CASE NO.: CC 12/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

KENNETH BUNGE ORINA

CORAM: LIEBENBERG, J.

Heard on: 17 May 2011
Delivered on: 20 May 2011

SENTENCE

LIEBENBERG, J.: [1] Kenneth Orina, on 28 April 2011 this Court convicted you of murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003), and attempting to defeat or obstruct the course of justice. We have now reached that stage of the proceedings where the Court has to pass sentence.

[2] In sentencing, the Court has a judicial discretion that must be exercised in accordance with well-established judicial principles. Regard must be had to the personal circumstances of the offender, the crime, and the interests of society; whilst at the same time, the Court must decide the objective(s) of punishment to be meted out, considered in the circumstances of a particular case[1]. The Court is required to strike a balance between the sometimes divergent interests and to blend the punishment with a measure of mercy, according to the circumstances.[2] It has been said that although each factor deserves due consideration, equal weight need not be given to the different factors, as situations may arise where it becomes necessary to emphasise one factor at the expense of the others.[3]

[3] The accused elected not to give evidence or call any witnesses in mitigation and his personal circumstances were placed before the Court from the Bar. These are as follow: At the age of thirty-eight the accused is a first offender; has one child aged fourteen years, born from the relationship with the deceased and who currently resides with the deceased's parents in Kenya. He has a diploma in nursing and it was submitted that his parents and siblings (eight in number), were financially dependent on him. The accused suffers from high blood pressure and has been in custody since his arrest on 30 October 2007, a period of three-and-a-half years. It was submitted that the accused does not accept his conviction and has already given instructions to his counsel to note an appeal against conviction once the matter is finalised.

[4] One is not surprised by the view taken by the accused as he, despite condemning evidence adduced against him during the trial, maintained his innocence throughout.

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[1] *S v Khumalo and Others*, 1984 (3) SA 327 (A); *S v Tjiho*, 1991 NR 361 (HC).
[2] *Tjiho (supra)*.
[3] *S v Van Wyk*, 1993 NR 426 (HC).

It is obvious that the accused has not accepted any culpability for the heinous crimes he committed; nor has he expressed any remorse for the pain and suffering brought upon the family and loved one's of the deceased – including his own child. He was not moved by the emotional break-down of the deceased's mother in Court when she was required to identify the severed head of her own daughter – a scene that would strike at the heart of any ordinary person. He did not spare the parents the agony of having to look at horrific photos of the dismembered body of their child in order for them to identify the deceased – a fact the accused had placed in dispute despite conclusive (real) evidence against him. This observation is made mindful of the fact that the State bears the onus to prove the offence against the accused and that the accused is under no duty to prove his innocence. The absence of contrition, however, is a factor to be taken into consideration when the Court has to consider deterrence as an objective of punishment; and where same is lacking, there is an increased risk that the accused would re-offend. Whereas the motive behind the killing of the deceased is not known, the accused can be considered to be dangerous.

[5] The crimes committed are undoubtedly serious, more so when considering the circumstances under which the accused murdered his own wife for reasons only known to him; thereafter attempting to dispose of the body in the most gruesome way by dismembering it in ten pieces and discarding these in and around Grootfontein. The deceased was the accused's wife who died at the hands of the one who was supposed to comfort and protect her; and in the absence of any explanation for killing the deceased, it can only be described as a senseless murder where no respect for the sanctity of life was shown. The accused did not take the Court into his confidence when testifying; but instead, came up with a story that he was falsely incriminated by

the investigating team who concocted evidence implicating him as his wife's murderer – despite condemning forensic evidence proving a direct link between him and one of the crime scenes.

[6] This Court in its earlier judgment stated that despite the post-mortem finding as to the cause of death stated in the post-mortem report as: *"Incised wound of the throat. Dismembered, decomposed body parts"*, no *aliunde* evidence was presented from which the Court could reasonably determine the exact cause of death. It is therefore quite possible – and most probable – that death could have been caused in a different manner (than cutting the throat) and that the incised wound to the throat could have been part of the subsequent dismembering of the body and not necessarily be the cause of death. In the absence of such evidence the Court, on the facts, would not be entitled to conclude that the deceased died a *painful* and *cruel* death as contended by State counsel, as the circumstances in which the murder took place, remain unknown.

[7] Evidence has shown that the marital relationship between the accused and the deceased was unstable at the time and that there was a history of domestic violence. Against this backdrop it seems likely that the deceased's death came as a result thereof. Despite several judgments in which it was said that this Court views crime committed in a domestic relationship in a serious light and would increasingly impose heavier sentences in order to try to bring an end thereto, this unfortunate trend in society seems to continue unabated.[4] Regarding the circumstances under which the murder was committed, there are no mitigating factors weighing in favour of the accused. On the contrary, the fact that the crimes took place against the background

[4] *S v Bohitile,* 2007 (1) NR 137 (HC).

of a domestic relationship is an aggravating factor; where not only the life of a young mother was ended, but also left a fourteen year old girl to grow up without the love and support of her biological mother. One can only wonder how the accused one day would explain to his daughter what he has done to his wife – the mother of his child – when he again meets with her. What justification could there possibly be for a husband to kill his wife; what type of person would thereafter dismember the body into pieces, wrap it, dispose of it and then continue with his own life as if nothing has happened? These evil deeds certainly adversely reflect on the character of the accused and it seems to me that judging from the absence of motive and the accused's abominable conduct subsequent thereto; that it could be inferred that the accused is a real danger to society who deserves protection against him.

[8] Regarding the dismembering of the body the accused in his statement to the magistrate stated that he did this as it was the only manner in which he could take the body to the mortuary. This obviously, was a blatant lie. I have already in my earlier judgment concluded that the only reasonable inference to draw from the dismembering of the body and the discarding of the body parts at different sites in and around Grootfontein, was to mutilate the body beyond recognition and to destroy any possible ties with the accused. Add thereto the lies and misleading information given by the accused thereafter to several persons on the whereabouts of the deceased after she had been killed and the picture of a cold-blooded murderer emerges – a person who shows no remorse for what he has done and who meticulously dismembered the victim's body in order to destroy possible evidence; thereby attempting to obstruct the course of justice. It seems to me that it is even possible that the accused imitated

those murders committed in Windhoek where the *modus operandi* was to dismember the bodies and dump them along the B-1 main road.

[9] The barbaric behaviour of the accused fills one with abhorrence which has sent shock-waves through society and it seems appropriate to remind oneself of what was said in *R v Karg* [5]:

> *"It is not wrong that the natural indignation of interested persons of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if the sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands."*

I am aware that public expectation is not synonymous with public interest and that the courts are under a duty to serve only the latter[6]; however, given the grave escalation of crimes of violence committed lately against the most vulnerable in society like the elder, women and young children, there is a general outcry from the public for protection against criminals which cannot be ignored by our courts. The Court fulfils an important function in the community by applying the law and has a duty to uphold the rule of law through its decisions and the imposition of sentence, thereby promoting respect for the law. This Court will certainly fail in its duty to society if it omits to view the crimes committed in this instance as very serious and to protect the sanctity of life expressed by the Constitution by meting out appropriate and suitable punishment.

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[5] 1961 (1) SA 231 (A) at 236B-C

[6] *S v Mhlakaza and Another,* 1997 (1) SACR 515 (HHA); *S v Makwanyane and Another,* 1995 (2) SACR 1 (CC); 1995 (3) SA 391 (CC) at 431C-D.

[10] As regards the objectives of punishment the Court, when balancing the interests of the accused against the crime and the interests of society, is convinced that the aggravating factors by far outweigh the mitigating factors placed before the Court and that the imposition of a lengthy custodial sentence is inevitable. I have alluded to the fact that the accused, in my view, is considered to be a danger to society, who needs to be protected against him. In addition, the Court must ensure that the accused does not repeat these crimes and through the sentence to be imposed, to deter others from committing similar or other serious crimes. In *S v Mhlakaza and Another, (supra)* it was stated that given the current levels of violence and serious crimes, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence and that rehabilitation plays a minor role. I fully endorse these sentiments and further am of the view that the present case is one of those cases where the accused – despite being a first offender – should be punished for the crimes he committed and that the sentence to be imposed must reflect the Court and society's indignation. Not only should the sentence also deter the accused from repeating his crimes, but that a general warning should be sent out to other criminals that these crimes will be severely punished – even for first offenders.

[11] The Court has taken notice of the accused's state of health as he suffers from high blood pressure; but is satisfied that his incarceration would not necessarily bring about any additional hardship and medical suffering, as he could continue taking his medication whilst incarcerated. No reasons were given why this could not be the case. Given the accused's medical knowledge and experience, this would obviously be to his advantage.

[12] The accused has to date been in custody awaiting the finalization of his trial for a period of four years and seven months. As a matter of principle, where the period an accused spends in custody, awaiting trial, is lengthy, this would lead to a reduction in sentence.[7] The accused in this case would be given the same benefit.

[13] Despite the two crimes committed by the accused being closely related in proximity and time, I do not find it appropriate to take the charges together for purposes of sentencing, as two completely different offences were committed, which required different intentions and acts. It would therefore be proper to impose two separate sentences. Regard, however, should be had to the cumulative effect thereof in order to ensure that the totality of the sentence is not disproportionate to the moral blameworthiness of the accused.[8]

[14] In the result, Kenneth Bunge Orina, you are sentenced as follows:

> Count 1 – Murder: 30 years imprisonment
>
> Count 2 – Attempting to Defeat or Obstruct the Course of Justice: 10 years imprisonment.
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> It is ordered that a copy of the judgment and sentence be forwarded to the parents of Rose Chepkemoi Kiplangat (deceased) by the Deputy Registrar of the High Court Oshakati.

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[7] *S v Engelbrecht*, 2005 (2) SACR 163 (WLD) at 172C; *S v Mtimunye*, 1994 (2) SACR 482 (T); *S v Goldman*, 1990 (1) SACR 1 (A).
[8] *S v Coales*, 1995 (1) SACR 33 (A) at 36e-f.

It is further ordered that the passports of Linda Kerubo Orina (**Exh.** "**Q**") and Rose Chepkemoi Kiplangat (**Exh.** "**S**") be handed over to the parents of the deceased by the investigating officer; whilst the passport of the accused to be handed over for safekeeping to the Prison Authorities (Ministry of Safety and Security) where the accused is to serve his sentence.

It is further ordered that the Sony/Ericsson mobile phone (**Exh.** "**1**") be handed over to the parents of the deceased by the investigating officer.

It is further ordered that the knives (**Exh's 2, 3** and **4**) be destroyed.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED	**Ms. I. Mainga**
Instructed by:	**Directorate: Legal Aid**
ON BEHALF OF THE STATE	**Mr. N. Wamambo**
Instructed by:	**Office of the Prosecutor-General**