

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

Case no: CC 15/2021

In the matter between:

THE STATE

v

MARKUS SHIKERETE

ACCUSED

Neutral citation: *S v Shikerete* (CC 15/2021) [2023] NAHCNLD 99 (22 September 2023)

Coram: KESSLAU J

Heard: 19-23 September 2022; 28-30 November 2022; 1 December 2022;
21-24 February 2023; April May 2023 23 June 2023; 17 July 2023;
11 August 2023

Delivered: 22 September 2023

Flynote: Criminal Law-Criminal Procedure Act 51 of 1977 – Murder- read with Combating of Domestic Violence Act, 4 of 2003- Circumstantial evidence- Accused pleaded not guilty – Causation - *Novus actus interveniens* - Accused explanation rejected.

Summary: The accused is arraigned before this court on a count of murder, as in that upon or about the 19th day of October 2018 and at or near Shipando village, in

the district of Rundu, the accused did unlawfully and intentionally killed his one month old daughter by stabbing her with a sharp object in the stomach.

The accused was represented by counsel and pleaded not guilty to the charge. Accused relied on the defence of *novus actus interveniens*.

Held- Evidence presented shows that the deceased was found with an injury severe enough for intestines to protrude.

Held - that there is no evidence before court that there was any new act from medical staff, negligent or deliberate, that caused the death of the deceased.

Held further that the accused is found guilty of murder (*dolus directus*) read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

ORDER

1. The accused is found guilty of Murder (*dolus directus*) read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

JUDGMENT

KESSLAU J

Introduction

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[1] The accused was arraigned before this Court on a charge of Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. The indictment reads that upon or about the 19th day of October 2018 and at or near Shipando village, in the district of Rundu, the accused did unlawfully and intentionally kill the one month old baby Marceline Juliana Makena, the baby of Magdalena Dimbindo Napemba, by stabbing her with a sharp object in the stomach, while there was a domestic relationship as defined in section 1 and 3 of the Combating of Domestic Violence Act 4 of 2003, in that the accused was the father of the deceased.

[2] The accused, represented by counsel, pleaded not guilty to the charge. In a statement¹ received in terms of s 115 of the CPA, the accused denied all the allegations he however admitted to the date and place of the incident and further admitted that the deceased was his biological daughter. It became apparent that the accused is relying on the defence of *novus actus interveniens* when during cross-examination his counsel suggested that the deceased's death was caused by medical intervention.

[3] Various documents were received into evidence and will be referred to whenever relevant to this judgement.²

Summary of the evidence

[4] Laurentius Mukoya, a resident of Shipando village, testified that on the night of 19 October 2018 he was woken by the sound of people crying out for help. He went outside and found the mother and grandmother of the deceased in front of his house. They made a report to him of the attack on the deceased and requested his assistance. He went with them to their house and once inside he observed the baby with protruding intestines. He instructed the grandmother to bind the wound with a cloth while he was calling the police. The police, including officer Kassoma, arrived within an hour and took the baby, who was still alive at the time, together with the mother and grandmother to Nyangana hospital. He testified that the accused was not present on the scene. In cross-examination he added that his observation of the injury to the deceased was made while using the light of a cell phone and added that he did not have the courage to examine the wound closely.

[5] A nurse employed at Nyangana hospital, Mikhaya Dorothy Chirwa, testified that she was on call the night in question. After midnight on 20 October 2018 she attended to the deceased in the casualty theatre. She unwrapped the baby and observed protruding intestines from a wound on the stomach. She cleaned the intestines and cover the wound to keep it moist. She estimated the wound to be 1, 5 to 2 centimetre in length. In the meantime the doctor on call arrived, examined the wound and referred the baby to Rundu hospital. The injured baby was transported in

¹ Exhibit 'A'.

² Exhibits 'A to W'.

the company of Nurse Marilyn by ambulance. The ambulance however returned after approximately 35 minutes as the baby had passed on.

[6] During cross-examination it was pointed out to the witness that the post mortem report indicates three wounds to the stomach of the deceased in contrast to her evidence. It was further put to her that she and the other medical staff tried to operate on the baby and, after their failed surgery, the baby was referred to Rundu hospital. The witness strongly denied these allegations.

[7] Doctor Nyasha Muzirikazi testified that on 20 October 2018 he was on call at Nyangana hospital and past midnight he attended to the injured baby. He observed one stab wound, estimated at 5 centimetres, with protruding bowels. In his opinion the wound was caused by a sharp object and that force was used to penetrate into the stomach cavity causing the intestines to protrude. He further indicated that the injury was fatal if left untreated. He said that a third of the baby's stomach was covered by the protruding intestines so much so that it was enough to fill two hands. He did not observe any other stab wounds. He unsuccessfully attempted to insert the intestines back into the cavity through the wound. He then decided that the baby needed specialist care and referred her to Rundu hospital. The baby was put on oxygen, an anti-biotic drip and, after the wound was covered and bandaged, left by ambulance. He confirmed that the ambulance returned after some time as the baby had passed on.

[8] During cross-examination he confirmed that it was standard practise to deal with trauma in the theatre and denied that he or his staff tried to perform an operation. He added that the baby was received in a critical condition.

[9] Nurse Marilyn Sannrina Nepemba Kanyetu, stationed at Nyangana hospital, confirmed that she was instructed to accompany the baby in the ambulance to Rundu hospital. The mother and grandmother of the baby went with them. *En route* the witness realised there is no sign of life from the baby and when she failed to resuscitate her, they turned back to the Nyangana hospital. She confirmed that no additional injuries were sustained during transportation.

[10] The biological mother of the deceased, Magdalena Napemba Dimbindo testified that she is 19 years old and residing at Shipando village. She testified that the accused was her boyfriend and the father of her one month old baby. On 19 October 2018 the accused visited her in her room. He appeared to be angry and remarked that her room is hot. The accused requested to spend time with the baby outside and she agreed while she stayed inside the room.

[11] She testified further that approximately after an hour the accused returned with the baby, hand her over to the witness, and left in a hurry. The baby was crying and moaning when returned to her. She tried unsuccessfully to breastfeed her. She then decided to change the nappy and, when undressing the baby, witnessed blood. She further observed an open wound at the naval area of the baby and another wound below the abdomen with protruding intestines. She then started screaming which led to the grandmother of the baby waking up and entering the room to inspect the baby. The rest of her evidence confirmed the evidence from their neighbour, the medical staff and the eventual death of her baby.

[12] During cross-examination she conceded that the facial expression of the accused at the time might have been a troubled look instead of anger. She insisted that the baby started crying whilst still outside in the care of the accused. She could not explain why the medical staff only witnessed one wound and in that regard added that at the time she was in shock and that there was a lot of bleeding. She denied that any operations were done on her baby at the Nyangana hospital.

[13] The biological grandmother of the deceased, Cecilia Shampapi, testified that she did not attend any school and does not know her age. She confirmed the evidence of her daughter as far as she was involved. She only observed one wound but added that she was in complete shock and shivering due to the condition she found the baby in. During cross-examination she testified that she witnessed the arrival of the accused and the stabbing of the baby however it appears that her version in that regard was based on assumptions and hearsay evidence. For that reason her evidence, as far as it is not corroborated by others, will be treated with caution.

[14] Sonia Samupofu, a magistrate presiding at the periodical Magistrate's Court of Ndiyona testified that she noted the preliminary proceedings in terms of s 119 of the CPA.³ Her evidence was that the accused initially applied for Legal Aid assistance however when none was forthcoming, the accused indicated, on different occasions in court, that he wish to cancel his Legal Aid application and for the matter to proceed in the absence of an attorney. On that basis, the magistrate proceeded. She testified that the accused pleaded guilty to a charge of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The accused *inter alia* admitted that he stabbed his baby with a knife in the stomach because people were saying that he will not be able to support her. The accused added that he had no intention to kill the baby only to injure her, however he did foresee the possibility that the victim will die as a result of the stabbing. He said that in his defence the devil made him do it.

[15] The accused furthermore, in his own words, narrated to the magistrate the events that transpired. It was recorded by the magistrate that the accused said that on that day at 22h00 he went to the house of his girlfriend and knocked on the door. She opened and he entered. He asked to hold the baby and after a while said it was too hot in the room and that he will go outside with the baby. He went outside and stabbed the baby in the stomach. He then stayed outside for a while and upon returning to the room handed the baby back to the mother. He said the baby was sleeping. He placed the baby on the bed and the mother of the child then escorted him outside where he told her what he has done and apologized. He returned to his own room and was arrested the next day.

[16] During cross-examination the magistrate insisted that proceedings were properly explained to the accused as per pro-forma annexures that were not included in the copied record.

[17] The interpreter who assisted in court when the preliminary plea was recorded, Mr Justinus Kandjimi, testified that he communicated with the accused in Rumanyo. He confirmed the evidence presented by the magistrate regarding the proceedings in court.

³ Exhibit 'P'.

[18] Inspector Marishane testified that he collected the deceased's body from Nyangana mortuary to transport it to Rundu for the purpose of conducting a post mortem. The deceased was identified to him by officer Kassoma.⁴ The post mortem was conducted by Doctor Alfonzo Arganez, who has since returned to his country of origin.

[19] The last witness for the State, Officer Simon Sylvester Sinto Kassoma testified that he was stationed at the Ndiyona Police Station. He confirmed the evidence that a report was received of the stabbed baby. He furthermore confirmed that he and a colleague attended to the scene and returned with the injured baby in the company of her grandmother and mother. He testified that while transporting the injured baby from the homestead to Nyangana hospital, she was wrapped and held by her grandmother travelling in the passenger seat. His colleague and the biological mother of the deceased were seated on the back of the pick-up. He confirmed the protruding intestines of the baby and that she was handed over to medical staff.

[20] Officer Kassoma testified that after the death of the deceased he arrested and charged the accused. A school report indicated the age of the accused at 19 years.⁵ The officer took down a warning statement from the accused however during a trial-within-a trial the warning statement was ruled inadmissible.⁶ The officer also testified that the weapon was never recovered.

[21] The accused testified in his defence. He admitted that he stabbed his baby, the deceased, with a knife. The accused testified that he visited his girlfriend and baby at 22h00 to 23h00 on 19 October 2018 at Shipando village. On his request the baby was handed to him and he took her outside after complaining about the heat in the room. The accused testified that he used a small knife used for cutting bread to stab the baby. He only stabbed her once in the stomach area and it only caused a scratch. He said that his intention was only to hurt the child however could not provide a reason for doing so. His version is further that the biological mother then came to collect the child outside from him after which he returned to his home where he was arrested the next day.

⁴ Exhibit 'M'.

⁵ Exhibit 'K'.

⁶ *S v Shikerete* (CC 15/2021) [2023] NAHCNLD 50 (17 May 2023).

[22] During cross-examination the accused testified that he took the knife from a table inside the room of his girlfriend before being handed the baby. He could not describe details of the knife however testified that it was sharp enough to cut bread but not sharp enough to penetrate the clothing wrapped around the baby. He admitted that the baby died after the stabbing but denied having the intention to hurt the child. The accused in general struggled to answer questions during the State's cross-examination.

[23] The defence called Doctor Martin Shaninga who testified that he is employed at the Tsandi district hospital and, as part of his duties, conducts post mortems. In his evidence he criticized the post mortem report⁷ in this matter, saying that it is not detailed enough. He said that whilst the cause of death is noted as 'abdominal injury' it would be the underlying cause of death which would result in the actual cause of death as the body reacts to the stab wound. He also testified that if an attempt is made to insert protruding intestines it might lead to its perforation. He conceded that his evidence is based on the post mortem report conducted by another and that at no stage did he examine the body of the deceased. He also conceded that the cause of death was an abdominal injury caused by stabbing. The witness furthermore confirmed that severe force was applied to penetrate the different layers of skin and muscle covering the intestines. Finally he conceded that due to the nature of the injury and the protruding intestines it might be possible not to notice that there are three stab wounds as these will be covered by intestines and blood.

[24] Undisputed evidence before court is that on the night of 19 October 2018 at Shipando village, in the district of Rundu, the accused unlawfully stabbed his one month old baby Marceline Juliana Makena with a knife in the stomach. Shortly after the baby was returned to her mother, an open wound was noticed with protruding intestines. The cause of death was due to the abdominal injury.

[25] It is in dispute that the accused had the intention to injure or kill the deceased and additionally the accused raised the defence of *novus actus interveniens* in that the cause of death was brought about by the interference of medical personnel. The accused admitted to stabbing the deceased only once and thus counsel for the

⁷ Exhibit 'G'.

defence submitted that the only inference to be drawn is that the additional two wounds were caused by the medical personnel when attempting to return the intestines.

The law applicable

[26] It is trite law that the State bears the onus to prove the alleged offence beyond reasonable doubt, which does not mean proof beyond a shadow of doubt.⁸ The burden of proof will be satisfied if the evidence produced by the State raises a high degree of probability resulting in certainty in the court's mind of the guilt of an accused.⁹

[27] C R Snyman defines the offence of murder as 'the unlawful and intentional causing of the death of another human being'. The writer describes the elements of the crime as the following: '(a) causing the death (b) of another person (c) unlawfully and (d) intentionally'.¹⁰ A voluntary action or omission, causing the death of another person, qualifies as the cause of death if it is both the factual and legal cause of death.¹¹

[28] Whenever the court is tasked with the drawing of inferences from circumstantial evidence, the two 'cardinal rules of logic' which should be considered, as established in *R v Blom*,¹² are:

'(1) The inference sought to be drawn must be consistent with all the proven facts; if it is not, the inference cannot be drawn; (2) The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct'.

[29] Further to that, it was stated in *S v HN*¹³ that:

⁸ *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB).

⁹ *R v Mlambo* 1957 (4) SA 727 (A)

¹⁰ C.R. Snyman *Criminal Law* 6 ed (2014) at 437.

¹¹ *Ibid* at 438.

¹² *R v Blom* 1939 AD 188 at 202-203.

¹³ *S v HN* 2010 (2) NR 429 (HC).

'When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence. There is thus no onus on an accused to convince the court of any of the propositions advanced by him and it is for the State to prove the propositions as false beyond reasonable doubt.'

[30] In *S v Hoebeb*¹⁴ it was stated that:

'The Supreme Court in *S v Shaduka*¹⁵ endorsed the approach of Malan JA in the *Mlambo*¹⁶ case which essentially amounts to the following: When an accused causes somebody's death by means of an unlawful assault and only the accused is able to explain the circumstances of the fatal assault, but he gives an explanation which is rejected as false, then the Court can make the inference that the accused committed the said assault with the intention to kill rather than with any other less serious form of *mens rea*.'

[31] Burchell and Milton wrote the following regarding the defence of *novus actus* when raised in the context of medical intervention:

'In determining whether medical intervention can rank as *novus actus*, it is important to determine whether the medical conduct was negligent, or in some other way improper.'¹⁷ It should also be asked if the medical conduct broke the causal sequence set in motion by the action of an accused who had inflicted the initial wound on the deceased which necessitated the medical care.¹⁸

[32] Defence counsel submitted that this court should apply the reasoning in *State v Louw*¹⁹ and not follow the post mortem report blindly as the doctor who compiled it

¹⁴ *S v Hoebeb* (CC 13/2016) [2017] NAHCMD 218 (10 August 2017).

¹⁵ Case No SA 71/2011 (unreported) delivered on 13.12.2012.

¹⁶ 1957 (4) SA 727 (A) at 738B-D.

¹⁷ J. Burchell and J. Milton *Principles of Criminal Law* 2 ed (1994) at 100 para (vii).

¹⁸ *S v Britz* 1990 NR 293; *S v Williams* 1986(4) SA 1188 (A); *State v Ananias* (CA 34/2013) [2013] NAHCMD 238 (6 August 2013).

¹⁹ *State v Louw* (CC 1/2020) [2021] NAHCMD 268 (01 June 2021).

was not called to explain the discrepancies. Counsel for the State argued, and I agree, that the facts in the cited case is distinguishable from the matter at hand. In the *Louw* matter the deceased was stabbed in the shoulder and arrived in a stable condition at the hospital with evidence of additional medical procedures being performed afterwards. In this case before court the evidence is of an injury to the stomach of the deceased which is also confirmed as the cause of death. The witnesses who testified regarding this matter all denied any additional medical procedures apart from emergency care.

Factual findings and applying the law to the factual findings

[33] The accused by his own admission used a knife to stab the baby and did not examine the injury which he labelled a 'scratch'. His version that he only caused a scratch can be rejected as false. The evidence presented is that the deceased was found with an injury severe enough for the intestines to protrude shortly after the accused returned her to her mother.

[34] There is no evidence before court that there was any new act from the medical staff, negligent or deliberate, that caused the death of the deceased. The medical evidence presented from both the State and the defence confirmed that the treatment provided was necessary in an attempt to save the baby's life. The witnesses, all in shock and while the baby's stomach for the most part was covered in protruding intestines and blood, observed one stab wound to the stomach of the deceased. The only logical inference to be drawn, considering that the one month old baby had a tiny body and stomach area, is that the deceased was stabbed three times which could only be discovered during the post mortem examination when dissecting the body. The defence of *novus actus interveniens* can safely be rejected.

[35] Turning now to the intention of the accused. Evidence is that the accused was told he will not be able to support his child. With this in mind he went to his girlfriend's home, collect a knife and isolated the baby by taking her outside. He then used the weapon to repeatedly stab the baby whilst applying sufficient force to penetrate through the clothing covering the baby, the skin and stomach muscles into the cavity holding the intestines. Considering the vulnerable age of the victim, the

weapon used, the state of mind and behaviour of the accused, I am satisfied that the State proved the offence of murder with direct intent to kill beyond any reasonable doubt.

Order

[36] In conclusion this court's verdict is as follows:

The accused is found guilty of Murder (*dolus directus*) read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

E.E. KESSLAU
JUDGE

APPEARANCES

THE STATE: S Petrus
Of Office of the Prosecutor - General, Oshakati

THE ACCUSED: S Makale
Of Directorate of Legal Aid, Outapi