

REPUBLIC OF NAMIBIA



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

SENTENCE

Case No: CC 05/2017

In the matter between:

THE STATE

v

NDAMWENA EVARISTU JOSEF

ACCUSED

Neutral citation: *S v Josef* (CC 05/2017) [2019] NAHCNLD 42 (17 April 2019)

Coram: JANUARY J

Heard: 25 February 2019

Delivered: 17 April 2019

Flynote: Criminal law – Murder – Sentence – First offender– Domestic set up – Direct intent – Deceased chopped with panga – Almost beheaded – three years trial awaiting – 30 years.

Summary: The accused was convicted of Murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. He is a 36 year old first time

offender. The court found that he acted with direct intent. He has been awaiting trial for three years. He was in a relationship with the deceased with whom he has two children. On the day of the incident the accused met with the deceased. Both of them visited a cuca shop, had a few drinks and went home. The accused was carrying one of their children. The deceased at some point became angry, insulted the accused and attacked him with a panga. A struggle for the possession of the panga ensued. The accused eventually got control of the panga. He chopped the deceased horizontally on the frontal neck severing the trachea, oesophagus, major veins to and from the head and frontal and side muscles of the neck. The deceased passed away instantly on the scene.

ORDER

In the result, Mr Ndamwena Evaristu Josef, you are sentenced to: 30 years imprisonment.

SENTENCE

JANUARY J

Introduction

[1] The accused stands convicted of murder read with the provisions of the Combating of the Domestic Violence Act, Act 4 of 2003. The circumstances of the crime are that; the accused and deceased were in a domestic relationship. They were employed separately at King-Kauluma village in the District of Tsumeb. On the fateful

day, 4 April 2016, the accused met the deceased. They visited a cuca shop together, had some drinks and left together to go home. The accused was carrying one of their minor children.

[2] The deceased at some point on their way became angry, insulted the accused and attacked him with a panga. A struggle for the possession of the panga ensued. Eventually the accused got control of the panga and chopped the deceased horizontally on the frontal neck. The blow severed the trachea, oesophagus, major veins to and from the head and frontal and side muscles of the neck. The deceased instantly passed away on the scene.

[3] The accused took the child, went to one of the neighbours and almost tossed the child to her. He informed the neighbour that she must look after the child as he was going to commit suicide because he killed the deceased. The accused thereafter left into a land field.

[4] The accused was convicted of murder with direct intent when he chopped the person he once loved in cold blood. The accused must now be sentenced.

The law

[5] This court has a discretion that must be judicially exercised when it comes to sentencing. Well established judicial principles crystalized over many years as guidance and to be considered by this court in imposing a justifiable and appropriate sentence.

[6] The factors taken into consideration by the court are the personal circumstances of the accused, the crime and circumstances under which it was committed and the interest of society. These are referred to as the triad of factors in sentencing.¹The court is at the same time required to strike a balance between the divergent interests and where circumstances require it, to blend punishment with a measure of mercy.²

¹ *S v Zinn* 1969 (2) SA 737.

² *S v Tjiho* 1991 NR 361(HC).

[7] It often arises that equal weight is not afforded to the different factors and becomes necessary to emphasize one of these factors at the expense of the other.³ The court must also consider the objectives of punishment which are prevention, deterrence, retribution and rehabilitation.⁴

[8] The court should also be mindful to the principles of individualization opposed to uniformity which are well established in our law. The principle of uniformity concerns the court's approach where the same offence had been committed by other offenders and the circumstances of the offender were more or less similar to other cases. Individualisation is the principle that in imposing sentence all the relevant facts and the personal circumstances of the accused which may distinguish one case from another must be taken into account.⁵

Evidence

[9] The accused in this matter is a first time offender. In his testimony in mitigation, he states that: He grew up with his mother who is in Angola where he was born, he is 36 years old. He did not attend school by his choice. He was in a domestic relationship with the deceased and has two children born from the relationship. He has been in custody since his arrest on 4 April 2016, about three years. Before his arrest he was employed at King-Kauluma village. He was in the relationship with the deceased for about eight years since 2008. The accused suffers from High Blood Pressure and is currently on medication.

[10] The accused testified that he is remorseful and feels bad about the incident. He will never commit such a crime again. He extended his apology to the family of the deceased, as he could not do it before since he was incarcerated.

[11] In cross-examination the accused admitted that he was involved in another relationship whilst with the deceased. He admitted that the one year old child witnessed the incident. On a question of how he would feel if his daughter is killed and he stated whilst smiling he would want justice. He smiled answering that he would want such

³ *S v Van Wyk* 1993 NR 426 (HC).

⁴ *S v Nakale & others* (No 2) 2007 (2) NR 427 (HC).

⁵ *S v Srauss* 1990 NR 71 (HC); *S v Vos & others* 2017 (1) NR 106 (HC).

accused to go to prison. Mr Gaweseb, the State advocate, interpreted the smile as a sign of no genuine remorse.

[12] Mr Gaweseb called Paulus Petrus, an uncle of the deceased in aggravation. The witness testified that the death of the deceased has a great impact on the family and it was shocking. He testified that the deceased was very young at the time of her death. She was pregnant and left 2 children behind. She was employed as a domestic worker and supported her children. The children are now separated with one staying in Swakopmund with a relative. He was concerned that the accused is not a Namibian.

[13] The witness did not accept the apology from the accused and does not forgive him as he took away someone dear to the family. He wants the accused to be sentenced to imprisonment for more than 20 years.

[14] In cross-examination by Mr Adams, representing the accused, the witness conceded that he did not live with the deceased. He just heard that the deceased was pregnant before her death. He does not know the circumstances of the crime. He confirmed that he does not accept the apology.

[15] Mr Gaweseb submitted that it is aggravating that: the accused used a panga to kill his wife by cutting her horizontally on the neck; the accused was found guilty of murdering with direct intention to kill; in the circumstances, the deceased was totally defenceless against the weapon used against her by the accused; the deceased was a young person who could still have a long life ahead of her, had it not been for the accused actions; the loss of human life can never be over-emphasized; the constitution, article 6, expressly protects the right to life; the accused and deceased were in a domestic relationship; that the accused shows no genuine remorse; the deceased sustained a grade three injury, the most serious of injuries on a scale of survival.

[16] Mr Adams submitted in mitigation that: the incident was instigated by the deceased who became angry and attacked the accused with the panga: that there was no pre-meditation of the crime and it happened at the spur of the moment; the matter although committed in a domestic setting is distinguishable from other cases in not having been committed in a jealous rage or because the deceased ended the

relationship; there is no history of domestic violence committed by the accused; the deceased committed domestic violence by insulting and attacking the accused; the accused is a candidate for rehabilitation; the court should consider the time spent in custody (about three Years).

[17] In my view the smile of the accused may have different interpretations and not only that the accused is not genuinely remorseful. He might have felt defeated to admit that he must serve a long period in prison. It is a notorious fact that persons express their emotions in different ways. I give the benefit of doubt to the accused. From my observation he is remorseful. There is mitigation in the fact that the deceased was the initial aggressor.

[18] The commission of the crime is however by no means justifiable. The medical evidence indicate that the accused almost beheaded the deceased. It is a horizontal chop wound on the anterior part of the neck reaching the cervical spine. The neck structures – transacted neck structures which were the trachea, the oesophagus, all major vessels, and muscles on anterior and lateral sides of the neck. The doctor explained that it means all the above mentioned structures were cut i.e. the trachea which is the windpipe was totally cut. The oesophagus is the food pipe which was also totally cut and the major vessels is the blood vessels which take blood to the head and from the head. They were all cut and the muscles on anterior and lateral sides of the neck which are muscles on the front part and sides, they were all cut.

[19] The crime, in my view is an extreme murder, shocking and revolting. The deceased was helpless and unarmed when she was executed. It is aggravating that the crime was committed in a domestic setting. All the more committed in circumstances where one of the minor children witnessed it.

[20] I am convinced that this is a case where prevention, deterrence and retribution as objectives of punishment outweighs rehabilitation of the accused. The aggravating circumstances overshadow the mitigating factors. The accused, in my view, is a danger to society. The accused can only be sanctioned by a long period of a custodial sentence.

[21] In the result, Mr Ndamwena Evaristu Josef, you are sentenced to: 30 years imprisonment.

H C JANUARY

Judge

