



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO.419/2010

HELD AT MBABANE

In the matter between:

REX

Versus

NKOSINGIPHILE SAMUEL NKONKA MASEKO

Neutral Citation: *Rex vs Nkosingiphile Samuel Nkonka Maseko [419/2010]*
SZHC 225 [2018] (11 December 2018)

Coram: M. LANGWENYA

Heard: 3, 4 December 2018

Delivered: 11 December 2018

Summary: *Criminal law-accused charged with murder-pleads guilty-pleads provocation-requisites of provocation discussed-accused convicted of murder with extenuating circumstances in*

*light of
imprisonment.*

provocation-accused sentenced to twenty years

JUDGMENT

- [1] The accused is charged with murder, it being alleged by the Crown that on 1 March 2010, at eNdlembeni area in the Manzini region, the accused unlawfully and intentionally killed Takangwane Mabuza. The accused pleaded guilty to the offence charged.
- [2] The Crown led the evidence of four witnesses to prove its case. The accused was the only witness for the defence.
- [3] This case is a text book example of a family feud that escalated resulting in the death of the deceased. At eNdlembeni area in eVusweni there is a family of Lozingwe Maseko. Lozingwe Maseko had five wives excluding women he sired children with and whom he never married. The first wife was LaMabuza, the second wife was LaGamedze, the third wife was LaMasilela, the fourth wife was LaMamba and the fifth wife was LaNhlabatsi.
- [4] The crime which is the subject of this matter involves the alleged murder of LaMabuza (the deceased) by the accused.

[5] PW1 Musa Richard Maseko is a son of the deceased and an older brother of the accused. PW1 and the accused's father is Lozingwe Maseko who is now deceased. The accused's mother is Emmelinah Zwane and is not married to Lozingwe Maseko. La Mabuza, La Gamedze and La Masilela are now deceased.

[6] La Gamedze did not have biological children of her own. The accused and his sister were fetched from Bhunya and three cattle were paid to Emmelinah Zwane's marital home in order to have the accused and his sister relocate and live with Lozingwe Maseko and La Gamedze at eNdlembeni. For all intents and purposes, the accused considered La Gamedze to be his mother since he lived with her from the time he was about seven years old and in primary school.

[7] The first wife is said to have left eNdlembeni when her husband married La Gamedze. La Mabuza relocated to Sidvashini, in Mbabane where she lived with PW1 and his siblings. It was on the death of both La Gamedze and her husband that La Mabuza returned to eNdlembeni. She first lived in the homestead that was used by La Gamedze and the accused and only moved out when she had finished building her home below that of La Gamedze in 2010. The accused remained at La Gamedze's household when PW1 and the deceased moved to their new home.

[8] The relationship between the accused, PW1 and the deceased was acrimonious when La Mabuza relocated to Vusweni, eNdlombeni and took over La Gamedze's household. The acrimony deepened when, at the instruction of the deceased PW1 took all the property that belonged to Lozingwe Maseko from La Gamedze's household and placed it at La Mabuza's household. PW1 told the Court that he took the property from La Gamedze and La Masilela's households on the strength of a directive from the Master of the High Court. The Master of the High Court, so the evidence goes called a next of kin meeting where La Mabuza and La Masilela were appointed as executors. The next of kin meeting was attended by all concerned including the accused and PW1-so the evidence goes. Cattle, motor vehicles and other property was subsequently taken from La Gamedze's home and from La Masilela's home to La Mabuza's home- much to the consternation of the accused. The property was never distributed by the Master of the High Court. The Master is said to have stated that the property would be distributed once Lozingwe Maseko's gratuity was paid out. The gratuity was, however never paid out. The straw that broke the camel's back was when a grinding machine (Bethany) was removed from La Gamedze's household while the accused was away at work at Palfridge.

[9] PW1 and the accused also had a conflict over the family fields. At some point the conflict over the fields was reported by PW1 to the Vusweni Royal kraal. PW1 ploughed the family fields and the accused planted in the fields that had been ploughed by PW1 without the latter's knowledge and consent. The ruling of the royal kraal was that both the warring factions should remain at their designated households. That if either party wanted to go to either household,

they should do so in the presence of a member of the community police. The ruling by the royal kraal was issued before the grinding machine (Bethany) was taken from La Gamedze's household.

[10] On the fateful day of 1 March 2010 PW1 was not at home when he received a telephone call from his wife informing him to rush home as there was a problem with his mother. PW1 indeed rushed home and found his mother lying face down in the fields. Because his mother was epileptic, he lifted her. He observed blood clots coming out from her mouth and nostrils. He also observed stab wounds on her neck. PW1 was frightened when he realised that his mother was dead. He then left the deceased lying in the field.

[11] PW1 enquired from Chaka Tsabedze who was herding cattle nearby about who had committed the act. He was informed that the accused was responsible for the death of the deceased. PW1 then reported the matter to the police who came to the scene and later recorded a statement. PW1 told the police that he suspected the accused had committed the offence because his mother and the accused did not see eye to eye.

[12] PW2 Thuli Nomcebo Zwane-nee Maseko resides in the same neighbourhood with the accused at eNdlembeni, Vusweni area. She knows the accused because when she married into a Zwane homestead, he found him living in a Maseko homestead and immediately related to him as a brother as she is a Maseko by birth. It was the evidence of this witness that the accused's parents-La Gamedze and Lozingwe Maseko were good people who also related well with her. The accused is also a good person according to the

evidence of this witness. The accused was a councilor-*lihlonbe lekukhalela* and encouraged PW2 to join the councilors as a member.

[13] On 1 March 2010 PW2 was from attending a councilors' meeting at Vusweni royal kraal when the accused followed her to her homestead. PW2 updated the accused about the meeting since he had not attended same. The accused did not appear to be his usual self as he looked confused and not paying attention to what she was telling him. The accused then confided to this witness that he had 'injured' the deceased. He told PW2 that they were fighting over a grinding machine (Bethany) which had been removed from make La Gamedze's household by the deceased. The accused said he now did not have a grinding machine to grind his maize for mealie-meal.

[14] The police subsequently came and arrested the accused at the home of PW2.

[15] PW3 5522 D/Constable Frans Dlamini is a scenes of crime officer based at Matsapha Police station. On 1 March 2010 he was on duty when he received a report of an alleged murder at eNdlembeni. He proceeded to the scene of crime with 3135 Sergeant Langa (who is now an inspector). The scene of crime was a maize field below a Maseko homestead. He found a lot of people at the scene of crime. He introduced himself as a police officer, took charge of the scene and secured it. He saw an elderly woman lying in a pool of blood. He examined the body of the elderly woman and found that she was

not breathing. The body had wounds on the chest, back and shoulder and a big cut on a small finger. He suspected that a bush knife had been used.

[16] He photographed the scene and the body of the deceased and handed over the scene to the detectives.

[17] PW3 handed into court six photographs which were marked FSD 1, FSD 2, FSD 3, FSD 4, FSD 5 and FSD 6.

[18] Photo FSD 1 shows the deceased lying facing down in a maize field; FSD 2 shows the deceased facing up; FSD 3 shows the deceased's body has three stab wounds on the chest; FSD 4 shows the deceased's body has wounds on the shoulder; FSD 5 shows a cut on the small finger of the deceased's hand; and FSD 6 shows the body of the deceased has multiple wounds at the back. The photographs were collectively marked exhibit 'B'.

[19] On 4 March 2010 PW3 went to the RFM hospital when the post mortem examination was conducted on the body of the deceased. Blood samples were taken from the deceased to be examined. D/Sgt. Langa handed to this witness exhibits which were sealed. The exhibits were a brown pair of shoes, blue shorts, maroon T-shirt and a sharp object like a black spanner and a slasher. The exhibits were taken to the police headquarters.

[20] The post mortem report was admitted in evidence by consent and it was marked Exhibit 'A'. The cause of death was due to multiple stab wounds to chest. The following injuries were observed by Dr. Komma Reddy on the body of the deceased: first, stab wounds of 1x1/2cm, 1x3/4cm, with sharp margins, present on the front and middle portion of the right side of the chest, 4cms and 10cms, from the mid-line, 39cms and 49cms from the umbilicus.

Second, stab wound of 2x1/2cms, with sharp margins, present on the front and middle portion of the chest, in the midline, which is 33cms from the umbilicus. Third, a stab wound of 3x1/2cm, with sharp margins, present below the right nipple, 11cms from the midline and 32cms from umbilicus. Fourth, a stab wound of 1x1/2cms, with sharp margins, present adjacent to the left nipple.

Fifth, a stab wound of 1x1/2cms, muscle deep, present on the front portion of the left shoulder. Sixth, multiple stab wounds (6) of 1x1/2cm, with sharp margins present on the left side of the back in the upper half portion.

Seventh, multiple stab wounds (9) of 1x1/2cm with sharp margins present on the right side of the back in the upper half portion. Eighth, cut wound of 3cms length, with sharp margins present on the medial side of the palm of the left hand in the middle portion. Last, a cut wound of 2cms length, with sharp margins, present on the front and lateral side of the left forearm in the upper portion.

[21] PW4 3135 D/Inspector Langa stated that he is now based at Siphofaneni Police station. On 1 March 2010 he was based at Matsapha Police station when he received a telephone call that an alleged murder had been committed at Vusweni. He proceeded to the scene with Constable Matfonsi, constable Mngometulu, constable Mkhweli as well as Inspector Gilbert Kunene.

At the scene of crime PW1 showed the police a field which was a short distance from his homestead and told the police that is where the body of the deceased was.

[22] At the scene of crime the police found the deceased lying face-down and the time was about 230pm. The deceased's body had three stab wounds at the back. The maize plants around her had been destroyed-a sign that there was a struggle before the deceased died. The body of the deceased had multiple stab wounds which had been inflicted with a sharp object.

[23] PW4 and the police officers he was with went to PW2's homestead where they found the accused. PW4 introduced himself and the team to the accused and informed him why they were looking for him. PW4 cautioned the accused according to the Judges' rules. After the accused was cautioned, he elected to say something on the basis of which he was arrested. He subsequently led the police to his homestead where he was again cautioned in terms of the Judges' rules and informed of his constitutional right to remain silent. The police requested Mahlabane Tsabedze-an elder in the community to observe the pointing out by the accused.

[24] At his homestead, the accused pointed out a maroon T-shirt, navy blue faded shorts which had blood stains, a pair of brown leather shoes and a black slasher. The accused further led the police to an area which is a short distance from his homestead and next to Magwava Dlamini's homestead.

Magwava Dlamini was present and observed the pointing out by the accused. Before the accused pointed out anything at this stage, he was again cautioned according to the Judges' rules that he was not obliged to point out anything and that if he did, whatever he pointed out will be seized and used in Court as evidence. The accused went to a tree and took out a sharp metal object-which is a plug spanner which had been sharpened at the back. PW4 seized the plug spanner.

[25] The accused was taken to Matsapha Police station where he was detained pending his appearance in Court. The accused was subsequently cautioned in terms of the Judges rules and questioned in light of the evidence at PW4's disposal. The accused was charged with the offence of murder. After the accused was charged, he was informed of his right to make a statement before a judicial officer.

[26] The accused subsequently made a statement before a judicial officer in Matsapha. The statement before the judicial officer was handed into Court by consent and is marked exhibit 'C'.

[27] PW4 handed in the exhibits namely: the brown pair of shoes which were marked exhibit 1; the black slasher was marked exhibit 2; the maroon t-shirt was marked exhibit 3; the navy blue shorts were marked exhibit 4; and the plug spanner was marked exhibit 5.

The case for the Defence

[28] The accused said in 2010 he was resident at eNdlembeni, Vusweni and that currently he lives in Bhunya. The accused stated that at eNdlembeni he lived with his father Lozingwe Maseko and his mother LaGamedze. It was the evidence of the accused that LaGamedze was not his biological mother and that his biological mother is Emmelinah Zwane who never married Lozingwe Maseko.

[29] The accused told the Court that he was adopted (*wafakwa esiswini*) by LaGamedze because the latter did not have children of her own. The accused and his sister were taken from their biological mother's place at Bhunya when they were young to live with LaGamedze.

[30] It was when the accused's father died that LaMabuza and PW1 came to live with the accused at LaGamedze's homestead. Life became unbearable for the accused as he became a stranger in his homestead. He had to get permission from LaMabuza to use property which he hitherto had used without having to ask for permission to do so. The property belonged to LaGamedze who was living there with the accused's father. LaGamedze was also dead when LaMabuza relocated to eNdlembeni.

[31] The accused's father had built a house (*lilawu*) for the accused. It was the only house that remained standing after LaMabuza and PW1 destroyed all the houses when they moved into their new homestead below LaGamedze's

homestead. LaMabuza and PW1 took property that belonged to LaGamedze's household when they moved to their new homestead-this included cattle and motor vehicles.

[32] The accused subsequently got a job at Palfridge. He returned home on a Saturday to find the grinding machine missing. He did not ask PW1 and LaMabuza about the grinding machine (Bethany) on the Saturday he made the discovery. On Sunday, he went to church and did not ask about the Bethany. He, instead went to grind his maize elsewhere on the Monday of 1 March 2010. It was when he returned from grinding his maize that he went to LaMabuza to ask if she knew where the grinding machine (Bethany) was.

[33] The accused found the deceased at the maize field and asked her about the machine. The deceased's response was to ask the accused why he was looking for the grinding machine because it belonged to her. The accused asked why he had not given him prior knowledge that she was going to remove the machine; he also told La Mabuza that it was not the first time she had taken property that his father had left for him at LaGamedze's household. LaMabuza is said to have told the accused that he is selfish; that the white motor vehicle was given to her son.

[34] The accused says he was angered by LaMabuza's assertion that the grinding machine (Bethany) belonged to her because he knew the Bethany to belong to LaGamedze's household. An argument between the accused and the

deceased ensued. The accused informed the deceased that he was finding it difficult to respect LaMabuza as his mother because every time he returned home he found his property taken by her and her son. The deceased is said to have responded by saying she was authorized by the Master of the High Court to take whatever property she wanted from the accused's person's household.

[35] It was the accused's evidence also that the deceased once told him that his father was Macondzekufeni Maseko and not Lozingwe Maseko. The accused reported the insult to the family and was advised by the family not to pursue the matter.

[36] The accused says he was angered by deceased's reference to a certain Mkhathshwa. The deceased is said to have told the accused that she would talk to Mkhathshwa. When the accused enquired how Mkhathshwa featured in the estate of his father-LaMabuza stammered and did not come out clear. It transpired that Mkhathshwa was an attorney that the deceased had retained to represent her in the matter pertaining the estate of her husband.

[37] The accused says he told the deceased that on 1 March 2010 he had come to get an explanation from the deceased about the property that had been taken by the deceased from LaGamedze's household. After a heated argument, the accused stabbed the deceased with a plug spanner. He says he had kept the plug spanner in his pocket, lost his mind and found that he had used it.

[38] Under cross examination the accused conceded that on the fateful day when he went to confront LaMabuza he was carrying a plug spanner and a slasher. The accused said he carried the tools to do some work and it was a coincidence that he then used them in the commission of the crime charged. It was his evidence under cross examination that he was not armed but carried the tools in order to fix a machine. What machine and where the machine was located that required to be fixed is not stated by the accused.

[39] It is clear though that the accused accosted the deceased and found her in a maize field where she was weeding her field. It is also clear that the accused went to the deceased's homestead without being accompanied by a member of the community police-much against the directive of the Vusweni royal kraal. In my considered view, the accused was spoiling for a fight with the deceased.

[40] Under cross examination the accused stated that '*ngaphunyukelwa simo ngoba tento takhe betilumela kimi ngekutsi atsi angisiye umntfwana wa Lozingwe Maseko*'.-that he lost his cool because the deceased's actions caused him grief especially when she said he was not Lozingwe Maseko's son. The accused further stated under cross examination that he hacked the deceased with a slasher and left her helpless and sprawled in the field. The accused said he was too shocked and afraid to call an ambulance.

[41] It is apparent from the evidence that the accused stabbed the deceased with a plug spanner and also hacked her with a slasher-hence the *actus reus* is not in dispute. What remains to be determined is whether the accused had the necessary *mens rea* to commit the offence. The accused has pleaded provocation by the deceased. He argues that the deceased once said he is not a son of Lozingwe Maseko but is a son of Macondzekufeni Maseko; that the deceased took all the property that his father had left for him and that the final straw was when the deceased deprived him of the grinding machine (Bethany) and left him with no machine with which to grind his maize for mealie-meal.

[42] The accused pleaded provocation. Section 2 and 3 of the Homicide Act No. 44 of 1959 provides the following:

‘[2] (1) A person who-

- (a) Unlawfully kills 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 only be guilty of culpable homicide.

(2) This section shall not apply unless the Court is satisfied that the act which causes the 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 a 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 and servant, to deprive him of the power or self-control and to induce him to assault the person by whom such act or insult is done or offered.’

[43] In *R v Dutt*¹ Devlin J defined provocation in the following terms:

‘Provocation is some act or series of acts, done [or words spoken] [by the dead man to the accused] which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused subject to passion as to make him or her for the moment not master his mind.’

[44] For the defence of provocation to apply and succeed the loss of self-control must be associated with the act which causes death. This is not so in this case.

¹ (1949) AER 932

[45] In assessing what is reasonable, in the circumstances, the Court has to take into account the characteristics of the accused as might affect the gravity of the provocation.

[46] An established principle of our law is that the defence of provocation can only avail the accused where the act which causes death occurs in the heat of passion caused by sudden provocation. In addition, the provocation should be commensurate with the violence inflicted upon the deceased. The provocation should result in a loss of self-control to such an extent that the mental element requisite for murder is not present².

[47] From the evidence it is apparent that the accused was, at different times prior to the fateful day provoked by the deceased. However, the defence of provocation cannot avail the accused in the circumstances for two reasons: first, the accused did not act in the heat of passion caused by sudden provocation. The accused says in his evidence he discovered that the grinding machine had been removed from his home on Saturday but only confronted the deceased to enquire about it on the following Monday. It is the evidence of the accused that he was angry at the deceased for having said he was not a son of Lozingwe Maseko-a matter which had previously been addressed at family level. From these instances, there is evidence that after the said provocation, the accused had time for his passion to cool. Second, the violence and injuries inflicted on the deceased were not commensurate with the

² See *Mamba v Rex* (02/2007) [2018] SZSC 12 (09 May 2018); *Rex v Aaron Fanyana Dlamini* 1979-1981 SLR 30 at 35; *Rex v Nkambule Paulos* 1987-1995 (1) SLR 400 at 405 (HC); *Sipho Isaiah Lukhele v Rex* 1970-1976 SLR 164 at 164 (CA) and *William Valindzawo Ndlandla v Rex* Criminal Appeal No. 19/2015.

provocation. The accused conceded as much under cross examination. The accused inflicted multiple injuries on the body of the deceased with a plug spanner and a slasher-evidence that is confirmed by Dr. Komma Reddy in the autopsy report. In the circumstances, the accused was not entitled to kill the deceased.

[48] Clearly, the death of the deceased was foreseeable. The weapons used in the killing of the deceased were lethal; and the deceased was stabbed multiple times on the chest-a part of the human anatomy that houses delicate organs. The deceased was also hacked with a slasher and left for dead. The extent of the injuries sustained were serious and fatal, showing a reckless attitude on the part of the accused whether or not death of the deceased resulted.

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

[50] I accordingly find the accused guilty of murder with extenuating factors.

Sentence

[51] I, however accept for purposes of extenuating factors that the accused was provoked. Provocation of the accused is capable of reducing his moral blameworthiness because it naturally has an effect on his state of mind.

[52] At the time of the commission of the offence the accused was thirty-two years of age; he is not married and does not have children. The accused was arrested on 1st March 2010 and released on bail on 11 January 2011 this means he was in custody for a period of 10 months and 10 days. The accused is a first offender. At the time of the commission of the offence, the accused was employed at Palfridge and lived alone at his parental homestead. Prior to getting a job at Palfridge the accused was wallowing in poverty. The accused, through his attorney submitted that he is remorseful. He cooperated with the police during the investigation of the matter. He goes to church and the death has weighed heavily on his soul. It was submitted that the court should be lenient in sentencing the accused and temper its punishment with mercy. The court was entreated to consider the fact that it is the misunderstandings and troubles he had with the deceased which are a great factor in the commission of the offence charged.

[53] In considering the triad, I accept that the offence committed by the accused is very serious when taking into consideration that a human life was lost. What makes this offence more tragic is that it involves members of a family-a son and his step-mother. The deceased was an elderly woman of seventy-one years at the time of her death. Sons ought to look after their parents and protect them. Instead of looking after his step-mother, the accused visited violence on the elderly and defenceless woman and murdered her in the process.

[54] Society expects the Courts to show its abhorrence at the loss of life of any person even more so the loss of life of an elderly and vulnerable woman at the hands of her step son.

[55] I have considered the personal circumstances of the accused coupled with the impression I have of him that he lacks remorse and feels justified to have committed the crime he did. It is my view that a substantial term of imprisonment will give the accused time to ponder and reflect on what he has done and hopefully realize that no matter the provocation and anger-it is never open to anyone to take the law into their own hands. I also consider that during his sojourn in the correctional facility he will learn his lesson through the hardship he will experience there and will have time to reflect upon his actions.

[56] For your own peace of mind, and as a church goer I would urge you to offer an apology to your family, if you have not done so already. This will not bring the deceased to life but it will allow you to live peaceably going forward and would be a sign of your remorse. I have no doubt that this incident will haunt you for the rest of your life.

[57] Having made the observation above, I consider in your favour that you are a first offender and that you pleaded guilty thereby redeeming the Court's time.

[58] I consider the following sentence to fit you, the offence and to take into account the interests of society: You are hereby sentenced to twenty years imprisonment; and the 10 months and ten days spent in custody prior to your release on bail will be taken into account in computing the period of imprisonment.



M. LANGWENYA J.

For the Crown: Mr. M. S. Dlamini

For the Defence: Mr. S. A. Lokothwayo