IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 28/2012

In the matter between:

NHLASE ANTHONY NXUMALO

Applicant

and

REX **Respondent**

Neutral Citation	:	*Nhlase Anthony Nxumalo vs REX* (28/2012) [2018] *SZSC* 24 (26/09/2018)
Coram:		**DR. B. J. ODOKI JA, S. P. DLAMINI JA, M. J. DLAMINI JA, R. J. CLOETE JA, J. M. CURRIE AJA**
Heard	:	07 August 2018
Delivered	:	27 September 2018

Summary : *Application for review in terms of section 148 (2) of the Constitution 2005 – Reduction of sentence – No rare and compelling or exceptional circumstances shown – Application dismissed – Sentence confirmed. (– President Street Properties dictum confirmed)*

JUDGMENT

CURRIE - AJA

CONDONATION

[1] The respondent lodged an Application for Condonation for the late filing of its Heads of Argument and Bundle of Authorities. The founding affidavit of the Respondent, having complied with the provisions of the law and numerous authorities, and the Applicant not having opposed the application, the late filing of the said Heads of Argument and Bundle of Authorities was condoned.

BACKGROUND FACTS

[2] The Appellant was convicted in the High Court on the 20th July 2012 of the crime of murder with extenuating circumstances in connection with the commission of the offence and was sentenced to a period of imprisonment of 20 years. He appealed against the judgment of the court *a quo* and on the 9th December 2015 the Supreme Court dismissed the appeal on the basis that the act of the appellant in assaulting the deceased when he was lying injured and defenceless on the ground was vicious, barbaric, brutal, unjustified and totally unmitigated. It was held that there was no misdirection by the trial judge, M.C.B. Maphalala, J, (as he then was) in the imposition of the sentence and the sentence of 20 years of imprisonment did not induce a sense of shock.

[3] The facts upon which the appellant was convicted are common cause and are summarized below:

(a) On or about 12 January 2010, in the Shiselweni District, the appellant, a nephew of the deceased, assaulted two young children who were relatives of the deceased. His reason for doing this was that the day before he had requested the children to carry his soccer kit and they had failed to do so. This incident prompted the deceased to go and look for the Appellant.

(b) The next day on 13 January 2010 the deceased, armed with a stick and accompanied by his dogs, found the Appellant at a sports field playing soccer with other youths. The deceased called the Appellant and, without further communication, hit the Appellant with the stick on the forehead. The Appellant fell down, bleeding. The deceased's dogs bit the Appellant on the body including his testicles. The Appellant managed to get up and stabbed the dogs with a knife he was carrying and thereafter stabbed the deceased twice. The deceased left the sports field bleeding stating that he would return, but before he crossed a nearby river he fell down.

(c) Upon realizing that the deceased had fallen down and that he was very weak, the Appellant chased the deceased's dogs and thereafter found the deceased, hit him with a hard stick several times until the stick was broken. The deceased, lying on the ground, was severely wounded and could not fight back.

(d) Thereafter, the Appellant retrieved the knife from where he had earlier hidden it under the Marula tree and stabbed the deceased viciously seven more times until he died. The Appellant left the scene of crime and headed for the dipping tank but before reaching the dipping tank he licked the knife, broke it into two parts then threw it into the dipping tank.

[4] In the court of first instance a plea of not guilty was entered and the Appellant raised the defences of provocation and self defence. The trial court found neither defence to be proven and the Appellant was convicted of murder with extenuating circumstances.

[5] In sentencing the Appellant, the trial court considered the time honoured triad of the interests of society, the seriousness of the offence and the Appellant's personal circumstances. It came to the conclusion that the personal circumstances of the Appellant did not outweigh the seriousness of the offence as well as the interests of society. The killing of the deceased was a gruesome and vicious act.

APPELLANT'S ARGUMENT

[6] The Appellant, who is unrepresented, noted an application for a review on the 13th July 2018. This was by way of a letter, addressed to the Registrar of the Supreme Court and headed ……"HEAD OF ARGUMENTS FOR APPEAL REVIEW". There was neither a notice of motion nor affidavit filed in support of the application for review. The Appellant was not represented and appeared in person.

[7] In the application (letter) filed by the Appellant he states that he is remorseful for all the acts of felony he has committed regardless of the fact that, in his view, there was provocation by the deceased. He admits that it was wrong, which resulted in the loss of life to the deceased and deprivation of a relative to his wife and children. The

attack was inhumane and unlawful. He understands that he deserves to be severely punished. He further states that that he is committed to all programmes of correction in the correctional facility where he is at present. He states that he is a born again Christian, and has joined training for vocational skills. He is attending "Lisango," a program that is run by psychologists in the Centre, which was initiated to teach inmates as to how to control anger and tension and this has taught him good behavior even towards other inmates. He has also made peace with the family of the deceased and they have forgiven him for the crime he committed with regard to their father and appellant's uncle.

[8] As a result of his change of heart and remorse he asks this court to reduce his sentence in the spirit of correction, rehabilitation and mercy.

THE RESPONDENT'S ARGUMENT

[9] The Respondent contended that the trial court *a quo* was justified in sentencing the Appellant to 20 years imprisonment when considering the circumstances under which the deceased died, which facts were

admitted by the Appellant in the *court a quo*. The Crown referred to the case of **Mandla Mlondolozi Mendlula vs Rex Criminal Appeal No. 12/13 (SZSC [60]** page 10 wherein it is stated that the range of sentences for murder in our jurisdiction is between 14 and 20 years.

[10] When considering the appeal filed by the Appellant in this Court, this Court referred to the judgment in the case of **Vusi Masilela v R. Criminal Case 14/2008** wherein this court stated as follows:

[5] *It is now established in this jurisdiction, as indeed it is in the Commonwealth jurisdictions, that sentence is a matter which predominantly lies within the discretion of the trial court. It is the primary duty of the trial court to impose a balanced sentence taking into account the triad, consisting of the offence, the offender and the interests of society. See for example* ***S v Rabie 1975 (4) SA 855 (A)*** *quoted with approval by this Court in* ***Musa Kenneth Nzima v Rex, Criminal Appeal No. 21/07.***

[11] In the case of **William Mceli Shongwe vs Rex Criminal Appeal Case No. 24/2011,** Justice M.M. Ramodibedi CJ, stated the basic principle that the imposition of sentence is primarily a matter which

lies within the discretion of the trial court. This is so because the trial court is able to scrutinize all the evidence of the witnesses and their demeanour. An appellate court will generally not interfere with the exercise of that judicial discretion by the trial court in the absence of misdirection resulting in a miscarriage of justice, or where the sentence imposed was manifestly excessive so as to justify interference by the Supreme Court.

[12] With regard to the defences of provocation and self defence the Respondent contended that these defences were rejected by the court *a quo* in that the Appellant attacked the deceased when there was no imminent danger of attack by the deceased. If these defences had been accepted the crime of Murder would have been reduced to that of Culpable Homicide. When the Appellant assaulted the deceased with a stick and a knife, the deceased had already become defenceless. The Appellant foresaw the possibility of his death and was reckless whether or not death resulted. In the circumstances Section 186 of the Criminal Procedure and Evidence Act No. 67/1938 is not applicable to reduce the charge of Murder to Culpable Homicide because *mens rea* existed in the form of *dolus eventualis.*

[13] The Respondent stressed that the Appellant was the aggressor in the circumstances. When he attacked the deceased the second time, the deceased was weak, wounded and unable to defend himself and the Appellant did not face any imminent danger, yet the Appellant stabbed him seven more times until he died.

[14] With regard to review proceedings the respondent contended that the Appellant had not provided any grounds on which the court should review its own final decision delivered on the 9th December 2015. The Appellant, in fact, raised the very same grounds raised in his appeal argued on the 24th November 2015 and the present application is nothing but a further appeal disguised as a review.

THE LAW

[15] Section 148 (2) of the Constitution provides as follows;

"*The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be presented by an Act of Parliament or Rules of the Court."*

In **Simon Vilane N.O. and Others v Lipney Investments (Pty) Ltd, In Re Simon Vilane N.O., Mandlenbkosi Vilane N.O., Umfomoti Investments (Pty) Ltd, Civil Case No. 78/2013** Ramodibedi CJ at Paragraph 3 stated as follows:

"It remains to add that a review Court is not concerned with the merits of the decision under review. It follows that a misdirection or an error of law is not a review ground. It is a ground of appeal".

[16] In **President Street Properties (Pty) Ltd v Maxwell Uchechukwu and Four Others, Appeal Case No. 11/2014** M. J. Dlamini AJA said the following;

"*It is true that a litigant should not ordinarily have a 'second bite at the cherry' in the sense of another opportunity of appeal or hearing at the Court of last resort. The review jurisdiction must therefore be narrowly defined and be employed with due sensitivity if it is not to open a floodgate of reappraisal of cases otherwise res judicata. As such this review power is to be invoked in a rare and compelling or*

exceptional circumstance …". And further on he states "From the above authorities some of the situations already identified as calling for supra judicial intervention are an exceptional circumstance, fraud, patent error, bias, presence of some most unusual element, new facts, significant injustice or absence of alternative effective remedy."

FINDINGS

[17] The present review brought before this court is nothing but an appeal disguised as a review which is, in fact, a "second bite at the cherry" the Appellant being dissatisfied with the finding of this court in the appeal hearing.

[18] Taking into account all the circumstances, there can be no doubt that the Appellant was correctly convicted and appropriately sentenced in the trial court. The Supreme Court confirmed the sentence of 20 years of imprisonment and found that the sentence did not induce a sense of shock in view of the brutal attack by the appellant on the deceased, which caused his death.

[19] The appellant merely asks for a reduction of sentence in view of the fact that he is remorseful, has become a reborn Christian and is committed to never hurting anybody ever again.

[20] The Applicant has failed to show any exceptional circumstances as required by the now established case law of Eswatini as espoused in **President Street Properties** (*supra*) and others.

[21] These facts do not constitute rare and compelling or exceptional circumstances as required by the now established case law of Eswatini, as espoused in ***President Street Properties (****supra)* and others.

ORDER

Accordingly, the following Order is made:

1. The application for review by the applicant is hereby dismissed.

2. The sentence imposed by the High Court of Eswatini and confirmed by the Supreme Court on appeal is hereby confirmed.

J. M. CURRIE
ACTING JUSTICE OF APPEAL

I agree

DR. B. J. ODOKI
JUSTICE OF APPEAL

I agree

S. P. DLAMINI
JUSTICE OF APPEAL

I agree

M. J. BLAMINI
JUSTICE OF APPEAL

I agree

R. J. CLOETE
JUSTICE OF APPEAL

For the Applicant : In Person

For the Respondent : Beauty Fakudze