

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

In the matter

between: MALAWI

WILLIAM KAUNDA And

CRIM. CASE NO.
126/08

REX

Date of hearing: 16 December 2009

Date of judgment: 16 December 2009

Mr. Attorney Makhanya for the Applicant

Mr. Attorney S. Bhembe for the Respondent

EXTEMPORE J U D G M E N T

MASUKU J.

[1] The accused stands before me indicted on a single count of murder. It being alleged by prosecution that on or about the 31 March 2008 and at or near Mbelebeleni area in the Manzini region, the said accused person unlawfully and intentionally killed one Sandile Magagula and thereby committed the crime of murder. When the

charge was read to the accused person, he pleaded not guilty to the offence but pleaded guilty to the lesser offence of culpable homicide.

[2] This plea was confirmed by his attorney Mr. S. Bhembe as being in accordance with his instructions. The prosecution accepted the plea as tendered by the accused. I then, in order to determine and assure myself that the plea tendered by the accused was unequivocal, put certain questions to the accused, and in particular, I put some of the elements of the offence of culpable homicide to the accused person and he admitted those elements. Thereafter, a statement of agreed facts was read into the record and was interpreted to the accused. The accused stated that he understood contents of said statement and further confirmed that the statement of agreed facts was an accurate reflection of the events that led to the present charges. The statement of agreed facts reads as follows:-

"WHEREAS, the accused having been summarily indicted and charged for the crime of MURDER in that upon or about 31st March 2008 and at or near Mbelebeleni in the district of Manzini, the said accused did unlawfully and intentionally kill one, Sandile Magagula; and

WHEREAS, the accused having pleaded guilty to the lesser crime of CULPABLE HOMICIDE and the Crown accepted the plea without leading evidence;

NOW, therefore, it is hereby agreed as follows:

1. On the evening of 31st March 2008 and at or near Mbelebeleni area in the Manzini district, the said accused was walking home, together with his two companions.
2. They came across the deceased and his friend drinking marula home brew at the gate of one of accused's companions;
3. Accused being a community policeman asked deceased and his friends to leave the gate as it was not right to drink liquor at the gate of someone's homestead.
4. Deceased and his friend (Mcolisi Dlamini) started to insult the accused telling him that they will kill him and he must tell his wife to buy a mourning gown. Also that they will wait for him next to his homestead.

Deceased and his friend then left. Accused then parted ways with the two men he had been walking with. When accused was about to reach his home he was accosted by the deceased with his friend who had been hiding next to the path leading to accused homestead. The two started assaulting the accused with fists, until he fell down. Deceased then sat on top of accused's chest whereupon he throttled him until accused could not breathe.

It is then that accused drew out his knife and stabbed the deceased who fell down whilst his friend ran away.

Accused also got an opportunity to run away, leaving behind the knife and his spectacles which had fallen down during the skirmish.

Deceased was found dead on the next morning about 100 metres from the scene of the fight.

Accused admits and acknowledges that deceased died as a result of his unlawful and

negligent act and that there is no intervening or subsidiary cause.

10. Accused accepts the contents of the postmortem report which may be handed in by consent."

[3] Thereafter, the postmortem report was handed in by consent and marked exhibit "A". It reflects that the deceased person died as a result of a stab wound on the chest.

[4] Having regard to the plea tendered by the accused together with the answers that he returned to the questions I put to him regarding to the elements of the offence to which he pleaded guilty and also having regard to the contents of statement of agreed facts, I am of the considered view that the plea tendered by the accused person in this matter is unequivocal, and furthermore, I am of the view, considering all the above elements, together with the post mortem report, that the accused is indeed guilty of the crime of culpable homicide and of which I hereby convict him.

EX-TEMPORE JUDGMENT ON SENTENCE

[5] Upon his unequivocal plea of guilty to the offence of culpable homicide, the accused stands convicted by this court. It is now my duty to pass upon you what I consider a condign sentence in the circumstances. In doing so I am very mindful of the remarks that were made by the learned author Hogarth that "Sentencing is a lonely and onerous task". I will also be guided by the remarks that fell from the lips of Romadibedi J.A. in the Botswana case of *Bogosinyana vs The State* [2006] 1 BLR 206at208A-D. There the learned judge said;

"It is equally important to bear in mind that punishment should fit the offender as well as the crime while at the same time safe guarding 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 caution as one has read, lies in the fact that he who comes to punishment in wrath will never hold that middle costs which lies between too much and too little."

[6] In imposing the appropriate sentence in this case, I will first start by considering your own personal circumstances. The Court has been told that you are a 55 year old man with (two) 2 minor children and that you are the sole bread winner who was employed as a painter. I will also consider the fact that you are a first offender who had no brush with the law, which would suggest that you have previously conducted yourself well in your community. I will also consider the fact that you pleaded guilty as a sign of contrition and remorse and that by your plea, you have saved the Court's time and also saved the witnesses the

harrowing experiences of having to re-live the memories of the sordid day. I will also consider the fact that in the circumstances in which this sad offence occurred you were a person in authority as a member of the community police and that you were going about your duties when you warned the deceased and his friends to desist from certain conduct which was unacceptable.

[7] What resulted from that behaviour was that you were insulted by the deceased and his friends; they threatened to kill you and advised you to tell your wife that she will wearing mourning gowns and they further threatened to way lay you on your way home. Way lay you on your way home they did. It is also recorded that they assaulted you until you fell-down and having fallen down, one of them sat on your chest and started to throttle you until you lost your breath, and it was in that situation that you produced a knife and inflicted one stab wound that caused the deceased's death.

[8] It would be clear therefore in the circumstances that there was provocation on the part of the deceased on you and you were assaulted by the deceased and his friend and that your reaction in the circumstances suggested that you acted in a sense in self defense. This is a defence that was however not raised in view of your plea of guilty.

[9] I will consider the fact that the deceased died in your hands is a matter that will haunt you for a long time to come as he is a member of the community from which you come from. That on itself is a form of punishment on your soul.

[10] I will however not close my eyes to the fact that a life was lost, under tragic circumstances in this case. The Court has a duty in imposing sentence to uphold the principle of the sanctity of life. Life once lost can never be recovered. For that reason, the sentence that I will impose, which to the best of my assessment will meet the justice of the case is the following;

10.1 The accused is hereby sentenced to 5 years imprisonment; 3 years of which are hereby suspended on the following conditions:-

10.1.1. That you are not within the period of suspension to be found guilty of an offence in which violence to the person of another is an element and I will also take into account the pre-trial incarceration that you underwent from 31 March 2008 to 2 May 2008.

DELIVERED IN OPEN COURT IN MBABANE ON THIS 16th DAY OF DECEMBER 2009.

**T.S. MASUKU
JUDGE**

**Director of Prosecutions for the Crown
Messrs. Bhembe, Ngcamphalala Attorneys for the
Accused.**