



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Criminal Case No: 140/09

In the matter between:

REX

and

**NHLANYELO A. MAMBA
AMOS KHOBELA HLANZE
ALMON DOVADOVA MAPHALALA**

**1ST ACCUSED
2ND ACCUSED
3RD ACCUSED**

Neutral Citation : Rex v Nhanyelo A. Mamba; Amos K. Hlanze; Almon D. Maphalala (140/09) [2016] SZHC 244 (15 DECEMBER 2016)

Coram : MABUZA -J

Heard : 21/10/2014; 16/9/2015; 27/6/2016; 2/8/2016

Delivered : 15 DECEMBER 2016

SUMMARY

**Criminal Law: Accused charged with murder – Intention not proved
Accused acquitted of Murder and convicted of
Culpable Homicide.**

JUDGMENT

MABUZA –J

- [1] The Accused are charged with the crime of murder in that upon or about the 22nd April 2008 and at or near Madvubeni area in the region of Lubombo, the said accused persons acting in furtherance of a common purpose did unlawfully and intentionally kill Mfanimpela Sigayoyo Magongo by beating him with sticks and stones all over the body and did thereby commit the crime of murder.
- [2] When the charge was put to the accused they all pleaded not guilty. The accused were initially represented by Attorney T.M. Mlangeni and later on by attorney Ndlangamandla. Mr. Mlangeni confirmed the accuseds' pleas as being consistent with his instructions.
- [3] The Crown led eight (8) witnesses and the defence the three accused.

- [4] Mandla Elijah Hlanze (PW1) testified that during the material day he went to the local shop which had been broken into. An alarm had been raised earlier. When he arrived at the shop he found a lot of people gathered there and the deceased was being assaulted by the three accused on his buttocks with medium sized sticks. He knew the three accused as they all lived in the same area. He learned that this was not the suspect but was being beaten up because he had beaten up a woman. PW1 advised them to stop beating up the deceased and they stopped.
- [5] During the assault Accused 2 held the deceased down by his feet, Accused 3 held him down by the shoulders and Accused 1 administered the beating. They held him down because he was struggling.
- [6] When he was cross-examined PW1 revealed that the sticks were ½ cms. in radius. He stated that Accused 1 beat the deceased on his buttocks. He stated that he did not see any beating on the head. After the beating had stopped the deceased got up and left rubbing his buttocks.

[7] Mfanyana Alpheus Dlamini (PW2) also knew the accused as they lived in the same area. PW2 stated that he knew the deceased who had spent the night of the 21/4/2008 at his (PW2) home. He sent the deceased to the shop the following day to buy some sugar and he was not injured when he left for the shop.

[8] He stated that Sibusiso Mkhaliphi brought the sugar and informed him that the deceased was being held by the community police and the chief's runner. After a while Johannes Sikhondze arrived and confirmed what Mkhaliphi had informed PW2.

[9] After a while at about 8.00 a.m. the deceased came home walking very slowly and painfully. He told PW2 that he had been beaten by the community police and that his whole body was painful because of the beating. He further told PW2 that his head was painful because he had been made to carry a stone. PW2 says that he noticed that the deceased's body was swollen from the beating.

[10] He invited the deceased to spend the night which he did. The following morning PW2 and the deceased proceeded to the deceased's home in order to

report the assault. He left the deceased and returned to his own home. The following day the deceased returned to the home of PW2 and prepared to go to the hospital. The bus left him because he could not hasten his pace due to the pain. The deceased was with Sikhondze. They returned to the deceased's home where they spent the night. The deceased tried to board the bus the following day but to no avail.

[11] The deceased again spent the night at the home of PW2. On the following day the deceased could no longer eat and talk. PW2 went to report the state of the deceased at the chiefs kraal where he was advised to take him to his home. He put the deceased on a wheelbarrow and took him to his parental home. He never saw him again.

[12] When he was cross-examined he stated that the people in his home area had no cars to take the deceased to the hospital. Hence the deceased wanting to use public transport. Mr. Mlangeni introduced the issue that had PW2 treated the injuries to the deceased as a matter of urgency and tried to get him to a hospital timeously he would have received medical treatment and would not have died. For example he could have called the police and requested urgent assistance.

[13] Mr. Mlangeni suggested to PW2 that he was either irresponsible or the deceased's injuries did not warrant urgent attention. PW2 responded that he used the deceased's cellphone to call the police and the deceased's sister who arrived the very evening he had taken the deceased home in a wheelbarrow.

[14] It was put to PW2 that one Samkeliso Mzwandile Nyandeni had fabricated the charges against the accused. PW2 responded that this was not true as the origin of the charges was the shop that was broken into.

[15] Dr. Komma Reddy (PW3) testified that the cause of death was due to an injury to the head. PW3 conducted the post mortem on the deceased. He compiled his findings into a report which he handed into Court as Exhibit A. He referred the Court to page 2 item 20 where he recorded that the deceased had a contusion of 12 x 7 cms, ante mortem in nature present on the left side of the head.

[16] He explained that this meant that the deceased had a swelling inside the skin in that the skull left temporal was fractured. He elaborated at item 21 that there was bleeding inside the right side of the brain. That the brain had

different lobes and when he died the left lobe had pus. That there was no visible injury outside but on the inside.

[17] He stated that the injury was caused by a blunt object. That death was due to injury on the head for example, a knobkerrie or a hard surface because the injury was inside the head instead of outside the head. That there were no other appreciable injuries to the body.

[18] He stated that the history of the deceased was that he was assaulted and was in hospital during the lapse of twenty (20) days. As he was in hospital any injuries would have been healed and would not have been seen during the post mortem examination.

[19] He was asked by Mr. Mlangeni during cross-examination that given the seriousness of the head injury, was it probable for a person who had these injuries to survive for twenty (20) days then die. His response was that it was probable. Asked what sustained the person, he responded that perhaps because they were treating him bluntly yet he was bleeding slowly internally. He said that his head should have been scanned in order to ascertain how much he was injured. That he should have been treated by a neuro-surgeon.

[20] He was asked if he would rule out the possibility of intervention eventually leading to death between assault and death. His response was no, because on examination there was no other injury except the one he had described.

[21] He was asked if he could rule out that the deceased could have been assaulted after the initial assault and he replied no.

[22] He was referred to the findings on Exhibit B, which is a medical report compiled at Sithobelweni Health Centre where the deceased was first taken on the 12th May 2008 which was admitted by consent. He was asked by defence counsel that Exhibit B stated that the deceased's clothes were blood stained and soiled on admission. PW3 responded that he could not comment.

[23] Asked by the Court if the doctor who had examined him at Sithobela Health Centre would have noticed the contusion. He replied that he would not have done so because of the slow oozing. Asked what would a blunt object include? He responded that it would include hitting the head on the ground.

[24] He was asked by Mr. Mlangeni if a person who had sustained a head injury as such, would it not show in 5 days? His response was that even in more days. Asked whether they would have a head ache, he replied, yes as well as blurry vision and would walk slowly as well as hearing loss.

[25] On the 1st June 2015, Miss Ndlangamandla took over as defence counsel for the accused.

[26] Mfanimpela Dlamini (PW4) testified that he too joined the search party for the suspect who had broken into the local shop. Having failed to find the suspect they returned to the shop. The deceased arrived and Accused 2 suggested that he call him. They asked him why he had assaulted the old woman but he denied the accusation. He stated that they made the deceased pick up a stone. He tried to pick it up but it was too heavy and he dropped it.

[27] They said that he was insubordinate and they converged on him and Accused 3 pushed him on to the ground and held his head down. Accused 1 held his feet down while Accused 2 assaulted him with a big stick.

[28] Accused 1, 2 and 3 only let go of the deceased when PW1 arrived and told them to let him go. The deceased then left. PW4 did a dock identification of all three accused.

[29] He was cross-examined by Miss Ndlangamandla. He stated that the stick was about 1½ cms thick and the deceased was assaulted on his buttocks. And that after he was assaulted he got up and left.

[30] It was put to him that a certain Samkeliso Mzwandile Nyandeni who had been arrested by the accused persons for rape was behind the plot to arrest the accused for the present crime because he was revenging for his arrest for rape.

[31] Even though PW4 confirmed knowing Nyandeni he was not aware of his arrest for a rape and did not know that he was hitting back at the Accused for having arrested him.

[32] It was put to him that the deceased was never made to carry a stone and that PW1 had not mentioned such. PW4 stated that PW1 had not yet arrived when PW4 was made to pick up a stone, he arrived when the deceased was being assaulted.

[33] PW4 was asked by the Court whether or not the deceased carried the stone on his head and his response was that the deceased did not carry the stone on his head.

[34] An application was made by the Crown to hand in the medical report pertaining to the deceased that was compiled at Sithobelweni Health Centre. The defence had no objection and it was filed as Exhibit B.

[35] John Sikhondze (PW5) testified that he had also joined the search party for the suspect who had broken into the local shop on a Tuesday. After an unsuccessful search PW5 returned to the shop where he found the deceased. Accused 3 asked the deceased why he had assaulted an elderly person. PW5 left while the deceased was being questioned. However, he later returned and found that the deceased was being assaulted. Accused 3 had his foot pressing on the back of his neck and the deceased lay face down on his stomach. Accused 1 and 2 were beating him on his buttocks. PW1 ordered them to stop assaulting the deceased.

[36] Thereafter PW5 left with the deceased who was staggering and almost fell but PW5 held him up and helped him until they arrived at the home of Mfanyana Dlamini (PW2) where he left the deceased.

[37] On the Thursday following the Tuesday of the shop break in PW5 walked with the deceased to the bus station in order to take him to Sithobela Health Centre. The deceased failed to board the bus because he could not get off the ground and the bus left without him. PW5 took the deceased back to PW4's home.

[38] On Friday a call was received from the deceased's relatives to take him back home. The deceased was loaded on a wheel barrow by the nephews of PW5 and taken to his home. PW5 says that from the time that the deceased was assaulted by the Accused nobody else assaulted him. The deceased became ill after he was assaulted even though he did not have any visible wounds. He further stated that as far as he knew the deceased was never assaulted prior to being assaulted by the Accused.

[39] When PW5 was cross-examined he revealed that when the deceased failed to get off the ground in order to board the bus, PW5 asked the bus conductors to

help him carry the deceased on to the bus because he was ill. They refused to help saying that the bus was already late and they left.

[40] PW5 was not aware that the deceased died a month later after the assault. He stated that he was not aware that Accused 2 had met the deceased at one of the drinking spots after the assault.

[41] Makhosazane Grace Magongo (PW6) a sister to the deceased testified that during May 2008 she received a call from her mother's relatives informing her that the deceased had developed mental problems caused by an assault. She advised them to take him to hospital. They later phoned to tell her that he was critical. She left for home with her elder sister. When they arrived they found the deceased unable to speak.

[42] PW6 says that when she gave him a bath blood oozed out of his mouth. The blood stank. His shoulders were black with stagnant blood. She called the police. The police took him to Sithobela Health Centre. From there he was transferred to the Raleigh Fitkin Memorial Hospital in Manzini. He died the following day.

[43] From her cross-examination it was established that PW6 was called on the 10th May 2008 and left for home on the 12th May 2008. She also revealed that the injuries that she saw on the deceased were on his shoulders and chest and his neck was loose and there were no injuries on his buttocks.

[44] It was put to PW6 that the Accused did not inflict any injuries on the shoulders or the chest they merely beat him on the buttocks but she maintained her stance.

[45] 4158 Sergeant Sandile Simelane (PW7) testified that on the 11th May 2008 at about 4.00 p.m. he received a message through the police emergency line 999 that an assault with the intention to do grievous bodily harm had been received from Majubani area. He proceeded there and found two women, Makhosazane (PW6) and Busisiwe Magongo. They were pushing a wheelbarrow which had the deceased in it. They requested him to take the deceased to the hospital. That he had been assaulted by the community police some two weeks back.

[46] PW7 testified that he noticed that the deceased's skipper was covered in blood and that he was no longer talking and that he coughed blood. He took the

deceased to Sithobelweni Health Centre, where he handed him over to a doctor. On the following day PW7 returned to the Health Centre in order to record a statement from the deceased who was critical and could not talk.

[47] PW7 returned to the deceased home where he discovered that the deceased had been assaulted by the community police. Upon reaching the police post, he compiled a report opened a docket which he handed over to the Criminal Investigating Department officers for further action.

[48] PW7 was cross-examined but nothing much turns on his cross-examination because he did not investigate the matter.

[49] 5543 Constable Thandiwe Mokoena (PW8) testified that on the 11th October 2008, she was on duty at Lubuli police station working as an occurrence bookkeeper. She stated that 3447 Detective Sergeant Robert Dlamini arrived with the three Accused persons. He requested PW8 to be a witness while he cautioned the Accused in terms of the judges rules. But before that he introduced himself as the investigator in their case of the murder of the deceased. After 3447 had concluded his business with the accused, PW8

signed Form 218 as a witness. After the evidence of PW8 the Crown closed its case.

[50] The defence opened its case with the testimony of Nhlanyelo Albert Mamba (DW1). He testified that on the 22nd April 2008 a local shop was broken into and an alarm was raised. He together with other people went out to look for the suspect and on their return they found the deceased at the shop. During this time he was the Chief's runner.

[51] Wanting to scare the deceased he says that they chopped a branch from a tree and used it to beat the deceased on his buttocks. They beat him up because he had assaulted an old lady with a stone near his home. DW1 says that he did not assault the deceased. He held him down by his shoulders as he lay down on his stomach in order to prevent him from searching and covering his buttocks. The deceased was given five (5) strokes and thereafter released to go home. He says that he did not instruct the deceased to carry any stone on his head or shoulders. And that the size of the stick used was about the size of the first finger, it was 1½ cms. round and one metre long. The deceased was fine when they released him.

[52] During cross-examination it was put to him that PW1 and PW2 had testified that he assaulted the deceased. He denied this but had no reason to give why the two witnesses would lie about him.

[53] Amos Khobela Hlanze (DW2) testified that at the material time he was a community policeman. He went to the local shop which had been broken into. They tried to track the suspect by following a footprint but failed to locate the suspect. However, they managed to find a woman who had been assaulted by the deceased. After examining her they returned to the shop where they found the deceased.

[54] DW2 asked the deceased why he had assaulted the woman, and the deceased denied that he had assaulted anyone. DW1 chopped off a branch from a tree. DW2 instructed the deceased to lie down on the ground and he assaulted him on the buttocks. He did not make the deceased to carry any stones on the head or shoulders. He stated that the condition of the deceased was fine after the assault except that he was drunk. He says he saw the deceased again after the assault and that he was fine.

[55] When he was cross-examined he stated that the assault on the deceased was meant to frighten him for assaulting an old woman. DW2 never thought that it would go this far. That they did not beat the deceased to the extent of him being injured badly they were just disciplining him.

[56] Almon Dovadova Maphalala (DW3) testified that during the material time he was a community police man. There was a break-in at the local shop and they proceeded there. They followed some footsteps but failed to find the suspect. They abandoned the search and went to the home of an old lady who had been assaulted by the deceased. He used a brick and struck her leg. They returned to the shop where they found the deceased and questioned him about the assault.

[57] DW1 ordered him to lie down got a stick and started beating him. Deceased covered his buttocks with his hands but DW3 held them away from the buttocks. After the assault and a warning to stop assaulting old people, the deceased arose and walked away. He had no visible injuries nor any blood on him. DW3 says that he did not make the deceased to carry a stone on his head or shoulders.

[58] During cross-examination Mr. Dlamini suggested to DW3 that during the assault of the deceased DW3 was wearing boots called Fram which have iron fittings in front with which he kicked the deceased. DW1 denied this and stated that he did not own such boots.

[59] It was further put to DW3 that PW1 said that DW3 was the one who was pressing the deceased by the head and pressing him down. While PW2 said that it was by the neck. That Johan Sikhondze told the Court that DW3 was stepping on the deceased on the neck and back. He denied this. After DW3 had concluded his evidence the defence closed its case.

[60] Essential among the elements of murder that the Crown has to prove is the unlawful and intentional killing of a human being. The Crown has proved that the deceased was unlawfully killed. PW3 testified that the deceased's cause of death was due to an injury to the head. And that the external injury was not visible because the deceased had a swelling inside the skin as the left temporal was fractured. He stated that the injury was caused by a blunt object such as a knobkerrie or a hard surface such as the banging of the head on the ground. PW3 corroborates the evidence on Exhibit B compiled by Dr. Bary

which stated that the deceased had multiple head and neck injuries inflicted by severe blunt trauma.

[61] There is evidence that the Accused persons held the deceased to the ground while they assaulted him on the buttocks. They held him down by holding his head onto the ground because he was struggling. There is evidence that one of the Accused had his booted foot on his neck and pressed him down. In short the evidence is that he was injured on the head while two of the Accused held him down and a third one beat him with a stick on his buttocks.

[62] There was a suggestion by the Accused's counsel that there may have been an intervening cause such as a later assault meted out on the deceased but PW5 a Crown witness testified that there was no such assault. PW4 testified that the deceased never recovered from the injuries meted out on him by the accused persons. The deceased is said to have fallen ill from the date of the assault and never recovered until he died.

[63] Counsel for the defence further suggested to PW4 that there was negligence on his part for not taking the deceased to the hospital in time. Had he done so the deceased would have been alive today. My understanding of our law is

that it is not really material as to what happens after the infliction of a deadly injury, the assailant must shoulder the blame, in this instance the accused persons. See the following cases:

“**Rex v Mfanimphela Malindzisa** (21/2010) [2015] SZHC 155 (24 September 2015) at page 8 paragraph [14] page 9 paragraph [14].

The King v Nomsa Ntombencane Mhlaba Case No. (116/09) [2011] SZHC 127 (15 June 2011) paragraph [21] – paragraph [24].

[64] The deceased advised PW2 that the Accused persons had made him carry a heavy stone on his head. PW4 testified that he found the accused persons forcing the deceased to carry a heavy stone. He did not tell the Court whether the deceased was made to carry the stone on his head or not. Furthermore there is no evidence that the stone hit the deceased on the side of his head.

[65] The conclusion on the unlawful killing of the deceased is that the accused were responsible for the injuries that led to his death.

[66] Having established that the Crown has proved the unlawfulness of the death of the deceased, I turn now to consider whether or not the Crown has proved intention on the part of the accused persons.

[67] The injury that killed the deceased was inflicted on him during the assault by the accused persons on the deceased from which he died. The deceased's injury was not visible to the naked eye. I am satisfied that the Crown has proved that the accused persons acted in common purpose when all three involved themselves in the assault of the deceased.

[68] I am persuaded by the dicta of Masuku J in the case of **R v Matimba and Another** 2000 SZHC 64 (22 May 2000) in which he cites the following passage from **S v Mattioda** 1973 (1) PH 24 (N):

“The proper approach in a criminal case is to consider the totality of the evidence, that is to say, to examine the nature of the state case, the nature of the defence case, the probabilities emerging from the case as a whole; the credibility of all the witnesses in the case, including the defence witnesses, and then to ask oneself, at the end of this, whether the guilt of the accused has been established beyond a reasonable doubt. It is not a proper approach to hold that, because a court finds that the state witnesses have given evidence in a satisfactory manner, the defence evidence must be rejected as false.”

[69] However, I am not satisfied that the Crown has proved any intention to kill the deceased. In their own evidence they were disciplining the deceased for having assaulted Tayi Vilakati. In doing so they say that they got hold of him held him down and one of them administered corporal punishment on the

buttocks. It is clear to me that the invisible fatal injury was inflicted during this time but the accused persons were unaware of this invisible injury which they had inadvertently inflicted.

[70] In the circumstances I acquit the accused of the crime of murder and find them guilty of the crime of culpable homicide.

SENTENCE

[71] The Crown informs me that the Accused persons are first offenders.

Re: Accused 1

[72] He is 54 years old. He is married. Has no children. He is unemployed. He is a subsistence farmer. He is a chief's runner (umgijimi).

Re: Accused 2

[73] He is 63 years old. He is married. He has 9 children of which three are minors and dependent on him.

Re: Accused 3

[74] He 51 years old. He has 9 children of which 2 are minors and dependant on him.

[75] At the material time all accused persons were community policemen. All are illiterate.

[76] In passing sentence I have taken into account the above factors. I have also taken into account that the Accused persons are all senior members of the community and that they have had clean records all their lives.

[77] I agree with their learned Counsel Miss Ndlangamandla that the death of the deceased was a most unfortunate incident.

[78] I also take into account that they attended Court religiously each time the matter was called.

[79] However, I agree with Mr. Dlamini learned Counsel for the Crown that community policemen have been cautioned all the time to refrain from taking

the law into their hands. The caution is to prevent such incidents such as the death of the deceased.

[80] I take into account that it is their illiteracy that made them not to appreciate the gravity of taking the law into their hands.

[81] I have also taken into account circumstances surrounding the occurrence of the crime.

[82] While listening to the evidence unfold during the trial I got the sense that the accused persons were lying about the head injury inflicted on the deceased and that they were protecting one another.

[83] I take a dim view of this attitude in view of the untimely demise of the deceased.

[84] The Accused did not show any remorse about the deceased death during the trial. They opined that because he was a known drunkard, he could have been injured during a fight on one of his excursions.

[85] They had no right or power to discipline the deceased. In fact they took the law into their own hands which was unlawful. They should have taken the deceased to the police station. Besides Tayi Vilakati had not laid a charge of assault against the deceased to them or the police. The Accused came by this information by the way during their search for the suspect who had broken into the local shop.

[86] The Accuseds' act of assaulting the deceased is worse looked at from the perspective that among them were community police. They abused their power and should be suitably chastised for this.

[87] I have also taken into account the interests of society. Society expects the courts to mete out sentences that are fitting in order to warn would be offenders to desist from crime.

[88] I have considered the sentence carefully and sentence each of the accused persons to seven (7) years imprisonment without an option of a fine, two years of which are hereby suspended for one year on condition the Accused are not convicted of an offence of which assault is an element during the period of suspension.

[89] The accused were arrested in respect of this offence on the 4th October 2008 and released on bail on the 25th November 2008. This period is to be deducted from each of their sentences.

MABUZA J
JUDGE OF THE HIGH COURT

For the Crown : Mr. S. Dlamini
For the accused persons : Mr. N. Ndlangamandla