



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

**CRIMINAL CASE NO.377/13**

In the matter between:

**THE KING**

**AND**

**CELUCOLO MSAWAWA MKHWELI**

**Neutral Citation:** *The King vs Celucolo Msawawa Mkhweli (242/13) [2019] SZHC 15 25<sup>th</sup> February 2019.*

**Coram:** MLANGENI J.

**Heard:** 17<sup>th</sup> April 2018, 30<sup>th</sup> April 2018, 12<sup>th</sup> September 2018, 30<sup>th</sup> October 2018 and 5<sup>th</sup> December 2018.

**Delivered:** 25<sup>th</sup> February 2019.

*Summary: Criminal Law, accused charged with one count of murder and one count of rape, both counts in respect of the same victim.*

*After a drinking spree the accused, who was a herdboyc in one of the homesteads at Mafutseni area, went to a nearby home that he often visited. It was late at night. The homestead consisted of a one-room flat. He gained entry into the room and, according to his confession, he raped the lone occupant of the room and later killed her by bare hands. At the scene of crime he left behind a hat and a piece of traditional neck wear known as ligcebesha.*

*The evidence of the Crown established beyond any doubt that the hat and ligcebesha were worn by the accused on the day the deceased was killed. According to the accused's confession, he killed the deceased after she called out his name.*

*Accused found guilty of murder and acquitted and discharged in respect of rape.*

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## **JUDGMENT**

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- [1] In our folklore it is said that the human spirit talks – *inhloko yemuntfu iyakhuluma*. One man who can attest to this, with conviction, is Celucolo Mswawawa Mkhweli. Having killed one Siphwe Tsabedze, alone and in the still of the night, he was arrested less than twelve hours later. And the arrest was reminiscent of a scene in a movie.

[2] After committing the grisly act he went to his place of abode, packed up his personal belongings in a black bag and, at dawn, embarked on a long journey on foot, from Mafutseni towards Manzini. The attention of vigilant police officers who were travelling in a motor vehicle from Manzini to Mafutseni to reinforce in the search for the murderer, was drawn to a man who was walking away from the road but parallel to it, in the opposite direction, carrying a bag. It seemed odd that he was not walking in the road where he was likely to get a lift from motorists. Sometime later, as the police officers were travelling back from Mafutseni towards Manzini, their workstation, they again spotted this man still walking in the direction of Manzini. They stopped their unbranded motor vehicle and offered him a lift. He jumped onto the motor vehicle and, in polite appreciation, he removed his hat. As he removed his hat he exposed a dent on his forehead. The dent fitted the description of the suspect who was being sought in connection with the macabre incident. He was taken straight to police custody where, upon interrogation, it was clear that he was the offender.

[3] Celucolo Msawawa Mkhweli now stands accused of murder, **“in that on or about the 1<sup>st</sup> September 2013 and at or near Mafutseni area in the Manzini Region, the said accused person did unlawfully and intentionally kill Siphiwe Tsabedze, and thus commit (sic) the crime of murder.”** He is also charged with rape in respect of the same victim. He pleaded not guilty on both counts.

#### THE CROWN CASE

[4] The first crown witness was Rita Simelane, a neighbour of the deceased. Her evidence was that on or about 2:00 am on the 1<sup>st</sup> September 2013

she was awoken by one Musa Nyawo, the deceased's son, who needed a light and assistance to see what had happened to his mother since she did not open the door when he knocked. When the door was pushed it was heavy. As they opened the door they saw the deceased's body lying just behind the door. It was on the ground, facing upward. Although there was a foam mattress that she used to sleep on, on this occasion her body was not on it. Her petticoat was pulled up to the lower part of the torso. There was blood on her mouth, eyes and ears. The forehead was swollen, and so was the neck, suggesting that she was probably strangled.

[5] PW1 proceeded to say that next to the body of the deceased there was a piece of traditional necklace made of beads (ligcebesha) and a camouflage hat that had the colours of the army. The colours of the ligcebesha were red, blue and yellow. The hat was green outside and light blue inside. She then proceeded to identify the two items, the ligcebesha and hat, which were inside the courtroom.

[6] The line of cross-examination of PW1 by the defence counsel was suggesting that it was not true that the hat and ligcebesha were found close to the body of the deceased. The witness stood her ground that it was so. She was adamant that the items were found there and were later taken by the police. PW1 was not re-examined.

[7] PW2 was Siphso Bright Shongwe. He told the court that he was born at Mafutseni and presently resides there. He knows the accused who, in 2013, was employed as herdboy at a Dlamini homestead in Mafutseni. The witness stated that on the 31<sup>st</sup> August 2013, the day preceding the

death of the deceased, a group of boys gathered at a Maziya homestead to have alcoholic drink. He was one of them. The accused also joined the group. In the course of the drinking spree an altercation occurred between the accused and one Musa Nyawo who is the deceased's son. The brawl became physical and the two manhandled each other. One Mcolisi Mkoko made peace. At the time the brawl occurred the accused was wearing ligcebesha on the neck, which had colours white, yellow and blue. During the physical conflict the ligcebesha split into two pieces. The accused took the pieces and put them in his pocket. Thereafter the witness and other boys left the Maziya homestead while the accused remained behind.

[8] Under cross-examination this witness testified that the alcoholic drink was made from grapefruit and that it was highly intoxicating. He further stated that after the conflict between the accused and Musa Nyawo the accused was asked to leave the homestead because he was uttering threats against Musa Nyawo, the deceased's son.

[9] Some questions and answers during cross-examination of PW2 follow below.

Q: For how long were you drinking before the conflict occurred?

A: About two hours.

Q: Most of you were already drunk, as you said the fruit is potent?

A: Yes

Q: You told the court that the accused then took the pieces of ligcebesha. Into which pocket did he put them?

A: On his trousers. I don't recall which side.

Q: My instructions are that the accused never took a piece of ligcebesha, it was taken by Musa Nyawo?

A: The accused is the one who took it.

Q: My instructions are that the accused said that he wants his ligcebesha intact, hence he threw it to Musa Nyawo?

A: No

The witness was not re-examined.

[10] PW3 was Musa Nyawo. As stated earlier, this witness came to his mother's one room flat after midnight. He knocked at the door but there was no response. When he tried to push the door it was heavy. He then went to get matches from Rita Simelane who is neighbour, and together with Rita they made the grisly discovery. He corroborated the evidence about the camouflage hat and ligcebesha, stating that the hat was inside the door step and ligcebesha on the door step. He stated that he was part of the group of boys that had gathered at the Maziya homestead for alcoholic drinks, that the accused later joined the group and had a drink without the consent of those present. The witness proceeded in this manner:-

**“I protested. He drank against my wish and then he broke a bottle to stab me then I held him by the neck, ligcebesha split, he took the pieces and put them in his pocket .....He swore**

**at me that he was going to get even. The ligcebesha was yellow, red and blue.”**

Later on the witness went to CPL, a drinking spot in the area, and eventually went home to find a most harrowing situation, his mother dead.

[11] Cross-examination of this witness sought to establish that the hat that was found at the scene of crime did not belong to the accused but it belonged to this witness. Here are some questions and answers.

Q: The hat was in your possession when you left the Maziya home?

A: No. I had my own.

Q: Further, even the ligcebesha was with you, after the altercation you took it?

A: I did not. He (accused) is the one who took it in his pocket after the fight.

Q: Do you agree that he (accused) was not drunk?

A: I do not agree. His behaviour showed that he was drunk, like breaking the bottle to assault us.

Q: Siphon Shongwe said on that day you guys were drunk?

A: Yes. We came there already drunk.

Q: It is you who hit the accused with an open hand and grabbed him by his clothing?

A: Yes, I did. He was drunk and aggressive.

Q: In your statement to the police you did not record that and that piece of ligcebesha were found at the hut?

A: Yes. But I was confused at the time.

Q: So you cannot recall all that happened?

A: I do.

Q: You suspected that he was the one who hurt your mother because of your earlier conflict?

A: When I saw the piece of ligcebesha I then suspected that he was the one.

Q: You deliberately placed the ligcebesha there in order to implicate the accused because of the earlier conflict?

A: Where would I get it because it was with him, he put it in his pocket after the fight.

[12] PW4 was Mcolisi Zwakele Mkoko. His evidence was brief. He informed the court that he was among the group of boys who gathered at the Maziya homestead to have alcoholic drinks. His evidence materially corroborates that of PW2 and PW3 in respect of the drinking spree, the conflict that ensued between the accused and PW3, the hat and ligcebesha that the accused was wearing, and that the accused remained behind at the Maziya homestead when the other boys left.

[13] Assistant Inspector 2856 Elvis Magagula testified for the Crown as Pw5. He testified that on the 1<sup>st</sup> September 2013 he was on duty at Mafutseni

Police Station. He was shift officer then. At about 02:00 am he received a report through the emergency number 999 and, together with 5137 Constable Thwala they proceeded to the home of the deceased. Using a torch as a source of light they inspected the scene of crime and saw the body of the deceased lying down and facing upward, wearing a grey T-shirt and a brown petticoat. She was injured on the face as if assaulted with a blunt object. Her face had blood. He also saw a part of ligcebesha at the door step and a camouflage hat inside the room.

[14] He further testified that inside the room there were signs of a struggle. He and the other officers ensured that the scene of crime remained as it was until scenes of crime officers arrived. He also mentioned that the foam mattress was blood stained. He then showed to the court a piece of ligcebesha and a camouflage hat, which were recovered from the scene, and he handed them to court as part of his evidence. The piece of ligcebesha was marked as **Exhibit “1”** and the camouflage hat as **Exhibit “2”**.

[15] PW5 was cross-examined on the contents of the report that he made in respect of the incident. In the report the witness had stated that he proceeded to the scene with four other officers, not one as stated in his evidence under oath. In his response he clarified that him and 5137 Constable Thwala were immediately followed by scenes of crime officers and the total number of police officers then became five. I find this inconsistency to be minor and inconsequential. The fact of the matter is that PW5 and other police officers attended the scene of crime immediately after receiving a report.

[16] Upon further cross-examination he stated that the camouflage hat was inside the room, next to the body of the deceased. He left the scene soon after scenes of crime officers had arrived. What follows are some questions and answers in respect of this witness.

Q: There are two pieces of ligcebesha. Can you identify the one you found at the scene?

A: Yes I can.

He then proceeded to the exhibits and picked up the piece that he found. He described it as being smaller than the other one which was not at the scene. He stated that he does not know where the longer piece was found. He was asked the following questions:-

Q: I put it to you that you never saw the two exhibits at the scene?

A: I did.

Court: When you saw the two items (exhibits) did it occur to you that they could give a clue to who the criminal was?

A: Yes.

Court: Is there an explanation why in your report there is no mention of the two exhibits?

A: Things were done in the night. Sometimes we rush to make reports.

[17] The next witness for the Crown was 4726 Detective Constable Wandile Malindzisa. He testified that in 2013 he was based at Manzini Regional Headquarters under Lukhozi Serious Crimes Unit. On the 1<sup>st</sup> September 2013 he received an instruction to go to Mafutseni to reinforce in the

search for the murderer of the deceased. He went there, in the company of four other officers whom he named in his evidence, who included In Charge of Detectives in the Region – Bhiza Dlamini. In his evidence he proceeded as follows:-

**“As we proceeded to Mafutseni, next to Mpandze I saw someone walking away from the road, wearing a hat, a black coat, carrying a black bag. I was suspicious but because we were rushing I did not pay further attention to this.....when we got to the scene we found six police officers..... We found them talking to one Musa Nyawo.... I then learnt that there was a suspect.....”.**

[18] Thereafter, they proceeded to the suspect’s residence, kaDlamini, where he was a herdboyer. Upon investigating there they were informed that the suspect had come home at night and later left. In the suspect’s room they discovered that his personal belongings and clothing were not there. They then started on the journey back to Manzini. While travelling in the motor vehicle he was on the lookout for the person he had seen walking away from the road, wearing a coat, a hat and carrying a bag. His evidence proceeded in the following manner.

**“At Rest Camp, Lugaganeni, I saw this person walking on the right hand side as one proceeds towards Manzini. I asked the driver to stop the motor vehicle to see if that person did not fit the description of the suspect. I called him and said ‘lift to town’. He came running. When he got into the motor vehicle he took off his hat and sat next to me. When he took off the**

**hat I noticed something we had been told we would identify him with. They had said he was in his early twenties, light in complexion, handsome looking with a depression on the top part of the forehead. As the motor vehicle was moving I asked him his name and he said he was Celucolo Mkhweli. That is the name we were looking for. Thereafter I warned him and introduced myself and the other police officers, and told him that I was arresting him in relation to Gogo Tsabedze's death. He was shocked and he cried".**

[19] Mafutseni Police were then called and when they arrived I searched the accused's bag. It had many personal belongings and three of them were blood stained – a jean trouser, white in colour, white t-shirt and navy blue sweater. In the pocket of the white jean trouser a piece of ligcebesha was found. The piece of ligcebesha that I found has red, yellow and blue colours – **"like the national flag"**.

[20] The witness then walked out of the witness box, picked up the longer piece of ligcebesha and handed it to court as part of his evidence. It was marked **Exhibit "3"**. He then pointed at the accused in the dock and told the court that this is the man that he gave a lift to and eventually arrested for the murder of the deceased.

[21] The defence did not put any questions to this witness whose evidence was quite overwhelming. The court asked one question.

Q: Were you travelling in a Police branded motor vehicle when you gave a lift to the accused?

A: No.

[22] The last witness for the Crown, PW7, was 4453 Constable M. Mkhwanazi, who told the court that in 2013 he was stationed at Mafutseni Police Station, and that he is one of the officers that were investigating this case. His evidence in respect of the scene of crime was consistent with that of the other Police officers. He described the condition in the one-room flat, the position of the deceased's lifeless body and the exhibits that were found there – **Exhibit "1"** and **Exhibit "2"**. He mentioned the presence of fresh blood on the deceased's ears and eyes, and that the face was swollen. The witness further corroborated the evidence of PW6 regarding what transpired when the Police team went to the Dlamini homestead where the accused was employed as herdboys, specifically that he had come home at night and left thereafter.

[23] This officer later received a call from Manzini Police Headquarters that the suspect had been arrested. He together with other officers then proceeded to Manzini. He confirmed the evidence of PW6 regarding the items that were found in the bag of the accused, some of which were blood stained. He further stated that there was a suspicion of rape emanating from the chaos that was in the room and the position in which the deceased was found. Blood samples and pubic hair of the accused were taken and sent for forensic investigation in South Africa. The court was informed that at the time of the trial the results of the forensic investigation had not been received, about five years after the crime was committed. I digress to lament that for all the development that this country has achieved post- independence, we still do not have a forensic laboratory of our own, where such cases would receive prompt attention. Unavoidably some guilty persons will get away scot-free due to

insufficient evidence. This being an essential tool for the Police, I am inclined to think that not enough has been done to highlight the importance of a forensic laboratory in the fight against crime in this country.

[24] In conclusion, this witness stated that the accused was co-operating with the investigators and this gave him the idea that the accused might be willing to make a confession. Indeed, he subsequently did make a confession before a judicial officer.

[25] Cross-examination of this witness sought to establish the relatively young age of the accused at the time, that he was about twenty years old, that he co-operated with the police at all times, that on the fateful day he had consumed a lot of alcohol and had smoked dagga. The alcohol was obviously common cause but the officer would not know anything about the dagga. The defence also brought forth that in 2010 the accused was assaulted heavily by his father and got hurt on the forehead, and that as a result of this injury on the forehead he sometimes forgets what he has done. I may point out that this last aspect would best be dealt with by an expert if it was of any relevance at all.

[26] The accused's confession was handed in by consent, and marked **Exhibit "A"**, and the defence acknowledged that its contents were correct. A photo album was also handed in by consent and was marked **Exhibit "B"**. Post-mortem report was also handed in by consent and marked **Exhibit "C"**. The Crown then closed its case. Below I make brief observations about the exhibits mentioned above.

- 26.1 In his confession, **Exhibit “A”**, the accused states that he killed the deceased with bare hands, through assault and strangulation. He also mentions that he did this because the deceased called him by name after he had raped her. This gives a clear hint of the motive for the killing, to kill evidence. This was obviously not achieved.
- 26.2 The photo album, **Exhibit “B”**, portrays the extent of brutality upon the deceased. It shows a swollen face (photo 6) with blood that came through the eyes, nose and mouth. There is no doubt that this sixty-three year old lady died a very painful death.
- 26.3 The post-mortem report, **Exhibit “C”**, states that the cause of death was **“throttling and injury to head”**. This conclusion is consistent with the accused’s confession.

#### DEFENCE CASE

- [27] The accused led his own evidence in defence, under oath. He stated that he knows the deceased. He used to visit her at her homestead and often assisted her with chores, like getting water for her from kaBabe Sithole. She was a neighbour to the Dlamini homestead that employed him as a herdboys. The accused largely corroborated the evidence of the Crown about the drinking session at Thandi Maziya’s homestead. He further confirmed the occurrence of the brawl at the Maziya homestead, detailing how it came about, and that it occurred in the afternoon but before sunset. The drinking, according to him, had started mid-morning, and this makes for many hours of drinking. Significantly, he confirmed that on the occasion he was wearing ligcebesha and that it was split as a result of the physical scuffle. He stated that he did not threaten the deceased’s son, Musa Nyawo. Later on he went to the deceased’s

homestead, intending to listen to a certain radio programme that he often listened to at the deceased's homestead. The following are his exact words that followed:-

**“I got there and sat. I chatted with the deceased. I don't recall what happened thereafter. I heard the following day from the Police that a criminal offence had been committed. This was at Manzini Police Station after they had given me a lift at Hhelehhele. I don't recall anything about murder and rape. I was too drunk and had smoked dagga. I don't even know if I am the one who committed the offences”.**

[28] He denied that when he was arrested he was carrying a bag with personal belongings in it. This, however, was not put to the investigating officers. His evidence proceeded in this manner.

**“When I was arrested I was going to look for a cow which was lost. I decided to go and look for it in the morning.”**

As he gave this hopeless explanation he was smiling. The explanation is hopeless because if a cow strayed at Mafutseni area he would not be looking for it along the highway to Manzini, and he would not take his personal belongings in a bag on a mission to find a cow that had strayed. Significantly, he admitted that he was wearing the necklace on the fateful day.

[29] Apart from telling a bad lie, the defence that he sought to advance was that he was too drunk to know what exactly happened at the deceased's place, this coupled with the effect of the dagga that he claims to have smoked, for the first time. This, however, is inconsistent with the clear account that he gave in the confession of how and why he killed the deceased. And it must, in any event, be seen in the context of the lies that he told about going to look for a cow.

[30] The accused also stated that as a result of the injury that he sustained on the forehead, leaving it dented, he sometimes feels dizzy. I am not certain of the relevance of this aspect of his evidence. If anything, a dizzy person is unlikely to have enough strength to commit such a heinous crime that obviously required a lot of strength.

[31] Finally, the accused stated that he never went to formal school. He is learning to read and write now in prison.

#### FINDINGS BY THE COURT

[32] The case against the accused is overwhelming. He admits that at the Maziya homestead he was wearing ligcebesha. He admits that a fracas occurred, resulting in physical conflict involving him and Musa Nyawo, the deceased's son. He admits that the ligcebesha was split into two pieces. His counsel's line of cross-examination that the accused rejected the pieces of ligcebesha is inconsistent with the rest of the evidence, especially that one piece was found at the scene of crime and the other one in his personal clothing. It is clear that the deceased's son, Musa Nyawo, did not pick up the damaged ligcebesha after the fight but the

accused is the one who did so. And it later surfaced in the manner that it did, at the scene of the crime and when he was being searched by police officers in Manzini.

[33] The accused's confession completes the puzzle, at the very least by giving an insight into the motive behind the gruesome killing. After the drinking session the accused went to the place that he usually visited, the deceased's residence. He got there and the two of them, according to him, had a chat. Then he raped her. The reason why she called his name is a matter of immense curiosity. The likely sequence of events is that he came to the one-room residence in stealth, raped her and when she called his name he realised the possible consequences and attempted to **'kill the evidence'**. The hapless women died, but the evidence did not die.

[34] The accused's explanation of the long journey on foot from Mafutseni towards Manzini, that he was looking for a stray cow, is a hopeless lie. In any event, you don't pack your personal belongings in a bag, some of them blood-stained, and then set out to look for a stray cow. As he told this lie, the accused had a smile on his face, apparently oblivious of the extent of the tragedy that he caused the deceased and her family. Given that he made a confession, which was admitted by consent, there was no need for him to offer the ferry-tale explanation that he did for the journey that he undertook, and which placed him on the path of the law enforcers who captured him within twelve hours of committing the offence.

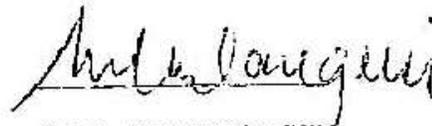
[37] Accepting, for the benefit of the accused, that he may have been very drunk at the time, and possibly under the influence of dagga as well, it is

settled law that voluntary intoxication is not a defence. But even this is undermined by his clear account of how and why he killed the deceased.

#### CONCLUSION

[38] The Crown has proved the case of murder beyond reasonable doubt. The accused is accordingly found guilty of the murder of Sipiwe Tsabedze. I find no extenuating circumstances.

[39] In respect of the charge of rape, the Crown did not lead any evidence. I cannot convict on the basis of the confession alone, as this would infringe the accused's right against self-incrimination. I accordingly acquit and discharge the accused on the charge of rape.



**T.M. MLANGENI**

**JUDGE OF THE HIGH COURT**