



**IN THE HIGH COURT OF SWAZILAND**

Criminal case No: 445/2011

In the matter between:

**REX**

**VS**

**SABELO KUNENE**

Neutral citation: *Rex vs Sabelo Kunene (445/2011) [2014] SZHC94*  
(23<sup>rd</sup> April 2014)

**Coram: M.C.B. MAPHALALA, J**

**Summary**

Criminal Law – Murder and Rape – the accused was indicted on counts of murder and Rape – held that the Crown had proved *mens rea* in the form of *dolus eventualis* in respect of the murder – held further that all the three essential requirements of Rape had been established by the Crown – accused accordingly convicted as charged.

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**JUDGMENT**  
**23 APRIL 2014**

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[1] The accused was indicted on two counts. In the first count of Murder, the Crown alleges that on the 12<sup>th</sup> May 2011 at Mpaka area in the Lubombo region, he unlawfully and intentionally killed Mgungu Harriet Maziya. He pleaded not guilty to the offence. On the second count of rape the Crown alleges that on the 12<sup>th</sup> May 2011 at Mpaka area in the Lubombo region, he unlawfully and intentionally had sexual intercourse with Mgungu Harriet Maziya without her consent. The Crown contends that the count of rape is accompanied by aggravating circumstances as envisaged by section 185 bis of the Criminal Procedure and Evidence Act 67 of 1938 on the basis that the accused stabbed the victim during the rape which led to her death. He pleaded not guilty to the rape charge.

[2] PW1 Xolile Tigezile Sibandze, a twelve year old girl, was admonished to speak the truth. She testified that the deceased was her grandmother, and, that on the 12<sup>th</sup> May 2011, she was sleeping in the same room with the deceased. She heard the deceased's bed moving, and, the deceased asked what she was doing. In reply she told her that she was sleeping. The door was not locked; she woke up and went to a neighbour's home to report that there was a person on the deceased's bed and who was killing her. However, the neighbour did not open the door presumably because it was at night. She went back to the house and heard that the deceased and her assailant were still fighting; then she went to the main homestead which was situated nearby and she was able to report the incident to PW2. Together they went to the deceased's home; when they were

next to the gate, they saw a person running away from the homestead but they could not identify him. At the deceased's house, they found her dead; her body was half-naked. The defence did not cross-examine PW1.

[3] PW2 Ncamsile Maziya is a relative to the deceased. Her grandmother is a sister to the deceased. She testified that on the 12<sup>th</sup> May 2011, PW1 arrived at her homestead at about 3am; she was with Lungile Tatatele Maziya and her children. PW1 informed her that the deceased was being attacked by an unknown person. She raised an alarm at a neighbouring Ginindza homestead; together with PW1, Lungile Tatatela Maziya and Ncamiso Ginindza they went to the deceased's homestead. They found the deceased lying half-naked and facing upwards and wearing only a red T-shirt on top. They phoned the police who promptly arrived at the scene and conducted their investigations.

[4] PW3 Sibongile Simangele Maziya is related to the deceased. She testified that on the 11<sup>th</sup> May 2011 at about 5pm, the accused arrived at her home; he found her with LaNdwandwe and her late brother drinking liquor. The accused wanted to buy alcohol on credit and she refused. However, Siphon Matse also came and bought alcohol for cash and she sold him the liquor. The accused started touching and caressing LaNdwandwe; she felt uncomfortable and decided to leave. Siphon Matse also decided to leave; however, PW3 was scared of the accused after what he had done to LaNdwandwe; she asked them

to stay behind with her until the accused had left the homestead. After the accused had left, laNdwandwe also left.

[5] On the next day she was informed of the death of the deceased by Siphiwe Maziya. They went to the deceased's homestead and passed the accused's home. They saw the accused and asked him to go with them to the deceased's home; his face had scratch-marks and bruises resembling those caused by fingernails. They told the accused to wash his face otherwise people would think that he was the person who had killed the deceased. The police came and arrested the accused. She identified the accused in Court and further told the Court that she was related to the accused.

[6] Under cross-examination PW3 told the Court that when the accused arrived at her homestead he was drunk, and, that he left between 10pm and 11pm. She further told the Court that Sipho Matse only left her homestead at about 2am. She reiterated her evidence that the accused touched and caressed LaNdwandwe, and, she further conceded that she never disclosed this incident to the police. PW3 further told the Court that she had asked the accused about the scratch-marks on his face but he never responded; she was in the company of Temhlanga and Zandi. She further denied that the accused had told them that he had fell and incurred the scratch-marks. The scratch-marks were on his cheeks and forehead. She added that she had even suggested to the accused to look himself in the mirror.

[7] PW4 Rose Lomazulu Maziya is a sister to the accused's mother, and, she stays with the accused and his mother. The deceased is her aunt. She testified that on the 12<sup>th</sup> May 2011 she arrived home at about 6pm and roasted meat; they ate the meat together with the accused. His mother had not yet returned from a neighbouring sheeben. The accused left and his mother arrived shortly thereafter; he returned after sometime when they had slept. Again he left for the second time and she heard the door closing. He disappeared for a long time and later came back. The accused was moving in and out of the homestead, and, he had told her not to lock the door from inside and that he would lock the door from outside.

[8] This witness decided to ask the accused where he was coming from, and, he said he was with his friend Orlando Sithole. She switched on the radio, and, she heard that the time was 4am on the next day. Two hours later at 6am, Sipiwe Maziya told her that the deceased had been raped the whole night. She went out of the house and saw police at the deceased's homestead. She woke up the accused's mother, and they went to the deceased's homestead. They left the accused sleeping in the house. When they arrived at the deceased's homestead, they saw a police van leaving the deceased's homestead and driving to her homestead. They saw the accused running away and the police chasing after him from behind. The police eventually caught him and locked him in the police van. Subsequently, they went to the Siteki Police Station to record statements.

[9] A few days after the incident, she found the accused's jacket hidden behind the door to the house; she was sweeping the house. The jacket had bloodstains, and, it was worn by the accused on the day of the incident but he removed it on the following day. He told his brother Magagajane Maziya about the jacket, and, he surrendered the jacket to the police. She was able to identify the jacket in Court during the trial, and, she further confirmed that the jacket belongs to the accused.

[10] Under cross-examination she denied that the jacket belonged to the accused's friend Orlando Sithole, and, she reiterated her evidence that the jacket belongs to the accused. She further reiterated her evidence that the accused was wearing the said jacket on the day the deceased died. PW4 reiterated her evidence that the accused was moving in and out of the house on the day in question and that he finally returned to sleep at 4am. The accused had told her that he was with Orlando Sithole. She conceded that when he was arrested by the police on the next day, he had changed clothing and was no longer wearing the purple jacket, which she had found with bloodstains and hidden behind the door.

[11] PW5 Sipho Matse testified that in the evening of the 11<sup>th</sup> March 2011, he visited the sheeben homestead of PW3 Sibongile Maziya. The accused arrived shortly thereafter and joined the drinking session. When the other people left, he remained behind with PW3. The accused was unsettled, moving in and out

of the homestead, and that he eventually departed at 1am. During the trial he identified the jacket as the one that was worn by the accused on the day of the commission of the offence. He maintained his evidence under cross-examination.

[12] PW6 Magagajane Maziya is the brother to PW4 and the accused's mother. He is a builder by profession; and, he testified that on the 11<sup>th</sup> May 2011, he was employed by Mpaka High School as a builder, and the accused was assisting him. After work they had liquor drinks at PW3's homestead from 4pm until 7pm; thereafter, they went to their homesteads.

[13] At about 3am on the next day PW6 was woken up by his sister in-law LaBhembe who informed him that the deceased had been killed. The police were called to the scene of crime; Zandi, Temhlanga and PW3 told the police that the accused had scratch-marks and bruises on his face caused by fingernails. The police went to the accused's home and, when he saw the police van coming, he came out of the house and ran away. However, the police ran after him and eventually caught him. Together with the other Crown witnesses, they recorded statements with the police. Subsequently, PW4 handed to him a jacket belonging to the accused which was bloodstained and found hidden behind the door. He told the Court that the accused was wearing the very same jacket on the 11<sup>th</sup> May 2011 when they went to work at

Mpaka High School. He was able to identify the jacket in Court during the trial. He maintained his evidence under cross-examination.

[14] PW7 Orlando Sithole was a friend to the accused. He testified that he last saw the accused on the 11<sup>th</sup> May 2011 when he came to PW3's home to drink liquor with his uncle Magagajane Maziya. The accused left with his uncle at about 7pm, and, that he was wearing a purple jacket similar to his own jacket. He denied that they exchanged clothing with the accused as friends. He identified the jacket in Court as belonging to the accused; he told the Court that the accused was always wearing the jacket for a long time.

[15] Under cross-examination PW7 denied that he was at one time evicted from his rented apartment for failing to pay rent or that he subsequently sought refuge at the homestead of the accused. He further denied that some of his clothes were with the accused or that they ever exchanged clothes with the accused. He also denied that the accused has ever slept in his apartment, and he reiterated his evidence that they usually met with the accused at the sheeben.

[16] PW6 Detective Constable Lungelo Ngwenya was at the time based at Siteki Police Station under the Scenes of Crime Unit. He testified that on the 12<sup>th</sup> May 2011, he received a message from the Police Desk Officer to attend the scene of crime at Mpaka behind the High School. On arrival at 0530 hours, he

found the scene of crime cordoned; there were police officers and community members in attendance.

[17] The deceased was in a one-roomed house made of bricks. She was lying dead on a bed facing upwards; her petticoat was pulled up to the waist half-naked. She was wearing a red sleeveless top with blood on her face. There was blood which was coming out from her mouth. A stab wound was visible next to her right eye. Her vaginal area was wet.

[18] They took her from the bed and placed her on the floor, and more blood came from the stab wound. He looked for evidence inside and outside the house including fingerprints; there was none. The body was placed in a body bag and taken to the mortuary.

[19] At 11 am of the same day, he was advised by the Desk Officer that the accused had been arrested. At the police station he noticed scratch-marks on the accused's face. He went to the mortuary and took the deceased's fingernails together with clothes which she was wearing; these items were sealed and packaged for forensic analysis.

[20] On the 17<sup>th</sup> May 2011 a post-mortem examination on the body of the deceased was conducted, and, the pathologist was asked to remove vaginal swabs, blood samples, and pubic hair; these items were sealed and packaged for forensic

examination in South Africa. Other items which were also sealed and packaged for forensic examination included the black petticoat, the red sleeveless top, the right hand fingernails, the left hand fingernails, uprooted pubic hair as well as combed pubic hair.

[21] He also took photographs of the scene. Firstly, two photographs of scratch-marks on the accused's face were admitted in evidence and marked Exhibits 1 and 2. Secondly, a photograph of the house was admitted in evidence and marked Exhibit 3. Thirdly, a photograph of the deceased as she was found on the bed half-naked with the petticoat pulled to the waist; she wore a red sleeveless top on her upper body and the photograph was admitted in evidence and marked Exhibit 4. Fourthly, a photograph of the deceased showing blood coming from the mouth was admitted in evidence and marked Exhibit 5. Fifthly, a photograph of the deceased with a stab wound next to the right eye was admitted in evidence and marked Exhibit 6. Sixthly, a photograph of the deceased with blood coming from the wound was admitted in evidence and marked Exhibit 7. Seventh, a photograph showing the deceased's vaginal area when found at the scene was admitted in evidence and marked Exhibit 8. Eighth, a photograph showing the deceased as she lay on the bed when found by the police was admitted in evidence and marked Exhibit 9. Tenth, a photograph showing the inside view of the house including the bed where PW1 was sleeping was admitted in evidence and marked Exhibit 10. The petticoat worn by the deceased was admitted in evidence and marked

Exhibit 11, and, the red sleeveless top was admitted in evidence and marked Exhibit 12.

[22] PW9 Detective Inspector Bheka Manyatsi was the Desk Officer in-charge of the Criminal Investigation Department (C.I.D.) at the Siteki Police Station. He was the investigator in the matter. He testified that on the 12<sup>th</sup> May 2011, he received a report of a murder case at Mpaka area in the Lubombo region. He proceeded to the scene of crime together with other police officers, including the police from the Scenes of Crime Unit. At the scene they found the body of the deceased in a house. They left the police from the Scenes of Crime Unit to work on the scene of crime, and, they continued with their investigation which led to the arrest of the accused.

[23] From the scene of crime they proceeded to the homestead of the accused which was not far from the scene. As they approached the accused's homestead, he came out and ran away from the police. The police chased after him shouting that he should stop but he continued running until they caught him. The time was about 6.30am on the 12<sup>th</sup> May 2011. They introduced themselves to him as police officers investigating a murder and rape case in which he was a suspect. They explained his rights to remain silent as well as cautioned him in accordance with the Judges Rules that he was not obliged to say anything but that whatever he would say would be used in evidence in Court during the trial. They proceeded to the Siteki Police Station where he was again cautioned in

terms of the Judges Rules; he elected to say something about the case, and, he was formally charged with the Murder and Rape of the deceased.

[24] The accused surrendered clothes which he allegedly was wearing on the day of the commission of the offence which was a red jacket, a trouser and a green T-shirt. His nails on both hands were cut, combed pubic hair taken, uprooted pubic hair taken and his blood samples taken; this was done at Good Shepherd Hospital. All items taken were sealed separately and packaged for forensic investigation. Subsequently, PW6 gave him a purple jacket which was found hidden at the accused's homestead; it was also sealed and packaged for forensic examination. It later transpired that the red jacket he was wearing during his arrest and which he handed to the police was not the one he was wearing during the commission of the offence. It is the purple jacket which he was wearing during the commission of the offence. PW9 handed the exhibits to Court as part of his evidence. The red jacket was admitted in evidence and marked Exhibit 13, the trouser marked Exhibit 14, the green T-shirt marked Exhibit 15 and the purple jacket Exhibit 16. He maintained his evidence under cross-examination.

[25] PW10 Captain Samuel Mashegoana is a South African police officer and attached to the Science Laboratory in Pretoria as a Senior Forensic Analyst since 2002. He testified that on the 9<sup>th</sup> September 2011, he received DNA samples pertaining to this matter including blood samples, semen, combed

pubic hair, uprooted pubic hair and sweat. He explained to the Court that no two people share the same DNA except identical twins. He made the following findings: firstly, the vaginal swabs taken from the deceased matched the DNA results of the accused's samples. Secondly, the DNA results obtained from the bloodstained purple jacket matched the DNA results of the deceased. The findings were outlined in an affidavit deposed by PW10 and sworn before a commissioner of oaths. The report was admitted in evidence and marked Exhibit 17. The other DNA results were inconclusive. He maintained his evidence under cross-examination.

[26] The post-mortem report was admitted in evidence by consent, and, it was marked exhibit 18. The cause of death was due to a stab wound to the face. The stab wound caused the right eye to be ruptured and blood vessels to the right eye were severed. There was also a contusion to the right thigh. The frontal bone and right ethmoid bone were fractured. Extra-dural and sub-dural haemorrhage were present in the right frontal lobe of the brain; in addition, there was intra-cerebral haemorrhage present in the brain. There was further bleeding in the right orbit. Lastly, petechial haemorrhage was present in the heart.

[27] When the Crown closed its case, the accused testified in his defence. He told the Court that he was arrested on the 12<sup>th</sup> May 2011 aged fifteen years. He went to school as far as Standard III and had to quit school for lack of funds. He did

piece jobs prior to his arrest building toilets and making cement bricks; he also assisted his uncle Magagajane Maziya who is a bricklayer.

[28] He denied knowledge of the offences for which he has been indicted. He told the Court that on the 11<sup>th</sup> May 2011, he was working with his uncle at Mpaka High School until 3pm when they went to PW3's homestead where they bought liquor to drink. He drank a small amount of liquor and they left for home at 4pm. At home he ate food prepared by PW4; thereafter, he went back to PW3's homestead where he drank liquor till about 10pm when he went home to sleep. According to his evidence, he was not too drunk. This evidence is in contrast to the evidence of PW4 who told the Court that the accused was moving in and out of the homestead, and that he had told her not to lock the house. PW4 further told the Court that on his last departure, he only came back at about 4am on the next day. The accused told the Court that the police came in the morning and asked the cause of his scratch-marks on the face, and he told them that he had fallen over shrubs at night on his way from PW3's homestead. The police disputed this contention and said he was lying.

[29] The accused further told the Court that he exchanged clothing with his friend PW7 Orlando Sithole. This was vehemently denied by PW7; he further denied the accused's contention that they stayed together sometime after he had been evicted from his apartment for failing to pay rental. It was the evidence of the accused that the purple jacket which was bloodstained belongs to PW7.

However, this evidence contradicts the evidence of PW4 and PW6 that the purple jacket belongs to the accused and that he was wearing the same jacket on the 11<sup>th</sup> May 2011. PW4 further told the Court that after the accused's arrest, she found the purple jacket bloodstained and hidden behind the door. PW5 Siphon Matse also testified that the purple jacket belongs to the accused and that he was wearing it on the 11<sup>th</sup> May 2011 when they were drinking liquor at the homestead of PW3; he further identified the jacket in Court as did PW4 and PW6. Similarly, PW7 Orlando Sithole told the Court that the purple jacket belonged to the accused. The evidence by PW4, PW5, PW6 and PW7 corroborate the evidence of PW10 Captain Samuel Mashegoane that the purple jacket belongs to the accused. The findings of PW10 were that the vaginal swabs taken from the deceased matches the DNA results of the accused's samples. PW10 further found that the samples taken from the bloodstained purple jacket matched the DNA results of the deceased.

[30] The accused further contradicted his earlier evidence that the purple jacket belongs to PW7 and later conceded that he wore the purple jacket during the week, and that on the 11<sup>th</sup> May 2011, he was wearing the red jacket and that he had left the purple jacket at home but and knows nothing about the bloodstains found in the jacket.

[31] There is evidence of PW4 that the accused was moving in and out of the homestead on the 11<sup>th</sup> May 2011, and, that he returned home at about 4am on

the next day. It is common cause that the deceased was raped and stabbed to death in the early hours of the 12<sup>th</sup> May 2011. There is the evidence of PW10 that the vaginal swabs taken from the deceased contained the accused's semen; the only inference to be drawn is that the accused had sexual intercourse with the deceased and later stabbed her to death. The accused's jacket also contained the deceased's blood.

[32] Under cross-examination he told the Court that on the 11<sup>th</sup> May 2011, he was at home from 10pm until the next morning; however, this evidence is disputed by the evidence of PW4 as outlined in the preceding paragraphs that the accused only returned home at 4am on the next day, and that he told her that he was with PW7 Orlando Sithole. It is the evidence of PW7 that the accused left the homestead of PW3 with his uncle at 7pm of the 11<sup>th</sup> May 2011; and, that he was wearing the purple jacket. Clearly, the accused was not with PW7 during the night.

[33] It is the evidence of PW4 and PW9 that the accused ran away when he saw the police arriving at his homestead. They chased him telling him to stop but he ran away until they caught him. This evidence was never disputed by the defence. The conduct of the accused in running away from the police also corroborates the other Crown's evidence that the accused committed the offence for which he has been indicted.

[34] The accused further told this Court that his biological mother Mavis Maziya saw him when he returned home at 10pm. His mother testified on his defence and told the Court that the accused returned home at about 11pm but she could not deny whether he left again because she was drunk. She further told the Court that PW7 had stayed with them in their one-roomed house for a month; however, this evidence was denied by PW7 and certainly not corroborated by PW4. She further testified that the accused and PW7 exchanged clothing including the purple jacket; however, it is the evidence of PW7 that both of them had purple jackets, and, that the one which was bloodstained belongs to the accused. This piece of evidence was not disputed by the defence. More importantly, the evidence of PW10 put it beyond doubt that semen was found in the vaginal swabs taken from the deceased, and, that the purple jacket contained the deceased's blood.

[35] Under cross-examination she conceded that since she was drunk she could not deny that the accused left home after 11pm. She further conceded that she doesn't recall which jacket the accused was wearing on the 11<sup>th</sup> May 2011. She also conceded that the accused's age might be twenty seven as suggested by the police, and she further denied knowledge of his age. The accused had told the Court that he was fifteen years when the offence was committed and the Crown had disputed such evidence.

[36] It is apparent from the above evidence that the Crown has proved the commission of both offences as charged beyond reasonable doubt. The accused set out to sexually assault the deceased but when she resisted, he stabbed her to death. The scratch-marks on his face bear evidence of the resistance.

[37] In the case of *Mandla Mlondolozu Mendlula* Criminal Appeal No. 12/2013 at para 28, I quoted with approval my earlier judgment in the case of *William Mceli Shongwe v. Rex* Criminal Appeal No. 24/2011 at para 46 where I stressed the law as follows:

**“46. In determining *mens rea* in the form of intention, the court should have regard to the lethal weapon used, the extent of the injuries sustained as well as the part of the body where the injuries were inflicted. If the injuries are severe such that the deceased could not have been expected to survive the attack, and the injuries were inflicted on a delicate part of the body using a dangerous lethal weapon, the only reasonable inference to be drawn is that he intended to kill the deceased.”**

See also the cases of *Ntokozo Adams v. Rex* Criminal Appeal No. 16/2010 and *Xolani Zinhle Nyandeni v. Rex* Criminal Appeal No. 29/2008.

[38] Similarly, in the case of *Mandlenkhosi Dlamini* Criminal Appeal No. 30/2011, I quoted with approval the case of *Thandi Sihlongonyane v. Rex* Criminal Appeal No. 40/1997 at pages 4 and 5 of the judgment where *Tebbutt JA* summarised the essential requirements of *dolus eventualis* as follows:

**“They are: 1. Subjective foresight of the possibility, however, remote, of the accused’s unlawful conduct causing death to another. 2. Persistence in such conduct, despite such foresight. 3. The conscious taking of the risk of resultant death, not caring whether it ensues or not. 4. The absence of actual intent to kill.**

**In the case of *dolus eventualis* it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e. if it can be said from all the circumstances that the accused must have known that his conduct could cause death, it can be inferred that he actually foresaw it.... The issue of *dolus eventualis* is whether the accused himself or herself foresaw the consequences of his or her act... ”**

[39] It is trite law that in rape cases the Crown must prove beyond reasonable doubt the identity of the accused, the fact of the sexual intercourse and the lack of consent by the complainant. See the case of *Zimele Samson Magagula v. Rex* Criminal Appeal No. 31/2011 at para 10. In the present matter the Crown has proved all these elements beyond reasonable doubt. The accused’s semen found in the vaginal swabs of the deceased points to the identity of the accused as well as the fact of sexual intercourse. The resistance by the deceased demonstrated by the scratch-marks on the accused as well as the stabbing of the deceased points to the lack of consent by the deceased to the sexual intercourse.

[40] Accordingly, I found the accused guilty on both counts of murder and rape as charged.

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

For Crown  
For Defence

Crown Counsel Elsie Matsebula  
Attorney Ben Simelane