



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 378/2012

In the matter between

**REX**

and

**KHANYISILE TERESA DLAMINI**

**Neutral citation:** *Rex v Khanyisile Teresa Dlamini* (378/12) [2013] SZHC 220 (7<sup>th</sup> October 2013)

**Coram:** Mamba J

**Heard:** 6 August, 2013

**Delivered:** 7 October, 2013

- [1] Criminal Law – Accused charged with forgery and uttering a forged instrument well knowing it to have been forged and theft.
- [2] The law of evidence – handwriting expert – prima facie establishing that signature of testator on Will and Last Testament a forgery.
- [3] Criminal Law and Procedure – Crown leading evidence that accused submitted alleged forged Will to office of the Master and on the strength thereof Master issuing Letters of Administration to her.
- [4] Criminal Law and Law of Evidence – Letters of Administration fraudulently obtained and used to access money at the bank – such evidence implicating the accused as defined in

section 174 (4) of Act 67 of 1938. Application for acquittal and discharge of accused refused.

- [1] The accused is charged with four counts. The first two allege that she is guilty of theft of money in the sum of E135,694.40 belonging to Calsile Dlamini who was at the material time under the curatorship of Sallie Abdulla. These two offences were allegedly committed between January and November 2002 at the Matsapha branch of First National Bank (hereinafter referred to as the bank).
- [2] On the third count the crown alleges that the accused is guilty of the crime of forgery. Here the allegation is that between 16 December 2001 and 5 February 2002 she unlawfully falsely and with intent thereby to defraud, forge the Last Will and Testament of the Late Vincent Ndosu Dlamini of Ludzeludze. The fourth count flows from the third in that it is alleged that the accused unlawfully and with intent to defraud, utter and put off the said forged Will to the office of the Master of the High Court, well knowing that it was forged. This is said to have occurred on 5 February 2002.
- [3] On being arraigned, the accused who is represented by Counsel herein, pleaded not guilty on all four counts. At the close of the crown case, the

accused applied that she be acquitted and discharged on these counts on the grounds, so it was submitted by her attorney, that there is no evidence implicating her with any of the crimes she faces. Reference was made in this regard to section 174(4) of the Act. That subsection provides that:

‘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.’

[4] In *R v Mpumelelo Mamba and 3 others, case 138/2009*, a ruling delivered on 2 December 2009, I stated the position thus:

‘These provisions have been the subject of many judicial decisions within this jurisdiction. Amongst these cases is *REX v DUNCAN MAGAGULA AND 10 other, Crim Case 43/96* (unreported) where DUNN J said

‘This section is similar to section 174 of the South African Criminal Procedure Act 51 of 1977. The test to be applied has been stated as being whether there is evidence on which a reasonable man acting carefully might convict.’

See also *REX v OBERT SITHEMBISO CHIKANE & Another Crim case 41/2000* where the court (Masuku J) emphasized the point that the court has a discretion, to be exercised judicially in deciding whether or not to grant the application for a discharge. (see also the

decision of this court in *Rex v Mario Masuku, Crim. Case 348/08*, delivered on 23<sup>rd</sup> September, 2009)’

I repeat these remarks herein.

[5] The material facts herein, which have not been challenged by the defence are these:

5.1 The accused was at the material time one of two wives of Vincent Ndosi Dlamini (hereinafter referred to as the deceased), who was the biological father of Calsile Dlamini.

5.2 In or about 1996, Calsile was involved in a motor vehicle accident. The deceased filed or lodged a claim for damages on her behalf with the Motor Vehicle Accident Fund and a sum of E300,500.00 was paid to her by the said fund. The total amount that was eventually paid over to the deceased by his attorneys was a sum of E281 380.00 (Exhibit A).

5.3 The sum of E281 380.00 was deposited by the deceased into his bank account with the bank. This money belonged to Calsile and the deceased intended or wanted to invest this money on certain income generating projects for the benefit of Calsile.

- 5.4 Upon the death of the deceased, PW1, Andreas Lukhele, a lawyer, and Sallie Abdullah were duly appointed the joint curators bonis of Calsile Dlamini.
- 5.5 The death of the deceased was duly reported to the office of the Master of the High Court, under estate file number EM63/2002.
- 5.6 On or about 5 February, 2002 the office of the Master of the High Court of Swaziland received what was purportedly the Last Will and Testament of the deceased. This purported Will was filed with the said office by the Accused. (Vide exhibit T1).
- 5.7 In clause six of the purported Will, the accused is appointed the executor of the Estate of the deceased.
- 5.8 On 21 May 2002 the office of the Master duly appointed and issued Letters of Administration to the accused.
- 5.9 On or about 25 May 2002 the accused, on the strength of the said letters, caused the bank to transfer the monies held by the deceased into her account and used these monies for her own benefit. These monies, the crown alleges, included money belonging to Calsile.
- 5.10 The crown has in my judgment, prima facie led the necessary evidence, through Lawrence Teboga Mashabela (PW9), the handwriting expert, that the signature appearing on exhibit T1, which

is the purported Will and Last Testament of the deceased as the signature of the deceased is not the signature of the deceased, (See Exhibit X and W). It is a forgery. So far, there is nothing to gainsay this.

[6] From the above summary of the evidence by the crown, it is clear that the case for the crown hinges on or is dependent on the alleged forgery of the Will. It was through that purported Will that the Master of the High Court issued the Letters of Administration to the Accused and it was on the strength of those Letters of Administration that the bank released the monies that were held by the deceased into the name of the accused. The crown argues therefore that but for the forged Will, the Letters of Administration would not have been issued to the accused and the bank would not have released the relevant money to her.

[7] I have said above that the crown has prima facie led evidence indicating that the Will, in question is a forgery. Whilst there is no conclusive evidence that it is the accused who forged it, there is evidence that it was submitted by her to the Master's Office. This is the essence or substance of count four; uttering a forged instrument or document well knowing it to have been

forged. Again, the required knowledge may be said to be lacking at this stage, but I do not think that this is an issue that should burden this court at this stage of the proceedings. The fact of the matter is that she was in possession of it and did use a document that on the available evidence, appears to have been forged. It was this document that facilitated her access to the monies that are the subject of counts one and two. This evidence implicates her in the commission of these four offences.

[8] For the foregoing reasons, the application for the acquittal and discharge of the accused in terms of section 174(4) of the Act is refused.

**MAMBA J**

**For the Crown : Mr. M. Nxumalo**

**For the Defence : Mr. S. Gumedze**