

REPUBLIC OF NAMIBIA

HIGH COURT  
WINDHOEK  
SENTENCE



OF 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 497 (11 August 2023)

**Coram:** SHIVUTE J

**Heard:** 28 July 2023

**Delivered:** 11 August 2023

**Flynote:** Criminal Procedure – Sentence – Murder – Factors to be taken into account – Personal circumstances of accused – Accused 50 years old – First offender – Spent two years in incarceration awaiting trial – Factors in his favour – Murder – Serious Crime – Prevalent – Committed in domestic setting – Accused not showing remorse – Aggravating factors – Interest of society – Accused to receive an appropriate sentence.

**Summary:** The accused stands convicted on a charge of murder with direct intent. In sentencing the accused, the court considered the personal circumstances of the accused. The accused is 50 years old. He is a first offender who spent two years in custody awaiting the finalisation of his trial. These are factors in his favour. Murder is a serious offence which is prevalent in our country and it has been committed in a

domestic setting. The accused did not show any remorse. These are aggravating factors. There is a need to balance the interest of the accused and those of the society in relation to the crime itself and in relation to the purposes of punishment. The interest of society demands the accused to receive an appropriate sentence for the offence he committed. In the present matter the aggravating factors greatly overshadow the mitigating factors. The accused deserves to be removed from society for a lengthy period of time.

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### **SENTENCE**

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Murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003: 28 years' imprisonment.

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### **JUDGMENT ON SENTENCE**

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SHIVUTE J:

[1] The accused was convicted on one count of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

[2] The accused did not testify in mitigation of sentence. However, counsel for the State called the deceased's father who testified in aggravation of sentence. He testified that the deceased, left a son who was one year and six months old at the time she passed on. Currently the deceased's son is three years old. The child is now staying with the witness and his sister. The witness and his sister have no source of income apart from the social grant they receive from the government.

[3] The witness and his family are badly affected by the deceased's death. Although the deceased was not working, she was looking after her father. She supported him with the little money she got and she used to clean his house and his clothes. She was also his only daughter. The deceased died at a youthful age as she was only 28 years at the time. The deceased's siblings get emotional, especially if they see the deceased's child. The witness asked the court to sentence the accused to more than 50 years' imprisonment, so that he can also be removed from his family and they could experience how it feels when a family member is taken away from them.

[4] The personal circumstances of the accused were placed before court by his counsel. He is a first offender whose educational background is very poor. The accused is 50 years. He is not married. However, he has two minor children, including the child he has with the deceased. His counsel urged the court to impose 30 years' imprisonment on the accused of which five years are suspended on the usual conditions. Counsel further argued that the accused should be given an opportunity to serve a sentence that would enable him to come out of prison so that he could look after his children.

[5] On the other hand, counsel for the State argued that the accused has been convicted of a serious offence. It is aggravated by the fact that it was committed in a domestic setting. Although his counsel urged the court to exercise mercy on him, the accused's moral blameworthiness was very high. The accused used to physically abuse the deceased as testified to during the trial. The accused killed the deceased after he was warned by the police to not physically abuse her. The deceased died a cruel death according to the post-mortem report as presented by Dr Gurure. Counsel argued that this is a case where there can be no balance between the aggravating and the mitigating factors as the aggravating factors far outweighed the mitigating factors. Therefore, the accused should be sentenced to life imprisonment as he is not capable of being reformed.

[6] In deciding what a proper sentence should be, I will consider a triad of factors namely the offender, the crime and the interest of society. At the same time regard must also be had to the objects of punishment which are prevention, deterrence, rehabilitation and retribution.

[7] The court must try to effect a balance in respect of the interest of the accused and the interest of society in relation to the crime itself and in relation to those purposes. Whatever the nature of the crime may be, it is the person who committed the crime who is to be punished. His personal circumstances play an important role and must not be ignored. The net result of this approach is that sentences for similar offence frequently differ because personal circumstances differ. The personal circumstances of the accused must be weighed in relation to the interest of society. It is in the interest of society that the accused receive an appropriate sentence. See *S v Tjiho* 1991 NR 361 at 362, headnote.

[8] In sentencing the accused, this court will be guided by the above principles. Although the accused is a first offender who is unsophisticated, he killed a defenceless woman with whom he was in a domestic relationship to which a son was born. It is not very clear as to why the accused killed the deceased. The motive is only known to himself. The accused brutally and cowardly killed the deceased by stabbing her with a knife multiple times on her vital organs. The accused murdered the deceased with a direct intent. He did not show any remorse for his actions. He has committed a serious offence which is prevalent in this country and he has also deprived his young son of the love and care of his mother. Furthermore, the accused's actions caused the deceased's family to suffer irreplaceable loss.

[9] The factors which are in the accused's favour are that he is a first offender who spent two years incarcerated awaiting for the finalisation of his trial. This court having considered the evidence placed before it, as well as arguments by both counsel, it is of the view that the aggravating factors greatly overshadow the mitigating factors. The

accused is a danger to society as he has no respect for human life and he deserves to be removed from society for a lengthy period of time.

[10] In view of the foregoing reasons, I consider the following sentence to be an appropriate sentence:

Murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003: 28 years' imprisonment.

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N N Shivute  
Judge

APPEARANCES:

THE STATE:

E Ndlovu

Of Office of the Prosecutor-General, Windhoek

ACCUSED:

S Kanyemba

Instructed by the Directorate of Legal Aid, Windhoek