



**CASE NO.: CC 18/2009**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

**versus**

**EPHRAIM KARIKO**

**ACCUSED**

**CORAM: SIBOLEKA, J**

**Heard on: 2010 February 23; 24; 25; 26**

**2010 March 12; 2010 August 23; 24; 25;**

**2010 September 07; 08; 09; 10; 13; 14; 15; 16; 17; 20;**

**21; 22; 24; 30**

**2010 October 14; 20; 2010 November 09;**

**Delivered on: 2010 November 23**

**JUDGMENT: SIBOLEKA, J**

[1] The accused was arraigned in this Court on three counts, namely murder, robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, and defeating or obstructing the course of Justice: Count 1: Murder

The allegation is that during the period 20 - 21 June 2008 and at or near Walvis Bay in the district of Walvis Bay the accused did unlawfully and intentionally kill Allewyn Jacobus van Zyl Brand, an adult person.

Count 2: Robbery with aggravating circumstances as defined in Section

1 of Act 51 of 1977.

In that during the period 20 - 21 June 2008 and at or near Walvis Bay in the district of Walvis Bay the accused did unlawfully and with the intent to force him into submission assault Allewyn Jacobus van Zyl Brand by hitting him at least three times with an unknown object on the head and with intent to steal take from him a Hyundai Accent motor vehicle with registration number N1972WB and its ignition key, a cellular telephone and at least N\$800,00 cash money, the property of or in the lawful possession of the said Allewyn Jacobus van Zyl Brand.

And that aggravating circumstances as defined in section 1 of Act 51/1977 are present in that the accused was before, during or after the commission of the crime wielding a dangerous weapon and inflicting grievous bodily harm to the said Allewyn Jacobus van Zyl Brand by hitting him at least three times on the head.

Count 3: Defeating or obstructing or attempting to defeat or obstruct the course of Justice.

In that during the period 20 - 21 June 2008 and at or near Walvis Bay in the district of Walvis Bay and or in an unknown district and or in the district of

Windhoek the accused did unlawfully and with intent to defeat or obstruct the course of Justice:

1. Remove the dead body of the deceased from the premises of the restaurant "Die Restaurant" and dumping it in a storeroom and locking the storeroom with a padlock; and or
2. Remove the registration number plates from the deceased's motor vehicle and destroy it or in an unknown way dispose of it and fleeing with the motor vehicle to Windhoek; and or
3. Ask State witness Winnie Kariko to destroy the accused's clothes which were covered with blood and to wash the accused's shoes which were covered with blood;

Whereas these acts were perpetrated whilst the accused knew or foresaw the possibility that:

4. His conduct may frustrate and or interfere with police investigations into the disappearance and death of the deceased; and or
5. His conduct may conceal and or destroy the evidence of an assault perpetrated on the deceased; and or
3. His conduct may protect him from being prosecuted for a crime in connection with the assault, disappearance and death of the deceased and the theft of the deceased's property.

[2] The accused pleaded not guilty to all three counts. Mr. Wessels, his counsel, confirmed the plea as in accordance with his instructions. In his plea explanation in terms of Section 115 of Act 51 of 1977 he placed the following on record:

COUNT 1: MURDER

That the accused pleaded not guilty to the charge and denied that he wrongfully and intentionally killed Allewyn Jacobus van Zyl Brand. The accused claimed that on the night of the 20<sup>th</sup> of June 2008 and at or near Walvis Bay and at a restaurant called "Die Restaurant" he merely defended himself from an unlawful attack perpetrated on him by the deceased Allewyn Jacobus van Zyl Brand.

The accused specifically denied that he acted negligently, causing the death of Allewyn Jacobus van Zyl Brand and reconfirmed that he merely acted in self defence at the time when the deceased was in fact fatally wounded.

COUNT 2: ROBBERY WITH AGGRAVATING CIRCUMSTANCES AS

DEFINED IN SECTION 1 OF ACT 51 OF 1977 Accused pleaded not guilty to the charge, and specifically denied that he unlawfully and with the intent to force Allewyn Jacobus van Zyl Brand into submission assaulted the deceased; with the intent to steal and take from him:

A Hyundai Accent motor vehicle with registration number

N1972WB;

Ignition key;

A cellular telephone;

N\$800,00 in cash.

COUNT 3: DEFEATING OR OBSTRUCTING OR ATTEMPTING TO DEFEAT OR

OBSTRUCT THE COURSE OF JUSTICE He pleaded not guilty; He specifically denied that he in any way acted with the intent to defeat or obstruct the course of Justice when he: Removed the body of the deceased from the premises of the restaurant

and placed it in a storeroom on the premises of the restaurant;  
 Fled with the motor vehicle to Windhoek; Asked Winnie Kariko to  
 hide the deceased's clothes which were covered with blood and  
 to wash his shoes which were covered with blood.

[3] The following admissions were recorded in terms of Section 220 of  
 Act 51/77:

COUNT 1: MURDER

Accused admitted that on the night of the 20<sup>th</sup> of June 2008 he  
 was in Walvis Bay when one Allewyn Jacobus van Zyl Brand, an  
 adult male person was fatally injured. He hit the deceased two  
 to three times with a wooden object on the head and also  
 pushed him away from him at some stage where after he fell.

He admitted the identity of the deceased as Allewyn Jacobus  
 van Zyl Brand.

He admitted the cause of death as being internal head  
 hemorrhage.

He admitted the deceased died on the evening of the 20<sup>th</sup> of  
 June 2008 at the premises of "Die Restaurant", in Walvis

Bay.

He admitted that the body of the deceased person, did not  
 sustain any further injuries when it was transported from the  
 scene of the incident to the morgue in Swakopmund where a  
 post mortem examination was conducted.

COUNT 2: ROBBERY WITH AGGRAVATING CIRCUMSTANCES AS DEFINED  
 IN SECTION 1 OF ACT 51/77

The accused admitted that he wrongfully and unlawfully stole from the  
 deceased Allewyn Jacobus van Zyl Brand:

A Hyundai Accent motor vehicle with registration

number N1972WB;

Ignition key;

A cellular phone;

N\$800,00 in cash;

He admitted that when he took the above mentioned items he knew that it was the property of Allewyn Jacobus van Zyl Brand and or at least were under his custody and control;

He admitted that he knew that stealing the four items referred to *supra* from the deceased constituted a criminal offence for which he could be arrested, charged, convicted and sentenced; He admitted that although he was in a serious state of shock at the time of the commission of the crime of theft, he still knew that his actions were unlawful and that he could be punished for same; He admitted that it was him who made the decision to steal the four items referred to *supra* after the deceased was injured very seriously, and he decided to flee to Windhoek in order to get assistance from his family and more particularly his mother and seek their advice as to what should be done about the incident.

COUNT 3: DEFEATING OR OBSTRUCTING OR ATTEMPTING TO DEFEAT OR  
OBSTRUCT THE COURSE OF JUSTICE

The accused admitted the following allegations:

That he removed the body of the deceased person from the lounge of "Die Restaurant", and placed it in a storeroom on the same premises;

- He admitted that he fled to Windhoek after the incident with a motor vehicle to wit an Hyundai Accent with registration number N1972WB; He admitted that he asked Winnie Kariko to hide his clothes that were covered in blood and to wash his shoes which also had blood stains on them.

[4] According to the accused his above mentioned actions were

however not intended to defeat or obstruct the course of justice in that:

He placed the body of the deceased in the storeroom for reasons he cannot explain. He was highly confused, in a state of shock and to say the least hysterical;

He fled to Windhoek with the motor vehicle referred to *supra* in order to seek advice from his parents and his family and more specifically from his mother; He asked Winnie Kariko to hide his clothes until such time that he has discussed the matter with his parents and family where after he would have handed the same to the police.

[5] **JOB KAUVI** is the scene of crime officer, at Walvis Bay. He took photographs at the scene "Die Restaurant" on the 21<sup>st</sup> of July 2008 and compiled a photo plan which was handed in as an exhibit. For purposes of this judgment it is not necessary to repeat details of the photo plan's contents save to say that the deceased's shoes and trouser were found in the lounge apart from the store room where in the body was dragged and found locked up.

[6] **MARINDA BEKKER:** She is a sergeant in the Namibian Police attached to Serious Crime Unit, Walvis Bay. She was called to the scene where visible dragging marks of blood leading up to the store room were shown to her. With the help of a G4 Security officer, she broke the padlock to the store room, opened the door and she found the deceased's body known to her as Allewyn Brand. The corpse had a jersey on without the trouser and she called other police officers to the scene.

[7] **MYRNA LIVEN BRAND:** testified that the deceased was her husband. On 21 July 2008 she could not believe it when Janine, her daughter woke her up at 01h00 and told her that her husband did not arrive home yet. She called the deceased on his cell phone, and on the "Die Restaurant" 's telephone, but there was no response. She and her daughter drove to the scene and the premises were locked, but the car was not parked at its usual place in front of the restaurant. She called Mr. Shimbulu of Community Crime Prevention but he was not there, and she called a friend at Meersig who promised her to find out what happened. In the morning she took the spare keys of "Die Restaurant", and together with a male friend and her sister in law they went to the scene. When she opened she noticed the deceased's spectacles, handkerchief and the comb next to the cash register. On the couch she saw a male trouser which she assumed was her husband's and a rope. They could not go closer or touch things inside. At this stage she started crying hysterically and they decided to take her back home. She was later informed that they found her husbands' body already dead. The vehicle the deceased was regularly using belonged to her, and was registered in her name. On the 20<sup>th</sup> of July 2008 the deceased went to work earlier before she woke up. All was in order with their vehicle and it had its registration numbers on, N1972WB front and rear. When it was recovered it had a sticker written "for sale" which she was not aware of, and neither did she authorize the sale of their vehicle. It was only herself and the deceased that were authorized to use the vehicle. She did not authorize anybody else to use or sell the vehicle.

[8] **HERMAN GEORGE SANDERSON:** testified that the deceased was his brother in law. He packed all the belongings of the deceased and stored them in the garage. In one of the cartons he found a letter from



the accused to the deceased dated the 4<sup>th</sup> of October 2006 and it states:

"Dear Mr Brand, I Ephraim Kariko JR hereby admit that to have stolen your money from your bank account. I am trully sorry for what I have done and there is no way in hell someone could ever trust me again. You are trully a true friend and the best boss I have ever met and I feel so disgusted by my actions that I wish you would lock me up in a jail cell and throw away the key. Because, I am a very confused young man who does wrong based on a bad child hood past. I feel you do not deserve a person who did that to you. I so sorry, I am forever in your debt, signed Kariko."

[9] **NGAVEUANE SHIKONGO** resides in Otjomuise, Windhoek and his other name is Kanu. He knows the accused as they were schooling

together at Ella du Plessis. On the 21<sup>st</sup> of July 2008 at about 16h00, while he was sitting at home with Chester and Seun drinking with friends, they saw and recognized the accused driving alone in a Hyundai car without registration numbers. They called him and when he came they asked if he could buy them some beers because they did not have money. The accused parked in front of the house, beers were bought and they were drinking there. The accused later parked the car inside the yard. The car had a sticker saying: "for sale N\$20.000,00, contact Joe". When asked to whom the car belonged, the accused said he got it from his uncle in Walvis Bay, and was just looking for a customer in Windhoek because he was selling it. The accused left the vehicle there to go and look for petrol but did not return. This witness and others went to look for him but could not find him. On their way back home they heard that the vehicle was stolen and they called the police. According to this witness, the accused did not show that he was drunk he was just normal as he knows him, a quiet person.

On the contention that the accused was highly confused, in a state of shock

and to say the least hysterical, this is what this witness had to say.

"Mr. Wessels:

My instructions from the accused is that he was intoxicated - I do not know about that but he did not show that he was drunk. Did he look as though he is somewhat confused, worried about something, drinking to forget something? - My Lord, he was as normal because we know him as a quiet person and he was quiet."

I am persuaded to accept this description of how the accused looked like, because this witness was just a friend who has no reason to tell a lie.

[10] **WINNIE KARIKO** testified that he resides at Erf No. 2383 Katutura and that he knows the accused as his elder brother. On the 21<sup>st</sup> of June 2008 at 02h00 in the early hours of the morning the accused arrived at their home (at the above address in Katutura). He gave this witness two bags, one containing clothes and the other had shoes which were covered with blood. The accused asked this witness to hide these bags and that he would later tell him the reason for such move. The accused then asked this witness to escort him to Chez Ntemba Club in town where they drank up to 07h00 in the morning before they went to sleep. At 12h00 they woke up and started drinking again. This witness threw the accused's clothes in the dustbin. The accused together with this witness soaked the bloodied shoes in a bucket of water with soap so that the bloodstain could get off. According to this witness the accused's pair of jean trousers also had blood on. The accused gave the deceased's cell phone to this witness as a gift. This witness said that, the night when the accused found him at home he was not normal as he used to be. He looked like someone who was confused, frightened and afraid of

something.

[11] **CHESTER SCHIMMING** testified that he resides at Erf No. 2349 in Katutura. He had known the accused for more or less than 9 years. They stay in the same area and are friends. On the 21<sup>st</sup> of June 2008 while this witness was underway to Winnie Kariko's residence, he saw the accused driving a vehicle and he stopped him. He was alone and he asked him whose vehicle it was, and the accused told him it was for his uncle. The accused gave him a lift up to Winnie Kariko's house. According to this witness the vehicle had a tag written for sale and had no number plates on.

[12] **PHILLIP SIMBAMBI KAYOMBO TSHITETA** testified that he is employed as a medical doctor at Swakopmund hospital. He performed the post mortem on the deceased and found three large wounds on his head, one on the forehead and two behind.

According to this witness each one of the above three wounds would have caused the death of the deceased. During the cross examination of this witness on exhibit 'H' (Report on a medico-legal post mortem examination) and the request by Mr. Wessels the six wounds found on the body (head and neck areas) of the deceased were numbered as follows:

- The wound on the forehead - no. 1
- The wound on the left back side of the head - no. 2
- The wound on the right back side of the head - no. 3 The

wound on the right back side of the head just below the one marked no. 3, is no. 4

- The wound just below the left side eye - no. 5

The wound on the left side of the neck - no. 6.

This witness said wound no. 1 was caused by a blunt trauma (blunt object). When a question was put to him whether such a wound would not have been caused by the falling of the deceased on a blunt instrument lying on a concrete floor that will not move away or break after the deceased being forcibly pushed with great force from behind, the witness said he could not see how it can cause that kind of wound.

[13] This aspect was further pursued with this witness, as follows: "Mr.

Wessels:

If you are pushed and if no additional force is applied to the mass in motion then it will travel at the same speed - No it will even reduce. Yes it can even reduce - Yes so if it reduces then the chances of getting this kind of injury is also reduced ..."

This witness did not rule out the possibility of such a wound resulting from a push with great force from behind.

[14] **JETRO LINEKELA NAKALE** testified that he was employed as a chef by the deceased at "Die Restaurant", and worked there for 7 months before this incident. On the 20<sup>th</sup> of June 2008 he started work at 15h00 up to 22h50. He saw the accused sitting on one of the couches in the lounge alone. When this

witness, the cleaner and the waiter knocked off, the accused remained behind with the deceased in the restaurant. According to this witness the accused was drinking a beer as he sat there talking to the deceased. The deceased was not drinking anything. It was common that sometimes when they knocked off they could leave the deceased with somebody else there in the restaurant. Although this witness testified during cross examination that the deceased sometimes had "funny attitudes" of a woman-like behavior, he could not confirm whether he was a homosexual or not.

[15] **CHARLES SIBOLILE** testified that he is a Chief Inspector, with 20 years experience of which 16 years relate to criminal investigations. At the time of the incident he was the Regional Crime Investigation CoOrdinator for the Erongo Region. After he was alerted about the incident, he drove to the scene and there he instructed that a search for the suspect be intensified. By 12h30 he was informed that the car suspected to belong to the deceased was impounded by members of the Anti-Motor Vehicle Theft Sub Division in Windhoek. He drove to Windhoek with Warrant Officer Sinvula. In Windhoek this witness in the company of Warrant Officer Sinvula and Sergeant Aupa Erastus met the accused at his mother's house, and he appeared shocked. The witness arrested the accused in the presence of both parents (his father and mother). He explained to him his various legal rights whereupon the accused elected to remain silent, however this is contradicted by Detective Sergeant Aupa Erastus. The witness took the accused back to Walvis Bay and gave a lift to his mother to be with him. He did not see injuries on the accused and neither did he ask him to undress himself. The accused told him he does not have injuries.

[16] **AUPA ERASTUS** testified that he is a Detective Sergeant at Walvis Bay

and the investigation officer in the matter. He was present when Chief Inspector Sibolile arrested the accused. When they came out of the house, this witness asked the accused about the allegations that he was

in Walvis Bay, and in his evidence in chief he stated that: "Ms.

Ndlovu:

Okay. Did he mention anything himself? --- That time? So, when we came from the house I asked him regarding the allegations that he was in Walvis Bay and he explained to us that he was the previous night in Walvis Bay. I mean the night of the 21<sup>st</sup> to 22<sup>nd</sup> June he was in Walvis Bay and he was at Die Restaurant where he was left with the Deceased and the argument broke between them the two of them. Then he had a fight with the Deceased where he hit him two to three times in the head or somewhere in the face. .

That is right? --- Then there I asked him what happened thereafter? He said after the Deceased fall on the ground he pull, drag his body from where he fall in the restaurant to the store room at the back of the restaurant is where he left the body there. He came in the restaurant, according to him what he explained to me, he came back into the restaurant where he took the keys. He did not mention to me where exactly where did he find the keys for the car but for the cell phone of the Deceased he alleged that he took eight hundred Namibian Dollars (N\$800.00) from the till. Then after all he locked the restaurant. He closed the restaurant. He locked all (indistinct) then he threw the keys away. It is whereby he jumped into the Deceased vehicle. He went at a certain service station where he put petrol in the car he drove to

Windhoek."

This witness testified further that the accused told him that he took the deceased's cell phone and car keys and gave them to his brother Winnie, and he directed the police to where Winnie was found in Katutura, and the items

were handed to the police. This witness asked Winnie some questions and the evidence in this regard is as follows:

"Ms. Ndlovu : What is the brother's name --- His brother it should be Winny. Okay. --- Then when we arrived at the house directed by him, by the Accused person we found his brother there. I asked him whether he was given a cell phone by the Accused person, he says yes he gave it to me. Then I asked him what else was he given by his brother referring to the Accused person now, he told me that his brother also gave him the shoes, takkies which he requested him to put in the bucket of water because apparently there was blood stain on it. I requested him to give it to me. He went then he fetched the takkies then which he gave to me. I asked him what else if there was something else was given to him? I asked him what about his brother's clothes, which he put on? He told me his brother throw the clothes in the dust bin. I requested him to (incomplete), I went with him so that we can check in the dust bin whether we can find the clothes, alleged clothes. Then with me and his brother we found the plastic containing of clothes. I cannot exact tell what type of clothes was there. Then we picked it up from the dustbin. Then from there I took everything as exhibit to the car."

This witness testified further that he found the accused's takkie shoes in the water and later the jean trouser in the boot of the deceased's car. There was less blood on the deceased's trouser and more on the accused's jean trouser. It is not clear how the deceased's trouser got blood because it was found on the couch in the lounge while his body was found locked up in the store room. This witness was ordered by Chief Inspector Sibolile to drive the deceased's car back to Walvis Bay. He went to the Anti Motor Vehicle Theft Unit where he found the deceased's Hyundai whose rear left small window was broken. It had three stickers on, with words reading 'for sale N\$20.000,00'. There was a contact person's cell phone number which this witness called several times, but remained switched off. It was as a result of

that number always switched off that he was not able to establish who that contact person is.

According to the evidence of Detective Sergeant Aupa Erastus, the accused told him when the deceased fell down as the result of the assault, he dragged the body into the store room and locked it up there. He then locked the doors of the restaurant and threw the keys away. He took the deceased's cell phone, car keys, N\$800 cash, jumped into the deceased's car and drove to Windhoek. There accused's friend and this police officer saw stickers reading 'for sale N\$20.000,00' without number plates. In my view, from the above chain of events it is clear that the taking away of the deceased's property was unlawful.

[17] **CHRISTIAN BORMAN** testified that he resides at Meersig in Walvis Bay and he is a plumber by trade. He told the Court he knew the deceased and was acquainted with his family. On the 21<sup>st</sup> of June 2008 at 04:30 the deceased's wife and her daughter phoned him about the deceased who had not yet come back home. This witness went to the restaurant of the deceased and found that the premises were locked and it looked like all was in order. He drove to Dune 7 to see if the deceased's car was there, but did not find him. He then asked the deceased's wife to come and open the premises, because at that time they were suspecting that something was really wrong. When the restaurant was opened, they went in and on the counter this witness saw a watch and a handkerchief. When the lights were switched on, he walked to the lounge area where he saw blood stains, and he then requested that the deceased's wife be taken back home. The witness



called a security company and requested them to notify the police. This witness and the security guards followed blood stains from the restaurant up to the store room which was locked. When the police arrived he gave them a set of pliers to open the store room door, but before this was done he left the scene.

So far the State's evidence can be summarized as follows:

When the deceased fell down as a result of the assault by the accused, the latter dragged his body from the restaurant and locked it up in a store room;

Hereafter the accused locked the doors of the restaurant and threw away the keys;

Christian Borman supplied a pair of pliers to the police to open the store room where the deceased's body was locked up;

The accused took the car keys and drove the deceased's

Hyundai car to Windhoek;

- The number plates of the deceased car were removed (not on) when the accused came driving the Hyundai car at his friends place in Windhoek;
- The Hyundai car had stickers reading 'for sale N\$20.000,00 contact Joe' when the accused arrived driving it at his friends residence in Windhoek;

After the accused had failed to turn up at his friends residence to collect the Hyundai car he had left there, despite his promise to do so, his friends looked for him at several places they knew he could be found, but was nowhere to be seen. On their way back home they received information that the Hyundai car was stolen, and they called the police who impounded it there and then; The investigation officer, Detective Sergeant

Aupa Erastus tried unsuccessfully to call the contact person's cell phone number which remained switched off;

- The accused's clothes were hidden in the dust bin; However, when Detective Sergeant Aupa Erastus asked the accused about the matter, the latter only told him about the deceased's cell phone, car keys and N\$800,00 cash;
- The Detective Officer had to ask the accused's brother, Winnie Kariko, if there were any other items or something,

that was how the police officer came to know about the accused's clothes hidden in the dust bin and the shoes soaked in water with soap to remove blood stains.

[18] **EPHRAIM JOSEPH TJIZEKUA KARIKO** is the accused in this matter. He testified that he is 24 years of age and was 22 years at the time of the incident. During the beginning of 2008 he was unemployed, he looked for work in Windhoek and later in Walvis Bay, but could not find any. In Walvis Bay he already knew the deceased, because he previously worked for him. The accused testified that he used to visit the deceased as a friend just to greet him, and the deceased had also promised to look for work for him at DHL, a parcel overnight company. The accused also had a friend still in the employ of the deceased called Barongo Toromba.

[18.1] On the 20<sup>th</sup> of June 2008 the accused was in town at Walvis Bay when the deceased requested him to make a turn at the restaurant during weekdays so that he could tell him whether he got work for him or not. When the accused came there, the deceased told him to come back later as he was

still busy with restaurant activities. The deceased latter called and told him to come in the afternoon as he had good news for him. Around 18h00 to 19h00 on Friday, the accused went to the deceased's restaurant. When the accused came there, the deceased told him to go behind at the lounge, as there were three customers who were having meals. The accused went to the backside, a fire place with sofas where they used to seat. It is in the lounge. It was only himself there.

[18.2] The deceased sent a waiter to find out what drink the accused preferred and after making his choice, two beers were brought to him. He drank the two beers and eventually the customers who were having meals left, and it was then time to close the restaurant for the day. The cleaners were busy preparing for the end of that day's business. The deceased came and joined the accused there in the lounge and he told the latter he found him a driving post at DHL. The accused said he did not have a driver's licence, but was told to be patient as the deceased would get it for him within two weeks. While they were sitting there, all workers left the premises, the last to leave were the chef and two cleaners. The chef, Jetro Nakale confirmed this point in his evidence.

[18.3] The accused told the deceased he did not want a beer anymore, because it requires him to go to the toilet now and again. He was then told to get something for himself and he got a full glass of brandy. He sat there and enjoyed it. The accused also told the deceased he was hungry and was told to serve himself with food. The accused went and took pasta and macaroni for himself. The deceased and the accused were sitting at the same seat, and

when the accused had finished his meal, the deceased went to sit at another one. The two men discussed about N\$3000,00 that the accused owed the deceased. At some stage the accused went to the toilet and when he came back all the lights were switched off. The only light illuminating the lounge where they were sitting was from the aquarium, and the accused found this conduct strange. The accused also observed that the deceased had taken off his trousers, pants, and shoes leaving only a jersey on top, and was busy playing with his penis, like masturbating, stimulating in order to get erection.

[18.4] The accused asked the deceased what was going on, but was only told to come and sit down. The accused did not sit, but instead asked the deceased to open the door so that he can leave the place, because according to him he did not know those things.

[18.5] The accused went up to the door of the restaurant and found that it was locked. He came back to the deceased and again asked him to open the door, but the deceased told him to just calm down and be seated so that they could talk. At this stage the Court intervened as follows:

"Court: But why did you want to leave? -- My Lord, I was afraid because this person was naked and normally he does behave like that. He said I owe him some money, now the easy way to take that is I must play with his penis. He said if I should not play with him, he will not find me the job if I refuse to play with him or to take part in this play. Then he said if I do not want to play with him, he will report me to the police to pay back his money. I got angry and I swear at him my Lord, as a drunk person I was angry ... I said to him „your mothers vagina ... come and open the door so that I can leave, then he got

angry ...

Yes He got angry ... and he stood up and he grabbed me.

Court: And now why did you assault him -- Because I was angry I wanted to go out and he did not want to open the door."

[18.6] The accused testified that he did not want to play with the deceased's penis. According to the accused the deceased was a huge heavy built person, he grabbed him on his clothes and started strangling him and in the process he fell on the couch. The deceased started strangling him on top of the couch, and latter on the accused fell on the ground (floor) where he landed with his back. The deceased continued to throttle the accused while on top of him and in that process the accused felt something (an object) underneath the seat (this was a stick - plank) piece of wood, he took it and hit the deceased. While the deceased was continuing strangling him, he was saying to him "fuck you I will kill you." At some stage the accused managed to free himself and he pushed the deceased away from him. However, the deceased still stormed at the accused leading to the latter hitting him further.

[18.7] After hitting him, the accused pushed the deceased hard so that he fell against a table. The accused said the blows he hit the deceased were very hard so that he could get away from him. The deceased could not stand up from where he had fallen there on the ground. He started to look for the keys. Meanwhile the deceased was bleeding and was severally hurt, he was not moving his body, and was no more alive. The accused dragged the deceased's body and locked it up in the store room. He looked for the padlock key and later found the car keys, the cell phone, and plastic bags containing money and he took N\$800,00 cash. He thought to go and tell his mother in Windhoek what had happened.

[19] The question that comes to one's mind here is whether a person who after assaulting another to death proceeds to take away his victims property robs such a victim or merely steals from him.

[20] Mr. Wessels argued that the accused did not rob the deceased, but only stole the alleged items (property).

[21] The charge of robbery preferred against the accused in this matter reads:

**"COUNT 2: ROBBERY WITH AGGRAVATING CIRCUMSTANCES AS DEFINED IN SECTION 1 OF ACT 51 OF 1977**

In that during the period 20 21 June 2008 and at or near Walvis Bay in the district of Walvis Bay the accused did unlawfully and with the intent to force him into submission assault Allewyn Jacobus van Zyl Brand by hitting him at least three times with an unknown object on the head and with intent to steal take from him a Hyundai Accent motor vehicle with registration number N1972WB and its ignition key, a cellular telephone and at least N\$800,00 cash money, the property of or in the lawful possession of the said Allewyn Jacobus van Zyl Brand.

And that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused was before, during or after the commission of the crime wielding a dangerous weapon and inflicting grievous bodily to the said Allewyn Jacobus van Zyl Brand by hitting him at least three times on the head." my own underlining.

[22] It appears from the above charge that for robbery to arise the assault to force the victim into submission before his property is taken away must be wrongful, unlawful and intended coupled with the actual intention to steal. In this matter the accused assaulted the deceased in self defence to protect

himself and therefore the assault was lawful and in accordance with our law. Self defence as a ground of justification has not been displaced by the State witnesses.

[23] On self defence, Holmes, AJA stated as follows in *R v Patel* 1959(3)

SA at page 123 (D:)

"Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons."

[24] The fight between the accused and the deceased has only been covered by the word of the accused before Court. There is no other witness who was able to shed some light as to what the cause of the fight was, who started the attack as well as the details of the fight itself up to the end. Therefore the accused's version has not been contradicted, and as a matter of common cause, he gets the benefit of the doubt in that regard.

[25] Regarding the duty resting on the accused in a criminal trial, I agree with the reasoning of the Court in *R v Difford* 1937 AD at page 373, where Watermeyer, AJA stated the following:

"It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal, ..."

[26] After the accused had assaulted the deceased to death he dragged and locked the corpse in the store room. He went to the restaurant and took N\$800,00 cash, cell phone, car keys, locked the premises and threw away the keys. The police had to use a pair of pliers to open the store room in order to remove the body of the deceased. The accused arrived in Windhoek driving the deceased's car without number plates and was offering it for sale at N\$20.000,00. After the accused had abandoned the deceased's car at a friend, he did not pitch up to collect it. That friend tried to locate him without success, and when word that it was stolen surfaced, police were alerted and they came to impound it. Police only learned about the accused's clothes hidden it in the dust bin, and tekkies shoes soaked in the water with soap to remove blood stains, from his brother Winnie Kariko. The accused himself did not tell the police about it. It is my considered view that the accused made all these efforts to make it difficult for the police to find out who committed the crime and what happened. The accused had succeeded in defeating the course of justice because after conducting himself as stated above, his arrest came only as a result of a tip off to the police about the stolen car.

[27] In conclusion, the evidence in this matter viewed as the whole shows that the deceased has been the aggressor and the State has not been able to prove murder or any of its competent verdicts. The same applies to the crime of robbery with aggravating circumstances.

[28] I am however satisfied that the State has proved beyond reasonable doubt that the accused committed the crimes of theft and defeating or obstructing the course of justice.



[29] In the result, I find as follows:

Count 1: Murder: Not Guilty;

Count 2: Robbery with aggravating circumstances as defined in

Section 1 of Act 51/77: Not Guilty;

In terms of Section 260(d) of Act 51 of 1977: the accused is found

guilty of the offence

of Theft;

Count 3: Defeating or obstructing the course of justice: Guilty.

**SIBOLEKA, J**

**COUNSEL ON BEHALF OF THE STATE:**

**ADV. NDLOVU**

**INSTRUCTED BY:**

**THE OFFICE OF THE**

**PROSECUTOR-**

**GENERAL**

**COUNSEL ON BEHALF OF ACCUSED:  
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**MR. WESSELS  
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