then was, in the Court of Appeal of Botswana in* Bogosinyana v. The State *(2006) 1 BLR 206 (CA) at page 6 where the learned judge of Appeal had this to say:*
>
> > ***"It is equally important to bear in mind that punishment should fit the offender as well as the crime while at the same time safeguarding the interests of society. It is thus a delicate balance which should be undertaken with utmost care. In this regard it is important to remember the age-old caution not to approach punishment in a spirit of anger. The justification for such a caution, as one seems to have read, lies in the fact that he who comes to punishment in wrath will never hold the middle course which lies between too much and too little."***

[31] Similarly, Moore JA *in the Botswana Court of Appeal in the case of* Mosiiwa v The State *(2006) 1 B.L.R. 214 at p.219 made the following caution which the judge in the Court* a quo *seems to have heeded:*

> ***"It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentence's message should be crystalso 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 of serious offences. By the same token, a sentence should not 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."***

[32] In S.v. Rabie *1975 (4) S.A. 855 (AD) at p. 866* Holmes JA *had this to say:*

> ***"A judicial officer should not approach punishment in a spirit of anger because being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after 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 humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

[54] In the result, this Court makes the following order;

(a) That the application for condonation of the late filing of the cross-appeal and the cross-appeal be and is hereby dismissed;

(b) That the appeal against conviction and sentence be and is hereby dismissed;

(c) That the judgment of the *Court a quo* be and is hereby confirmed;

(d) That the bail granted to Appellant pending the outcome of her appeal be and is hereby revoked;

(d) That Applicant is ordered to start serving the sentence imposed by the *Court a quo* without delay namely; ***"seven (7) years imprisonment without an option of a fine, two years of which are suspended for two years on condition the accused is not convicted of any offence of which assault is an element."***

(e) That aforesaid sentence is to take into consideration any time the Appellant spent in custody upon arrest and her subsequent release on bail (in any); and

(f) That there is no order as to costs.

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S. P. DLAMINI JA

I agree _____

DR B.J. ODOKI JA

I also agree _____

M. J. DLAMINI JA

For the Appellant	**:**	Advocate M. Mabila
For the Respondent	**:**	Mr S. Dlamini