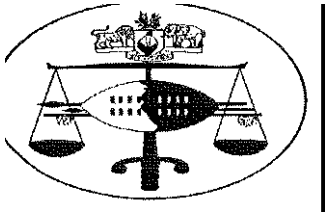


IN THE SUPREME COURT OF

ESWATINI JUDGMENT

Held in Mbabane **Case No. 18/2019**

In the matter between:

SIBUSISO KUKUZA DLAMINI **Applicant**

And

REX **Respondent**

Neutral Citation: Sibusiso Kukuza Dlamini versus Rex (18/2019)[2019] SZSC..15.(24th May, 2022 ..)

Coram: MJ Dlamini JA; SB Maphalala JA; MD Mamba AJA; JM Currie AJA; AM Lukhele AJA

Heard: 20 April, 2022

Delivered: 24 May, 2022

Practice: *Review application - Section 148 (2) of Constitution - Nature and purpose of the review - Not a second appeal -Application dismissed.*

JUDGMENT

MJ Dlamini JA

[I] The Applicant has applied for the review of his conviction and sentence as confirmed by this Court on appeal. The Applicant was convicted of the murder of one Lungi Hleta on 26 December 2005 at Mbhuleni in Kwaluseni. The Applicant, at first instance, was found guilty of murder without extenuating circumstances. Applicant was accused and charged of assaulting to death by an iron rod the deceased whom he accused of taking some money and cigarettes from the Applicant's spaza shop at Mbuleni at a time when the Applicant had left the spaza for restocking. Some 14 years later the girl, then 12 years old, who was left by Applicant to keep watch over the spaza shop, said she did not know how much money was taken by the deceased who she knew and was known in the hood. The Applicant in his testimony said that he was told that deceased had taken an amount of £3000-00 which Applicant says he later found in the pocket of deceased the same day of the alleged taking and assault. But, speaking for myself, I do not believe thl;lt in a spaza shop at Mbhuleni there could have been that amount left open for taking by any casual visitor. It is not stated that there was a break-in or burglary at the spaza.

[2] Applicant's main ground of appeal and review was that he had been wrongly convicted of murder instead of culpable homicide as he had never intended to kill deceased and the evidence did not support murder.

[3] On appeal, Applicant's conviction of murder without extenuating circumstances and sentence of 25 years imprisonment were set aside and substituted for a conviction of murder with extenuating circumstances and a sentence of 23 years imprisonment. The judgment of the trial court was in all other respects upheld. The Applicant has sought a review of the judgment on appeal in terms of section 148 (2) of the Constitution. The Applicant's grievance is that: *"The murder does not qualify to be a murder but to be culpable homicide ... The reasons ... are that the killing of the thief who stole from my spaza shop was not premeditated and neither was it intentional.* " The Applicant further alleged that the evidence of the witness named Sabelo Dlamini was *"misunderstood and misinterpreted"* by the Supreme Court on appeal.

[4] It bears restating and reminding that the review provided under section 148 (2) is not a normal or ordinary review. The remedy of a litigant who is aggrieved by judgment of the High Court lies in an appeal to the Supreme Court. Ordinarily, judgments of superior courts are not reviewable. The power vested in the Supreme Court in terms of Section 148
(2) to review its own decisions is a special jurisdiction serving within tight and restricted boundary. The Applicant's ground for review is substantially the same as the ground for appeal. This raises the impression of the proposed review being not very different from the appeal. This is not to be permitted and is not within the sphere of section 148 (2). In short, the review should not be a second appeal. In the result, even if it is shown that the court on appeal was wrong in some respect, that will not without more be a ground for review under section 148 (2). In other words, the error grounding possible review must be patent or exceptional and cause manifest injustice to the Applicant.

[5] The background to the Applicant's heads of argument is, *inter alia,* as follows:-

> "2. In support of the application the Applicant has alleged that this Honourable Court in its judgment held that the Crown had discharged its onus of proving *mens rea* in the form of *dolus eventualis* and the contention on his behalf that the Crown

failed to establish *dolus eventualis* could not be sustained due to the failure to cross examine and challenge Sabelo Dlamini (PW4) on his testimony that he assaulted the deceased with an iron rod.

"3. The Applicant alleged that this Honourable Court committed an error of law when considering whether the Crown had established *dolus eventualis* by holding that the failure to cross-examine and challenge Sabelo Dlamini (PW4) on his testimony that he assaulted the deceased with an iron rod indicated that he had the necessary intention to kill the deceased.

"4. The Applicant alleged also that this Honourable Court committed an error by not considering his state of mind when he assaulted the deceased in determining whether he had the necessary *mens rea* in the form of *dolus eventualis* in particular that he had been provoked by the deceased who had taken his money and cigarettes from the his spaza where he was carrying on business.

"5. The Applicant further alleged that this Honourable Court committed an error by not taking into account the fact that in his evidence he had stated that it did not cross his mind that the deceased might die and that he did not think that the injury was serious."

[6] In his founding affidavit the Applicant averred *inter alia* as follows -

"S. Subsequently an Amended Notice of Appeal was filed on my behalf in terms of which the judgment of the Court *a quo* was appealed against on the basis *inter alia* that the Court *a quo* erred in fact and in law by failing to find and hold that the Crown had not succeeded in establishing *dolus eventualis* ...

"6. My appeal to this Honourable Court relating to the ground that the Court a quo had erred in fact and in law by failing to find and hold that the Crown had not succeeded in establishing *dolus eventualis* was dismissed. A copy of the judgment of this Honourable Court is annexed hereto marked "C".

"7. Following the judgment of this Honourable Court in terms of a letter dated the 16th June 2021 I applied for the review of the judgment of this Honourable Court on the basis *inter alia* that the death of the deceased was not premeditated and not intentional. A copy of the letter in terms of which I applied for the review of this Honourable Court's judgment is annexed hereto marked "D".

"8. This Honourable Court in its judgment held that the Crown had discharged its *onus* of proving *mens rea* in the form of *dolus eventualis* and that the contention on my behalf that the Crown failed to establish dolus eventualis could not be sustained due to the failure to cross-examine and challenge Sabelo Dlamini (PW4) on his testimony that I assaulted the deceased with an iron rod.

"9. I aver that this Honourable Court committed an error of law when considering whether the Crown had established *dolus eventualis* by holding that the failure to cross-examine and challenge Sabelo Dlamini (PW4) on his testimony that I assaulted the deceased with an iron rod indicated that I had the necessary intention to kill the deceased.

"10. I aver that this Honourable Court committed an error of law by not considering my state of mind when I assaulted the deceased in determining whether I had the necessary *mens rea* in the form of *dolus eventualis* in particular that I had been provoked by the deceased who had taken my money and cigarettes from my spaza where I was carrying on business.

> "11. I aver that this Honourable Court committed an error by not taking into account the fact that in my evidence I stated that it did not cross my mind that the deceased might die and that I did not think that the injury was serious."

[7] With respect, it must be obvious from the foregoing averments that the thrust of the review is in fact a re-appeal. Dealing with these foregoing averments will in reality be a rehearing of the appeal. That is not the purpose of section 148 (2).

[8] The court on appeal carefully considered the issues for determination and found in favour of the Applicant in that there were extenuating circumstances contrary to what the High Court had found. The appeal court dismissed the Applicant's contention that *dolus eventualis* had not been established with the result that the ultimate finding be one of culpable homicide instead of murder.

[9] The issue regarding Applicant's failure to cross-examine Sabelo Dlamini was in my view also equally and adequately dealt with by this Court on appeal. To reopen this point would not be a review but a second appeal. I can find no basis for holding that this Court on appeal erred as asserted by the Applicant. In other words, I find no reviewable error(s). The purpose of section 148 (2) is not to eliminate all errors on appeal. Humans being fallible, that would be impossible. *In casu,* I cannot find any patent or exceptional circumstances that have occasioned a miscarriage of justice. Further, it will be realized that section 148 (2) does not impose an obligation on the Court to review its decision. The section states that the Court 'may' review its decision. That in my view means that a case for review must be made out by the applicant. If grounds for review were not to be exceptional, there would be review of all decisions of the Court: that would be unbearable.

[10] In one of the helpful authorities submitted on behalf of the Applicant but more supportive of the Respondent, Atuba JSC[1] (presiding) stated the following:

> "In view of the principles governing our review jurisdiction the natural question is whether the application is within them. The relevant principles have been stated in several cases and have been forcefully summed up by Dr. Date-Bah JSC in **Chapel Hill Ltd v The Attorney General & Anor.** J?/10/2010 (5/5/2010) as follows:
>
> > 'I do not consider that this case deserves any lengthy treatment. I think that it represents a classic case of a losing party seeking to re-argue its appeal under the garb of a review application. It is important that this Court should set its face against such endeavor in order to protect the integrity of the review process. This Court has reiterated times without number that the review jurisdiction of this Court is not an appellate jurisdiction, but a special one. Accordingly, an issue of law that has been canvassed before the bench of five and on which the Court has made a determination cannot be revisited in a review application, simply because the losing party does not agree with the determination. This unfortunately is in substance what the current application before this Court is....
> >
> > I would like to reiterate the view that I expressed in **Gihoc Refrigeration (No.1) v. Hanna Assi (No.1)** [2007 - 2008] SC GLR I at pp 12 - 13, that 'Even if the unanimous judgment of the Supreme Court on the app(/al in this case were wrong, it would not necessarily mean that the Supreme Court would be entitled to correct that error. This is an inherent incident of the finality of the judgments of the final Court of appeal of the land. The brutal truth is that an error by the final Court of the land cannot ordinarily be

[1] Ellis Tamakloe v. The Republic CM. No: J7A/1/2010 (Supreme Court, Ghana) pp 3 -4 (20th January 2011).

remedied by itself, subject to the exception discussed below. In other words, there is no right of appeal against a judgment of the Supreme Court, even if it is erroneous. As pithily explained by Wuaku JSC in **Afrainie v Quarcoo** [1992] 2 GLR 561 at 591 - 592: *"There is only one Supreme Court. A review court is not an appellate court to sit in judgment over the Supreme Court."*

However, in exceptional circumstances and in relation to an exceptional category of its errors, the Supreme Court will give relief through its review jurisdiction. The grounds on which this Court will grant an application for review have been clearly laid out in the case law. Notable in the long line of relevant cases are **Mechanical Lloyd Assembly Plant v. Nartey** [1987 - 88] 2 GLR 598; **Nasali v Addy** [1987 - 88] 2 GLR 286; **Ababio v Mensah**

(No.2) [1989 - 90] 1 GLR 573; and **Attorney - General (No. 2) v Tsatsu Tsikata (No. 2)** [2001 - 2002] SC GLR 620. The principles established by these cases and others are that *the review jurisdiction of the Supreme Court is a special jurisdiction and is not intended to provide an opportunity for a further appeal. It is a jurisdiction which is to be exercised where the applicant succeeds in persuading the Court that there has been some fundamental or basic error which the Court inadvertently committed in the course of delivering its judgment and which error has resulted in miscarriage a/justice.* This ground of the review jurisdiction is currently exercised by the Court pursuantto rule 54 (a) of the Supreme Court Rules 1996 (CI 16), which refers to 'exceptional circumstances which have resulted in miscarriage of

justice.' This is a high hurdle to surmount.

The public interest in avoiding the protraction of litigation requires that this Court should continue to uphold these principles."

[11] The foregoing extract should suffice to explain the use and purpose of the review jurisdiction. It is not a jurisdiction to be lightly resorted to or employed. As I have already stated, in this case, I have not been persuaded that the High Court and this Court on appeal erred in finding the Applicant guilty of murder as confirmed.

[12] In para [2] of the judgment on appeal, the learned Manzini AJA in part observed and stated as follows: " ... *The murder trial commenced on the ?fh May, 2018, thirteen years after the deceased met his death. The inordinate delay can hardly be said to be in line with the age - old adage that justice delayed is justice denied, particularly for the relatives of the deceased. We are not aware of the reasons for the long delay, but it is not acceptable.* " As a follow-up to this pertinent observation by the learned Judge: The same paragraph [2] reflects that the Applicant soon after the death of the deceased was charged for culpable homicide and released on bail. After nine years without prosecution commencing, the charge was altered to one of murder, and again some four years went by without the prosecution begun.

[13] As the learned Judge on appeal points out, no explanation for the delayed prosecution has been given by the Respondent. Needless to say: this is a matter that should worry and concern the Crown; it should not be business as usual where prosecution has been delayed to the extent that it could reasonably be said that justice has been denied. For thirteen years the Applicant had a charge of a very serious nature hanging over his heard like the Sword of Damocles. That in my view is not only a form of torture, but it is a contravention of the speedy trial required by the Constitution. Any form of denial of justice should not be taken for granted. Had the matter been duly raised at the hearing, I would have seriously considered reducing the term of imprisonment by no less than five years.

[14] For the foregoing considerations the application for review in terms of section 148 (2) must fail for lack of merit. The application is dismissed.

MJ Dlamini JA

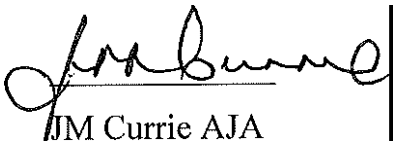
I Agree

SB Maphalala JA

I Agree

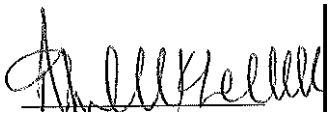
I/ Mamba AJA

I Agree



JM Currie AJA

I Agree



AM Lukhele AJA

For the Applicant XMthethwa

For the Respondent AMakhanya