

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: CC 23/2018

In the matter between:

**THE STATE**

and

**JOHANNES KATANGA**

**ACCUSED**

**Neutral citation:** *S v Katanga* (CC 23/2018) [2019] NAHCMD 66 (27 February 2020)

**Coram:** SIBEYA, A.J.

**Heard:** 13-14 February 2020.

**Delivered:** 27 February 2020.

**Flynote:** Criminal Procedure – Sentence – Murder of a farm owner and robbery with aggravating circumstances – Accused employed at the farm murdered and robbed his employer - Position of trust - Society cries to court for protection against violent offenders – Failure to show remorse is an aggravating factor.

Criminal procedure – Murder gruesomely perpetrated on the deceased - This should be condemned by courts - Premeditated murder- Lengthy custodial sentence unavoidable- Accused sentenced to 30 years' imprisonment.

Robbery with aggravating circumstances committed against the employer in a trusted employer-employee relationship. Accused abused the trust – Farming is the cornerstone of our development and economy as such should be protected - Present circumstances calls for custodial sentence- Accused sentenced to 10 years' imprisonment.

**Summary:** The accused was indicted in the High Court on the following charges of count 1 - murder, count 2 - robbery with aggravating circumstances and count 3 – attempted robbery with aggravating circumstances. He pleaded not guilty to all counts and offered no plea explanation but opted to remain silent. On 23 January 2020, this court found that the state proved its case beyond reasonable doubt on charges of murder with direct intent on count 1 and robbery with aggravating circumstances on count 2 and convicted the accused accordingly. He was acquitted on attempted robbery with aggravating circumstances on count 3 as the evidence led by the state was found wanting on that charge.

*Held* that, in sentencing courts should consider the triad principles, namely: the crime, the offender and the interest of society as well as the fourth element of mercy, but mercy should not be misplaced pity.

*Held* further that, although accused is a first offender, such is outweighed by the seriousness of the offences and need for the court to protect society from the accused and would-be offenders.

*Held* further that, the accused murdered the deceased in a premeditated, calculated and gruesome manner which deserves condemnation.

*Held* further that, the accused was in a position of trust towards the deceased in his capacity as the deceased's employee and the accused abused such trust which aggravates the sentences.

*Held* further that, the number of cases of murder and robbery on our court roll shows no sign of abatement and courts should play its role by imposing severe sentences to deter would-be offenders.

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### ORDER

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Count 1: Murder (*dolus directus*) – 30 years' imprisonment.

Count 2: Robbery with aggravating circumstances – 10 years' imprisonment.

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

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### SENTENCE

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SIBEYA AJ:

[1] Working is advantageous to people's well-being. Work keep people busy and creates opportunities for human development. Remunerated work escalates the benefit of such work to human kind as it enables people to

better support themselves and their families. It is therefore a privilege to be employed, which privilege should be cherished and the employers who are the architect of such privilege should be honoured and respected. Where an employee affronts the said privilege by murdering the employer, such person does not only kill the employer, but offends the enjoyed privilege, the trust accorded to him by the employer and his own well-being coupled with that of his family.

[2] On 23 January 2020, this court convicted the accused of murder with direct intent and robbery with aggravating circumstances. This was the ultimate result after the accused pleaded not guilty to all charges and did not offer a plea explanation but opted to remain silent, after which the state and the accused led evidence. The accused insisted that he was innocent on all charges throughout the trial but this court found that the state proved its case beyond reasonable doubt on the charges on which he was convicted.

[3] Mr *litula* appeared for the state while Mr *Siambango* appeared for the accused.

[4] In the premises of the conviction of the accused, this court is duty bound to pass an appropriate sentence to the accused which is proportionate to the charges on which he was convicted.

[5] In endeavour to arrive at appropriate sentences this court considers the frequently cited triad factors of sentencing,<sup>1</sup> namely: the crime, the offender and the interests of society. A fourth adopted factor, so to speak, worthy of consideration was set out in *S v Khumalo*<sup>2</sup> and begs for the consideration of the element of mercy. It has however countless times been stated that mercy should not be misplaced pity. In *S v Sparks and Another*,<sup>3</sup> it was stated that punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. The aforesaid factors should be considered together with the main purposes of punishment, being deterrent, preventative, reformatory and retributive which

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<sup>1</sup> *S v Zinn* 1969 (2) SA 537 (A).

<sup>2</sup> 1973 (3) SA 697 (A) 698.

<sup>3</sup> 1972 (3) SA 396 (A) B at 410H.

are of critical importance to sentencing and this court accordingly consider same.<sup>4</sup>

[6] In sentencing, courts are called upon to strike a balance between the competing factors of sentencing in order to deliver sentences commensurate to the offences on which the accused is convicted. In so doing, it may sometimes be unavoidable to emphasise one factor at the expense of the others.<sup>5</sup>

[7] In applying these factors to the facts and circumstances of this case, this court finds it fitting to commence with the particulars of the accused. The accused testified under oath and stated, *inter alia*, that he is aged 32 years old and at the time of the commission of the offences on 25 September 2017 he was aged 30 years old. He is unmarried and has one son who is due to turn 5 years this year and whose mother is deceased and this child resides with the accused's mother. Accused's mother is unemployed and his father separated from his mother when he was still young and had not heard from his father since. His highest grade in school is grade 7. He further testified that before his arrest, he stayed in Otjiwarongo with his mother and worked as a construction worker at a stone crusher which later closed down. By then he supported his son from his salary. Currently he is not aware of the living conditions of his so as since his arrest none of his family members visited him. He suffers from high blood pressure. The accused further testified that he felt bad because his employer died but still denied causing the deceased's death. He further testified that he had not apologised to the family of the deceased but if the deceased's wife was present at court when he testified in mitigation then he would have apologised to her. He has been in police custody since the date of his arrest on 25 September 2017.

[8] Proceeding to consider the offences. It cannot be disputed that the offences that the accused is convicted of are very serious in nature. The accused while testifying in mitigation acknowledged the seriousness of the

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<sup>4</sup> S v Tcoeib 1991 NR 263.

<sup>5</sup> S v Van Wyk 1993 NR 426 (SC).

offences of murder and robbery with aggravating circumstances. The said offences are further prevalent in this country despite severe sentences being meted out by our courts.

[9] In respect of the murder offence, the deceased died as a result of blunt trauma to the head and thorax and gunshot wound to the right thigh. The murder was premeditated, calculated and gruesomely perpetrated on the deceased causing him severe injuries from a gun-shot, assault him with wooden droppers, stones and dragging him on the ground. The assault was so severe that blood was observed on the brain of the deceased, this according to medical evidence led, is indicative of the severity of the blunt impact to the head of the deceased. The deceased further sustained a gunshot injury to the leg and 17 broken ribs as a result of the atrocious actions of the accused. The offence of robbery with aggravating circumstances entails robbing the deceased of the two firearms, the nokia cellular cellphone with a sim card, and 11 x live ammunitions with aggravating circumstances.

[10] With regard to the interests of society, the number of cases of murder and robbery with aggravating circumstances on our court rolls shows no signs of abatement. Courts are therefore duty bound to protect the society from devastating effects of such offences by imposing severe sentences to deter the accused and would-be offenders from committing similar offences.

[11] The spouse of the deceased provided a statement under oath to the court. She stated in her statement, *inter alia*, that her late husband's death meant that she could no longer live at the farm which was her home for 25 years due to being traumatised resulting from the deceased's death. She stated further that her late husband's death traumatises her daily and she is undergoing psychological treatment as a result. The deceased was the breadwinner in his family. She further stated that she will try to forgive the accused but wished that he should never set his foot out of prison. This court

sympathises with the deceased's family for their loss and considers same in sentencing.

[12] Courts should be mindful that farming is one of the contributing industries to our socio-economic development. Farmers contribute substantially to the sustenance of our economy, provide employment and better life to the employees and their families. Despondently farmers fall victim to violent robberies at an alarming rate in the process of which most precious lives are lost. In expressing condemnation to these barbaric offences, the court in *S v Alexander*<sup>6</sup> per Maritz AJA, as he then was, cited with approval the following passage from *S v Matolo en 'n Ander* 1998 (1) SACR 206 (O) at 211d-f:

*'In cases like the present the interests of society is a factor which plays a material role and which requires serious consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, inter alia, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct.'*

These remarks although made in a South African context, finds equal application to our country Namibia.

[13] *Mr Siambango* submitted that before arrest the accused was a law-abiding citizen and that this fact mitigates the sentence. *Mr Siambango* further submitted that the period of two years and five months that the accused spent in custody awaiting trial thus far is a strong mitigating factor worthy of serious consideration.<sup>7</sup> *Mr litula* submitted in contrast that time spent in custody

<sup>6</sup> (Case No. SA 5/1995) delivered on 13 February 2003 at page 7.

<sup>7</sup> *S v Kauzuu* 2006(1) NR 225 (HC).

awaiting trial is outweighed by the seriousness of the offences and the interest of society in this matter, resultantly it should carry less weight. It is an established principle in our law that time spent in custody pending trial should be considered during sentencing. Cognisance is further taken of the fact that there is no mathematical formula in calculating the exact effect of time spent in custody to sentencing save for sufficient consideration thereof together with all other relevant factors in sentencing. This court will therefore attach due weight to the time spend in custody while considering all other relevant factors to sentencing.

[14] I interpose to state that accused stated that he would have apologised to the family of the deceased if they were present at the time of his testimony in mitigation. This intimation is belatedly made, and in my view, should carry less weight. Genuine remorse should be expressed at the earliest available opportunity as the prolonged delay thereof may cast doubt on the sincerity of the remorse expressed.

[15] The fact that the accused is a first offender must be weighed against the calculated and gruesomeness nature of the offences committed particularly the murder. This court further considered that the accused was in a position of trust as an employee and he bit the hand that fed him when he committed the offences in question.

[16] In view of the aggravating circumstances set out herein, the seriousness and prevalence of the offences, the need for retribution, deterrence and prevention, outweighs the personal circumstances of the accused. This court also considered sentences imposed in similar matters in this jurisdiction for consistency purposes.

[17] Mr *Siambango* submitted that the appropriate sentence in the circumstances of this matter will be a sentence of 15 years' imprisonment on the offence of murder and 10 years' imprisonment on the offence of robbery. He further invited the court to order that the sentence on the robbery offence should be served together with that on the murder.



[18] Mr *litula* in his submissions agreed with Mr Siambango that the appropriate sentence for the offence of robbery will be 10 years' imprisonment while on the offence of murder his submission was that an appropriate sentence will be that of life imprisonment. He also submitted that the sentence on the robbery should be served concurrently with the sentence on murder.

[19] Considering the proximity in time and place and the relation of the actions of the accused, this court in sentencing will order that the sentence imposed on the offence of robbery should run concurrently with the sentence imposed on the offence of murder.<sup>8</sup>

[20] Taking all the aforesaid factors, reasoning and conclusions into account, this court is of the considered view that the sentences set out below meets the justice of this case. In the result the accused is sentenced as follows:

Count 1: Murder (*dolus directus*) – 30 years' imprisonment.

Count 2: Robbery with aggravating circumstances – 10 years' imprisonment.

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

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O S SIBEYA  
ACTING JUDGE

APPEARANCES:

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<sup>8</sup> Section 280 of the Criminal Procedure Act.

FOR THE STATE: Mr T litula  
Of the Office of the Prosecutor-General,  
Windhoek.

FOR THE ACCSUED: Mr M K Siambango  
Of Directorate of Legal Aid,  
Otjiwarongo.