



IN THE HIGH COURT OF SWAZILAND

Criminal case No: 87/10

In the matter between:

REX

VS

NHLASE ANTHONY NXUMALO

Neutral citation: *Rex vs Nhlase Anthony Nxumalo (87/2010) [2012]*
SZHC165 (2012)

Coram: M.C.B. MAPHALALA, J

Summary

Criminal Law – accused charged with murder – provocation and self-defence invoked by accused – the said defences inapplicable in the circumstances of the case – intention in the form of *dolus eventualis* established – accused convicted of murder with extenuating circumstances – accused sentenced to twenty years imprisonment.

JUDGMENT
20th July 2012

[1] The accused is charged with Murder and the Crown alleges that on the 13th January 2010 at Ndiyaneni area in the Shiselweni region, he unlawfully and intentionally killed Vusi Mankwe Nxumalo. He pleaded guilty to the offence and the Court recorded a plea of not guilty.

[2] Certain formal admissions were made in terms of section 272 of the Criminal Procedure and Evidence Act No. 67 of 1938. Firstly, the accused admitted that the deceased died due to injuries he inflicted upon the deceased with a knife. Secondly, that there was no intervening cause for his death. The defence confirmed the formal admissions.

[3] The post-mortem report was admitted by consent and marked Exhibit 1. The cause of death was due to multiple injuries. The medical report of the accused was also admitted by consent and it was marked exhibit 2; the report concluded that the accused suffered minor injuries, and that the injuries were caused by a blunt object.

[4] PW1 Khulekani Mazibuko a resident of Ndiyaneni area and a cousin to the accused testified that on the 13th January 2010 they were at a sports field with the accused and others playing soccer . The deceased was the accused's uncle;he arrived at the sports-field with his dogs carrying a stick. The deceased called the accused and said he was looking for him. Without further communication, the deceased hit the accused with the stick on the forehead; the

accused fell down and started bleeding. The deceased's dogs bit the accused on the body including his testicles. The accused managed to rise up, and stabbed the dogs with his knife. Thereafter, he stabbed the deceased twice.

[5] The deceased left the sports ground and said he was going home and that he would return; he was bleeding. Before he crossed a nearby river, he fell down. Meanwhile the accused went to a Marula tree outside the sports ground and hid the knife; thereafter, he rejoined his playmates. However, upon realising that the deceased had fallen down and was that he was very weak, the accused chased the deceased's dogs; thereafter, he hit the deceased with a hard stick several times until it was broken. The deceased was not fighting back because he was very weak; he just lay on the ground as he was being assaulted.

[6] Thereafter, the accused retrieved the knife from where he had hidden it under the Marula tree; he stabbed the deceased viciously seven more times until he died. The accused left the scene of crime; however; before he reached the dipping tank, he licked the knife, broke it into two parts, then he threw it in the dipping tank. PW1 and the other boys told the accused to go home and he left on his own.

[7] One of the boys went to report the incident to the Chief's Royal Kraal; the police were subsequently called to the scene of crime. PW1 was able to

identify in Court both the broken stick as well as the knife used by the accused in the commission of the offence.

[8] The defence case was put to PW1 during cross-examination. In particular the defence disclosed that the accused had beaten the deceased child for refusing to take his sport-kit; and, the deceased was not happy at what the accused had done. He arrived at the accused's home at about 05.30 am on the day of the incident looking for the accused. However, the accused hid himself in his house until the deceased left. The deceased had told the accused's mother, DW1, that he would sort the accused; DW1 subsequently reported the threats to the Chief's Royal Residence.

[9] PW1 further told the Court that the deceased was only carrying a small long stick as a weapon. He denied that the deceased was also carrying a bushknife and a knobstick as alleged by the defence. He reiterated that the deceased was stabbed twice on the sports ground and more than six times after he had fallen next to the river; the post-mortem report records a total of nine stab wounds.

[10] PW1 admitted that when the accused was initially beaten with a stick by the deceased, he acted in self-defence and stabbed the dogs and the deceased two times on the sports grounds; however, he denied that the subsequent attack

on the deceased in which he stabbed him more than six times still constituted self-defence.

[11] PW2 Constable Alex Mathobela, the police investigating officer for this case, testified that in January 2010, he received a report that the deceased had been killed at Ndiyaneni. He went there with Detective Sergeant Nsibandze and other police officers. They found the dead person covered with shrubs; he was lying on the path next to the dipping tank and facing downwards. Upon investigating, he found that the accused and other boys were playing soccer when the deceased arrived on the scene and a fight ensued between him and the accused; and, the deceased was subsequently stabbed by the accused.

[12] PW2 told the Court that when they arrived at the scene of crime, the accused had gone home; they took the deceased to the mortuary. They also noticed his multiple injuries with intestines protruding from the stab wound.

[13] They found the accused at home with his mother. After cautioning him, the accused led them to the dipping tank where he had thrown the knife; however, since it was dark, the accused could not retrieve the knife. On the next day he was again cautioned, and, he led the police to the dipping tank; the water was removed until the knife was retrieved. The knife was broken into two pieces; it was taken to the police station as an exhibit. PW2 subsequently

charged the accused with murder, and, the knife was taken for forensic examination.

[14] PW2 was further given a stick by the accused which was used in the commission of the offence. The knife and the stick were handed in Court by PW2 as part of his evidence and were marked Exhibit A and B respectively. PW2 maintained his evidence under cross-examination.

[15] The accused gave evidence in his defence, and, he told the Court that he was related to the deceased, and, that he was a sibling to his own father. He testified that on the 12th January 2010 between 6 pm and 7 pm, when they had finished the soccer practising session and were sitting down on the sports field, two boys arrived and also played soccer; and, he asked one of the boys to take his bag which had a soccer kit, but the boy refused. He took a pipe on the ground and hit him; then he took his bag and left home. The two boys are children of the deceased.

[16] When the accused returned home, he told his mother about hitting the boy at the sports field. At 0530 hours of the 13th January 2010, the deceased arrived at his homestead with his dogs and spoke to his mother; then he knocked at the door to the house where the accused was sleeping and said he wanted to talk to him. He told the deceased that he was asleep and that he should come back mid-day. Thereafter, the deceased went out of the gate; the

accused came out of the house and saw the deceased sitting with his dogs carrying a knobstick and a knife. The deceased was in the company of the two boys; then they left.

[17] Again at 9 am the accused saw the deceased next to his homestead. At 1000 hours he went to the main homestead to report to his grandmother the latest confrontation with the deceased. In the afternoon he took his sports kit and went to play soccer.

[18] He was playing soccer when the deceased arrived at the sports ground with the stick and his dogs. The deceased hit him with the stick and he fell down to the ground; the dogs bit him as he lay down. He stood up and stabbed him twice on the stomach and right shoulder.

[19] He told the Court that he could not recall how many times he stabbed the deceased after he had fallen next to the river because his mind was no longer stable at the time. He also told the Court that he could not recall licking his knife as alleged by PW1. He alleged that a herdman who looks after cattle at his homestead took him home allegedly because he was then unconscious. However, PW1 denied this piece of evidence and told the Court that the accused left home on his own and that he was not assisted as alleged.

[20] He further told the Court that the police took him to Matsanjeni Health Centre where he was treated and discharged. A medical report was subsequently prepared by a doctor who attended to him, and, he stated that the injuries suffered by the accused were minor. The defence did not challenge the medical report but it was admitted in evidence by consent.

[21] The accused admitted that in addition to the first two stab wounds sustained by the deceased on the sports field, he stabbed the deceased seven times next to the river and that he died on the scene. Similarly, he didn't dispute the evidence of PW1 that the deceased only hit him once with the stick. He also admitted that the knife was a lethal weapon and that he was grossly reckless for carrying the knife during the soccer game. He further admitted that he knew that when stabbing the deceased with the knife he would die.

[22] DW1 Zipporah Nxumalo the mother to the accused, told the Court that the deceased was her brother in-law, and that on the 13th January 2010 at about 0530 hours, the deceased arrived at her homestead with his dogs; he was carrying a stick. She was not sure of the other weapon he was carrying whether it was a slasher or a bushknife. The deceased asked for the accused; and, she went to the accused's house, stood at the door and told him that the deceased was looking for him. The accused told her that he was tired, and that the deceased should come back at about 08.00 am if he wanted to talk to him.

[23] The deceased came to the door of the accused's house intending to enter the house, but she blocked him from entering the house. The deceased told her that he wanted to deal with the accused. She told the deceased to go and report their misunderstanding with the accused to the community police or the Chief's Royal Kraal so that the dispute could be deliberated upon; however, the deceased refused. When he left the premises, he swore and threatened the accused; the accused wanted to come out of the house but she dissuaded him from doing so.

[24] After the deceased had left, she advised the accused to remain at home and not go to the grazing land to look after the family cattle; and, she suggested that the younger boy should look after the cattle. Thereafter, she went to the Chief's Royal Kraal where she reported that the deceased had come to her homestead to attack the accused.

[25] Under cross-examination she admitted that the accused left home against her advice, and, that he met him along the way with other boys going to the sports ground to play soccer. She was on her way home from the Chiefs Royal Kraal. She further told the Court that when she met the accused she didn't know that he was armed with a knife.

[26] The Crown has proved its case beyond reasonable doubt. It is apparent from the evidence that the deceased had initially attacked the accused on the

sports field and hit him with a stick; and he fell down. The medical report has not been disputed that the injury sustained by the accused was minor.

[27] It is also not in dispute that the dogs bit the accused as he lay on the ground. However, he rose from the ground and stabbed the dogs with the knife; he further stabbed the deceased two times. The deceased left the scene promising to come back. The provocation and self-defence ended with the first attack by the deceased. The deceased had provoked the accused, and, the accused was entitled to defend himself. However, the amount of force the accused used to defend himself was excessive in the circumstances because the deceased only hit the deceased with a stick. There is no evidence adduced that the deceased was armed with any other weapon at the sports ground other than the stick.

[28] There was no dispute that after the first two stab wounds, the deceased left the sports field; however, when he was next to the dipping tank and just before crossing the river, he became very weak due to the bleeding and fell down. Meanwhile the accused had hidden the knife under a tree after the deceased had left; and, the accused rejoined his playmates at the sports ground.

[29] However, after realising that the deceased has fallen next to the dipping tank, the accused retrieved his knife, and, he went to the deceased and beat him several times with a stick until it was broken. Thereafter, he stabbed him seven

times viciously and gruesomely until he died. It is not in dispute that when the accused beat the deceased with the stick and further inflicted seven fatal stab wounds, the deceased was not fighting back but he was just lying on the ground weak and helpless.

[30] In the circumstances, I reject the of provocation and self-defence advanced by the defence. When the accused attacked the deceased with the stick and further inflicting upon him multiple stab wounds, the accused was not provoked and there was no imminent danger of attack by the deceased. When the accused attacked the deceased next to the dipping tank with the stick and knife, he foresaw the possibility of his death and was reckless whether or not death resulted. In the circumstances section 186 of the Criminal Procedure and Evidence Act is not applicable to reduce the charge of murder to culpable homicide because *mens rea* in the form of *dolus eventualis* existed.

[31] In the case of *Maphikela Dlamini v. Rex* 1979 -1981 SLR 195 (CA) at 197 *Dendy Young JA* delivering the unanimous judgment of the Court of Appeal of Swaziland as it then was, described legal intention as follows:

“As I understand the law in Swaziland, the South African concept of *dolus eventualis* has been stated this way: if the assailant realises that the attack might cause the death and he makes it not caring whether death occurs or not that constitutes *mens rea* or the intention to kill. And the way this test has been applied is whether the assailant must have realised the danger to life.”

[32] In the case of *Mazibuko Vincent v. Rex* 1982 -1986 SLR 377 (CA) at 380, *Hannah CJ* delivering the unanimous decision of the Court of Appeal of Swaziland, stated the following:

“A person intends to kill if he deliberately does an act which he in fact appreciates might result in death of another and he acts recklessly as to whether such death results or not.”

[33] The Homicide Act No. 44 of 1959 cannot assist the accused in the circumstances. The Act provides the following:

“2. (1) A person who-

(a) unlawfully kill another under circumstances which but for this section would constitute murder; and

(b) does the act which causes death in the heat of passion caused by sudden provocation as defined in section 3 and before there is time for his passion to cool;

Shall be guilty of culpable homicide.

(2) This section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

3. (1) Subject to this section “provocation” means and includes any wrongful act or insult of such nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the

relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom such act or insult is done or offered.”

[34] It is not in dispute that after the accused had stabbed the deceased two times as a result of provocation, the deceased left and went home; meanwhile the accused went and hid the knife under a marula tree next to the sports ground. Thereafter, the accused went back to the sports ground. The accused attacked the deceased after he had fallen with the intention of killing him; he was no longer acting in the heat of passion caused by the initial provocation by the deceased. The accused had time for his passion to cool. In the circumstances, the defence of provocation as well as the Homicide Act cannot assist the accused in reducing the murder charge to culpable homicide.

[35] Similarly, self-defence as a defence cannot avail the accused because of two factors. Firstly, when the accused initially stabbed the deceased twice, the force he used was not commensurate to the attack but it was excessive. Secondly, when the accused inflicted the seven multiple stab wounds on the deceased, he was not in imminent danger of an attack by the deceased; and, most importantly, the accused was the aggressor, and was not acting in self-defence.

[36] In the case of *Rex v. Aaron Fanyana Dlamini* 1979 -1981 SLR 30 at 35 *Cohen ACJ* said the following:

“It is not every case where there has been provocation which entitles the resort to a severe form of violence to establish absence of intention ... the provocation must have been commensurate with the violence following on it.”

[37] Rooney J in the case of *Rex v. Nkambule Paulos* 1987-1995 (1) SLR 400 (HC) at 405F stated the following:

“It is a fact of life that people abuse and threaten each other in confrontation. The Homicide Act only applies to grave insults likely to deprive an ordinary person of his self-control. In any event, it is provided by section 2 (2) of the Act that section 2 shall not apply unless the Court is satisfied that the act which causes the death bears a reasonable relationship to the provocation.”

[38] With regard to self-defence, *Nathan CJ* in the case of *Rex v. John Ndlovu* 1970 -1976 SLR 389 (HC) at 390 stated the following:

“In the case of *S v. Ntuli* 1975 (1) SA 429 (A) which was followed by the recent case of *S v. Motleleni* 1976 (1) SA 403 (A), it was said that a person may apply such force as it reasonably necessary in the circumstances to protect himself against unlawful threatened or actual attack. The test whether the accused acts reasonably in defence is objective. But the force used must be commensurate with the danger apprehended; and, if excessive force is used, the plea or self-defence will not be upheld.”

[38.1] Clearly, the force used by the accused in the initial attack by the deceased was not commensurate with the attack; it was excessive.

[38.2] The accused was the aggressor when he hit the deceased with a stick and further stabbed him seven times. Self-defence is not applicable in the circumstances, and, it cannot avail the accused.

[39] Accordingly, I find the accused guilty of murder with extenuating circumstances. It is trite law that provocation constitutes extenuating circumstances. See the cases of *S v. Letsolo* 1970 (3) SA 476 (AD) at 476 and *Rex v. Mbuso Dlamini* Criminal Trial No. 420/07 High Court (unreported). The Crown also admits that the provocation could be accepted as an extenuating circumstance. The Crown concedes that the provocation and the age of the accused properly constitute extenuating circumstances in the present case.

[40] In mitigation of sentence, the defence argued that the accused was 23 years of age when he committed the offence; and, that he was still relatively young and immature; that the accused didn't run away from the area where the offence was committed but was arrested at home; and, that the accused has two minor children to support. The accused was arrested on the 13th January 2010 and was granted bail on the 30th July 2010.

[41] However, the Crown made submissions in aggravation of sentence. It was argued that the accused inflicted fatal and gruesome injuries upon the deceased which exposed internal organs; and that the accused inflicted seven

stab wounds on the deceased at a time when the deceased was lying on the ground weak and helpless after the first two stab wounds; that the vicious and cruel killing of the deceased was done in full view of many boys who were playing soccer with the accused; that the accused carried the knife in anticipation of an attack by the deceased.

[42] I have considered the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. I agree with the Crown that the personal circumstances of the accused in the present case do not outweigh the seriousness of the offence as well as the interests of society. The killing of the deceased was gruesome, vicious and totally reckless. This Court owes a duty to society to prevent a recurrence of such a similar offence by imposing appropriate deterrent sentences.

[43] Accordingly, the accused is sentenced to twenty years imprisonment; and, the six months spent in custody prior to the bail will be taken into account.

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

For Crown
For Defence

Attorney Sikhumbuzo Fakudze
Attorney Ncamiso Manana