



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Criminal Case No: 92/13

In the matter between:

REX

v

MAPHIWO MPHUMUZENI KUNENE

1ST ACCUSED

BHEKI LAWRENCE THWALA

2ND ACCUSED

Neutral Citation : Rex v Maphiwo Mphumuzeni Kunene and Bheki Lawrence
Thwala (92/2013) [2015] SZSC 73 (3 JUNE 2015)

Coram : Q.M. MABUZA J

Heard : 30/1/14; 6/3/14; 17/6/14; 29/9/13; 30/9/14; 27/11/14;
17/3/15; 16/4/14

Delivered : 3 JUNE 2015

SUMMARY

THE ACCUSED PERSONS ARE CHARGED WITH THE CRIME OF MURDER. NO EVIDENCE LINKING ACCUSED TO THE DEATH OF THE DECEASED IN RESPECT OF ACCUSED 2. ACCUSED 2 ACQUITTED AND DISCHARGED AT THE END OF THE CROWN CASE. INSUFFICIENT EVIDENCE IN RESPECT OF ACCUSED 1 AS EVIDENCE OF POINTING OUT CONDUCTED IN THE ABSENCE OF ACCUSED 1 INADMISSIBLE AND HAS NO CORROBORATION. ACCUSED 1 ACQUITTED AND DISCHARGED AT THE END OF THE CASE, THE CROWN HAVING FAILED TO PROVE ITS CASE BEYOND A REASONABLE DOUBT.

JUDGMENT

MABUZA –J

- [1] The accused persons were charged with the crime of murder it being alleged that upon or about the 12th October 2012 at or near Jojo area in the Shiselweni Region the said accused persons each or both of them acting in furtherance of a common purpose did unlawfully and intentionally kill Mcondisi Masondo and did thereby commit the crime of murder.
- [2] When the charge was put to the accused they pleaded not guilty and their attorneys confirmed the pleas as being consistent with their instructions.

[3] PW5 Mandla Mngomezulu says that he gave Accused 1 and Accused 2 a lift on the night of the 12th October 2012 he was travelling from Mahamba border gate to Jojo. He stopped to fill up petrol. Accused 1 arrived and asked for a lift. PW5 agreed. Accused 1 called out to Accused 2 and said that they should go and carry out the job because the sun had gone down.

PW5 says that he dropped them off at Jojo at 12:00 p.m. The job referred to by Accused 1 is not stated and one cannot therefore conclude that it was a reference to go and kill the deceased. PW5 did a dock identification of Accused 1 whom he also knew from the area.

[4] The story narrated by 2750 Detective Sergeant Nhlanhla Mkhabela (PW6) is that on the 13th October 2012 at about 6:00 p.m. the Nhlangano police called him about a murder that had taken place at Jojo area in the Shiselweni district. He proceeded to the scene which was at a Mazibuko homestead. He found the body of the deceased in the yard of the Mazibuko homestead. The body was covered with a curtain and lay face up. The deceased was wearing a short blue trousers. On examining the body of the deceased he noted multiple stab wounds in the chest and neck. There were two stab wounds on the left of the head and one cut through the centre of the ear. On the right side of the chin was another stab wound. He turned the body over

and found another five stab wounds on the back and another on the left abdomen. He took photographs of the body and the wounds. He also drew a sketch plan of the crime scene. The photographs were handed in as exhibit C “a – o” and the sketch plan as Exhibit D.

- [5] He says that he noted that there were struggle marks on the ground around the body. He noted some foot prints which he followed. These led him to the homestead across the road to a homestead opposite to the Mazibuko homestead. At this homestead across the road, he found that the house comprised of an old shop with the words “Mzala” on its front. He noted an open window of that house which had some bloodstains on it. Even below the window on the outside were bloodstains. There were struggle signs below the open window and that a window pane next to the handle was broken. He further noted that the door was locked and it had a burglar door. He requested a key to the house. Upon entry he noted an unmade bed. On the bed there was a blanket and a yellow sheet which had bloodstains. On the wall beneath the open window were more blood stains. He collected the yellow sheet for blood analysis.

- [6] The post-mortem of the deceased was held on 17th October 2012 and PW6 attended it. He requested a blood sample of the deceased for further analysis.
- [7] The post-mortem was conducted by Dr. R.M. Reddy a Government pathologist (PW1). He testified that the body of the deceased was identified by the deceased's aunt, Khangayini Dlamini. He stated that the cause of death was due to multiple penetrating injuries which involved the trachea, right lung and vertebra. The wounds were consistent with having been inflicted by a sharp object such as that of a knife or spear. The post-mortem report was handed in as Exhibit A.
- [8] PW6 further instructed the investigating team to seize the suspects' clothing which were worn during the commission of the offence. These were brought to him on the 5/11/2012 by 6186 Detective Constable P. Madzinane (PW7) having been packaged and sealed. Among the clothes taken from Accused 1's home was a red track suit top which was found to have DNA belonging to the deceased.

- [9] When PW6 was cross-examined by Mr. Manana he admitted that the assault of the deceased began at point “F” of his sketch plan Exhibit D and that the deceased succumbed to death at point “A” of Exhibit D which point was at a Mazibuko homestead across the road. Even though PW6 stated that the first officer on the scene of crime had recorded a statement from a family member of the Mazibuko’s, the Crown did not produce this witness.
- [10] PW7 the investigating officer testified that on the 13/10/2012 he and other police officers were called to the scene of crime where they interviewed several witnesses pertaining to the death of the deceased. On the 2/11/2012 Accused 1 was arrested at Mahamba after he had crossed the border gate into Swaziland. He was charged with the murder of the deceased. He obtained Accused 1’s clothes and handed them to PW6.
- [11] PW7 further confirmed that he together with other officers went to Accused 1’s home on two occasions. On the first occasion Accused 1 was not there. They found his wife and asked PW3 (Jabulane Kunene) to act as an independent witness. On the second occasion Accused 1 was present. Again they asked PW3 to act as an independent witness. On the first

occasion they retrieved clothes belonging to Accused 1 and on the second occasion Accused 1 handed over a knife to them.

[12] PW2 Sandiso B. Dube testified that on the 13th October 2012 at about 1:00 a.m. Accused 1 arrived at his parental home with another short dark boy who was unknown to him. Accused 1 had blood on his clothes. He said he was from a bar called Rehab where he was involved in a fight. Accused 1 sat on a stool in front of a dressing table where he took out a knife which he wrapped in a black leather jacket which he placed on top of the dressing table. Accused 1 shared a bed with PW2 while his companion slept on a spare bed. In the morning they left. Accused 1 was wearing a black leather jacket and a red coloured clothing under the jacket. There was blood on his jacket right arm and also on his right hand. He identified Accused 1 in court. He stated that he had known Accused 1 for ten years. Accused 1 was also his brother in-law.

[13] Mr. Manana during cross-examination denied that Accused 1 slept at PW2's home. He stated that Accused 1 arrived later in the morning to ask that PW2 charge his phone but PW2 denied this. Mr. Manana further denied that Accused 1 was carrying a knife but PW2 maintained his story that Accused

1 was carrying a knife on that day. It was further denied that Accused 1 had told PW2 that he got into a fight at Rehab because he did not go there. It was put to PW2 if he noticed any blood stains in the bed linen in the morning when Accused 1 had left and he said he did not.

[14] Jabulane Kunene (PW 3) is Accused 1's grandfather and neighbor. He testified that on the 13/10/2012 police officers arrived at his home and requested him to accompany them to Accused 1's home as a witness. When they arrived at Accused 1's home they asked Accused 1's wife to open the house. They went in asked her to give them the clothes that Accused 1 had worn the previous day and she did so. They took a black leather jacket which had blood-stains on it and a pair of jeans and white takkies. Accused 1 was not at home.

[15] Under cross-examination by Mr. Manana PW3 stated that the police came back a second time to Accused 1's home. This time they were with Accused 1. Accused 1 opened his house, took a few clothes out of a box and a knife and handed it over to the police. There was a suggestion from Mr. Manana that Accused 1 was assaulted by the police but PW3 stated that he did not see any injuries on Accused 1 nor did the police threaten him. Mr. Manana

put to the witness that because of threats made to his client, Accused 1 produced a knife which was an ordinary table knife from among the dishes and not from a box with clothes. PW3 denied this.

[16] Reginah Cecelia Janse van Rensburg (PW8) was the last Crown witness to give evidence in the main case. PW8 is a DNA specialist and she conducted DNA tests on the Exhibits handed to her by the RSP. She recorded her findings in Exhibit B which she handed into Court as part of her evidence. She testified that the blood belonging to the deceased was found on the front left sleeve of a red track suit jacket belonging to Accused 1.

[17] Due to the complaints raised by Mr. Manana about Accused 1 being assaulted, the Court constituted itself into a trial within a trial. The Crown led the evidence of the Honourable Magistrate Mr. Dumsane Magagula (PW9) Miss Pholile Dlamini (PW10) and 6946 Constable Lindiwe Matsenjwa (PW11). PW9 recorded a statement from Accused 1 (Exhibit F) and PW10 interpreted to Accused 1 from English to Siswati and from Siswati to English.

[18] At the end of the trial within a trial the Court found that Accused 1 was not assaulted and admitted the statement. The Crown closed its case.

[19] Miss Mazibuko thereafter moved an application for the acquittal and discharge of Accused 2 in terms of section 174 (4) of the Criminal Procedure and Evidence Act No. 67/1938 which states as follows:

“If at the close of the case for the prosecution the Court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon it may acquit and discharge him.”

[20] After perusing and analyzing the evidence in respect of Accused 2 I acquitted and discharged him and found that Accused 1 had a case to answer because DNA results from his red track suit top “EPM – 3 B” (RSPF 5L – 15301) matched the DNA result from the reference sample “Mcondisi Masondo” (RSPF 5L - 1273 See page 4.1 page 3 of Exhibit B). According to the evidence this track suit top belongs to Accused 1. Exhibit B is the forensic affidavit of DNA tests carried out by the South African Forensic Science Laboratory handed in by Ms. Janse van Rensburg who conducted the aforesaid tests.

[21] Accused 1 (DW1) having been called to his defence took the witness stand. He testified that he resided at Jojo area which is between Nhlango and Mahamba and that he was arrested on the 2/11/2012 at Mahamba after his return from the Republic of South Africa. He was charged with the murder of the deceased. He stated that he did not know how the deceased's bloodstains came to be on his track suit top. He said that he was not present when his clothes which included the red track suit top were taken from his home by the police.

[22] He told the Court that he knew the deceased as they stayed in the same area. The deceased operated a kombi and asked for it to be parked at his (DW1's) home because Accused 1 also operated kombis. At some point the deceased owed him some money which he had paid before his death. He admitted that PW5 had given him a lift from Mahamba on the 12/10/2012 but denied that he said to Accused 2 that they should do "the job" because the sun had gone down. He re-iterated that he did not know how the deceased's blood came to be on his track suit top.

[23] When he went to record the statement with PW9 he narrated to PW9 that he used to be the deceased's manager and that the deceased was owing some people money that had painted his motor vehicle and that the deceased had quarrelled with his kombi driver and they had had a fight and that he DW1 was a witness in that case. He told PW9 that he gave this information to the police as a possible motive for the deceased's death but they did not want to listen to him.

[24] According to Exhibit F Annexure "A" the following is what DW1 recorded when he was taken to PW9:

"I have come before this Court to (make) give my apologies for what happened. I did not intend it. It was a mistake on my part.

This is all I have to say. In the event that the Court sentences me, I am pleading for a lenient sentence.

The reason for what befell me arose from a misunderstanding arising from a debt he owes me amounting to E30,000.00. That is all.”

[25] A confession is defined as an unequivocal admission of guilt. The statement (Exhibit F) which Accused 1 made to PW9 does not in my view amount to a confession because it is exculpatory. It does not take the Crown case any further because it does not state:

- What DW1 was apologizing for?
- What did he not intend?
- What was the mistake on his part?
- What was the Court going to sentence him for which he was pleading for leniency?
- What befell him?
- Who owed him a debt amounting to E20,000.00?

[26] An analysis of the evidence shows that PW5 gave Accused 1 together with Accused 2 a lift to Jojo on the night of 12 October 2012. Accused 1 called out to Accused 2 saying that they should go and carry out the job because the sun had gone down. The Crown interprets this statement as meaning that Accused 1 meant that they should go and kill the deceased but Accused 1

did not identify the person who had to be killed nor did he say that it was the deceased.

[27] The Crown also led the evidence of PW4 who used to wash cars with Accused 2. He testified that Accused 2 had told PW4 that he had travelled with Accused 1 and another man had been stabbed. He also testified that Accused 2 was worried and restless as to what Accused 1 was going to say.

[28] Accused 2 did not say who had been stabbed and where the stabbing had taken place and the circumstances surrounding the stabbing.

[29] PW2 testified that Accused 1 and another young man arrived at his parental home at 1.30 a.m. on the 13/10/2012. He stated that Accused 1 had blood on the right arm of a black leather jacket that he was wearing as well as on his right hand. Accused 1 informed PW2 that he was from the Rehab a bar, where he had been involved in a fight. PW2 also said that Accused 1 was wearing a red something under the black leather jacket.

- [30] PW2 also said that Accused 1 had a knife with him. He did not describe the knife nor did he identify the knife that the police handed in as an Exhibit as the knife which he saw in Accused 1's possession that morning.
- [31] PW3 also testified that the police retrieved a black leather jacket from Accused 1's wife at his home. According to PW3 the jacket had what the police suspected to be blood stains around the arms.
- [32] However, this black leather jacket when DNA tests were conducted did not test positive for the deceased's blood, which fact makes me conclude that both PW2 and PW3 were schooled to record statements to this effect and nobody bothered to make the corrections when the DNA tests returned.
- [33] The Crown led evidence that the deceased's blood stains were found on a red track suit top belonging to Accused 1. That is the only evidence linking Accused 1 to the deceased's murder.
- [34] PW1 said that the injuries on the deceased were consistent with those of a knife or spear. A knife was retrieved from the accused's home and DNA

tests were conducted on it but it did not test positive with the blood of the deceased.

[35] There was no witness called from Rehab to support the Crown witnesses that testified that he told them that he was there and that he had got into a fight. There was no witness called from the Mazibuko home to tell us about the presence of the deceased's body or even the house across the road opposite the Mazibuko's home which seems to be where the crime had taken place.

[36] PW7 testified that he requested the Magistrate's Court at Nhlanguano for an order to obtain the suspect's blood samples. Armed with the Court order he took the suspects to the Nhlanguano Health Centre where blood samples were extracted from them. PW7 further says that he was the one who obtained clothing from Accused 1 which clothing included the red track suit top which tested positive with the deceased's blood. It was PW6 who upon attending the deceased's post mortem on the 17/10/2012 requested PW1 to extract a blood sample from the deceased for analysis.

[37] The defence suspects that the deceased's blood was smeared on his track suit top by the police who went to his home or took clothes belonging to him in

his absence. I may not agree with the defence but this submission does raise a measure of suspicion even on my part. The police went to accused's house without him and retrieved items of clothing without him and one item of clothing conveniently turned out to be bloodstained. The evidence relating to the clothes including the bloodstained track suit top taken from accused's house on the 2/11/2012 is not in my view admissible as Accused 1 did not partake in the pointing out.

[38] Furthermore even if such evidence was admissible, there is no evidence corroborating the evidence of the bloodstained track suit top. The Court has not been told how it got there. There is no evidence putting Accused 1 anywhere near the deceased.

[39] In the circumstances I find that the Crown has failed to prove its case beyond reasonable doubt and Accused 1 is found not guilty of the murder of the deceased. He is acquitted and discharged.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Crown : MR. P. Dlamini
For the 1st Accused: Mr. Manana
For the 2nd Accused : Miss N. Mazibuko