

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

SENTENCE

Case No: CC 06/2014

In the matter between:

**THE STATE**

v

**MATIAS KASHINDINGE KALUNGA**

**ACCUSED**

**Neutral citation:** *S v Kalunga* (CC 06/2014) [2019] NAHCNLD 35 (29 March 2019)

**Coram:** JANUARY J

**Heard:** 11 February 2019

**Delivered:** 29 March 2019

**Flynote:** **Criminal law** – Sentence - Murder read with the Combating of Domestic Violence Act, Act 4 of 2003 and a second count of murder –Direct intent – Case of 2 extreme murders – alleged adultery.

**Summary:** The accused is convicted for 1. Murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. 2. Murder.

He shot his wife and a male person with whom his wife was allegedly in an adulterous relationship. The accused was informed by one Hilia, the wife of the male deceased on

numerous occasions about the alleged relationship. The accused who was employed in Walvis Bay travelled to the North of Namibia where his wife was residing. He confronted his wife of the adulterous allegations. She denied it. On the night of the incident his wife did not return from work. The accused, armed with a pistol, searched for his wife and the male deceased. He was directed to a certain house where the male deceased stayed. He did not find the two deceased. A motor vehicle approached the house. It turned out that the two deceased were in the motor vehicle. The accused firstly shot and killed his wife. He thereafter shot the male deceased in a motor vehicle the deceased was driving. Both deceased died instantly. The court found that he murdered both deceased with direct intent.

The court found that this is a case calling for the harshest sentence. Sentenced to life imprisonment on each count of murder.

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### **ORDER**

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1. On count 1: The accused is sentenced to life imprisonment;
2. On count 2: The accused is sentenced to life imprisonment.
3. The sentences are to be served concurrently.
4. The accused is declared unfit to possess a firearm for the rest of his life.
5. The relevant Makarov pistol with serial number ATM890797, 2 magazines, 6 live bullets and pistol holster are declared forfeited to the State.

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### **SENTENCE**

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#### **JANUARY J**

[1] The accused is convicted on 2 counts of murder committed on the same date, time and place. Count 1 relates to the murder of his wife in a domestic setting. Count 2 relates to a deceased that allegedly was in an adulterous relationship with deceased in count 1. The court has now reached the stage where sentence must be imposed.

[2] This court must exercise a judicial discretion in accordance with well-established judicial principles. The court must sentence the accused considering the personal circumstances of the accused, the crime, the interest of society<sup>1</sup> and have regard to the interest of victims of crime.<sup>2</sup> The court must consider elements such as retribution, deterrence and prevention, as well as reform or rehabilitation to satisfy the objectives of punishment.

[3] The crime of murder of the deceased wife took place in a domestic setting. Therefore section 25 of the Combating of Domestic Violence Act, Act 4 of 2003 is applicable. It provides as follows:

**'25 Complainant's submission in respect of sentence**

(1) The court must, if reasonably possible and within a reasonable time, notify the complainant or the complainant's next of kin, if the complainant is deceased, of the time and place of sentencing in a case of a domestic violence offence against the complainant.

(2) At the time of sentencing, the complainant, the complainant's next of kin, if the complainant is deceased, or a person designated by the complainant or the complainant's next of kin has the right to appear personally and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation.

(3) A complainant, or the complainant's next of kin, if the complainant is deceased, who is unwilling or unable to appear personally at sentencing has the right to inform the court of his or her views on an appropriate sentence by means of an affidavit.'

[4] Mr Matota called a witness who is the aunt of the deceased. She testified that the relationship between the accused and the deceased was characterized by unresolved disputes. The deceased left their common home in Walvis Bay because of a history of domestic violence. The deceased was the mother of five children of which four are the children of the accused. After the death of the deceased the children were divided amongst family members who take care of them. The youngest child stays with the

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<sup>1</sup> *S v Tjiho* 1991 NR 361 (HC).

<sup>2</sup> *S v M* 2007 (2) NR 434 (HC).

witness. The witness is a pensioner, 82 years of age. None of the children currently receive social grants as the applications were rejected.

[5] The witness testified that the relevant deceased, the wife of the accused, was the only breadwinner in the family and was self-employed. The witness testified that the court should impose a sentence that will fit the offence. She testified that the family did not receive an apology from the accused. She forgives the accused because God also forgives. The family will however never forget the incident.

[6] The accused testified in mitigation. He is 48 years old. He has 6 children. He stated that the children are schooling but he does not know where. He does not know who takes care of the children. The accused was employed at Tunacor, a fish factory in Walvis Bay, and earned about N\$4000 per month. He took care of the children before his arrest. He is in custody trial awaiting, for about 6 years.

[7] He suffers from health problems, is a doctor's patient, HIV positive and has abnormal heart beats. He testified that he feels bad about the crimes. He extended an apology to the court, the deceased's family, his family and the whole of Namibia. He asked the court to impose a lenient sentence.

[8] The accused conceded in cross-examination that the crimes are serious. He denied that he travelled to the North with intent to commit the murders. According to him the relationship between him and his deceased wife was good. He testified that he acted in self-defence. In my view the accused only paid lip-service with his apologies to the families, the court and Namibia in general. He did not show genuine remorse. The accused is a first offender.

[9] This court already found that the accused acted with pre-meditated direct intent to commit both murders. His explanation that he had the pistol for self-defence was rejected. Murder is one of the most serious crimes. Any person's life is protected by the Namibian Constitution. The evidence shows that the crimes were committed in a cold blooded executional manner. The accused shot his wife 6 times, all shots directed to the head and face of this deceased. I accepted the evidence of the pathologist that the first shot went through the hand of this deceased. She had her hand in a defensive position

before the shot was fired. One can just imagine the fear and agony she must have suffered before her execution by a person she once loved. The male deceased was shot three times also into vulnerable parts of the body.

[10] Collectively the accused emptied a magazine with 8 bullets on the victims. The attack on the deceased persons was heinous, savagery and brutal. This court has on numerous occasions condemned violent behaviour, especially on women and children in domestic settings. This is also applicable to any accused who takes away the life of another person. A sentence that will not only deter the accused but also other would be transgressors is called for.

[11] I respectfully agree with Cheda J where he stated: ‘ . . . Time has come for men to realize that women have a right over their bodies, minds and souls to an extent that when they have made up their minds about terminating a relationship, this should be respected and they should be allowed to start their lives without feeling bound to their previous relationships, which in some cases are abusive to say the least.’<sup>3</sup>

[12] In my view the accused is a danger to society. Society, his own relatives and children deserve protection from him and any persons who commit crimes with such brutality and cold bloodedly as had happened in this case.

[13] In this jurisdiction, it was recently confirmed that life imprisonment is the most severe sentence in Namibia and is not unconstitutional. The crime of murder is one of the most, if not the most extreme crimes. It was determined that life imprisonment should be imposed in the most extreme cases of a murder.<sup>4</sup> This court finds in the circumstances of this case that these murders are most extreme.

[14] The State applied in terms of section 10(6) of the Arms and Ammunition Act, Act 7 of 1996 for the accused to be declared unfit to possess a firearm. The accused did not object to being declared as such. In the same breath the State applied that the firearm, two magazines ammunition and pistol holster to be forfeited to the State in terms of section 35(1)(a) of the Criminal Procedure Act, Act 51 of 1977 as amended. There was no objection to the application.

<sup>3</sup> See: *S v Johannes* (CC 07/2015) [2015] NAHCNLD 47 (05 October 2015).

<sup>4</sup> See: *S v Gaingob & others* 2018 (1) NR 211 (SC); *S v Alexander* 1998 NR 84 (HC).

[15] In the result the accused is sentenced:

1. On count 1: The accused is sentenced to life imprisonment;
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H C JANUARY  
JUDGE

APPEARANCES:

For the State:

Mr Matota

Office of the Prosecutor – General, Oshakati

For the Accused:

Ms Amupolo

Amupolo &amp; Co Inc.,

Instructed by Legal Aid, Ongwediva