

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CRIMINAL TRIAL NO. 203/08**

In the matter between:

**REX**

**VS**

**NKOSINATHI BRIGHT THOMO**

CORAM

MAPHALALA MBC, J

FOR CROWN

MR. N. MATHUNJWA

FOR DEFENCE

MR. B. MDLULI

**JUDGMENT 23<sup>rd</sup>  
NOVEMBER 2009**

[1] The accused is charged with murder in that upon or about the 10<sup>th</sup> May 2008 and at or near Thulwane area in the Manzini region the said accused did unlawfully and intentionally kill one Sicelo Khumalo

[2] When the accused was arraigned, he pleaded guilty to culpable homicide. The Crown accepted the plea.

[3] The Crown then submitted into Court the statement made by the accused to a Judicial Officer, the report on postmortem examination as well as the statement of agreed facts signed by both Counsel for the Crown and Defence.

[4] All three documents were submitted with the consent of both Counsel for the Defence and the Crown and the documents were duly admitted into court as evidence.

[5] Both the Statement of Agreed Facts as well as the PostMortem Report were read out in Court by the Crown and the contents thereof were confirmed by the Defence Counsel.

[6] The Court further enquired from the accused personally whether he was conversant with the contents of the three documents and whether he had no objection that all three of

them should be admitted into court, as evidence. The accused said he was fully aware of the contents of the documents and that he had no objection to them being admitted into Court as evidence.

[7] The Court also enquired from the accused personally whether he admitted having killed the deceased and whether he was aware that this act was unlawful; he admitted and responded positively to both questions.

[8] It is common cause that on the evening of the 10<sup>th</sup> May 2008, the accused stabbed the deceased to death using a knife.

[9] The accused together with Dumsane Matfonsi and Mfana Mavuso were coming from a drinking spree when they met the deceased.

[ 10] The deceased and the accused were left behind talking to each other whilst the other two men proceeded on their destination.

[11] It is common cause that the accused and the deceased later quarrelled with each other over a debt of E 100.00 owed by the deceased to the accused; the latter had sold to the former a loin skin, and the accused wanted payment.

[12] Subsequently, a fight broke out between the accused and the deceased during which the accused stabbed the deceased with a knife on the chest.

[13] After he had stabbed the deceased, the accused left the scene. The deceased was found dead the following morning next to a gate that leads to the community well. The accused was arrested on that morning and charged with the murder of the deceased. He handed the murder weapon to the police.

[14] It is common cause that after his arrest, the accused made a statement to Magistrate Fikile Nhlabatsi, a Judicial officer stationed at the Manzini Magistrate Court on the 13<sup>th</sup> May 2008.

[15] The statement has been admitted into Court by consent of both the Crown and Defence. The Court after enquiring from the accused personally is satisfied that the statement was made freely and voluntarily without any undue influence.

[16] Dr. Komma Reddy, a police Pathologist conducted a post-mortem examination on the body of the deceased on the 15<sup>th</sup> May 2008. The body of the deceased was identified by 3408 D/Sgt Stanley Maseko of Mafutseni Police Station as well as Ndumiso Khumalo the brother to the deceased.

[17] Dr. Reddy confirmed that the deceased died from a stab wound to the chest.

[18] Section 221 of the Criminal Procedure and Evidence Act provides *inter alia* that,

*"In any criminal proceedings in which any facts are ascertained by a medical Practitioner in respect of his opinion as to the cause of death of such person, such facts may be provided by a written report signed and dated by such medical practitioner and that report shall be prima facie evidence of the matters stated therein".*

[19] The Court has accepted the post-mortem report as *prima facie* evidence of the cause of death of the deceased. Since the report was admitted with the consent of both Counsel for the Crown and the Defence it was not necessary to require the attendance of the police pathologist.

[20] Similarly, the statement made to the Magistrate by the accused was submitted by the consent of both Counsel and the accused personally confirmed to the Court that he made the said statement freely and voluntarily without any undue influence; the statement is admitted accordingly as the evidence of the Crown.

[21] Section 226 provides *inter alia*,

*"That any confession of the commission of the offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence be admissible in evidence against such person provided that such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto".*

[22] The accused has pleaded not guilty to murder but guilty to culpable homicide and the Crown has accepted his plea. **Section 155 of the Criminal Procedure and Evidence Act No. 67 of 1938** provides, *inter alia*,

*"That the accused may plead that he is guilty of the offence charged, or with the concurrence of the prosecutor, of any other offence of which he might be convicted on such indictment or summons".*

[23] In the circumstances, the Court proceeded on a charge of culpable homicide.

[24] Section 238 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides, *inter alia*, that:

*"If a person is arraigned before any court upon any charge has pleaded guilty to such charge or has pleaded guilty to having committed any offence other than the offence with which he is charged, and the prosecutor has accepted such plea, the court may if it is the high court, and the accused has pleaded guilty to any offence other than murder, sentence him for such offence without hearing any evidence."*

[25] In view of the evidence before Court as well as the plea advanced, the accused is convicted of culpable homicide. The Court is satisfied that the Crown has proved the commission of the offence.

[26] To this end, I am in full agreement with the majority decision of the Court of Appeal as it then was in the appeal of **Annah Lokudzinga Mathenjwa v R SLR 1970 - 1976 25** at **29** where **Schreiner JP** stated:

*"The subject of equality in this connection is discussed very fully by Macdonald J. A. in giving the judgment of the **Rhodesian Court of Appeal in R v John 1969 (2) SA 560(RAD)**. I am in respectful agreement with the view expressed at P.568 that "causa sine qua non", or what has been called "but for" cause, is not a cause in the law of culpable homicide.....in law you seek the fact that actually produces the result or positively contributes to its production and not a fact that only provides the occasion or opportunity for the result to be produced....*

*My agreement, however with the distinction between real causes and causes that are only "but for", and so not causes at all, leads me to the conclusion that the express outlawing of "versari in re illicita" has left out the law in this field unchanged. It seems reasonable to hold that the doctrine if it only relates to "causae sine qua non" was an excrescence on the law and not a part of it, and that its disappearance leaves untouched the established definition of culpable homicide as the unlawful killing of a human being without the intent to kill. All negligent killing is unlawful killing and it covers a large part of the field of unlawful killings. But the converse is not true and not all unlawful killings are negligent."*

[27] I now turn to consider the appropriate sentence befitting the crime committed by the accused.

[28] In mitigation the defence submitted that:

- (1) The events leading to the death of the deceased were unfortunate as the accused never intended to kill the deceased.
- (2) The accused pleaded guilty to culpable homicide and by so doing he has saved the Court's time.
- (3) Accused is married with a wife and two minor children; he is the sole breadwinner.
- (4) Accused is relatively young and should be given another chance in life.
- (5) The fact that the deceased died in his hands is a punishment on its own.
- (6) Accused is a first offender.

[29] In response, the Crown submitted as follows:

- (i) The Court should take into account the interests of the accused as well as those of the society.
- (ii) The Court should consider the nature of the offence for which the accused has been convicted particularly because there is a rise of cases involving knife-stabbing and alcohol leading to the death of other people.
- (iii) It is the duty of the Court to give a sentence that will deter others from committing a similar crime.

[30] In the Criminal Appeal of **Petros Mngisi Masuku v. Rex** Criminal Appeal Case No. 11 of 2008 the Supreme Court confirmed a sentence of nine years for culpable homicide; the Appellant had initially been charged with murder but pleaded guilty to culpable homicide. Banda CJ at pages 6 and 7, quoting

the judgment delivered by Tebbutt JA in **Musa Kenneth Nzima v Rex** Criminal Appeal No. 21 of 2007 stated:

*"There are obviously varying degrees of culpability in culpable homicide offences. This Court has recognized this and in confirming a sentence of ten (10) years imprisonment in what it described as an extra ordinarily serious case of culpable homicide said that the sentence was proper for an offence at the most serious end of the scale of such a crime."*

[31] **In the case of Musa Kenneth Nzima**, a sentence of ten (10) years for culpable homicide was confirmed, but the Court viewed this case as a serious case of culpable homicide.

[32] In the appeal of **Lucky Sicelo Ndlangamandla and Two Others, Criminal Appeal No. 8 of 2008**, the Appellants had inflicted multiple stab wounds on the deceased during a drinking session after a minor quarrel. They pleaded guilty to Culpable homicide and were each sentenced to ten (10) years imprisonment commencing from the date of arrest. The Supreme Court confirmed the sentences holding that the sentences do not induce a sense of shock as alleged, and, that the trial judge never misdirected himself.

[33] Annandale AJA who delivered the judgment of the Court had this to say in paragraph 15:

*"Ultimately, the discretion to mete out appropriate punishment is to remain within the realm of trial Courts, steeped in the atmosphere of a trial or during curtailed proceedings such as the present which followed upon pleas of guilty. The public must remain assured that adequate measures have been taken to protect them from serious offenders while at the same time, proportionate punishment is meted out which does take into account all prevailing*



*circumstances. Should it be necessary, the established procedures of appeal and review remain as measures of safety to correct improper sentences."*

[34] In the appeal of **Vusi Madzalule Masilela Criminal Appeal Case No. 14 of 2008**, the Appellant had been indicted on a charge of murder, and he pleaded guilty to culpable homicide, which was accepted by the Crown. The trial Court sentenced him to ten (10) years imprisonment backdated to the date of arrest. The Supreme Court confirmed the sentence noting that:

*"This was a brutal and unprovoked attack on the deceased and that the Appellant got no more than his just deserved"*

[35] In the appeal of **Musa Bhondi Nkambule v. Rex Criminal Appeal No. 6 of 2009**, Ramodibedi AC J delivering the judgment of the Supreme Court in an appeal against conviction and sentence on a charge of culpable homicide stated at paragraph 5:

*"In several of its decisions, this Court has upheld the principle that the imposition of sentence is a matter which primarily lies within the discretion of the trial Court. An appellate Court will not generally interfere with such a sentence unless there is a material misdirection resulting in a miscarriage of justice.*

*Put differently an appellate Court will not interfere unless the sentence is so grossly harsh or excessive as to warrant interference in the interests of justice. See for example, such cases as **Vusi Muzi Lukhele and another v. The King** Criminal Appeal No. 23 of 2004; **Benjamin B. Mhlanga v. Rex** Criminal Appeal No. 12 of 2007; **Sifiso Zwane v. Rex** Criminal Appeal No. 5 of 2008; **Vusi Madzalule Masilela v. Rex** Criminal Appeal No. 14 of 2008; **Bheki Goodwill Gina v. Rex** Criminal Appeal No. 2 of 2009."*

[36] In the present case, the Court has taken into account the personal circumstances of the accused as well as the seriousness of the crime. The accused stands convicted of a serious offence which resulted in the loss of the deceased's life. From the confession and the Statement of Agreed Facts, it is apparent that when the accused stabbed the deceased, the latter was not armed, and the accused was himself not in danger.

[37] Furthermore, after the accused had stabbed the deceased, he made no attempt to look for him and take him to hospital or to even raise an alarm to other people to assist the deceased with hospitalization. But he alleges on his confession that the deceased was his friend.

[38] It is further apparent from the confession that after he had stabbed the deceased, the accused went with his friends that night to buy more alcohol which they drank until very late that night.

[39] Failure by the accused to render any form of assistance to the deceased in the circumstances is aggravating and renders this case one of the most serious cases of culpable homicide and requires a stiffer sentence.

[40] In the appeal of **Musa Kenneth Nzima v Rex Criminal Appeal No. 21 of 2007** where the Appellant was convicted of culpable homicide and sentenced to nine years of imprisonment, Tebbutt JA who delivered the judgment of the Court had this to say in pages 5 and 6:

*"Each case must be decided on its own facts and therefore a bench - mark of a certain number of years of imprisonment, designed as an indication of the Court's aim to ensure severity in sentences in cases where knives are used and lives are in consequence lost, without individualizing the facts of*

*the case and the personal circumstances of the offender is not an appropriate approach to sentencing."*

[41] I agree wholeheartedly with the above quoted statement by Justice Tebbutt on the basis that there are varying degrees of culpability in culpable homicide offences; hence, each case should be decided differently guided by the facts of each case, the personal circumstances of the accused as well as the severity of the crime committed. To do otherwise would defeat the Rule of Law, the independence and discretion of the Court.

[42] Lastly, I take cognizance of the notorious fact which has been confirmed not only by the High Court but our Supreme Court, that there is a rapid increase of deaths resulting from stab wounds using knives; hence, the Court has a duty in imposing sentence, to deter such further conduct.

**JUDGE OF THE HIGH COURT**



[43] In the circumstances, I sentence the accused to ten (10) years imprisonment to commence from the date of his arrest on the 10<sup>th</sup> May 2008.