CASE NO.: CC 20/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

MANDUME MATHEUS KAMUDULUNGE

CORAM: LIEBENBERG, J.

Heard on: 26 October 2011
Delivered on: 31 October 2011

SENTENCE

LIEBENBERG, J.: [1] With the commencement of proceedings this morning the accused was found standing outside the dock bare chest arguing with police officers. I was informed amidst the accused's tirade that he refused to calm down and enter the dock, whereafter I directed the Court

orderlies to take him back to the cells forcibly, if necessary, and had the matter stood down. On resumption Ms *Mugaviri*, who is standing in for Ms *Kishi*, explained that the accused's conduct came as a result of Ms *Kishi's*, absence and that the accused brought to Ms *Mugaviri's* attention that there were other cases outstanding against the accused which he demanded answers for. When the accused returned to the Court he appeared calm. It was explained to him that, should he persist in disrupting proceedings, the Court will invoke the provisions of s 159 of Act 51 of 1977, which provides for proceedings to take place in the absence of an accused who conducts himself in a manner which makes the continuance of the proceedings in his presence impractical. He was further informed that it would be in his best interest to be in attendance when the Court hands down sentence; which advice he apparently accepts.

[2] The accused stands convicted of two counts of murder, having acted with direct intent when he stabbed his girlfriend and seven months old son to death with a knife and thereafter poured petrol over them and set them alight.

[3] When it comes to sentencing the court has a discretion, however, it must be exercised in accordance with well-established judicial principles laid down by the courts over many years. Factors taken into consideration by the court at this stage is the personal circumstances of the accused (offender), the crime (and here the circumstances under which it was committed plays a major role), as well as the interests of society. At the same time the court is required strike a balance between the sometimes divergent interests and

where the circumstances require it, blend punishment with a measure of mercy.[1] It is settled law that although each factor deserves proper consideration, equal weight need not be afforded to the different factors, as situations often arise where it becomes necessary to emphasise one of these factors at the expense of the others.[2]

[4] The State handed in a record of previous convictions of the accused and in aggravation of sentence, led the evidence of Vilho Simeon, a nephew of the deceased, Bertha Kashile.

[5] The accused admitted the previous convictions proved against him. On 26 November 2002 he was convicted of escaping from lawful custody and sentenced to six (6) months' imprisonment. On 07 March 2003 he was convicted of armed robbery and sentenced to a fine of N$1 200 or 12 months' imprisonment; and lastly, on 03 January 2008 he was convicted of theft and sentenced to fifteen (15) months' imprisonment of which five (5) months suspended on certain conditions. Regarding the last sentence, the accused was unable to inform the Court when he was released from prison and whether he had served the sentence in full. Had he completed the sentence, then it means two months later, he committed the murders he now stands convicted of.

[6] When under cross-examination it was elicited from the accused that he has another pending case of escaping from lawful custody – which he

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

admitted, but denied that he was guilty thereof – the Court deemed it necessary to obtain information from the Station Commander where the accused was detained, about the period the accused was not in detention according to police records. According to the evidence of Chief Inspector Shivolo their records reflect that the accused absconded on 09 January 2011, but was re-arrested the following day. This is an insignificant period and would not impact on the sentence to be imposed.

[7] As to the evidence of Mr Simeon, he said that whereas the deceased was the eldest of her siblings, she took it upon herself to support them with the little means to her disposal as casual worker, for their parents are deceased. For this reason her death was a severe loss to her family. Monetary compensation in the amount of N$14 000 was paid by the accused's family to the family of the deceased; which was used on headstones for the deceased persons. From the evidence of Mr Mathias, the elder brother of the accused, it is clear that the compensation came from him and that the accused had no part therein; other than being the sole cause for that. Mr Vilho further said that neither did the accused send his apologies to the family of the deceased for the misery he had brought upon them. In these circumstances, I do not consider the compensation made by the family of the accused to be a mitigating factor, favouring the accused, in sentencing.

[8] The accused testified in mitigation and his personal circumstances are the following: He was born in 1982 at Ohangwena as one of four children, and both his parents in the mean time have passed away. He made a living

from buying and selling goods between Namibia and Angola. Regarding his relationship with the deceased, he was unable to say for how long they had been in this relationship. He was in good health. He furthermore said he attended school up to grade 5 and when his counsel tried to elicit from the accused the reason why he dropped out of school, he informed the Court that he was unable to answer the question *"Because I did not prepare for that one"*. After the Court explained to him the need to get as much as possible information from him for purposes of sentence, he replied, saying *"I have nothing [to do with the sentence]. I don't care about the sentence myself. I'm a Christian. I don't mind the sentence my Lord"*. When asked by counsel what he meant by saying that he was a Christian, he answered, referring to the presiding judge, *"I just said, he must just do his duty, as he study for it. Me I'll just answer before God and not before anyone else"*. It went further and when asked in cross-examination by the State prosecutor how he feels about the death of the two deceased, his response was the following: *"To me, because I don't behave like in flesh, but to me it is okay – it is fine with me, because they have left the suffering of this world"*.

[9] Ms *Kishi* submitted on behalf of the accused that the Court should find in his favour that he has a very limited educational background. Furthermore, that when regard is had to the long spells between his previous convictions as set out in the record, it is indicative that the accused is capable of reform. Whilst acknowledging the seriousness of the offences committed, it was, notwithstanding, argued that the Court should guard against imposing a sentence that would satisfy public expectation; and the Court was encouraged

to exercise its discretion judiciously and mindful of well-established principles on sentence. Mr *Shileka*, on the other hand submitted that the educational background must be considered in relation to the offences committed and as authority, relied on *S v Tcoeib*.[3] It was contended that the offences were committed within the frame work of the Combating of Domestic Violence Act, 2003; and in view of sentences imposed in this Court in the past, involving domestic violence, a deterrent sentence is called for. In his view, when looking at the accused's criminal record, there are no prospects of rehabilitation of the accused; who, from his demeanour in Court, has clearly shown no remorse for what he has done.

[10] Defence counsel's contention that the accused's lack of formal education should be considered a mitigating factor, is, on the present facts, without justification; for there is nothing before Court showing that the accused is an unsophisticated person; neither that it might have impacted on his state of mind when committing the offences and thus lessens his moral blameworthiness. Lack of formal education does not *per se* classify a person to be unsophisticated, for in this country there are many people who, without *any* formal education, live a decent life and has distinguished themselves from others as leaders. According to the Encarta Dictionary, the word "unsophisticated" means *"1. Naïve, inexperienced, and not wise in the ways of the world; 2. Simple and lacking in refinement"*. The accused was to a certain extent a self-employed businessman making a living from the buying and selling of goods across the border, and from what emerged during the trial, lived an ordinary life style – similar to that of the majority of people in this

[3] 1991 NR 263 (HC)

country. Neither do I see the connection between the accused's limited formal education and the manner in which he planned the commission of the offences and the execution thereof, for it does not speak of any lack of sophistication. Consequently, I do not consider the accused's lack or limited formal education to be a mitigating factor – more so, where the accused was unwilling to inform the Court of the reasons why he dropped out of school.

[11] Three previous convictions were proved against the accused of which the armed robbery is the one most serious and relevant whereas it involves an assault perpetrated on someone. Judging from his criminal record, it shows that the accused, despite having served custodial sentences, is a repeat offender; and as regards the murders committed in January 2009, these were committed shortly after he was released from prison. It also shows that the accused has no respect for the rights of others; neither for law and order. Although I am of the view that not too much should be made of the accused's remarks made in Court about him being a Christian and so forth, it would be naïve to completely disregard these remarks, for it tends to shed some light on the character of the person the Court is about to sentence. After all, sentence is not determined in a vacuum. Punishment must fit the criminal i.e. *the person the court is dealing with at the time*, and not what the court may perceive would generally be suitable punishment for an offender guilty of the crime under consideration. The accused's remarks also join in with his demeanour on that fateful evening when he walked into the police station saying *"it is my life"*, as if to say that his actions were justified and only affected him and no one else. Given the nature of the crimes committed by

the accused in the past, at relatively short intervals, and the sentences accordingly imposed, I am not persuaded that the accused, despite his age, is a candidate for reformation. I do not thereby say that it is impossible for the accused to reform, but should he decide to turn a new leaf and work towards reformation, then that should take place in confinement.

[12] The commission of the murders and particularly the circumstances under which it was committed is revolting and shocking. It leaves one with a feeling of disgust and repulsion when hearing evidence and looking at the photos of a seven months old baby who has been stabbed seven times in the chest with a knife – all fatal injuries – and burns all over the head and body. It equally applies to that of the child's mother, Bertha. Although the motive behind the killings remain unknown, I am convinced that there is *nothing* that remotely can explain and justify such cruelty when ending the lives of an innocent, defenceless baby and his mother, stabbing them several times with a knife – more so, when it is your own child. The Court, from the evidence adduced, concluded that the accused must have planned the commission of the murders in advance, which in itself, is an aggravating factor. Besides being stabbed with a knife on either side of the chest twenty-three times and thrice on the back, the accused tied together the hands and legs of Bertha with a rope, making it impossible for her to defend herself, or even attempt escaping the assault. He had also tied the sleeve of a blouse around her neck, in all probability to strangle her. Although the sequence in which these acts took place is unknown, it shows that the accused was determined to eliminate the deceased, Bertha, irrespective of the means required to achieve

his goal. Except for the pain and agony suffered by the victims from the stab wounds, the medical evidence has shown that Bertha was still alive when the bodies were set alight, for there were signs of soot in the trachea; and according to the pathologist, Dr Vasin, she must have died shortly thereafter. The circumstances under which the murders were committed are exceptionally ruthless and cruel, compared to the ordinary cases dealt with by this Court – if murder cases can at all be described as "ordinary" – and, in my view, constitute several aggravating factors weighing heavily against the accused when considering sentence.

[13] Another aggravating factor is the commission of the offences within a domestic relationship as defined by the Act.[4] In the matter of *The State v Kenneth Bunge Orina*[5], I occasioned to say the following at p4 para [7] about offences committed within a domestic relationship and the courts' approach to such crimes:

> *"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.[6]"*

When looking at the circumstances under which the present offences were committed and the accused's demeanour thereafter; as well as his attitude displayed in Court when the accused said that he only answers to God and

[4] Combating of Domestic Violence Act, 2003 (Act 4 of 2003)
[5] Unreported Case No CC12/2010 delivered on 29 May 2011
[6] *S v Bohitile,* 2007 (1) NR 137 (HC).

that he was pleased by the thought that the deceased *"have left the suffering of this world"*, it leaves the impression that he labours under the misconception that his misdeeds are justified and that it is not for society and the courts, to judge him for his deeds, for he only has to answer to the All Mighty. Although I have the greatest of respect for the religious believes of others, I have no doubt that the Christian faith condemns the killing of another human being in the strongest terms; for it is embodied in the Ten Commandments in the Old Testament,[7] on which Christianity is founded. Whereas the accused may be the master of his own destiny, he cannot decide the fate of others; nor decide over life and death of fellow beings. Whilst nurturing these unfounded beliefs, the accused, undoubtedly, is a threat to society; hence, he should be prevented from repeating these evil acts.

[14] The murders were unexpected and on innocent, vulnerable people – especially that of the baby who became the victim of circumstances. The murders displayed acts of brutality and callousness for which he has shown absolute no remorse. When regard is had to the accused's criminal record, his lack of remorse, and the mindset he has displayed before and during the proceedings, the possibility cannot be excluded that he will not re-offend. On the contrary, it appears to me that there is a very strong possibility that he would re-offend. I am convinced that this is an instance where prevention, deterrence and retribution, as objectives of punishment, must come to the fore; and where rehabilitation of the offender deserves to be given less weight.

[7]Exodus 20:15 "Thou shalt not kill" (King James version text)

[15] I have been reminded by counsel that the Court should exercise its sentencing discretion judiciously and should refrain from satisfying the expectation of society when deciding sentence. I can do no better but repeat what I have stated in the *Orina*-case (*supra*) at p6 para [9] where the following appears:

> *"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*[8]*; 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."*

As stated earlier, I consider the accused a danger to others, and in an instance as the present; he should be removed from society for a considerable period of time, for he should not be allowed to repeat these horrendous crimes in future. At the same time, it should also serve as a stern warning to other like-minded criminals that the courts would impose severe sentences on those who make themselves guilty of serious crimes (as in this

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

case); and that the courts, as far as it is reasonably possible, will uphold the rule of law and protect the sanctity of life guaranteed by the Constitution. The aggravating circumstances overshadow the mitigating factors by far, and the crimes the accused was convicted of can only be sanctioned by lengthy custodial sentences. In similar cases, this Court has imposed sentences ranging between thirty and thirty-five years' imprisonment on first offenders[9], which has become the norm and it would require exceptional circumstances to impose a lesser sentence. The accused is not a first offender and when considered together with the remaining factors, a very long term of imprisonment is justified.

[16] For reasons set out above and where the prospects of the accused rehabilitating are little to none, I do not consider a (partly) suspended sentence to be appropriate in the circumstances. The accused, to date, has been in custody, awaiting trial, for two years and nine months; and as a matter of principle, especially where the period is a lengthy one, this would lead to a reduction in sentence.[10] Despite the two murders being committed at the same time, I do not deem it appropriate to take the charges together for sentence; however, the cumulative effect of lengthy custodial sentences may be ameliorated by making an appropriate order.

[17] In the result, Mr. Mandume Matheus Kamudulunge, your sentence is as follows:

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[9]*The State v Joseph Simon Kanghondi*, (unreported) Case No CC09/2002; *The State v Stanley Danster,* (unreported) Case No CC10/2005; *The State v Ronny Naobeb*, (unreported) Case No 26/2006.
[10]*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).

Count 1– Murder, read with the provisions of the Combating of Domestic Violence Act, 2003: 40 (forty) years' imprisonment.

Count 2 – Murder, read with the provisions of the Domestic Violence Act, 2003: 40 (forty) years' imprisonment.

In terms of s 280 (2) of Act 51 of 1977 it is ordered that 20 years of the sentence imposed on count 2, run concurrently with the sentence imposed on count 1.

It is further ordered that Exhibits 1 – 6 be forfeited to the State.

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LIEBENBERG, J

ON BEHALF OF THE ACCUSED **Ms. F. Kishi**

Instructed by: **Kishi Legal Practitioners**

ON BEHALF OF THE STATE **Mr. R. Shileka**

Instructed by: **Office of the Prosecutor-General**