

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 225/09

In the matter between:

THE KING

VS

NDABA KHUMALO

CORAM:

SEY, J

FOR THE CROWN

MR A. MAKHANYA

FOR THE ACCUSED

MR. N. MANANA

JUDGMENT ON SENTENCE

7th JUNE 2011

SEYJ.

[1] On the 3rd day of June, 2011, this Court convicted the accused of murder with extenuating circumstances on the grounds that he was drunk when he committed the offence.

[2] Once a finding has been made that extenuating circumstances exist, the Court is at large, without necessarily having to resort to its constitutional discretion under Section 15 (2) of the Constitution of Swaziland Act, 2005, to impose any sentence it finds appropriate, other than one of death.

[3] In arriving at the appropriate sentence, I have taken into account all the mitigating circumstances of the accused which said factors usually influence discretionary sentences. However, I must also not lose sight of two other applicable factors namely, the gravity of the crime and the interests of society.

[4] Ndaba Khumalo, I have carefully considered the mitigating factors put forward by your defence counsel but I must state that I afford little weight to your drunkenness as a mitigating factor in the circumstances of the case.

[5] In so doing, I place reliance on the guidance given by the Supreme Court of Swaziland in **Mgubane Magagula v The King Criminal Appeal No 32/2010** delivered on the 30th day of November 2010. His Lordship **Moore JA** made the following pronouncement:

"In *Mbuso Siphon Dlamini v The King Criminal Appeal No. 34/2010 Unreported*, I gave guidance, with the concurrence of Ramodibedi CJ and Ebrahim JA, concerning the weight which must now be afforded by sentencing judges and magistrates to pleas of voluntary drunkenness as a mitigating factor:

His remorse has come at much too late a stage. His consideration of the dangers inherent in the voluntary and excessive consumption of alcohol should have been done before he took his first sip. The subjects of this kingdom must not be made to suffer the loss of their lives because of persons such as the appellant's continuing abuse of alcohol, which is a powerful and mind affecting stimulant and

intoxicant. He who continues to abuse alcohol to such an extent that the control of his voluntary actions is impaired and then commits serious crimes, must face the full penal consequences of his conduct. Voluntary drunkenness as a mitigating factor in cases such as this has lost its efficacy. The judge a quo was fully justified in affording it but little weight as a mitigating factor in the circumstances of this case."

[6] I also have regard to what was said by **Holmes JA in S v Rabie 1975 (4) SA 855 (A) at 862 G** when he held that:

"Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."

[7] I must state that your act of murdering the deceased Andile Mncina was totally reprehensible and unjustified. You simply snuffed out the life

of an innocent little school girl who never knew you and bore you no grief. You have undoubtedly created a vacuum in the lives of her family members which will forever remain empty.

[8] The offence you have committed calls for a very severe sentence which would curb this type of senseless murder and deter others. In the circumstance, it is my considered view that a sentence of 18 years will be appropriate. The said sentence is back dated to the 8/12/08 which is the date when you were deported from South Africa and taken into lawful pre-trial incarceration in Swaziland. It is so ordered.

M.M. SEY(MRS)

JUDGE OF THE HIGH COURT