IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM APPEAL CASE NO. 12/08

In the matter between:

MDUDUZI DLAMINI APPELLANT

AND

REX RESPONDENT

CORAM: ANNANDALE J

MAMBA J

FOR APPELLANT: MR. S. MAGONGO

FOR RESPONDENT: MS L. HLOPHE

JUDGEMENT
DECEMBER, 2008

MAMBA J

[1] The Appellant was convicted and sentenced by the Magistrate at Manzini and thereafter the matter was brought to this court on automatic review. After examining the matter (on review) I came to the conclusion that the proceedings had been proper and in accordance with real and substantial justice. In the meanwhile

the Appellant rioted an appeal against both the conviction and sentence.

[2] The Appeal was set for hearing before Justice Annandale and myself but before the court set counsel for the Appellant approached me in chambers and notified me that he would be applying for my recusal from the case in view of the fact that I had considered the review and taken a decision thereon.

[3] In court, in motivating his application for my recusal, Mr Magongo argued that since I had certified the proceedings in the court a guo as having been in accordance with real and substantial justice, I was disqualified from hearing the Appeal. He submitted that the informed reasonable person would feel, and not without any justification, that I would be biased against the Appellant in view of the decision I had taken on review.

[4] I allowed the application and recused myself from hearing the Appeal. I stated then that I was doing so on moral and personal grounds and not because in law I would be expected to do so. I stated that my decision to recuse myself in the circumstances of this case should in no way whatsoever be taken as authority for the view that a judicial officer who finds himself or herself in a similar position should follow my course. I pointed out that I was recusing myself purely because I did not think that, apart from the obvious delay in hearing the Appeal, an injustice would be occasioned to any of the parties herein by my decision and that at least the Appellant would not feel apprehensive about or

aggrieved by my sitting on the Appeal.

I pointed out further that any such apprehension or perception of bias or likelihood of bias would in any event be unreasonable.

[5] In the case of **Mkhwanazi v R, 1979-1981 SLR 83** the automatic review was considered by the then Chief Justice Nathan who reduced the sentence of two years by half. When the appeal was heard the Chief Justice was a member of the appeal bench together with justice Cohen who delivered the main (appeal) judgement. In that appeal Cohen J stated as follows:

> **"In terms of s79 of the Magistrate's Court Act 66 of 1938 the decision of this court in an automatic review case is "without prejudice to the right of appeal against such sentence whether before or after confirmation of the sentence by the High Court." In an automatic review, the judge only determines whether the proceedings are in accordance with justice or that doubts exist whether or not they are in such accordance and it is not his duty at that stage to weigh the evidence as the court would do if the matter came before it on appeal (see Swift Law of Criminal Procedure 2 ed 789). It is accordingly in order for this court to consider the matter afresh. I may say, however, that I am in respectful agreement with the review judgement given by the Chief Justice on sentence and provided the Appeal against conviction itself fails, I am of the opinion that the sentence should be reduced to twelve months."**

The Appeal against conviction was upheld with the review judge concurring. I do not think that any reasonable man who is properly informed about the real nature of an appeal and review would think that the learned Chief Justice should have recused himself from hearing the Appeal. It is also noted herein that Cohen J also expressed his agreement with the decision by the CJ pertaining to the review process.

MAMBA, J