



## **IN THE HIGH COURT OF SWAZILAND**

**CRI. CASE #24\_99**

**In the matter between:**

**REX**

**VS**

**KHEKHE SIMELANE & OTHERS**

<b>CORAM</b>	<b>:</b>	<b>MATSEBULA J</b>
<b>FOR ACCUSED NOS. 1, 2, 3 &amp; 5</b>	<b>:</b>	<b>MR. BEN SIMELANE</b>
<b>FOR ACCUSED NO.4</b>	<b>:</b>	<b>ADVOCATE TWALA</b>
<b>FOR THE CROWN</b>	<b>:</b>	<b>MISS S. NDERI</b>

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### **JUDGMENT**

The five accused are indicted of on count one of murder. It being alleged that on or about the 27<sup>th</sup> August 1998 and at or near Qomintaba area in the Shiselweni District, each or all of them acting in common purpose did wrongfully, unlawfully and intentionally kill George Simelane. On count two, on the same date and place, each or all of them also acting in common purpose did unlawfully and intentionally break windows of a house, the property or in the lawful possession of Rejoice Simelane with an assortment of weapons with the intent to injure the said Rejoice Simelane or her property. They pleaded not guilty to both counts and accused no.1, 2, 3 and 5 were represented by Mr. Simelane whilst accused no.4 was represented by Advocate Twala instructed by Maphalala & Company. Both counsel confirmed that their respective clients pleas were in accordance with their instructions.

Miss Langwenya represented the Crown. She informed the Court that some of her witnesses would not be present at the commencement of the trial because they have not been served with the necessary subpoena and that one of the investigating officers was indisposed and it later emerged that he had been admitted in hospital at Nelspruit, Republic of South Africa. I

have deemed it necessary to mention this because during the trial the names of some of these prospective witnesses featured prominently but the Crown was unable to call them. On the contrary the Crown made an application for additional summary of evidence which was not opposed by the defence.

A post-mortem report performed on the body of the deceased was handed in by consent and marked "A." It therefore became unnecessary to call the evidence of the doctor who performed the autopsy on the body of the deceased. According to annexure "A" the deceased died as a result of haemorrhage caused by multiple penetrating injuries (involving lungs, heart and intestines). On pages 2-5 of the medical report the doctor lists the following injuries: -

1. *Laceration over left parital 4x0.5cm scalp deep.*
2. *7 multiple penetrating injuries over neck 1.2x1xm, 1x0.4cm with abrasion 2.7cm neck vessel deep, over chest front above, medial and lateral to nipple left 1x1cm heart deep, 1.5cm muscle deep, 3.6x1cm, lung deep 2x1cm, 2.4x0.9cm, 2x0.9cm lung deep involved intercostal structures, pleura, ribs, pleural cavity contained about 1100ml blood.*
3. *Multiple penetrating injuries (5) over abdomen outer to umbilicus 2.5x1cm intestinal deep 2.6x1cm , 3x0.9cm, 3x0.8cm abdominal cavity deep 1.5x0.9cm muscle deep, peritoneal cavity contained 1200ml blood front to back.*
4. *Penetrating wound over right axilla posterior fold 1.5x1.2cm muscle deep.*
5. *Penetrating wounds left forearm 2.4x0.7cm, 2x1cm muscle deep.*
6. *Penetrating wound over right thigh 1.5cmx1.2cm muscle deep, right knew 1x1cm skin deep, edges of wounds clean cut angle sharp.*

From the contents of exhibit "A", it is evident that the deceased was subjected to the most brutal and vicious attack leading to his death.

The Crown led the evidence of PW1 Rejoice Simelane, widow of the deceased. For the purpose of this judgment it is appropriate to treat the matter of relationship between PW1 and her late husband and the accused on the other hand and put it in its proper prospective. PW1 stated on oath that she knew all the accused and saw them on the day in question. She said they were all her children and qualified this relationship by adding that they were her children in the sense that their father and her late husband were brothers. In the Swazi context there is absolutely nothing sinister about her claim that these are her own children. The accused too when giving evidence and under cross-examination they constantly referred to PW1 as their mother and the deceased as their father. PW1 mentioned all the accused by their respective names and said accused no.4 Stanley Myeni whose surname differs from the rest of the

accused was her nephew. PW1 also mentioned the first names of accused no.1, 2, 3 & 5's father names. Under cross-examination by Mr. Twala on behalf of accused no.4 she said the following:

*"I and the accused stay in different homesteads but we see one another frequently. We used to stay in one and the same homestead before they moved to different homesteads."*

Answering another question put by Mr. Twala she said the following: -

*"On the day of the incident, I saw accused no.1 arriving from Johannesburg. I saw him at the time I had gone to their homestead to pay condolences for their late sister."*

The above is in a nutshell a background to the relationship between the family of PW1 and the accused.

I now turn to her evidence in greater details. She testified that the deceased George Simelane was her husband. She told the Court how he met his death. She said it was on the 27<sup>th</sup> August 1998 and at plus minus 4.40pm when she took water for her husband to wash himself. She and her husband heard some noise made by human beings across the mountain. The deceased asked her who were those making noise and she responded by saying it could be people from the drinking place or boys from the soccer match. It was her evidence that the noise continued and she heard a voice shouting. The deceased again asked whose voice it was that was shouting, to which she replied and I quote her words verbatim. *"The voice is similar to one Phineas Dlamini our neighbour."* The significance of these observations regarding the voice of her neighbour Phineas Dlamini will become apparent as I deal further with her evidence later. It was her evidence that the deceased asked her what was Phineas Dlamini saying and she answered that he was saying and I quote, *"Get outside and get dressed."* She testified that her husband took hold of his pair of trousers which he had already taken off but before he could put them on PW1 and her husband heard a stone landing on the roof of their house. She testified that other stones followed with immediate succession and caused damage to the windows of the house. She said she could hear voices asking, *"Where is Ivy and where is France? Come out so that we kill you."*

France and Ivy are two of the accused and PW1's relatives, who according to a question put to PW1 by Mr. Twala on behalf of accused no.4 had met their death under mysterious and questionable circumstances. This piece of evidence will also tend to support that the deceased was suspected by his killers to having brought about the death of these two relatives.

I will revert to this aspect of evidence later when dealing with the accused's evidence individually. At this stage, it is sufficient to mention that the accused in their evidence and under cross-examination denied any insinuation on their part that deceased would have been suspected of having brought about the death of France and Ivy.

PW1 stated that the shuttering of the windows continued and the attackers moved away from the windows and came and stood at the doorway. They all converged at the entrance of the door. PW1 said as they were breaking the windows she had the bedroom light on, when she put it off, she heard them say even though the light is off, we will still kill you. After the door had been broken open she came and stood next to her husband by the door and the stones continued pouring through the entrance of the house. She described the position of the house as having a front room used as a dining room and immediately behind it another room used as a bedroom. When she realised that the throwing of the stones through the entrance to the house continued unabated, she decided to escape through the window and fled to the nearest homestead on the upper region of the locality and shouted that even if they killed him she had seen all of them. She heard in response, a voice in the nature of an insult i.e. "*voetsek.*" As she fled she could hear some voices asking, "*Where is he? Hit him.*"

It was her evidence that she went and made a report to the neighbouring homestead. As she was at this homestead, the attackers went past on their way to their homesteads. They shouted that they were coming back. PW1 then informed the neighbour, a Dlamini that she wanted to go back to her homestead and see if her husband was still alive. Dlamini accompanied her. They saw the destruction caused to the house and she called for her husband but there was no response. She and Dlamini went back to the Dlamini's homestead and Dlamini sent his brother to report the incident to the "*indvuna.*" PW1 spent the night with the Dlamini family. In the morning she again went to look for her husband and could not find him. She then went to the Dlamini homestead and again in the company of Dlamini and his wife, they went back to her homestead and it was then that they saw footmarks and

followed them. These footmarks led them to a donga where they found her husband in a standing position against the donga. He was dead.

She was asked by the Crown counsel who her attackers were and she said they were the accused. It was her evidence that as she stood at the doorway with her husband she not only saw them clearly, but the accused were calling one another by their names as the attack was being carried out. It was her evidence that she saw them clearly as each one would raise his weapon striking her husband. They accused him of being a witch who had brought about the death of France and Ivy.

Under cross-examination by Mr. Simelane for accused 1, 2, 3 and 5 she said the time could have been at 6.40pm that is why her bedroom was already lit. She told Mr. Simelane that the stones were thrown at all the windows. Asked why she did not describe how the accused were dressed, she said she recognised their voices. She stated that even though she was shocked at the incident she was able to identify the accused because they were her children. She confirmed that she had gone to the homestead of the accused to pay condolences for the late Ivy and that she had seen accused no.1 there. She said she did not see a slaughtered goat there.

Under cross-examination by Mr. Twala for accused no.4 she stated that just as she was able to identify Phineas Dlamini's voice she was able to identify the voices of the other accused. She said although their homestead and hers are separate they stayed together in one homestead before the accused moved to establish theirs. She said even though none of the accused entered her house, she saw and recognised all of them because they stood in such a way that she could see them. She was adamant that accused no.4 was there. It was put to her that France and Ivy died under mysterious circumstances. She answered that she did not think so, because France committed suicide and Ivy was taken ill before she died. She said that Ivy had died on a Thursday preceding the 27<sup>th</sup> August 1998 when her husband was killed and France committed suicide a year ago.

The questions put to this witness about how France and Ivy died in mysterious circumstances seem to suggest to me that these were instructions Mr. Twala was given by his client accused no.4. However, when accused no.4 gave his evidence he said there was nothing mysterious about the death of France and Ivy.

PW3 Dumsani Mshushisi Simelane, whose evidence I will revert to later, gave evidence and said accused no.4 was his cousin and they lived together in one homestead. On the 27<sup>th</sup> August 1998 he and others came from the soccer veld and proceeded to his homestead. Accused no.4 went into the sleeping hut whilst PW3 went to the cooking hut. In the cooking hut PW3 found that his mother who had been away was back. He spent plus minus 30 minutes in the cooking hut and heard peoples' voices outside his homestead. The voices were calling for accused no.4. He recognised the voice as that of accused no. 3. Accused no.3 called for accused no.4 three times to come out. Then accused no.3 said, *"You are reluctant to respond because there is no bereavement at your homestead. We are bereaved."*

Mr. Twala on behalf of accused no.4 never put any question to PW3 about the people who were making this noise using insulting language even though accused no.4 when he gave evidence said this was the case. All Mr. Twala was concerned about was whether the deceased was regarded as a witch. PW3 denied that he regarded the deceased as a witch or had heard anyone referring to the deceased as a witch. PW3 referred to the deceased as his father.

To round-off PW1's evidence about her ability to identify voices, one further observation needs to be mentioned here. PW1 was able to identify PW4 Gubundu Phineas Dlamini's voice when he called out to her husband. This was a voice of a neighbour and if she was able to recognise PW4's voice surely she would identify the voices of her children, the accused. I found her evidence very reliable and credible. She could easily have said in her evidence she saw the accused through the light, which came from her house, but she did not say that. I find further corroboration of her evidence in the evidence of PW4. PW4 uttered words which PW1 repeated when she gave evidence i.e. the words which PW4 shouted after the group of people went past him and accused no.3 probed him with a stick. Immediately after they went past, he then heard shattering of windows. This evidence corroborates that of PW1. She too gave evidence about the shattering of windows. This shattering was with immediate effect after accused no.3 and other persons went past PW4. PW1 came running to the homestead of PW4 and made the report about her husband's homestead being under attack and told PW4 who the attackers were. PW4 accompanied PW1 and saw the havoc at PW1's homestead and also helped in the search for her husband that was futile at that stage. PW4 also corroborated the evidence of PW1 about the discovery of her husband in the donga. He was dead when

they found him. PW4 also said that he had shouted that “*Sotja get out and dress.*” He said “Sotja” was deceased’s other name. This piece of evidence is also corroborated by PW1 who gave evidence that there was such a shout and she even verified the voice. PW4 was very honest in giving evidence. He admitted that although he had said Nomo was there he admitted that he had made a mistake, Nomo was infact not there. It was his evidence that even though it was already dark but he clearly saw accused no.3 who is well known to him. He told the Court that he was surprised at the question by accused no.3 who asked which area he came from because according to him accused no.3 knew the answer to that question.

The Crown also led the evidence of Thomas Ndlovu called as PW2. His evidence in short was that he was the uncle of accused no.3. Accused no.3 being his sister’s son. It was his evidence that accused no.3 had approached him on a Saturday. He did not remember date. PW2 was on his way to the chief’s kraal when he was approached by accused no.3. He said accused no.3 said he was aware that he PW2 was capable of using *muti* and asked him if he could do something for him and the others. It was not immediately clear at that stage what accused no.3 wanted “*muti*” for. Under cross-examination it became apparent that the request was aimed at cleansing them (the killers). This became clear from an answer to a question by Mr. Simelane on behalf of accused no.3. The answer is and I quote, “*I think accused no.3 thought I was able to use muti because I myself had a case preferred against me but I eventually became acquitted and discharged.*”

PW2 had to clarify some confusion arising from his testimony to the effect that he did not know accused 1, 2, and 5. He said he meant he did not know them in connection with what accused no.3 had approached him to ask for *muti* for cleansing. It was his evidence that infact accused 1, 2, and 5 were known to him but not in that connection. In answer to one of Mr. Simelane’s questions he said his nephew’s mother and his family are close relatives and they sometimes hold meetings of ritualistic matters. He said on this occasion when accused no.3 approached him, he told him that he had used a spear to kill George Simelane.

The third witness for the Crown was Dumsani Mshushisi Simelane. He said he was 18 years old and a resident of Qomintaba, the same area that all the accused reside. He knew the accused and he mentioned them by their names and said he was related to all of them. He said accused no.4 was his cousin and that he and accused no.4 stayed in the same homestead. He said he knew the deceased George Simelane. He said on the 27<sup>th</sup> August 1998 he woke up

and went to check on his sick mother at his grandparent's place. He could not find her there as she had gone back home when he was still away. It was his evidence that he later went to the soccer field for soccer practice. He was joined by accused no.4 and others at the soccer field. After the practice, he and his cousin accused no.4 went home. At home accused no.4 went into his sleeping hut and PW3 went into the cooking hut. In the cooking hut he found that his mother had returned. He was in the cooking hut for plus minus 30 minutes when he suddenly heard voices of people on the upper edges of his homestead calling for accused no.4. He recognised the voice being that of accused no.3. Accused no.3 called no.4 three times and then said "*You don't respond because you have suffered no bereavement at your homestead. We have suffered bereavement.*" PW3 said after a while he and others went to see if accused no.4 was still in his sleeping hut but could not find him there. It was his evidence that after a while accused no.4 had disappeared they again heard people's voices within the premises of his homestead and suddenly accused no.3 pushed the door open and he was carrying a blood stained spear. Accused no.3 said he had just come from George Simelane's homestead where he had killed him. PW3 said he and his mother were so shocked at these news that his mother actually started crying. When accused no.3 saw PW3's mother crying he said, "*You cry for a witch.*" It was PW3's evidence that whilst accused no.3 was still there another person also came and reported that George Simelane had died. Accused no.3 left. PW3 estimated the time to have been plus minus 7.30pm.

PW3 was adamant that he knew and could recognise accused no.3's voice very well. He and accused no.3 lived together for a very long time. He was in no doubt that it was accused no.3's voice calling for accused no.4.

PW3 was cross-examined by Mr. Simelane on behalf of accused 1, 2, 3 and 5 and was not shaken. He said he and accused no.3 herded cattle together for a long time and he knew his voice well to be able to recognise it. He said when accused no.3 entered the kitchen, the kitchen was lit by means of a candle and there was also fire burning. He stated that he estimated the time as being 7.30pm because they had been listening to a radio story which had just ended.

It was never suggested that the blood on the spear was that of a goat. It was denied that accused no.3 came to the homestead at all. It was also put to PW3 that accused no.3 had never referred to the deceased as a witch.



Mr. Twala on behalf of accused no.4 only concerned himself with whether PW3 had himself regarded the deceased as a witch and PW3 stated he had not so regarded him and had never heard anyone on previous occasions referring to him as a witch. Reference has been made to PW4's evidence Gubundu Phineas Dlamini. PW4 said he had come from Nkondola when he was passed by the accused. He said one of them, accused no.3 poked him with a stick as he went passed asking to which area did he (PW4) belonged. PW4 said he responded by saying what had that to do with accused no.3. He said the accused (all of them) went past and disappeared. PW4 said the question put to him by accused no.3 caused him to be suspicious. He said this suspicion arose from the fact that all the accused knew him and why should he be asked where did he belong to. He said because of his suspicion he then shouted that "Sotja" should get out and get dressed. He said "Sotja" was one and the same person as the deceased George Simelane. The relevance of alerting the deceased was not canvassed by the Crown.

Under cross-examination by Mr. Twala on behalf of accused no.4 PW4 said he uttered these words to alert the deceased of his (PW4) presence. It is common cause that the deceased was a community policeman.

PW4 was adamant that it was accused no.3 who poked him with the stick. He further stated that he clearly saw accused no.1 and 5 amongst people who went past. He said he also saw one of them as Nomo but subsequently said he made a mistake, Nomo was not amongst those people. He said he was not sure whether accused no.4 was present. The evidence of this witness was in my view credible allowing for human error e.g. where he said one of the accused was one Nomo. Regarding accused no.3, he had no doubt. There is no reason why I should not accept his evidence implicating accused no.3. I will revert back to this when dealing with the evidence as a whole.

The evidence of PW5 2698 Sergeant Khumbula Nsibandze and PW6 3710 Constable Solomon Msele Ndzimandze dealt mainly with the arrest, obtaining of exhibits and the nature of the exhibits and the extent of the injuries as seen by them on the deceased's body. They also deposed to the warning of the accused in terms of the Judges' Rule at their arrest, during the investigations and before pointing out some of the exhibits.

According to PW5 and PW6 all the accused were very cooperative during the investigations. The accused on the other hand told the Court that they were subjected to the most barbaric method of assault by the police to induce them to admit having murdered the deceased and also to cause them to point out exhibits they are alleged to have pointed out. Considering the relationship of the accused towards the family of the deceased in particular to the deceased himself, I come to the conclusion that the accused did in fact suspect the deceased of having been responsible for the death of their relatives, France and Ivy. Of course this had been denied by the accused in their evidence in chief and also under cross-examination.

I have referred in my judgement earlier on to a question put by Mr. Twala to PW1 to the effect that France and Ivy had died under mysterious circumstances. Of course PW1 denied that they died under these circumstances. All the accused stated they loved their father the deceased and that they were saddened by his death. Until their arrest not one of them dared to go and see the damage caused to their junior father's homestead, the deceased. Not one of them had gone there to find out how their junior father met his death.

The accused in their respective evidence all denied the evidence of the Crown witnesses implicating them. They all stated that they were busy at their homesteads as they were bereaved. This, in my view is a bare denial and this Court rejects it. Accused no.1 and 2 also testified having been throttled by the police during the investigations. This was never put to the police witnesses i.e. the throttling. Accused 1, 2, 3, and 5 were even prepared to say accused no.4 who does not even stay with them was not at the homestead of the deceased at the crucial time. Accused no.4 on the other hand tells a different story. He says he left on the afternoon of the 27<sup>th</sup> August 1998 at 4pm for a soccer practice and then left that evening for good and spent a night at Vusi Ndlovu's place and in the morning went to Matsanjeni. I keep reminding myself as I refer to the case of **REX VS DIFFORD 1937 AD 370 @373** that:-

*“no onus rests on an accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any*

*reasonable possibility of his explanation being true, then he is entitled to his acquittal.”*

When an accused person shows himself to be a lying witness the risk by the trial Court of convicting wrongly is to some extent reduced. In other words the Court still expects the Crown to prove its case beyond reasonable doubt and in this particular case, the Court is of the view that the Crown has proved its case beyond reasonable doubt. I have read **SIGWANE AND SIGWANE VS REX APPEAL COURT CASE NO.10/98** dealing with an accused or witness who lies thus reducing the risk of wrong conviction.

I have found that PW1’s evidence about her identification of the voices of the accused is strengthened to a greater extent by her ability to identify even the voice of PW4. She testified before this Court that she told her husband before the attack that the person who was saying he must get out and get dressed was the voice of PW4. PW4 gave evidence and confirmed that he had in fact shouted to that effect.

I have also found that PW3 Dumsane Mshushisi Simelane positively identified the voice of accused no.3 and he stated that they herded cattle together and stayed together for a very long time and I have no doubt that he knew the voice of accused no.3 very well. Accused no.3 was calling accused no.4 to join them in their mission which he said was because they were bereaved. Accused no.3 returned shortly thereafter and confessed to PW3 and his mother that he and others had killed George Simelane. He was carrying a blood stained spear.

I have found that the merits of the Crown witnesses and the demerits of the defence witnesses are beyond question. Accused no.3 and 4 have been placed squarely in the commission of the crimes with which they are charged. Accused no.3 is further incriminated by PW2 whose evidence I have dealt with earlier and have no reason to doubt.

The pointing out at the police station has not been taken into account as being corroborative of the involvement of the accused in my judgement. The Crown properly conceded, in my view that these items were already known by the police, therefore nothing turns on the pointing out. But in the case of the spear pointed out by accused no.1 at his homestead different consideration applies there. The spear which he pointed out at his homestead had not been known prior by the police. **HOFFMANN AND ZEFFERT SOUTH AFRICAN**

**LAW OF EVIDENCE 4<sup>TH</sup> ED. @205** deals with the pointing out and cases cited there.) Even in respect of the spear pointed out by accused no.1 at his homestead, the Court cannot admit as evidence any confession accompanying the pointing out of the spear by the accused. But the Court can certainly infer that the spear had something to do with the commission of the offence. It is then up to the accused to give the reasonable explanation why he pointed the spear out and the explanation given so far by the accused is not accepted by this Court. The mere fact that it was placed and kept outside the house strengthens the inference that it is the spear that was used in the commission of this crime. The injuries to which reference has been made as depicted in exhibit "A" accord with the injuries which could have been caused by the spear pointed out by accused no.1. There is evidence that the day the deceased was attacked and the property of PW1 damaged accused no.1, 2, 3 and 5 were together at their homesteads. This has been admitted by all of them. There is also evidence by PW4 that the accused passed them along the way when he was going to his brother's homestead. This homestead is nearer to that of the deceased.

There is evidence that accused no.3 poked him with a stick and asked him to which area did he belong. There is evidence that PW4 then shouted that the deceased should get out of his house and get dressed. It is common cause that deceased was a community policeman and according to PW4 when he shouted he was alerting deceased that he PW4 was around. There is evidence that immediately after the accused had overtook PW4, ----

PW4 heard noise made by objects which suggested that the house of PW1 was being attacked. There is evidence that accused no.3 approached PW2 and asked him for some muti to cleanse him and others. PW2 gave a reasonable explanation why accused no.3 approached him requesting that he gives him (accused no.3) "*muti*". I reject the suggestion by the defence that PW2 fabricated this story about accused no.3 approaching him for this "*muti*".

I was referred by Mr. Simelane to the case of **R VS MOKOENA 1932 OPD** dealing with the caution that the Court should exercise when approaching the evidence of a single witness. I do not find in my judgement that this case is a case in point, I find it distinguishable because as I have referred to in my judgement, there is corroboration in the evidence that Mr. Simelane has referred to as a single witness.

I find PW1's evidence to be very credible. She has not shown herself to have any axe to grind against any of the accused. She has throughout her evidence referred to all the accused as her children and accused no.4 as her nephew. Indeed the accused themselves when they gave evidence and under cross-examination agreed that PW1 was their mother and deceased their father. It was PW1's evidence that all the accused grew up in one homestead at which homestead she also stayed before they moved and established the present homestead. She knew their voices very well. One can also make an example of one's voice when you come to your homestead you merely tell your children to open up and they hear your voice and they open, they do not ask you to identify yourself further than that because they recognise your voice. PW1 knew the voices of the accused very well. She also exhibited an unusual ability when she recognised even the voice of PW4 who was not even a relative but a neighbour.

I find for the purpose of this judgement that accused no.1, 2, 3 and 5 associated in the pursuant of a common illegal purpose that is to eliminate the deceased they considered to be a witch and accused him of having brought about the death of France and Ivy. It is common cause that France and Ivy had infact died. I find, further that in pursuance of their illegal purpose they caused damage to the house of PW1 and ultimately killed and murdered the deceased. I find that each had the necessary *mens rea* and it is not necessary for the Crown to prove the causal connection between the act of each of the accused in causing the damage to the property of PW1 and ultimately causing the death of the deceased. In this regard I refer to the case of **R VS KGOLANE 1960(1) PH110 AD**. I reject the accused's bare denial that they never overtook PW4 on their way to the deceased homestead and that PW1 never saw them at her homestead causing damage to her homestead. That accused no.4 was never called by accused no.3 to join them in the illegal mission to go and murder the deceased. And the denial that accused no.3 never came to the homestead with a bloodstained spear in the presence of PW3 and confessed to killing the deceased. I also reject their defence that the bloodstains on accused no.3's pair of trousers were those from a goat. In short, I reject the accused's bare denial. I find that the Crown has proved its case beyond reasonable doubt and find all five accused guilty as charged on count one and two.

#### JUDGMENT ON EXTENUATING CIRCUMSTANCES

For a very long time, the High Court in Swaziland has, applied the case law of the Courts in the Republic of South Africa before the death sentence was abolished, holding consistently that the onus rests upon an accused person to establish on a balance of probabilities the

existence of extenuating circumstances. The death sentence has since been abolished in the Republic of South Africa, in the Kingdom of Swaziland the death sentence is still in the statutes. The Kingdom of Swaziland's Court of Appeal has however in a recent decision set a precedent which the High Court of Swaziland is bound to follow in dealing with the enquiry into whether or not there are extenuating circumstances. It (Court of Appeal) has ruled in that precedent which party should bear the onus to establish the existence or otherwise of extenuating circumstances.

In a recent case of **DANIEL M. DLAMINI VS REX CRIMINAL APPEAL 11/98** a judgment delivered on the 29<sup>th</sup> September 1998 the Court of Appeal held that “*no onus rests on an accused person who is convicted of murder to establish extenuating circumstances.*” However, the definition of extenuating circumstances has been re-stated by the Court of Appeal and the general definition applied in previous cases remains the same i.e. extenuating circumstances is defined as being one which morally although not legally reduces an accused person's blameworthiness or his degree of guilt.

The Swaziland Court of Appeal has referred with approval to the Botswana Court of Appeal in **DAVID KALELETSWE AND OTHERS CRIMINAL APPEAL CASE NO.26/94**. The Court said the following:

*“In reaching a conclusion as to whether or not extenuating circumstances are present the Court makes a valuable or moral judgment after considering all the relevant facts and circumstances both mitigating and aggravating in order to make such a judgment. In these circumstances, it seems to us it will be quite inappropriate to determine the issue of raising a question of onus. The duty falls upon the Court.”*

In the present case, I have made a finding that the accused murdered the deceased and destroyed the property of the deceased's wife because they subjectively believed that the deceased was responsible for the death of their relatives i.e. France and Ivy. The Court of Appeal has also had numerous decisions amongst others that of **JAMESON DLAMINI VS REX** that a belief in witchcraft is an extenuating circumstance. They have also found in numerous decisions that the age of a convicted person is also a factor taken into account in establishing extenuating circumstances. The younger the person is, the more likely the Court is to find that there are extenuating circumstances.

In the present enquiry I rule that there are extenuating circumstances. I make this ruling both based on the evidence by some of the accused. Also, mainly the fact that they committed this crime under the belief subjectively of witchcraft.

### JUDGMENT ON SENTENCE

You have been convicted of a very serious crime that of murder in fact even the malicious injury to property is just as serious. I have been addressed at length by their respective counsel and would want to consider the matter of sentence. There is nothing to hurry when you deal with human beings especially when you are going to pass sentence that is going to be effective once it has been pronounced by the Court. Nor should a Court presiding over this matter be excited about the end result in matters where convicted persons have been convicted and sentenced. The Court should be very careful and weigh all the factors for and against the accused and also take into account the interests of the community. It is very simple to convict a person because you follow the evidence but it is extremely difficult when the Court or the Judge who will be considering the question of sentence because whatever the Court says has power and has to be carried into effect. Many factors has been raised by all three counsel which the Court has to sit down and consider before reducing into writing the sentence that the Court is going to mete-out.

Handing down a sentence is an unpleasant duty for any Court. As I have already mentioned that it is easy to follow the evidence and come to a conclusion that an accused is guilty but when it comes to sentence it is extremely difficult.

I will use as a springboard on the question of sentence the case **R VS ZINN 1969(2) SA537(A)** where the Honourable Judge of the Court of Appeal as he then was Rumpff JA said the following:

*“Once the accused has been convicted it then becomes a task of this Court to impose a sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interest of the society.”*

And further down he also said the following:

*“The Judge must be watchful to see that no step is taken either more harshly or more indulgently than is called for by the case. In trivial cases indeed Judges ought to be*

*more inclined to mildness but in more serious cases to follow the severity of the laws with a certain moderation of generosity.”*

In this particular case, there are two main objects of to be served by punishment. The first one is the reduction of the crime. The second one is the promotion of respect for the criminal law. The reduction of the crime is achieved by deterring (a) potential offenders; (b) individual offenders; (c) reforming the individual offender.

In considering the above I have taken into account the gravity of the crimes of which you have been convicted. I have taken into account all the factors which were mentioned to me by your counsel. Taking into account subjectively that you believed the deceased was responsible for the death of your relatives. I have also taken into account that all of you including the deceased and the widow that is the complainant on count two are members of one big family. I have taken into account the age of accused no.1 who is 36 and accused no.2 is 26. Accused no.3 aged 20, accused no.4 is 20, accused no.5 is 17. As members of a big family, the Court cannot lose sight of the fact that people who are older must have had influence on the younger members. Considering all these factors, the Court passes the following sentence:-

*Accused no.1 and no.2 are each sentenced to an imprisonment of ten (10) years backdated to the 29<sup>th</sup> August 1998 on count one.*

*On count two, accused no.1 and no.2 are each sentenced to an imprisonment for two (2) years backdated to 29<sup>th</sup> August 1998 in respect of each accused.*

*It is hereby ordered that sentences on count one and two are to run concurrently.*

*Accused no.3, 4, and 5 on count one, are each sentenced to an imprisonment of seven (7) years backdated to the 29<sup>th</sup> August 1998 in respect of accused no.3 and 5. In respect of accused no.4 backdated to the 30<sup>th</sup> August 1998.*

*On count two, each accused i.e. 3, 4,5 are sentenced to an imprisonment of two (2) years in respect of accused no.3 and 5 backdated to the 29<sup>th</sup> August 1998. In respect of accused no.4 backdated to the 30<sup>th</sup> August 1998.*

*It is ordered that sentences on count one and two are to run concurrently.*



J.M. MATSEBULA

JUDGE

Delivered on the 25<sup>th</sup> October 1999.