

REPUBLIC OF NAMIBIA

HIGH COURT OF  
WINDHOEK  
  
JUDGMENT



NAMIBIA MAIN DIVISION,

Case No: CC 11/2022

**THE STATE**

versus

**JOHANNES SHIFIMA TOBIAS**

**ACCUSED**

**Neutral citation:** *S v Tobias* (CC 11/2022) [2023] NAHCMD 407 (18 July 2023)

**Coram:** SHIVUTE, J

**Heard:** 1 – 3 November 2022, 15 – 17 May 2023

**Delivered:** 18 July 2023

**Flynote:** Criminal Procedure – Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Accused making an extra-curial statement – Requirements thereof – Such statement admissible if – Made by the accused – Freely and voluntarily – Without the accused having been unduly influenced to make it.

**Criminal Procedure** – Failure to challenge witness' testimony – Unfair and improper to fail to challenge testimony and later on to say witness should not be believed.

**Summary:** The accused is charged with murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The accused made an extra-curial statement to a member of the public. Such extra-curial statement is admissible provided the following requirements are met: (a) The statement should be made by the accused (b) It should be made freely and voluntarily (c) Without the accused having been unduly influenced to make it.

Furthermore, the accused failed to challenge the witness' testimony concerning the nature of the break in at his (accused's) house. The general principle is that it is improper and unfair to let the witness' version go unchallenged and later argue that it should not be believed.

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### VERDICT

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Guilty of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

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### JUDGMENT

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SHIVUTE J:

#### Introduction

[1] The accused faces an indictment containing a single count of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. It is alleged that upon or about 1 July 2021 in the district of Rehoboth, the accused did unlawfully and intentionally kill Miriam Block, an adult female with whom he had a domestic relationship.

[2] The accused pleaded not guilty to the indictment and did not tender any plea explanation.

### Evidence

[3] In proving its case, the State called several witnesses. Tresia Pilukeni testified that she knew the accused person as they shared a residence in the past. She also knew the deceased because, after the witness found her own place where she was selling kapana, the accused used to visit her place in the company of the deceased.

[4] On 1 July 2021, the accused came to the witness' place and said that he wanted to talk to the witness. When the accused entered the sitting room he said: 'I am tired and I am finished'. The witness inquired from the accused why he was saying he was finished. The accused responded that he had killed his 'wife'. The witness observed that the accused's clothes were blood stained and he was full of sand. The accused was wearing a red uniform.

[5] When the accused was telling the witness what he did, there were three girls present who were in the kitchen that was close to the living room. The girls who were in the kitchen were: Ndapanda, Olivia and Laule. The witness' husband was standing at the door because he was the one who opened for the accused. The three girls were able to hear the conversation that took place between the accused and the witness as the door to the kitchen was open.

[6] After the accused said he had killed his 'wife', he invited the witness to accompany him to his house in order to go and see what happened. The witness with the aforementioned girls were led by the accused to his house. Upon arrival, the accused opened the door and uttered the following words: 'There is the lady, I have killed her.' Because the visibility was not very clear in the room, Olivia switched on her cell phone torch. The witness recognised the deceased who was in a kneeling position, as the girlfriend of the accused. She was in a pool of blood.

[7] After the accused showed the deceased's body, he told the witness that he was going to hand himself over to the police. The witness and the girls were shocked by what they saw and decided to leave the accused's place. The witness was screaming and neighbours came. The witness identified exhibit 'C' which is a photoplan by Sgt. Nandenga. Photographs numbers one and two depict the house where the accused took them and photographs numbers five and six depict the body of the deceased. It was further the witness' testimony that after they left the accused's house they went home. At around 20h00, a certain police officer came to her house and requested her to take him to the accused's place.

[8] Instructions were put to the witness that when the accused came to her house, he asked for money for a cab to go to the police station to report a break in that took place at his house. Although the witness initially said the accused did not ask for money, she later on conceded that he asked for money and she gave him N\$20. However, the witness stated that the accused never informed her that there was a housebreaking at his house. It was further put to the witness that, the accused never informed her that he killed his girlfriend and never took them to his house. The witness insisted that the accused told her about the killing of his girlfriend and he took them to his residence.

[9] It was again the accused's instruction that when the accused arrived at the police station, he reported that his house was broken into and his belongings were missing from the house. He was then told by the police that there was no transport, he must wait until transport was available to go to his house. The witness replied that she was not aware about that.

[10] Olivia Johannes and Ndapanda Fanuel both testified that during the time of the incident, they were staying at Ms Tresia Pilukeni's house. On 1 July 2021, they were at home when the accused came to their house and requested to talk to Ms Pilukeni. They both testified that when the accused entered the sitting room, he had bloodstains on his

hands and on his red overall that he was wearing and he was full of sand. They further confirmed that Ms Pilukeni enquired from the accused why he was bloodstained as well as why he was sandy. It was again their testimonies that they heard the accused telling Ms Pilukeni that he was tired and finished. When Ms Pilukeni enquired with what he had finished, he told her that he had killed his wife. The accused invited Ms Pilukeni to go to his place and see what he had done.

[11] The accused even suggested that Ms Pilukeni can go with her children. The accused, by saying Ms Pilukeni can go with her children he was referring to Ndapanda, Olivia and Laule. Both Johannes and Fanuel testified that when they went to the accused's place, they observed a lady who was in a kneeling position. Johannes further testified that upon their arrival, the accused opened the door to his house and invited them to go inside and see what he had done. Johannes and Fanuel testified that Johannes used her cell phone torch for the light. They further testified that the accused told them that he was going to the police station to report himself whilst they were at his house. Because the witnesses were terrified of what they saw, Ms Pilukeni screamed and they also left the accused's place. Johannes and Fanuel also testified that the accused never told them about the break in at his house. He only told Ms Pilukeni that he had killed his 'wife'.

[12] Warrant Officer Alfons Tuyoleni Shadongala testified that, on 1 July 2021 he was on duty at the charge office. Whilst on duty, he attended to the scene in respect of this matter after he received a call that someone was stabbed to death at Block E. The house where the incident took place was closed but not locked. Since the visibility was not clear he put on his cell phone light and pushed the door open. He saw a lifeless body kneeling down on the chair and it was bleeding. There were also blankets that were blood stained in the room. The room had only one door. The door was in a good condition. He did not observe any sign of a break in.

[13] Whilst at the scene, he received information regarding the identity of the suspect and that he told some of the people that he was going to hand himself over to the police

station. The witness then handed over the scene to the Criminal Investigation Department (CID) members and went back to the charge office. Whilst the witness was at the charge office, the accused arrived there. Since the witness was already given information concerning the accused's name and what he was wearing, the witness was able to identify the accused. He asked the accused whether he needed help and the accused said he did not need help, he only came to the police station because of the problem he caused at Block E. He did not interrogate the accused, instead he called members from the CID. The witness spoke to the accused in Oshiwambo, the language both understood. The accused did not report any break in to the witness he found on duty. Furthermore, it could not be said that the accused was told to wait for transport for the police to go to his house in respect of the alleged break in. The witness had a vehicle and he was the one driving it.

[14] Matheus Niklaas Van Wyk testified that he came to know the accused during the cause of his duty on 1 July 2021 when he was arrested at Rehoboth Police Station in connection with this matter. On the date in question, the witness was on standby duty when he received a call that a person was stabbed to death in Rehoboth. He went to the scene and found the deceased dead in a zinc house. She was hanging half way on the chair and she was in a pool of blood. When the witness arrived at the scene there were already other police officers present. A lady by the name Tresia called him aside and informed him that the suspect said he was going to report himself at the police station. Whilst at the scene, the witness received a call from the charge office informing him that the suspect had arrived at the charge office.

[15] The witness together with Sgt Shangula, went to the police station where they found the accused. The witness was able to identify the suspect because of the description of his clothes that was given to him by Tresia. The witness instructed Sgt. Shangula to speak to the accused in Oshiwambo language in order to explain the rights to the accused and to arrest him. Thereafter, the witness conducted a body search on the accused and found a knife in his possession. The knife had bloodstains. The witness had also observed bloodstain on the accused's jacket, trousers and on his arm

and hands. The witness further testified that when he was at the accused's premises, he did not observe any sign of housebreaking, neither did the accused report any break in that allegedly took place at his residence.

[16] Paulus Ndali Shangula, a Sgt. in the Namibian Police testified that on 1 July 2021 he was on standby duty when he accompanied his colleagues to Block E in Rehoboth where this incident took place. At the scene they found charge office members. He observed the deceased kneeling down holding the chair. The deceased had stab wounds all over her body. He checked around the zinc house where they found the deceased. He observed that the house did not have windows. There was a padlock and a chain that was hanging on the door and the key was also in the padlock. The house had one entrance and he did not observe any sign of a break in at the accused's house. Whilst the witness was at the scene, he was instructed by Warrant Officer Van Wyk to go back to the police station. The witness and Warrant Officer Van Wyk went back to the police station.

[17] Upon their arrival at the charge office, they found a man who matched the description of the suspect according to the information they were given at the scene. The accused approached the witness and informed him that his nickname is Shifima and that he stabbed his girlfriend but he did not know whether she was still alive or dead. After the accused told him that, the witness explained his rights to him and informed him that he was going to arrest him. After the explanation of his rights, the accused decided to remain silent.

[18] Whilst still in the charge office, Warrant Officer Van Wyk conducted a body search on the accused and the accused was found with a knife in his pocket. The handle of the knife was brown. The knife had bloodstains on it. The witness also observed bloodstains on the accused's clothes and on his hands. It was again the witness' testimony that the accused did not report any housebreaking to him or to anybody in his presence. He did not observe the accused being assaulted.

Furthermore, when the witness was talking to the accused, they communicated in Oshiwambo, the language they both understood.

[19] It was put to the witness that he assaulted the accused person and never explained any right to him. The witness responded that he did not assault the accused. It was again put to the witness that the accused did not tell him that he had stabbed his girlfriend to death. The witness insisted that the accused told him that. It was further put to the witness that according to his statement, he said, when the accused approached him, he asked the accused what he did. The witness conceded that he asked the accused what he did and the accused told him what he did. It appears to me that before the witness explained to the accused his rights he asked him what he did and the accused did not start telling the witness before he was prompted to do so. It was put to the witness that the accused was not found with a knife and his clothing were not blood stained. The witness replied that a knife was found on the accused and his clothing were stained with blood.

[20] At this stage of the proceedings, counsel for the state handed in documents by consent of both parties namely; Lower Court proceedings exhibit 'L' and application for scientific examination, exhibit 'M'. Thereafter, the state called Donny Block a sibling to the deceased who testified that the accused and the deceased were in a romantic relationship of which a child was born. He proceeded to testify that at first the accused and the deceased's relationship was very good. However, as time passed by, the relationship went sour because they were arguing a lot up to the time he started to assault her. The witness did not witness the first assault as it was only reported to him by the deceased. The second time, the witness saw the accused and the deceased fighting and he separated them.

[21] After he separated them, he advised the deceased to report the assault to the police. He then accompanied the deceased to Rehoboth Police Station. The witness, the deceased and the police went to look for the accused at a certain shebeen where they found him. The police spoke to the accused and the deceased whilst the witness



was standing a distance away but he was able to hear their conversation. The police advised them that if they do not understand each other they should just separate. The accused suggested that they should talk and reconcile. The witness left the accused and the deceased when they were still talking to the police.

[22] Elizabeth Amon, a Warrant Officer from Forensic Pathology Subdivision of the Namibian Police, Windhoek, testified that on 6 July 2021 she attended a post-mortem examination of the deceased by Doctor Gurure. She took photographs of the deceased and compiled a photoplan. Doctor Gurure handed to her a DNA sample that was taken during an autopsy and she handed it over to Sergeant Mutota to take it for forensic examination. The DNA sample that she gave to Sergeant Mutota was a blood sample. The sample was sealed and a number was allocated to it. The blood sample was not tampered with whilst it was in her possession.

[23] Constable Sebastian Basson testified that the deceased came to the police station during June 2021 to report a complaint that the accused assaulted and insulted her. She was in the company of her brother Donny Block. The witness accompanied the deceased and her brother to a place at Block E where they found the accused. He informed the accused of the reason why he was there and gave him a verbal warning. There was no case opened because the victim only wanted the accused to be warned. It was put to the witness that he had never engaged the accused concerning a domestic violence case against the deceased. The witness replied that he did.

[24] Sergeant Elizabeth Haifinasho Nandenga gave evidence that, on 1 July 2021 she attended the scene in this matter. She found the deceased kneeling down over a chair and she was in a pool of blood. She took photographs of the scene of crime. The witness identified the photoplan exhibit 'C' as the one she took and she read it into the record. Apart from taking photographs of the scene of crime, she also took photographs of the accused at Rehoboth Police Station. Photographs 19 – 20 of her photoplan depict bloodstains on the clothes the accused was wearing and photographs 21 – 22 indicate the alleged murder weapon. The witness further testified that she and Sergeant Makoya

transported the deceased's body from the scene of crime to St Mary's Hospital and thereafter, to the mortuary. The body did not sustain any injuries during its transportation.

[25] It was further the witness' testimony that they found the accused at the police station. At the police station, Sgt Van Wyk handed to her an Okapi knife as the murder weapon. The witness also took the belt from the accused that was bloodstained. The belt was photographed. Thereafter, she took the exhibits and booked them at the scene of crime office. The exhibits were packed and sent for forensic examination. The exhibits were recorded on an Application for Scientific Examination form, exhibit 'N'. The knife which had a brown handle was admitted in evidence and marked as exhibit '1' whilst the accused's white belt was marked as exhibit '2'. The witness further testified that she obtained an oral swab from the accused on 28 September 2021.

[26] The witness further explained the procedure she followed after she collected the exhibits to be taken for forensic examination. The DNA reference sampling collection kit was admitted in evidence and marked as exhibit 'O'. All the exhibits were handed over to Sergeant Mutezu to take them to the laboratory. Sergeant Mutezu Matheus Mutezu testified that he indeed received the exhibits and transported them to the laboratory for scientific examination.

[27] Shiwanapo Aloys who works at the National Forensic Science Institute testified that he received the exhibits listed in exhibits 'M' and 'N' and screened them. He took swabs from the blade and handle of the knife as well as the belt and tested them for human blood. The blade of the knife and the belt tested positive for human blood. The witness testified that he prepared two reports, exhibits 'P' and 'Q' that were read into the record.

[28] The second report was compiled because, initially, when he received samples for screening, there was no reference sample from the victim. He requested the investigating officer to submit samples from the victim. He received blood sample or

swabs in respect of the victim. The samples tested positive for human blood when they were screened. All the swab samples that tested positive for human blood were referred to the laboratory for further examination for DNA analysis.

[29] Tuyenikelao Nakalemo, a chief forensic scientist testified that she analysed the samples or exhibits sent to her by Shiwanapo. Her findings among other things were that, the deceased's DNA profile was found on the knife and on the belt. The accused's DNA profile was found on the knife handle and on the belt. The profiles matched the reference samples for the accused and the deceased. Both the accused and the deceased's profile were found on samples Q 060, Q 061 and Q 062. The witness read her full report that she compiled into record and it was admitted in evidence and marked as exhibit 'R'. It was put to the witness that the accused's belt had no bloodstains. The witness responded that the swab from the belt which she analysed had tested positive for human blood.

[30] Doctor Desire Gurure who conducted an autopsy on the body of the deceased on 6 July 2021 testified that he compiled a post-mortem report in respect of the deceased. He identified the report and read it into the record. His findings on the body of the deceased were multiple stab wounds to the neck, chest, heart, liver and back made by a sharp pointed object. Some of the stab wounds were penetrating and others were none penetrating. His conclusion was that the cause of death was due to multiple stab wounds. He further testified that he collected oral swab samples from the deceased and sealed them and handed them to Warrant Officer Amon who doubles as a clerk at the mortuary to send it to National Forensic Science Institute for DNA analysis. The post-mortem report was produced and admitted in evidence as exhibit 'E'. The witness again testified that Warrant Officer Amon was taking photographs according to his directions to correlate with the post-mortem report. The witness further identified a photoplan, exhibit 'D', compiled by Warrant Officer Amon and read it into the record. According to the doctor, for the type of injuries inflicted on the deceased to occur, severe force was used. Apart from the above evidence, further documents were produced by consent and admitted in evidence. This evidence concludes the state's case.

## Defence Case

[31] The accused testified under oath and called no witnesses. He testified that there was a time he was staying in Rehoboth at Tresia's residence because he did not have a place of his own. However, he later went to stay at a certain shack after the owner had moved out. He further testified that he had a romantic relationship with the deceased and he got her pregnant. She moved in to stay with him during 2018 until 2021. He again testified that although the deceased told him that he was responsible for her pregnancy there was a guy who was claiming that the child is his. However, the accused had accepted that he (accused) is the father of the deceased's child. The guy who is claiming paternity of the deceased's child is an ex-boyfriend of the deceased and he resides in the neighbourhood where the accused and the deceased were residing. The deceased told her ex-boyfriend that the child was not his.

[32] With regard to the charge the accused is facing, he testified that on 1 July 2021, he left his residence at 09h00 to look for firewood whilst the deceased was at home. However, his mission to gather firewood did not materialise because when he went to the guy who was supposed to go with him and where the axe was, the guy was not at home. He then decided to go to a place where they brew a traditional drink called tombo. He stayed there until around 20h00. When he went home he found that his house was broken into but he did not find the deceased there. He also realised that two of the blankets were missing. Thereafter, he decided to go to Tresia's place to ask for N\$10 for him to go and report the housebreaking of his house to the police station and she gave him N\$20.

[33] The accused disputed that he told Tresia and the people who were at her house that he killed the deceased. He further disputed that he invited them to his house to show them what he did. It was his testimony that when he went to Tresia's house he only found her and her husband. Although the accused was given N\$20 by Tresia he

walked to the police station as he did not manage to get a taxi. At the police station, he reported that his house was broken into but he was told to wait because there was no transport. Whilst he was waiting, three police officers arrived there and referred to him that he is the one. They then assaulted him and accused him of murdering someone. They locked him up without telling him the identity of the person he allegedly killed until the following day when they said he had killed his girlfriend.

[34] The accused proceeded to testify that he never told any police officer that he had killed his girlfriend. He was also not found in possession of an Okapi knife. Although he owns an Okapi knife, the knife that was produced in court was not his because it was of a different size. He further testified that he did not know the knife produced in court. It was again the accused's testimony that although a white belt was taken from him, he did not see any blood on it. The accused further said what is depicted as blood on photographs 19 and 20 of exhibit 'C' is not blood but rustiness of the belt and that it could be that the deceased touched his belt that is why her DNA profile was found on the belt. The accused disputed that he was seen by the deceased's brother assaulting the deceased or fighting with her.

[35] It was put to the accused that if he did not tell Tresia, Ndapanda and Olivia that he had killed his girlfriend how would they know that if they go to his place they would find the deceased in his room. His response was that he would not be able to say how they ended up going to his place. Concerning the break in, the accused was asked how his house was broken into and he said the person broke a padlock. It was put to him that Sergeant Shangula who attended the scene saw the padlock and the chain hanging but there was no sign of a break in. The accused replied that he could not dispute that because they were the ones who went to his house. The accused was further asked why when he pleaded in the magistrate's court in terms of s119 of the Criminal Procedure Act 51 of 1977 (the Act) he told the court that he is not guilty and that he had no intention to kill the deceased. He replied that he only informed the court that he is not guilty. If it is written that he said he had no intention to kill the deceased, it did not come from his mouth. This evidence concludes the defence case.

### Submissions

[36] Counsel for the state argued that the death of the deceased first came to light when the accused went to Tresia Pilukeni's residence and informed her that he had killed his girlfriend. This was in the presence of the girls who were staying with her. He invited them to go to his house to see what he did. The accused was wearing a red overall that had bloodstains. Tresia and the girls accompanied the accused to his house and found the deceased in a pool of blood. Johannes and Fanuel both corroborated the evidence of Pilukeni. Furthermore, the accused was found wearing a belt that had bloodstains and a knife was seized from him. Warrant Officer Van Wyk and Sergeant Shangula corroborated each other in this regard. Although the accused disputed that there was no bloodstains on his belt and that he was not found in possession of a knife and that the knife produced in court was not his, when the swabs were screened, they tested positive for human blood. Again when they went for DNA analysis, both accused's and the deceased's DNA profile were found on the swab samples taken from the knife and the belt.

[37] With regard to the alleged break in at the accused's place, the state had adduced evidence that there was no sign of a break in and the accused never reported a break in at his house. The break in was supposed to have been the padlock being forced open but this was not put to the witnesses. It was the accused who was in that house and killed the deceased. Again, counsel argued that when the accused pleaded in the magistrate's court, he pleaded not guilty and stated that he had no intention to kill the deceased, if the accused had nothing to do with the deceased's death, he was not going to plead that he had no intention to kill the deceased.

[38] Counsel argued that the deceased was stabbed multiple times. Stab wounds penetrated to the lungs, chest, liver, heart and the neck as per the post-mortem report. This is a clear indication that the accused had the intention to kill the deceased. The accused tendered a bare denial therefore, the court should reject it and convict the accused as charged.

[39] On the other hand, counsel for the accused argued that the state failed to adduce evidence controverting the accused's version. Witnesses Pilukeni, Johannes and Fanuel contradicted each other and proved to be unreliable. There is an instance when Pilukeni contradicted herself with regard to the money she gave to the accused. She kept on changing her version. The evidence by Pilukeni and the two girls that they heard the accused informing Pilukeni that he had killed his girlfriend is a fabrication. The state alleged that the accused had blood on his overall but nowhere on the overall can it be seen with naked eyes that it had bloodstains. Concerning the blood that was allegedly on the belt, the accused explained that it was not blood but rust. With regard to the knife that was allegedly found in possession of the accused, if it was true that it was found on him, the police could have taken a photograph depicting the knife in possession of the accused.

[40] Concerning the DNA profiles of the accused and the deceased that were found on the swab samples, the scientist testified that this can be transferred from one person to another or from one item to another. It is not unusual that DNA profile of people who are living together may be transferred from one item to another. Counsel argued further that the accused did not kill the deceased. He went to the police station to report a housebreaking that took place at his house and never reported himself in connection with this matter. With regard to the plea proceedings in the Lower Court that they should be taken as an admission by the accused when he allegedly said he had no intention to kill the deceased, the fact that they were admitted by consent does not mean that the defence conceded to its content. I pose to state that this submission is untenable, because the plea proceedings were not admitted conditionally. The truthfulness of the content of those proceedings was not challenged. Counsel proceeded to argue that the

state has failed to prove beyond reasonable doubt that the accused committed the present offence. Therefore, he should be given the benefit of the doubt.

### Evaluation of the evidence and applicable law

#### *Extra-curial statement*

[41] In the present matter, there is evidence that the accused allegedly made an extra-curial statement to Tresia that he had killed his wife. As a general rule an extra-curial statement may be made to anyone, not just to a police officer. A statement made by an accused person to any person, his acquaintance or relative other than his wife will be admissible in evidence at his trial. However, for the extra-curial statement to be admissible in evidence, the statement must be proved to have been:

- (a) made by the accused person;
- (b) freely and voluntarily;
- (c) without the accused having been unduly influenced to make it.

[42] Similarly, section 219A of the CPA makes provision for the admissibility of informal admissions that requires a voluntary extra curial admission which does not amount to a confession made by any person to be admissible against him at criminal proceedings relating to that particular offence.

[43] Although the accused disputed that he did not make an extra-curial statement to Pilukeni, her evidence in this regard was corroborated by Johannes and Fanuel. Pilukeni, Johannes and Fanuel went to the accused's place as per his request and indeed found the deceased in a pool of blood. These three witnesses were at their residence minding their own business. If it was not for the accused who went to their place, they may not have known of the deceased's death. Furthermore, it cannot be a mere coincidence that the witnesses went to the accused's residence and found the deceased dead. It was a point of criticism that Pilukeni and the girls Johannes and



Fanuel contradicted each other especially with regard to whether the accused was given N\$20 by Pilukeni. This court is of the view that these contradictions are not material.

[44] What Pilukeni, Johannes and Fanuel said concerning the spontaneous statement was allegedly repeated by the accused to Sergeant Shangula on the accused's own volition. However, it came to light through cross-examination that the accused told the police officer of what he did after he was prompted to do so by him. The police officer was aware that the accused was a suspect in the matter but he did not warn him of his rights before he asked the accused to explain what he did. In view of this, the court is not taking into consideration what the accused allegedly told Sergeant Shangula. However, the extra-curial statement is admitted on the basis that the accused voluntarily told Pilukeni that he had killed the deceased.

[45] Although there was no eye witness who saw the accused stabbing the deceased to death, the circumstances of this case have many pointers against the accused. This court is satisfied that the accused told Pilukeni that he killed his wife whilst Johannes and Fanuel were listening. When Pilukeni, Johannes and Fanuel were led to the accused's house by the accused, they found the deceased in a pool of blood. This court is further satisfied that the accused was found in possession of a white belt, and a knife by Warrant Officer Van Wyk. Van Wyk's testimony in this regard was corroborated by Sergeant Shangula's version. The swab samples from the knife and the belt when screened by Shiwanapo tested positive for human blood. A further examination for DNA analysis by Nakalemo revealed that both the deceased and the accused's DNA profiles were found on the swab samples taken from the knife and the accused's belt.

[46] The accused testified that he went to the police station to report a break in that took place at his house. He further testified that the knife was not found in his possession and that it was not his knife. Sergeant Shangula and Warrant Officer Van Wyk corroborated each other that there was no sign of a break in at the accused's place. They also corroborated each other that the accused was found in possession of

the knife and the white belt that had bloodstains. The knife which the accused said he knew nothing about and his belt tested positive for human blood. When the swab samples were sent for DNA analysis, they tested positive for the accused and the deceased's DNA profiles. It was argued on behalf of the accused that the DNA of the deceased could have been transferred to the accused's belt because they were sharing a residence. Although DNA can be transmitted through touching items, this swab sample was taken from the part of the belt where it tested positive for human blood of which the accused is disputing. Furthermore, if one has to accept that the DNA on the accused's belt was transferred through touching because they were living together, how did the accused's DNA get itself on the knife which the accused said he did not know of? The version that the knife was found in possession of the accused is reasonably possibly true.

#### Failure to challenge the witness' testimony

[47] The accused testified that the people who broke into his house broke a padlock. However, this version was not put to Sergeant Shangula who testified that he saw the padlock and a chain that were hanging on the door and the key was still in the padlock. It would be improper and unfair to let the testimony of the witness go unchallenged and later on argue that the witness should not be believed. This court is guided by this legal principle in deciding this case.

[48] This court having weighed the evidence in its totality, is satisfied that the above mentioned witnesses are credible and trustworthy despite a few shortcomings in their versions which are not material. This court is satisfied that there is no reason for the above witnesses to make allegations in order to falsely implicate the accused. The accused's defence as he placed it before court is a bare denial that cannot reasonably possibly be true and is false beyond reasonable doubt under the circumstances and stands to be rejected.

[49] The factual evidence led by the state is supported by medical and forensic evidence. This court is satisfied that the state has proved its case beyond a reasonable doubt that it was the accused who killed the deceased by stabbing her with a knife.

[50] According to Dr Gurure's evidence, the deceased had multiple penetrating stab wounds to her vital organs. He further testified that for such injuries to occur, too much force was used to inflict such injuries on the deceased with a sharp instrument. In light of Dr Gurure's evidence, this court finds that the nature of the injuries suffered by the deceased, the parts of the body where they were directed, the instrument used, and that the cause of death was due to multiple stab wounds, establish undoubtedly that the accused had a direct intent to kill the deceased.

[51] In the premise, the court arrives at the following verdict:

Guilty of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

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N N Shivute  
Judge

APPEARANCES:

THE STATE:

Ms Ndlovu

Of Office of the Prosecutor-General.

ACCUSED:

Mr Kanyemba

Instructed by: The Directorate of Legal Aid.