

**IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE**

CRIMINAL TRIAL NO. 224/08

In the matter between:

REX

VS

VUSI PHOYISA TSABEDZE

CORAM

MCB MAPHALALA, J

FOR CROWN

P. DLAMINI

FOR DEFENCE

Accused in Person

**JUDGMENT
12th APRIL 2011**

[1] The accused was charged with Culpable Homicide for the negligent unlawful killing of Goodness Mathobela on the 30th May 2008 at Sigcaweni area in the Lubombo Region. The Crown alleged that the accused unlawfully assaulted the deceased and inflicted upon her certain injuries which caused her death. He pleaded guilty to the charge, and, the Crown accepted his plea.

[2] A Statement made by the accused before a Magistrate in terms of Section 226 of the Criminal Procedure and Evidence Act states the following:

"My girlfriend Goodness Mathobela informed me that maize meal was about to get finished and as a result I went out seeking from neighbours and I approached Make Mamba who agreed to give me maize (20 litre) and which cost me E60.00. I gave my girlfriend £60.00 so that she could go with Make Mamba to purchase the maize. As she left with Make Mamba I remained at home ploughing beet rude and lettuce in the garden.

They took a while to come back and by then I was late to take out my family cattle to drink water, and I then set out with the cattle to the drinking place without my lover having returned and it was late in the afternoon by then. I then came back with the cattle and kept them within the homestead fields and I closed the field gate. When it was late in the afternoon, I then collected all the family livestock to the kraal the cattle and the goats as it was late by then.

Realizing that my lover had not yet come back I then went out to meet her halfway. My lover, and as I walked along the way and having passed where cattle

is sold at Sigcaweni market and loaded into trucks after they had been purchased. When my lover came I saw a short person running into the side of the pathway who I didn't actually see who the person was because it was already dark. I then asked from my lover as to who was that person running away and she replied by saying that madness was commencing to affect me and she further said people with HIV/Aids friends were now insane. As a matter of fact I had tested for HIV/Aids and I tested positive while she was negative. She talked loudly and as a result I got angry and I hit her on the face near the right eye which had a blue eye. Her white hat fell down and I warned her about it to which she said she did not care about it. I collected the said hat and I told her that it was easy for her not to care because she did not use her money to buy it but instead my money was used.

We then walked home and I realized that she was too drunk. I opened my homestead gate having realized that my lover was too drunk. Upon reaching home she started to shout on top of her voice and I told her as to what will the neighbours say to her shouts? On shouting she continued saying that I was HIV positive in a loud manner and other insulting words. I then used an open hand and upon hitting her she fell down

and I also told her that I would be forced to use a stick in beating her instead of my hands because of her continued insults. I did take the stick which I beat her on her thighs and buttocks i.e. four times. When she stood up she tried to grab my testicles but she failed and I kicked her on her front body next to her waist just below her stomach.

She stood up and attempted to enter the bedroom where I had entered to and locked, and I told her that she must go and sleep in the other bedroom which was also well bedded. While she was in that bedroom she continued talking but I did not respond but kept quiet.

In the morning when we woke up I asked her if she recalled what she said to me to which she confirmed but apologized for her utterances. I also reminded her of an incidence at Tshaneni where she had also fallen in love with a certain man while she was my lover and was staying with me which she was seeking or employment at Swaziland Inyoni Yami Irrigation Scheme where my father was working. I then decided not to ask her to cook light meal as I take an HIV tablet I need to eat before taking the tablet. I did the cooking myself after which I proceeded to the garden and took some money to buy chicken feet after I had eaten.

I bought the chicken feet and came back towards home, and along the way I met Make Mamba the lady she left with the previous day. I told her that we had a quarrel with my lover and she left me in the garden while she walked to the house and later came back and reported that she did not find her. After some time Make Mamba came and gave me meat in a bucket since she did tell me that she was selling meat after I had told her that I had gone to buy chicken feet previously. I then took the meat in the bucket and the chicken feet home. I did find my lover at home where I prepared the chicken feet she asked me to buy her Coca Cola. I went to buy the Coke and gave it to her then I told her that Make Mamba had given me meat in a bucket and she suggested that I cook her the chicken feet instead of the meat (beef) and she then asked me that I kiss her and I refused. I opened the drink for her as she wanted to satisfy herself and she asked me to share with her the drink and I refused.

In the evening she insisted that I come to sleep with her but I refused because I did not have condoms. We both slept alone in different rooms. In the following morning I prepared food for myself since she was not my wife and I could not force her to cook for me. After taking my morning meal, I went to manure the

garden and after finishing I went home, I found that she was not present at home. She later came back with condoms which had expired and I refused to have sex with her.

I again refused to sleep with her in the same bedroom but instead went to sleep on my own. In the following morning I wake up earlier in preparation for the cattle dipping day and I informed her that I was leaving. While at the dip tank I got information that they had found my lover sleeping at a bus station and asked me as to what I did to her and I explained our misunderstanding. I proceeded to the said bus station and I asked a health motivator to assist only to find that she was engaged with other sick people. My brother suggested that I carry her in a wheelbarrow and ferry her home. At home I prepared warm water and soothe her and I put "mkhuhlu" herb to with water in order to soothe my lover. My lover asked me whether Make Fakudze the health motivator would come and I explained that she will not come as she was busy with other sick patients. Then she started to vomit and she wanted to fall down, and I when she was falling I told her that I was not serious when I told her that I would terminate our love relationship because of what she was doing. At that juncture she could not reply me. Realizing her condition, I raised an alarm

and called my uncle who accused me that I have killed my lover, and then I realized that she had died. As a result of what had happened I then went to take the medicine used to treat cotton pesticides because I felt I should follow my lover as there could be nobody to assist me as I am sickly. I started vomiting after drinking the pesticides and lost energy, and when I gained consciousness I found myself at RFM Hospital. I was treated and recovered and I came to the Siphofaneni Police Station on Friday. That is all.

[4] The Statement was duly signed by Magistrate Joseph Gumedze, the court Interpreter as well as the accused. The accused admitted that the Statement had been made freely and voluntarily and without undue influence; and, that no threats or promises were made to induce him to make the Statement. He conceded that he was not physically assaulted during the detention. The accused admitted to have assaulted the deceased physically. The Statement was admitted in evidence and marked exhibit 1.

[5] Section 226 of the Criminal Procedure and Evidence Act provides the following:

"(1) 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...."

[6] A post-mortem report was also admitted in evidence and marked Exhibit 2; it showed that the cause of death was multiple injuries to her body. The body was identified by her uncle Majalimani Tsabedze.

[7] A Medical Report was also admitted in evidence; it showed that the accused was treated at the R.F.M. Hospital in Manzini on the 3rd June 2008. The accused had attempted to commit suicide using weevil tablets shortly after the death of the deceased. The Medical Report was marked Exhibit 3.

[8] Section 238 (1) (a) of the Criminal Procedure and Evidence Act No. 67 of 1938 provides the following:

"If a person arraigned before any court upon any charge has pleaded guilty to such charge, or has pleaded guilty to having committed any offence of which he might be found guilty on the indictment or summons 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."

[9] The accused was accordingly convicted of the offence of culpable homicide. The court was satisfied in the light of the evidence tendered by the Crown, that the offence charged had been proved beyond reasonable doubt. The accused admitted that the deceased died as a result of the injuries unlawfully and negligently inflicted upon her and that there was no intervening cause. The offence of Culpable Homicide has been defined by **Holmes JA in S v. Burger** 1975 (4) SA 877 at 877 as follows:

"...Culpable Homicide is the unlawful, negligent causing of the death of a human being..."

[10] In mitigation of sentence the accused apologized for the crime he had committed, and further submitted that he was provoked when he found the deceased drunk and in the company of another man who ran away when he arrived; he further submitted that he was also provoked; when the deceased mocked and shouted that he is HIV positive, and that when he asked about the man who was running away she said HIV people are insane, and that he was seeing non-existent people. The accused is single with two minor children. He is a first offender, and, he pleaded guilty to the offence charged. The Supreme Court in the Case of **Musa Kenneth Nzima v. Rex** Criminal Appeal No. 21 of 2007 laid down the fundamental guideline that a sentence of nine years imprisonment is warranted in culpable homicide convictions only at the most serious end of the scale of such crimes.

The court stressed the individualization of culpable homicide cases on the particular facts of each case.

[11] The deceased was at the time of the commission of the offence not armed with any weapon, and she did not present danger to the accused; she was too drunk and could not defend herself from the physical assault; furthermore, she could not even run away to avoid the physical assault. The accused initially assaulted the deceased with an open hand when he met her along the way; when they reached home, the accused beat the deceased with fists, kicks and safety boots all over her body. In addition he used a stick to hit her repeatedly all over her body. This assault on the deceased was brutal, merciless and too excessive in relation to the alleged provocation.

[12] Notwithstanding what has been said above, I will also take into account the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. The unlawful killing of defenceless women by men who claim to love them, is on the increase; and this court has a duty to defend them by passing appropriate deterrent sentences.

[13] Accordingly, I sentence the accused to ten years imprisonment four of which are suspended for a period of five years on condition that the accused is not found guilty of an offence in which violence is an element within the period of suspension.

**M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT**