



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case No: CC 14/2015

In the matter between:

**THE STATE**

and

**DAVID KIDO**

**ACCUSED**

**Neutral citation:** *State v Kido* (CC 14/2015) [2017] NAHCMD 18 (31 January 2017)

**Coram:** USIKU, AJ

**Heard on:** 01 December 2016

**Delivered:** 31 January 2017

**Flynote:** Criminal Procedure – Sentence – Factors to be taken into account at sentencing – Accused convicted of murder, rape, defeating or obstructing the course of justice and assault with intent to do grievous bodily harm – Offences committed in the context of a domestic relationship – Combating of Rape Act 8 of 2000 – Absence of substantial and compelling circumstances.

**Summary:** Accused convicted of murder, rape, defeating or obstructing the course of justice and assault with intent to do grievous bodily harm – Offences committed in the context of a domestic relationship – Absence of substantial and compelling circumstances – To ameliorate the cumulative effect of the sentence to run concurrently, to the effect that accused must serve a total of 32 years imprisonment.

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## SENTENCE

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(a) Count 1 - Murder: (acting with direct intent): 30 years imprisonment, three (3) years of which are suspended for a period of five (5) years on condition that the accused is not convicted of murder or attempted murder committed during the period of suspension;

(b) Count 2 - Rape (contravening section 2(1) (a) Act 8 of 2000): 12 years imprisonment;

(c) Count 3 - Defeating or obstructing the course of justice: 5 years imprisonment;

(d) Count 4 - Assault with intent to do grievous bodily harm: 1 year imprisonment;

(e) Count 5 - Assault with intent to do grievous bodily harm: 1 year imprisonment;

(f) It is ordered that seven (7) years of the sentence of count 2 and the sentences in respect of counts 3, 4 and 5 shall run concurrently with the sentence imposed in count 1. Therefore the accused is sentenced to a total of 32 years imprisonment.

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## JUDGMENT ON SENTENCE

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USIKU, AJ:

[1] The accused stands convicted of:

[a] one count of murder (acting with direct intent), read with the provisions of the *Combating of Domestic Violence Act 4 of 2003*,

- [b] one count of rape<sup>1</sup>, read with the provisions of the *Combating of Domestic Violence Act 4 of 2003*,
- [c] one count of defeating or obstructing the course of justice, and
- [d] two counts of assault with intent to do grievous bodily harm, both read with the provisions of the *Combating of Domestic Violence Act 4 of 2003*.

The facts of this case are as set out in the judgment on conviction delivered on 29 November 2016. The accused must now be sentenced in respect of the counts on which he is convicted.

[2] In deciding the proper sentence, the court has to consider the traditional triad of the factors normally considered by the courts at sentencing, namely: the personal circumstances of the accused, the nature and gravity of the crime(s) committed and the interests of the society. At the same time the court must also have regard to the objectives of punishment namely: prevention, deterrence, rehabilitation and retribution to strike a balance among them. However, that does not mean equal weight must be given to each of those objectives, as circumstances of a case might dictate that one or more factors must be emphasised at the expense of the others. Having considered the objectives of punishment the court will then have to decide which purpose or any combination of them is best served by the sentence to be imposed. While doing so regard is also to be had to the requirements of the sentencing process to strike a balance among the competing factors, as well as to strike a balance between the principles of equality and consistency of treatment on the one hand and the personal circumstances of the accused, on the other. Coupled with the above, the court is also required to impose a punishment that is blended with a measure of mercy, the court however, being guided by the circumstances of the case, in the application thereof.<sup>2</sup>

[3] The background against which the aforesaid offences were committed, insofar as is relevant to the present proceedings, is as set out hereunder. The accused and one SK were live-in lovers. SK is the mother of IK (the deceased in this matter) and IJK, from a different relationship. The accused and SK (and her aforesaid two girls) ordinarily shared residence, and lived in a domestic relationship, within the meaning

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<sup>1</sup> In contravention of section 2(1) (a) of the Combating of Rape Act 8 of 2000.

<sup>2</sup> S v Oxurub, Case No. CC30/2010 (unreported) delivered on 28 July 2015 para [2]

of the *Combating of the Domestic Violence Act 4 of 2003*. IK (the deceased) was then 18 years old, whereas IJK was 16 years old, and both were school girls at Mariental High School in grade 8.

[4] On or about 19 September 2013, the accused and the deceased were living alone at his dwelling-house at Jakkalsfontein farm, where the accused was employed as a farm labourer. Later that day, the 19 September 2013, the accused reported to SK that the deceased and her belongings had gone missing. According to his report, he had gone to work in the field on the farm, when returned, the deceased and her belongings were not at home. On the 21 September 2013, the accused reported the deceased as missing to the Mariental Police Station.

[5] On 24 September 2013, the accused led a contingent of police officers to a scene, about three kilometers from his dwelling-house, on the aforesaid farm, where a badly decomposed and half-naked body of the deceased was exhumed. The accused was then arrested, charged, tried and on the 29 November 2016 was convicted of the abovementioned offences.

## **THE NATURE AND CIRCUMSTANCES IN WHICH THE CRIMES WERE COMMITTED**

### a) Two counts of assault with intent to do grievous bodily harm

[6] During August 2013, IJK and the deceased decided in protest to leave farm Jakkalsfontein, where they were living with the accused and SK, for Mariental town. They were intercepted by the accused, who after asking them where they were going proceeded to repeatedly hit them with a dropper-pole all over their bodies, and later the accused similarly hit both girls with a whip. The two girls were severely beaten. As a result of such beating, the deceased sustained a laceration on one of her middle fingers, which was bleeding and swollen. SJK suffered a laceration on the back of her head which was also bleeding. As treatment for these injuries, SK applied an ointment on the deceased's injured finger, as well as on the wound at the back of SJK's head. Such treatment was administered for several days till the injuries were healed. The reason for the aforesaid assault by the accused was that

the two girls disobeyed their mother (SK), by suddenly deciding to leave for Mariental without parental authority.

b) rape and murder counts

[7] On or about the 19 September 2013, the accused took the deceased to a spot about three-kilometers from their dwelling-house on farm Jakkalsfontein, where the accused and the deceased sat down on the ground and ate some oranges. Thereafter, at that same spot, the accused suddenly grabbed the deceased on her shoulders, pushed her to the ground, forcibly removed her long-trousers and had sexual intercourse with her. At one point during that process, the deceased had intimated to the accused that she was going to report the rape to her mother. The accused then decided to kill her. After the accused finished raping the deceased, he sat on top of the deceased, strangled her and thereafter hit her with an iron-piece on her head. The medical report confirmed a scalp laceration on the head of the deceased of about 50 cm x 10 cm. After hitting the deceased as aforesaid, the deceased lay motionless.

c) defeating or obstructing the course of justice

[8] After the accused hit the deceased with the iron-piece, the accused unlawfully and intentionally:

- i) buried the deceased in a warthog-burrow that was nearby,
- ii) threw away the object he used to kill the deceased with (i.e the iron-piece),
- iii) burnt the belongings of the deceased,
- iv) reported, under oath, to the police that the deceased had gone missing, resulting in a missing-person file being opened, and resulting in the police undertaking investigations into the search of the missing person.

[9] In performing the abovementioned acts, the accused intended to:

- i) frustrate or interfere with police investigations into any possible charges that may be preferred against him,
- ii) conceal the death and/or destroy the evidence of the commission of the offences that may be preferred against him, and/or

iii) protect himself from being prosecuted for any crime that may be preferred against him.

## **PERSONAL CIRCUMSTANCES OF THE ACCUSED**

[10] The accused testified in mitigation of sentence, that he is at present 49 years old. He was 46 years old when he committed the offences. He is not married. Before his arrest, he was in a love relationship with SK, the mother of the deceased, for about eight years. He has two adult children aged 28 and 30 years old respectively.

[11] He attended school up to grade 10, but dropped-out before he completed grade 10. He has been in custody since 23 September 2013 and has been awaiting trial for about three years and four months. I hasten to add that, it is trite, that if an accused had been awaiting trial for a lengthy period, that would normally lead to a reduction in sentence.<sup>3</sup>

[12] According to his evidence, in 2014 while in custody the accused developed blisters underneath one of his feet. This condition led to his leg being amputated in February 2015, (above the knee), leaving a stump of about 30 cm in length.

[13] According to him, the remaining healthy leg has started to show similar symptoms, as those which developed on the amputated leg since December 2015, and the accused is scheduled to see a doctor on 12 December 2016 for diagnosis. He further deposed that the condition of his remaining leg has been progressively worsening. Since the worsening of the condition about three to four months ago, he testified, he is now wheel-chair bound. The wheel-chair has to be pushed by someone-else, and he depends on the good-will of third parties for mobility. He further related the challenges of using a wheel-chair to the effect that to get onto or off the wheel-chair one needs to get hold onto something else for support, an exercise that poses extra-difficulties especially when using toilet or ablution facilities.

[14] The evidence of the accused that he is wheel-chair bound was challenged by the State. Deputy Commissioner Eixab, the officer in charge of the Windhoek Correctional Facility, testified that part of his responsibilities involves visiting

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<sup>3</sup> S v Mushishi (unreported) Case No. CC07/2010, delivered on 24 June 2010, para [4]

communal cells and single cells, at prison, to check on the welfare of inmates. The accused is being kept in the single-cells division, where he occupies a single cell, alone. He further testified that he observed that about three months ago, since the start of his trial, the accused adopted a practice of going to court in a wheel-chair and using crutches when at the prison. At prison the accused uses both the crutches and the wheel-chair. He disputes the assertions that the accused is wheel-chair bound. Furthermore, he testified, that the accused had never informed him, on any of his visits at his cell, that his remaining leg gives him troubles.

[15] The evidence given by Deputy Commissioner Eixab on the foregoing subject is credible. He gave his evidence in a frank and honest manner and his testimony has not been challenged in material respects. The same cannot be said for the accused. The accused did not make reference during his testimony in mitigation to the fact he is in the single cells division. And did also not explain how he is able to move in the single cell in light of his evidence that the wheel-chair has to be pushed by someone else for mobility. He only conceded that he is in possession of crutches when the issue was brought up in cross-examination. On the basis of the evidence given, I find that the accused is able to use, and does use, both a wheel-chair and crutches.

[16] Insofar as the medical and health condition of the accused are concerned, I find that his condition deserves consideration as part of his overall personal circumstances at sentencing.

[17] The accused further testified that he is a first offender. This factor counts in his favour. He also asked for forgiveness from the family of the deceased and from the court for what he has done.

[18] For remorse to be a valid consideration at sentencing, the remorse must be sincere, and the accused must take the court fully into his confidence and indicate what motivated him to commit the deeds in question. In addition, he should disclose what has since provoked his change of heart and whether he now has full appreciation of the consequences of his actions.<sup>4</sup> In this matter the accused stated that he is asking for forgiveness because the court found him guilty. I find the

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<sup>4</sup> S v Matyityi Case No. 695/2009 (Unreported: ZASCA case) 30 September 2010 para [13]

expression of remorse by the accused in mitigation of sentencing, not credible, especially when viewed against the background of his adamant position that he did not commit murder or rape, in the face of the overwhelming evidence against him. Little weight is therefore to be given to the expression of remorse in this matter.

## **INTERESTS OF THE SOCIETY**

[19] Violence and abuse against women and children ravage our society at an alarming rate and many cases involving such violence come before the court on frequent basis. Many of such acts are committed within family structures. Society expects the courts to impose sentences that suitably match the gravity and prevalence of the offences committed.

## **INDIVIDUAL COUNTS**

### **a) Murder:**

[20] The accused had no justifiable reason for murdering the deceased. The senseless killing of the deceased by strangulation and hitting her with a metal object on her head, robbed the deceased's mother and the Namibian society of the joy of seeing her blossoming into maturity and becoming a productive member of the society. It cannot be gainsaid that the deceased died a violent and brutal death. The impact of the deceased's death on her mother, according to her evidence given in aggravation of sentence, was such that she received medical treatment for shock.

[21] The right to life is a fundamental right guaranteed by the Namibian Constitution. Indeed, the Constitution enjoins all persons to respect and protect the right to life.<sup>5</sup> The accused violated that right, without justification.

[22] Murder is a serious offence and deserves a sentence matching its seriousness. The fact that the murder took place in the context of a domestic relationship constitutes an aggravating factor.<sup>6</sup> A custodial sentence is, therefore, unavoidable to send a clear message that violence against vulnerable members of the society is and will be visited by the courts with severe sentences.

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<sup>5</sup> Articles 5 and 6 of the Namibian Constitution.

<sup>6</sup> Sv Mushishi (supra) para [12], also see Sv Aibeb Case No. CC: 10/2010 (Unreported); 21 November 2011, para [22], and Sv Basson Case No. CC: 23/2010 (Unreported); 01 July 2011, para [5],



(b) Rape

[23] When it comes to the count of rape, the provisions of the *Combating of Rape Act*, come into play. A minimum sentence of 10 years imprisonment is prescribed,<sup>7</sup> unless the court finds that there are substantial and compelling circumstances justifying the imposition of a lesser sentence.

[24] In this matter the rape took place in the context of a domestic relationship and that fact constitutes an aggravating factor.

[25] On the evidence presented during trial, the rape, murder and the burial incidents appear to have been carefully planned and executed with callous brutality. The proximity in time of the rape and murder incidents on the one hand, and the:

- i) decision by the accused that the deceased quits schooling,
- ii) insistence by the accused that the deceased accompanies him to the farm to render service in respect of household-chores where accused and the deceased would be alone,
- iii) insistence by the accused, when his brother RK turned up unannounced, that the latter leaves forthwith,
- iv) the taking of the deceased to the scene where there is/are warthog-burrow(s), and the accused having armed himself with an metal-piece in advance, coupled with the rape, murder and burial of the deceased at that particular scene, in the circumstances, lead to the conclusion that these were not all mere coincidences.

[26] Counsel for the defence submitted that the overall personal circumstances of the accused justify the imposition of a non-custodial sentence in respect of all the offences. Counsel for the State on the other hand, submitted that there are no substantial and compelling circumstances in favour of the accused, and that the accused should be sentenced against such background.

[27] I have taken into account all the personal circumstances of the accused including the time he has spent in custody while awaiting trial and the fact that one of his legs was amputated while in custody. I am of the view that there are no

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<sup>7</sup> Section 3(1) (a) (ii) of the Combating of Rape Act No. 8 of 2000.

substantial and compelling circumstances warranting deviation from the minimum sentence prescribed by the *Combating of Rape Act*. On the contrary, the circumstances in which this offence was committed, are aggravating, that they warrant a sentence in excess of the prescribed mandatory minimum sentence, to deter the accused from repeating this type of offence, and to serve as a general deterrence to the would be offenders.

c) Assault counts

[28] With regard to the assault counts, the general principles of sentencing are applicable. The two assaults were both committed in the context of domestic relationship and that constitutes an aggravating factor.

d) Defeating or obstructing the course of justice count

[29] Furthermore, when it comes to the count of defeating or obstructing the course of justice, the general principles of sentencing are applicable, regard being had to all factors as set out herein-before.

## **CONCLUSION**

[30] Having taken into account all factors discussed above,(including the time spent by accused in custody pending finalization of the trial) I am satisfied that direct imprisonment would be the only appropriate sentence in respect of the offences of which accused is convicted.

[31] As a general rule, the court is obliged to consider the cumulative effect of the sentences to be served. Where the cumulative effect is likely to be disproportionate to the blameworthiness of the accused, individual sentences may be ordered to run concurrently in order to ameliorate the cumulative effect of the sentences to be served.<sup>8</sup> For the foregoing reasons I will order some sentences to run concurrently.

[32] In the result, the accused is accordingly sentenced as follows:

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<sup>8</sup> S v Lukas, Case No. CC15/2013 (Unreported), delivered on 10 August 2015 para [30]

- (a) Count 1 - Murder: (acting with direct intent): 30 years imprisonment, three (3) years of which are suspended for a period of five (5) years on condition that the accused is not convicted of murder or attempted murder committed during the period of suspension;
- (b) Count 2 - Rape (contravening section 2(1) (a) Act 8 of 2000): 12 years imprisonment;
- (c) Count 3 - Defeating or obstructing the course of justice: 5 years imprisonment;
- (d) Count 4 - Assault with intent to do grievous bodily harm: 1 year imprisonment;
- (e) Count 5 - Assault with intent to do grievous bodily harm: 1year imprisonment;
- (f) It is ordered that seven (7) years of the sentence of count 2 and the sentences in respect of counts 3, 4 and 5 shall run concurrently with the sentence imposed in count 1. Therefore the accused is sentenced to a total of 32 years imprisonment.

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B Usiku  
Acting Judge

#### APPEARANCES

STATE: Mr. Lutibezi  
Office of the Prosecutor General

ACCUSED:

Mr. Mbaeva

Instructed by Directorate of Legal Aid