



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Criminal Case No: 68/06**

**In the matter between**

**REX**

**Versus**

**MFANAWABANI NDODA ZEPHANIAH SHONGWE      ACCUSED**

Neutral citation: *Rex v Mfanawabani Ndoda Zephaniah Shongwe (68/06)*  
[2014] SZHC367 (14 October 2014)

**Coram:                    M. S. SIMELANE J**

**Heard:                    8 October 2014**

**Delivered:              14 October 2014**

**Summary: Criminal procedure - Murder - Culpable Homicide - statement of agreed facts - Accused found guilty and convicted on a charge of Culpable Homicide.**

### **Judgment**

#### **SIMELANE J**

- [1] The Accused person was arraigned before me on 8 October 2014, charged with the offence of Murder. It was alleged by the Crown that upon or about the 6 of February 2006 and at or near Mlindazwe area at the Shiseleweni Region the Accused did intentionally and unlawfully kill one Magwegwe Myeni.
- [2] When the charge was put to him fully interpreted in siSwati, the Accused indicated that he understood the charge and pleaded guilty to a lesser charge of Culpable Homicide. The plea was confirmed by learned defence Counsel Mr. Ntshangase. At that stage Ms. E. Matsebula learned Crown Counsel told the Court that the parties had prepared a statement of agreed facts which they wished to tender in Court as evidence. This was confirmed by the learned defence Counsel.

[3] The statement of agreed facts was read and explained to the Accused in siSwati. He accepted it as true and correct. Thereafter, the statement of agreed facts was admitted in evidence as Exhibit A. The statement of agreed facts states as follows:-

**“On the 6<sup>th</sup> February, 2006 the Accused and the deceased were at a certain Myeni homestead drinking alcohol. An argument ensued between the Accused and the deceased. The owner of the homestead chased both of them. The deceased left the place first and the Accused later followed. Whilst the Accused was walking to his homestead the deceased emerged before him. The Accused and the deceased exchanged words and insulted each other. The two ended up fighting each other with stones. One Simanga Matsenjwa arrived at the scene and tried to separate them. The deceased fell on the ground and the Accused continued to assault him with the stones. Simanga Matsenjwa called the police and the Accused fled the scene. The deceased laid on the ground motionless until the arrival of community members and the police. The Accused suffered injuries on his temple from the fight with the deceased.**

**4. The Accused specifically admits the following:-**

- (i) That the killing was unlawful;**
- (ii) That he negligently inflicted the injuries on the deceased;**
- (iii) That there was no *novus actus intervenes*.**

5. **The following are admitted as exhibits:-**

(i) **The post mortem report.**

6. **The Accused is remorseful.”**

[4] The parties also by consent tendered to Court the postmortem report. The postmortem report was admitted by Court as an Exhibit B. In the postmortem report Dr. Komma Reddy stated that the following antemortem injuries were seen.

“1. **Lacerated wounds of 3 x 1 cms and 2 x 1 cms, present in the right temple region of the head.**

2. **Lacerated wound of 1 x 1 cm, present on the left cheek.**

3. **Contusion of 2 x 1 cms, present on the right cheek.**

4. **Contusion present around the right eye.**

5. **A lacerated wound of 5 x ½ cms, present on the right side of the top of the head.**

6. **A lacerated wound of 3 x 1 cms, present behind the right ear.”**

[5] Having considered the statement of agreed facts together with the post mortem report as well as the guilty plea of the Accused, it is clear to me that the Crown has proved beyond reasonable doubt the offence of Culpable Homicide. I say this because the Accused has admitted that he acted both unlawfully and negligently in killing the deceased. It is

established that the deceased died as a result of injuries inflicted on him by the Accused.

- [6] I agree fully that there was no intention by the Accused to kill the deceased. What is however clear from the totality of the evidence is the unlawful negligent causing of the death of a fellow human being which clearly founds the offence of Culpable Homicide. This is so because case law has distinguished the offences of Murder and Culpable Homicide in the following words:-

**“Murder is the unlawful killing of a human being with intent to kill. Where this intent is absent, the offence is Culpable Homicide... A definition of Culpable Homicide is the unlawful negligent causing of the death of a fellow being.” See R V Thulani Doctor Mthembu Criminal Trial No. 120/06, R V Mbekezeli Wiseman Dlamini and Others Criminal Case No. 370/09, R V Nhlonipho Mpendulo Sithole Criminal Case No. 370/11.**

- [7] For the above stated reasons, the Accused is hereby convicted on his own plea of guilty to Culpable Homicide.

[8] **SENTENCE**

The learned Crown Counsel informed the Court that the Accused is a first offender.

- [9] In mitigation of sentence the Accused submitted through his defence Counsel that he is fifty nine years old and lost his wife in 2003. He further submitted that as soon as the incident happened he left the area

and decided to rent a flat to avoid interference with state witnesses. He stated that this is indicative of a good citizen who did not want to tamper with his bail conditions. He has Eight children, seven of whom are still dependant on him. He further told the Court that the youngest child is nine years old and visually impaired. He has four grandchildren who are dependant on him. He also told the Court that he too suffered some injures as a result of the fight with the deceased. He pleaded guilty to the offence and did not waste the Court's time. He spent seven months in jail before his release on bail.

[10] The Crown argued *au contraire* that the Accused is facing a very serious offence. Ms. Matsebula pleaded with the Court to pass a sentence that will send a clear message that violence is not tolerable in society.

[11] In my view the interests of the society far outweigh the mitigating factors. I have endeavoured to balance the *triad* and I am mindful of the oft - quoted dictum of Holmes JA in the case of **S V Rabie 1975 (4) SA 855 (A)** where he stated 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.”**

[12] Furthermore, in **S V Harrison 1970 (3) SA 684 (A)** quoted in **S V Rabie supra at 861 H-862 A** the Court said this:

**“Justice must be done, but mercy not a sledgehammer is its concomitant.”**

[13] The Accused is hereby sentenced to Eight (8) years imprisonment, Three (3) years of which are hereby suspended for a period of Three (3) years on condition that the Accused is not within the period of suspension convicted of an offence in which violence is an element. Seven (7) months of the sentence is hereby deducted to take care of the period of incarceration before his release on bail.

[14] Rights of Appeal explained to the Accused.

**M. S. SIMELANE J.  
JUDGE OF THE HIGH COURT**

**For the Crown:**

**Ms E. Matsebula**

**For the Accused:**

**Mr M. J. Ntshangase**