

IN THE HIGH COURT OF ESWATINI

CASE NO. 497/2022

HELD AT MBABANE

In the matter between:

REX

And

KHANYISILE NOPOPI MALINGA

NEUTRAL CITATION: **REX VS KHANYISILE NOPOPI MALINGA
(497/2022) [2024] SZHC – 283 (27/03/2024)**

CORAM: **BW MAGAGULA J**

HEARD: **02/11/2023**

DELIVERED: **27/03/2024**

SUMMARY: *Sentencing – Accused found guilty of murder
without extenuating circumstances – Mitigating
factors considered – Evidence of emotional abuse
by the father of her children - Accused overly*

fixated with her status of being orphaned – Triad considered.

HELD:

Accused sentenced to fifteen (15) years for each count, the sentences to run consecutively and to be back-dated to the date of arrest.

JUDGMENT ON SENTENCING

BW MAGAGULA J

- [1] The Accused was convicted by the court on the 11th of October 2023 and was found guilty of murder without extenuating circumstances. Subsequent thereto, the parties made written submissions in respect of mitigation and aggravation of sentence respectively. The court is now called upon to pass a befitting sentence.
- [2] The nature of the charge that the Accused is facing relates to two (2) counts of murder. On the 18th of May 2020 at KaMzizi an area in the Shiselweni Region, the Accused person unlawfully and intentionally murdered two (2) of her own children, Senkhosi Mabuza and Doctor Mabuza.

The Defence Submissions On Mitigation Of Sentence

- [3] It was submitted on behalf of the Accused that before the commission of the offence, she had been emotionally battered by the father of her children, to a point that she decided to take her own life and that of her two children. In the

process of executing that decision, she ingested the poison to her children and ate some herself. It is also contended that she did so to end the emotional pain she was suffering in the hands of the father of her children.

- [4] It was also submitted on behalf of the Accused that she has already been in custody for the past three (3) years. The Defence also submitted that when the incident occurred, the Accused was a double orphan and she was pregnant at the time. She later gave birth to a son while in custody. The Defence persuaded the court to take into consideration that the father of her children has not set foot in prison to check on the child, who is now the Accused's only child. The child has since been placed at an orphanage. The court has also been urged to consider that the Accused never anticipated that she would at some point, face a murder charge. Her intention was also to end her own life and stop the alleged emotional ache she was enduring in the hands of the father of her children, Sicelo Mabuza.

- [5] It was argued by the defence that the circumstances of the Accused, indicate that society would condone her actions, in light of the conditions surrounding her that she faced at the time.

The Crown's Submissions

- [6] The Crown has submitted that young people were killed by their mother. She had nothing against them, her actions were perpetrated by the alleged misunderstandings with their father. The crown submits that this is a double murder, and it is an aggravation on its own. More painful is that she selected the children which she bore and carefully avoided the child she did not bear.

Would anyone say, that she was out of options to avoid the killing? The answer is “no” she could have avoided this catastrophe.

- [7] The evidence before court shows that there are no extenuating circumstances. Her Ladyship Langwenya J in **The King v Ntokozo Kenneth Simelane Case No 42/16 Quorting S v Letsolo 1970 (3) SA 476 AD at 476** had this to say;

“Extenuating circumstances have more than once been defined by this court as any fact bearing on the commission of the crime which reduces the moral blame worthiness of the Accused, as distinct from his legal culpability. In this regard the trial court has to consider;

- a) Whether there are facts which might be relevant to extenuation such as immaturity, intoxication or provocation (list in not exhaustive)*
- b) Whether such facts in their cumulative effect, probably had a bearing on the Accused’s state of mind in doing what he did;*
- c) Whether such bearing has sufficiently appreciable to abate the moral blameworthiness of the Accused in doing what he did”.*

- [8] In deciding this issue, the trial court exercises a moral judgment. If the answer is yes, it expresses its opinion that there are extenuating circumstances. **Section 295 (2) of Criminal Procedure and Evidence Act 68 of 1938** states;

“(2) In deciding whether or not there are any extenuating circumstances the court shall take into consideration the

standards of behavior of an ordinary person of the class of the community to which the convicted person belongs”.

ANALYSIS AND CONCLUSION

- [9] What appears in the evidence is that the Accused was obsessed with being an orphan. In fact it is part of the submission by the Defence that the court must also take into consideration in her favour that she is an orphan. Due to this issue being made as a mitigating factor, the court deems it important to actually consider if it is accurate to refer to the Accused as an orphan. I have taken time to look carefully at the meaning of the word orphan. The word orphan is described as a child deprived by death of one or usually both parents¹. The operative word in this definition, is child. It is clear that when you are an orphan you must be a child that has been deprived by death of one or both of your parents. The Accused before court is clearly an adult who had two children before she took their lives away, she has one now. She is definitely not a child. Hence, it is a misnomer to consistently refer to the Accused as an orphan. If this word orphan could be stretched in the manner that it is in this matter, most citizens in this country would be orphans. This then begs the question, should any criminal conduct ascribed to an adult that has lost one or more of her parents be taken into consideration as a mitigation factor just because at some point both parents were lost?. Clearly not. In as much as it painful to lose a parent or worse even when you lose both, even if you are an adult. The word orphan is reserved for children, not an adult.

¹ www.merriam-webster.com

[10] When the evidence is considered further, both PW1 Sibongile Dlamini and the Accused's own evidence. It appears to the court that the Accused was overly obsessed with her status of being an orphan. It came out through the evidence that at some point she was told by Sicelo Mabuza, the father of the children that Sicelo's son Musa who is not born by the Accused had complained that whenever the Accused was dishing out food for the other children, she would not include him. Musa is said to have come to report this to his father. When Musa asked the Accused about this, she shouted the following "*ngiyintsandzane mine ngafelwa ngubabe namake*" this basically means "I am an orphan, I lost my father and mother". This makes the court to conclude that the Accused was overly fixated with her orphan status which was clearly misplaced in light of the definition of the word. This obsession must have over the period, got into her mind to the extent that she convinced herself that she deserved a special treatment due to the fact that she lost both her parents. This is despite the fact that she is a fully grown up adult. I assume this might have caused her depression of some sought. However, if most of the members of the public who have lost their parents would obsess themselves with being orphans despite having reached adulthood, then the entire society would get into a frenzy of unwarranted depression.

[11] The accused has been convicted of two counts of murder for using a poisonous substance in the food she gave to her own children, resulting in their untimely deaths. The children, who were very young, had their lives abruptly ended, depriving them of the years they had yet to live.

[12] The Accused person committed this offence in her sound and sober senses. She failed to successfully show the Court a justification for her conduct. She knew very well what the consequences of her actions would result. She contemplated her whole action and thought she would die herself but she did not. The evidence² suggest that the Accused on the day in question went to the garden of his boyfriend and got a pesticide in a container. She came back with it and placed it on top of the roof. She would later on in the day use it to poison the deceased children. The Court therefore concludes that the offences were premeditated.

[13] Children are an integral part of society. The expectation is that they have to be preserved and jealously protected by the societies they live in. Children are a step up from ageing people of society for they carry the genes forward of society.

[14] The offence of Murder covers a wide spectrum of unlawful acts varying in degrees of seriousness which include, less serious, moderately cruel and most cruel acts of the Accused person. The society expects more or motherly care from when it comes to children.

[15] In the case of **Samkeliso Madati Tsela Case No. 10/20 at paragraph 6** states the following;

² This is confirmed in the statement the Accused made before a judicial officer which was admitted as part of the crown's exhibits by consent.

“The fashioning of an appropriate sentence is more in the nature of art rather than science. Nevertheless, a fitting sentence must be founded upon several relevant factual basis and circumstances upon which a proper sentence must necessarily be premised”.

- [16] **Rex v Mhlonipho Mpendulo Sithole (370/11) [2012] SZHC cites R v Matoutous Mosilwa CA No. 124/05;**

“It is the public interest particularly in the case of serious and prevalent offences, that the sentencer's message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the Court has taken adequate measures within the law to protect them from serious offenders. By the same token, a sentence should not be manifestly excessive or to break the offender, or to produce in the mind of the public the feeling that he has been unfairly and harshly treated”.

- [17] Section 15 (10) of the Constitution of Eswatini clearly proscribes a killing of another person, Section 15 (1) of the Act states the following;

“A person shall not be deprived of life intentionally, save in the execution of a Court order in respect of a criminal case under the law of Swaziland of which that person has been convicted”.

[18] Two young people were killed by their own mother. She had nothing against them, but alleged that she had misunderstandings with the Children's father. The alleged misunderstanding between the Accused and her boyfriend despite being not proven, the Accused ended up killing the siblings. This is a double murder, and it is an aggravation on its own. More painful, is that she selected the children which she gave birth to and deliberately avoided the child she did not bear. Would anyone say, that she was out of options to avoid the killing? The answer is "no" she could have avoided this catastrophe.

[19] The evidence before Court shows that there are no extenuating circumstances. **Section 295 (2) of The Criminal Procedure and Evidence Act 68 of 1938** states;

"(2) In deciding whether or not there are any extenuating circumstances the Court shall take into consideration the standards of behavior of an ordinary person of the class of the community to which the convicted person belongs".

[20] The recent decision by the Appellate Court in **Muzi Petros Khumalo v Rex Case No. 11/2022** is that a murder sentence may reach a penalty of 40 years (life imprisonment) especially where the death or killing of the deceased was gruesome and having been premeditated.

[21] Regarding premeditation, the Court in **Muzi Khumalo's Case** in page 12 stated quoted the **State v Celumusa Dube (cc03/22) [2022] ZAMP MBHC 28; 2023 (1) SACR (MM) (3May 2022)**;

“Premeditation and intention are different in that premeditation involves a thought process that contemplates a certain outcome and a means to achieve that outcome... ”.

- [22] The Accused in this case, premeditated her actions. She knew what the outcome was going to be, save for the fact that she did not die.
- [23] The fact that she did not die as she intended to serves as punishment on it's own and counts as a factor in mitigating the sentence that the Court will issue. Having said so, the court must also balance the interests of society in arriving at an appropriate sentence to pass.
- [24] The line of thinking adopted by the Accused in the commission of the murder may have been influenced by her limited education and the over fixation that she lacks a support structure since both her parents passed away. While there is no evidence of mental incapacity to warrant a sentence reduction, the court will consider this fact in her favor for purposes of sentencing. The court will also take into account that, in attempting to end her own life, she survived while her children did not. This alone will torment her for the rest of her life. The sight of her children perishing as a result of her own actions must have equally tormented the Accused immensely. Additionally, the fact that she went through her last pregnancy in jail and gave birth to her child these must have caused her anguish a great extent. This is exacerbated by the fact that her child, born in prison, will grow up in an environment where she will not be present to partake in his early years of development.

[25] If the reports are anything to go by in the media, the Eswatini Observer, in their publication dated 11 March 2024, carried the following headline: **"Woman feeds daughter poison, both found dead."** The court is alive to the fact that this is only a newspaper report and the accused has not been found guilty yet. However, the message and the emerging prevalence of this kind of offence cannot be discounted. The commission of such an act of criminality must be nipped in the bud, by imposing deterrent sentences.

[26] The sentences of the Court must reflect or discourage other members of society from embracing the sacrifice of children as an acceptable means to escape whatever social ills or sufferings they are encountering. The sentences that come out of the Courts must be deterrent. If the sentences do not do so, these acts of criminality will spread like wildfire.

[27] The Court has taken into consideration the interest of society, the Accused and the offence itself, as it is enjoined to do in law in coming up with the appropriate sentence for the Accused.

[28] In the matter at hand, it is evident that the Accused in a premeditated act of malice, deliberately administered poison to her two children, Senkhosi Mabuza and Doctor Mabuza, resulting in their tragic and untimely deaths. This heinous crime, motivated by personal vendetta and spite towards the children's father, constitutes a grave violation of the sanctity of life and the fundamental duty of a parent to protect their offspring. The Court will therefore, sentence the Accused for two counts of murder separately. The

courts finds that they constitute two separate offences, they were not committed simultaneously, despite that they happened at the same time and at the same place. She fed one child with the poisoned food, and consciously went to the next child and fed her as well. That constitute two separate acts of criminality that must have two separate consequences in terms of sentencing. She had the opportunity to pause once she had fed the first child with poison and restrain himself. However, she formed a separate *mens rea* and proceeded with the *actus reus* of feeding the other child with food containing poison.

[29] In fact, when it was suggested to her that she was approached by the accused, who reported that the father of her children had instructed her to gather her belongings and leave his home, this witness stated that she does not recall such an incident. Furthermore, she vehemently denied ever being informed that Sicelo Mabuza instructed the accused to leave his homestead with her two children. The record shows that Sibongile Dumsile Dlamini stated she had no knowledge of such an event. This was the first time she had heard of it in court. This evidence raises doubts about the accused's claim that she was abused, particularly whether she was emotionally battered and the extent of any abuse in the first place. If this were true, the evidence presented to the court regarding such abuse is inadequate.

[30] On the other hand, the evidence revealed that there were open lines of communication between PW1 and the accused. Therefore, it seems unlikely that the accused would not have reported PW1 any abuse she was experiencing at the hands of the father of her children, especially to the extent

of being forced to leave their home. The court intentionally refrains from addressing the question of whether she had a legal right to remain at Sicelo Mabuza's residence if she was unwelcome. This issue was not explored in the evidence presented or raised by counsel during submissions.

[31] Based on the evidence presented, it is evident that the defense emphasized the allegation of emotional abuse inflicted upon the accused by the father of her children. However, upon scrutiny of the testimonies, doubts arise regarding the veracity of such claims. Sibongile Dumsile Dlamini, a key witness, denied any knowledge of the accused being instructed to leave the home by the father of her children. This casts uncertainty on the extent of abuse alleged by the accused, particularly the claim of being emotionally battered. Furthermore, the absence of evidence regarding the accused's entitlement to stay in Sicelo Mabuza's residence if unwelcome remains unaddressed, as it was not pursued during submissions.

[32] In light of the foregoing, the court cannot conclusively determine the presence of emotional abuse as claimed by the accused. The testimony of Sibongile Dumsile Dlamini, coupled with the lack of exploration regarding the Accused's entitlement to remain in the residence, raises reasonable doubt regarding the alleged abuse. Therefore, the defense's argument regarding emotional abuse lacks sufficient substantiation.

[33] The defense has placed significant emphasis on the assertion that the Accused was emotionally abused by the father of her children. This warrants the court to revisit the evidence before it to determine if emotional abuse was indeed

established as a matter of fact. During cross-examination, PW1, Sibongile Dumsile Dlamini, testified that the accused would sometimes leave and go to her parental home. However, this witness refuted the claim that the Accused was ever chased away by her boyfriend.

[34] In rendering this judgment, the court acknowledges the importance of thoroughly examining the evidence and considering all relevant factors. In this case, the evidence presented, particularly the testimony of key witnesses, has contributed to the court's decision. It is imperative to uphold the principles of justice and ensure that verdicts are based on reliable evidence. Thus, based on the presented evidence and the analysis thereof, the court finds the defense's assertion of emotional abuse unsubstantiated.

[35] Considering the severity of the offense, the irreversible loss inflicted upon innocent lives, and the blatant disregard for the welfare of the children³, the court hereby imposes a sentence of 15 years for each count, the sentences to run consecutively. The sentences are backdated to the date of arrest of the Accused. In the matter of **Gerald Mvemve Varthof vs The King**⁴, in that case the father killed two of his own daughters on the palpably absurd excuse that he thought their mother was having an affair with another man. The court of appeal increased a sentence of 20 years to 25 years imprisonment. In the case the court has ordered that the sentence must run concurrently, and the

³ In the matter ofthe Appeal court described such deaths as unpardonable dastardly acts which must evoke a justifiable feeling of society's anguish and disapprobation.

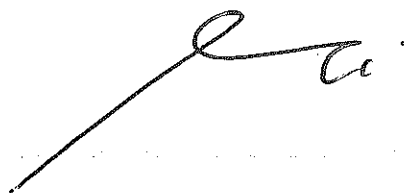
⁴ Criminal Appeal Case No. 5/10

effective total sentence was 25 years. In consideration of the consecutive effective of the sentence, the Court deems that a 15 year sentence for each count is befitting in the circumstances of this case.

[36] Additionally, the court orders Khanyisile Nopopi Malinga to undergo psychological evaluation and counseling to address the underlying issues contributing to this abhorrent act. May this judgment serve as a solemn reminder of the consequences of such depraved actions and a measure of justice for the victims, Senkhosi Mabuza and Doctor Mabuza, whose lives were unjustly cut short.

ORDER

- 1) The Accused is sentenced to 15 years in jail for each count of murder. The sentences are to run consecutively.
- 2) The sentence is back-dated to the date of arrest.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For The Crown:

Mr K. Masango (The Director of Public
Prosecutions)

For The Accused:

Miss N. Hlophe ((Mongi Nsibande & Partners)

