

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case no: CC 01/2016

In the matter between:

**THE STATE**

And

**KAXUI KATJIVI**

**ACCUSED**

**Neutral citation:** *S v Katjivi* (CC 01-2016) [2016] NAHCMD 258 (09 September 2016)

**Coram:** LIEBENBERG J

**Heard:** 25 July; 04 August 2016

**Delivered:** 09 September 2016

**Flynote:** Criminal Procedure – Sentence – Murder (*dolus directus*) – Committed in context of domestic violence – Assault with intent to cause grievous bodily harm – Assault – Plea of Guilty – Plea based on provocation – Evidence rebuts claim of provocation – Accused admits elements of offence but

on improper basis – Limited weight attached to the rejected plea of guilty where made to mislead the court.

Sentence – Mitigating and Aggravating circumstances discussed – Accused first offender and sole provider for family – Employed as cleaner – Uneducated and unsophisticated – Trial awaiting prisoner for two years.

Sentence – Lack of formal education or unsophistication – No basis to treat accused differently in sentencing, unless it was established by way of evidence that his lack of education or sophistication directly impacted on his capability to appreciate the wrongfulness of his actions and/or to act in accordance with such appreciation.

**Summary:** Accused initially pleaded guilty to all three charges preferred against him whilst claiming to have acted under provocation. The State rejected the plea upon which the Court entered a not guilty plea in terms of s 113 of the Criminal Procedure Act. Evidence adduced rebuts allegation of accused having been provoked prior to the commission of the murder. Although accused initially pleaded guilty and admitted all the elements of the offences charged, his intended plea of guilty as mitigating factor cannot be given significant weight as it was not genuine. In mitigation of sentence it was argued that accused's lack of formal education or him being unsophisticated are mitigating factors. There is no basis in law on which an accused, for that reason alone, should be treated differently at sentencing, or found to have acted with diminished capacity, except when established by way of evidence that these factors directly impacted on his capability to appreciate the wrongfulness of his actions and/or to act in accordance with such appreciation. The court found that the accused when committing the murder appreciated the consequences of his actions and notwithstanding executed his intentions. The murder was brutal and committed in a domestic relationship which aggravates the already seriousness of the offence. The accused's personal circumstances do not measure up to the seriousness of the offence and the legitimate interests of society.

---

---

**ORDER**

---

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 35 years' imprisonment.

Count 2: Assault with intent to do grievous bodily harm – 1 year imprisonment.

Count 3: Assault – Cautioned and discharged.

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

The Registrar is directed to forward a copy of this judgment to the Inspector-General of the Namibian Police for his attention and further to draw his attention to paragraphs 21 – 24 of the judgment.

---

**SENTENCE**

---

LIEBENBERG J:

[1] On 19 July 2016 the accused was convicted on counts of murder,<sup>1</sup> assault with intent to do grievous bodily harm and assault. It is common cause that the convictions arose from the same incident during which the accused murdered his wife, Dina Anton, by stabbing her several times on the upper body with a knife. When Alfeus Haurumbu<sup>2</sup> came to her rescue, the accused tried to stab him as well, but he fortunately managed to jump out of harm's way in time without being injured. Bertha Eises, complainant in count 3 and the sister to the deceased, was shoved out of the accused's house during an altercation shortly

---

<sup>1</sup>Read with the provisions of the Combating of Domestic Violence Act 4 of 2003 (hereinafter 'the Act').

<sup>2</sup>The complainant on count 2.

before the stabbing incident took place and did not sustain any injury in the process.

[2] The State in aggravation of sentence led the evidence of Bertha Eises who essentially confirmed her testimony given during the trial which portrayed an unsettled and volatile relationship between the accused and the deceased over many years. Understandably this severely impacted adversely on the family structure, resulting in the deceased leaving the common home on at least two occasions in the past, and on her last attempt on that fateful day, it resulted in her death. The lives of the couple's six children were equally disrupted in that they would leave the house during these unstable periods and seek refuge with their aunt Bertha. According to Bertha this significantly damaged the children's relationship with the accused and, more so, after he had killed their mother. The children are currently in the care of their grandmother living at Okakarara. Herself being a sickly pensioner, receives a grant from the State as well as for the children.

[3] The accused testified in mitigation of sentence and acknowledged his guilt, despite the State having had to lead evidence to show that the accused, prior to committing the offences, had not been provoked as he asserted. At the end of the trial and after rejecting the accused's assertion, the court found the accused to have acted with direct intent when murdering his wife. Nonetheless, the fact that the accused intended pleading guilty and essentially admitted the elements of the offences charged, counts in his favour. Bearing in mind the circumstances under which the murder was committed, together with the accused's failed attempt to mislead the court, limited weight should be accorded to the plea tendered as it cannot be likened to a genuine plea of guilty.

[4] The accused, now aged 34, lived with the deceased in a relationship in the nature of marriage from which six minor children were born. Though he received

no formal education, he had been working as cleaner at a bank in Otjinene for a period of four years prior to his arrest. It is common cause that the accused, ever since, remained in custody for the past two years. He pleaded for forgiveness from the deceased's family and realises that he has brought additional hardship to his children who are now left without the love and care of both parents.

[5] Contrary to Bertha's evidence, the accused maintains his stance that he has a good relationship with his children and that he was the sole provider for his family. As for his relationship with the deceased, he gave conflicting evidence, claiming on the one hand that she neglected her children and falsely spread rumours about him wanting to kill her, whilst at the same time saying that nothing at that stage troubled their relationship and that he did not know why she intended leaving him. The accused in cross-examination however conceded that their relationship had elements of violence and this probably explains why the deceased on the morning of the incident, had told Bertha that the accused, at knife point, threatened to kill her the previous night. On a question by his counsel as to why he killed the deceased, he said the real reason was that he had become tired of the situation, in that he was always accused of wanting to kill her. This, he said, infuriated him and he decided just to kill her to bring an end to it all.

[6] From the above it is evident that there is a history of violence of which the deceased was on the receiving end. It seems that the deceased's earlier alcohol abuse aggravated the situation, as it resulted in her neglecting their children and which frustrated the accused. Fortunately she had stopped drinking about one year prior to her death and there is no proof that alcohol played any role in the commission of the offence on that day.

[7] I find the reasons given by the accused for having killed the deceased disquieting. On his own account the sole reason for the killing was because he had become tired of the situation in which he was being accused of mistreating

the deceased. To him the only way out and to make an end to this hopeless situation, was to kill her. It was a calculated decision, the consequences of which he fully appreciated at the time. He knew he would not escape justice and for that reason went to the police and handed himself over. The fact that the deceased on that day had made her intentions known to (again) leave the common home for her own safety, clearly had a direct impact on his decision to commit the offence of murder.

[8] As for the circumstances under which the crime was committed, it is evident that the accused acted swiftly and took the deceased by surprise. He stabbed her on the upper body several times with a knife that was described as a butcher's knife. During the intervention of Alfeus who tried to stop him, the deceased fell onto the ground where after he continued the stabbing. These were deep penetrating injuries of which three were to the left lung and one to the liver. From the sketches appended to the post-mortem report there were nine injuries to the deceased's upper body, plus several injuries to the arms. The court found the accused to have acted with direct intent to kill when inflicting these injuries. The attack on the defenceless deceased was brutal and vicious with deadly consequences as she died on the spot.

[9] I was referred to what this court had said in *S v Kadhila*<sup>3</sup> which seems worthwhile repeating as from par 17:

'We live in an orderly society which is governed by moral values and obligations with respect for one another. It is expected of all members of society to uphold and respect these values. It is therefore not in the interest of society when persons like the accused trample on the values and rights of their spouses, life companions and loved ones only to make *their* authority felt. The sanctity of life is a fundamental human right enshrined in law by the Namibian Constitution and must be respected and protected by all. The courts have an important role to play in that it must uphold and promote respect for the law through its judgments and by the imposition of appropriate sentences on those making themselves guilty of disturbing the peace and harmony enjoyed in an ordained society; failing which might lead to anarchy where the aggrieved take the law into their own hands to take revenge.'

<sup>3</sup>CC 14/2013 [2014] NAHCNLD 17 (12 March 2014).

[10] What is further aggravating in the present circumstances is that the murder was committed in the context of domestic violence. In the light of the prevalence and continuation of these horrendous crimes being committed almost on a daily basis, it is well settled that the courts take a different view when it comes to sentencing and, in the past, confirmed in the judgments delivered its determination to root out the evil of domestic violence from society. Courts are duty bound 'to give effect to and protect the constitutional values of the inviolability of human dignity and equality between men and women' as was stated in *S v Bohitile*.<sup>4</sup> Though the court's condemnation of the accused's reprehensible and barbaric behaviour must be reflected in the sentence meted out, sight should not be lost of the makeup of the offender the court is dealing with. After all, it is the person before court who must be sentenced.

[11] In cases of serious crime where it is evident that the crime is deserving of a substantial period of imprisonment, the personal circumstances of the offender will necessarily recede into the background, where personal circumstances such as to whether he is employed, or the number of children he has, largely becomes immaterial. It does however not mean that it must therefore be ignored and accorded no weight, as it remains relevant in another respect such as to determine whether the accused is likely to reoffend. Regard may equally be had to his employment and the acceptance of responsibility towards his family, the totality of which could be indicative of the character of the person before court.

[12] The accused managed, despite the lack of any formal education, to secure himself employment as a cleaner at a local bank, which position he held for four years up until his arrest. This in my view is a positive indicator for purposes of reformation. However, the aggravating circumstances are such that a lengthy custodial sentence on the murder count, seems inevitable which brings about that rehabilitation, as an objective of punishment, becomes a lesser consideration and therefore has to take place in prison.

---

<sup>4</sup>2007(1) NR 137 (HC) at 141C-F.

[13] It was further argued on the accused's behalf that his lack of formal education, and him being an unsophisticated person, are mitigating factors to be taken into consideration. I do not agree with counsel's contention. The mere fact that a person is unsophisticated does not place him in a different category of persons when it comes to sentencing, unless it was established by way of evidence that his lack of education or sophistication directly impacted on his capability to appreciate the wrongfulness of his actions and/or to act in accordance with such appreciation. It was argued that had the accused fully and timeously appreciated the consequences of his actions, he would never have committed the murder. This argument clearly loses sight of the accused's evidence that, prior to committing the offence, he appreciated that his actions will land him in jail but, notwithstanding, acted in accordance with that knowledge. Accordingly, I am unable to find that the accused's moral blameworthiness had been diminished at the time of committing the offence, due to his background.

[14] During his testimony in mitigation the accused regretted his actions and said he should rather have left the house. Not only did he rob his children from a mother, but also alienated his children, with whom he had very little contact since the incident. He undoubtedly has to live with a constant sense of guilt for what he has done to his children. Unfortunately this is an inevitable consequence of crime and not something which the court can regard as a mitigating factor.

[15] In respect of the count of assault with intent to do grievous bodily harm, the court is cognizant of the complainant not having been injured due to him timeously jumping backward and out of harm's way. Had he not succeeded, he would likely have been seriously injured, as the evidence showed the stab was directed at the left side of his upper body. The accused's act therefore manifested his intent to injure in a serious respect. Instead of coming to his senses when Alfeus intervened and tried to stop the attack on the deceased, the accused turned on him, trying to stab him as well. The accused's unwarranted behaviour at the time is supportive of a conclusion that the accused had acted with complete disregard for life and the rights of others; neither would he be



stopped at what he had set his mind on, come what may. The offence of assault with intent to do grievous bodily harm to another is equally serious and more often than not attracts a custodial sentence. Though injury is not a requirement for the offence, the absence thereof is indeed a mitigating factor which should reflect in the sentence imposed.

[16] On the last count, involving an assault on Bertha when the accused shoved her out of the house, the court is equally mindful that no injury was inflicted which, in itself, significantly diminishes the accused's moral blameworthiness. Looking at the circumstances under which the incident took place, the accused by then had assaulted the deceased in the presence of Bertha and, as it would appear, he tried to get her out of the house for her not to interfere with what he was busy doing to the deceased. Had the accused already then come to his senses and reflect on his behaviour, much of what followed would likely not have happened; sadly, he did not.

[17] In the light of the circumstances under which the murder was committed, I find the accused's belated apology to the family of the deceased insincere. It was exactly because of the family's alleged interference into his personal life that made him reach the point where it would be better for him to end it all by killing the deceased. For remorse to be a valid consideration at the stage of sentencing, it has to be sincere, something I find absent in the present instance.

[18] The accused had spent two years in detention as an awaiting trial prisoner and although such period is not arithmetically subtracted from the overall total of imprisonment imposed, it is a factor taken into account with all the other factors to arrive at an appropriate sentence in the circumstances of the case. The accused will accordingly be duly credited for the period already spent in custody.

[19] Turning to the objectives of punishment, this is an instance where the emphasis should be on deterrence, specifically of the accused and, in general, to serve as a warning to other likeminded persons. The message must be clear that the courts will not shirk its duty to uphold the rule of law in society and to protect and defend the rights of its members, especially the innocent and

vulnerable, against unscrupulous criminals such as the accused. It seems inevitable to come to the conclusion that the accused's personal circumstances simply do not measure up to the gravity of the crimes committed and the circumstances in which it took place, considered together with the legitimate interests and expectations of society. I am also mindful of the accused being a first offender, however, in the present circumstances the imposition of custodial sentences on some of the counts is inescapable and justified. This view conforms to sentences imposed in similar cases decided in this jurisdiction and to which I was referred.

[20] For the reasons set out in this judgment, I find the following sentences imposed on the accused appropriate:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 35 years' imprisonment.

Count 2: Assault with intent to do grievous bodily harm – 1 year imprisonment.

Count 3: Assault – Cautioned and discharged.

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

[21] There remains one further aspect of this case that deserves further comment, and that is the alleged conduct of the two police officers on duty at the police station of Otjinene when Bertha Eises sought police intervention from them prior to the incident that led to the killing of the deceased, but was turned away.

[22] The evidence of Bertha Eises<sup>5</sup> was that, around noon on 31 July 2014 she went to the police station at Otjinene to report about the accused, being armed with a knife, threatening to stab her and the deceased but was informed by the first officer that his shift had just ended and was therefore no longer on duty,

---

<sup>5</sup>Record p16 line 25 – p17 line 5; p17 lines 22 – 29.

whilst the second officer remarked that he was tired of 'those two people quarrelling' and refused her any assistance. It is common cause that Bertha returned to the accused's house where after she informed the deceased that the police refused to attend to the complaint. The stabbing of the deceased took place soon thereafter.

[23] If any truth were to be found in the testimony given by the witness Bertha Eises pertaining to the conduct of the two police officers whom she approached for assistance, then their inaction, in my view, constitutes a serious dereliction of duty as the mere presence of the police, in all likelihood, would have prevented the attack on the deceased who planned on leaving the common home in order to go and live with her mother at Okakarara.

[24] It is therefore my considered opinion that the evidence adduced before this court regarding the alleged improper conduct of members of the police force be brought to the attention of the Inspector-General of the Namibian Police for his further attention.

[25] It is thus ordered that the Registrar forward a copy of this judgment to the Inspector-General of the Namibian Police for his attention and further draw his attention to paragraphs 21 – 24 of the judgment.

---

JC LIEBENBERG  
JUDGE

## APPEARANCES

STATE

A Verhoef

Of the Office of the Prosecutor-General, Windhoek.

ACCUSED

A Jantjies

Of Siyomundji Law Chambers,  
Windhoek.