

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

SENTENCE

Case No: CC 12/2019

In the matter between:

THE STATE

v

ISAK MATSI

ACCUSED

Neutral citation: *S v Matsi* (CC 12/2019) [2021] NAHCNLD 13 (18 February 2021)

Coram: MUNSU AJ

Heard: 25-26 January 2021; 28-29 January 2021; 01 February 2021

Delivered: 18 February 2021

Flynote: Criminal Procedure – Sentence – Murder read with the Combating of Domestic Violence Act, Act 4 of 2003 – Deceased accidentally damaged chair – Accused hitting her with axe handle causing her death - Accused convicted on plea of guilty – Factors to be considered discussed – Accused mercilessly killed the deceased

who was defenseless - Offence committed in a domestic setting - No prior history of violence by accused – Offence not premeditated - Accused relying on intoxication as a mitigating factor – Accused not adducing evidence to show that he was intoxicated – Intoxication ruled out by evidence - Reliance on intoxication not to be accorded weight considering that it had no impact on accused – Significance of accused’s advanced age outweighed by seriousness of the offence – Similarly, not much weight attached to the fact that accused is the only breadwinner for the surviving children as punishment is a consequence of crime - Circumstances of the case such that not equal weight is to be accorded to the objectives of punishment – Retribution and deterrence to be emphasized - A lengthy custodial sentence inevitable.

ORDER

1. Count 1 - Murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 – The accused is sentenced to 25 (twenty-five) years’ imprisonment

SENTENCE

MUNSU AJ:

[1] On the 17th of May 2018 at around 19h00 at Okatope village in the district of Ondangwa, the deceased was sitting on a blue plastic chair. As she sat, one leg of the chair broke. Her husband, the accused, took an axe handle and started hitting her. Writhing in pain, the deceased shuffled into the mahangu field towards the neighbour’s house in order to seek refuge. The accused pursued her, and despite their son’s effort to stop him, he continued to assault her with the axe handle. The deceased died on the scene as a result of the injuries sustained from the assault.

[2] The accused stands convicted of the offence of murder read with the provisions of the Combatting of Domestic Violence Act¹. It is now the duty of this court to impose an appropriate sentence. Courts have over the years crystallized principles to be considered when determining a just sentence. The court is required to take into account the circumstances under which the offence was committed and its magnitude, the interest of society as well as the personal circumstances of the accused.² Coupled with the aforesaid, the sentence must be blended with a measure of mercy and should strive to meet the objectives of punishment being retribution, deterrence, prevention and rehabilitation³.

Personal circumstances of the accused

[3] The accused is a 60 years old first time offender. He was 58 years old at the time of the commission of the offence. He is a father of six (6) children, five (5) of whom are majors while one is a minor below the age of 18. He attended school up to standard 3. Although his children are majors, he supports them to date. The accused owns livestock and a homestead situated at Okatope village. The accused testified in mitigation that he suffers from a heart condition which he developed in the same year the incident happened. However, he did not produce any medical report to confirm his illness. He only showed some tablets which does not tell anything about the nature of his illness.

Mitigating factors

[4] The accused pleaded guilty to the charge and expressed regret about the offence he committed. The offence does not appear to have been premeditated. Furthermore, the accused apologized to the affected families. He spent about four (4) months in custody before he was released on bail. Accordingly, due weight is accorded to these mitigating factors inclusive of the fact that he is of an advanced age and has lived the life of a law abiding citizen for the better part of his life.

¹ Act 4 of 2003

² See *S v Zinn* 1969 (2) SA 537 (A).

³ *S v Uupindi* (CC 11/2019) [2020] NAHCNLD (7 December 2020); *S v Rabie* 1975 (4) SA 855.

The offence

[5] The accused caused the death of the deceased by striking her with an axe handle measuring 81.50 cm in length and 3.30 cm in width. Its sheer size makes it a dangerous weapon. He inflicted several injuries which include 4 fractured ribs, a ruptured spleen, several bruises and abrasions on the chest and back. The post mortem report also shows that the attack on the deceased caused internal bleeding referred to as haemothorax and haemoperitoneum.

Interest of society

[6] We live in a society governed by the rule of law wherein all members of society are expected to uphold and respect the rights and obligations of one another. Our society abhors any form of domestic violence, more so when it involves the most vulnerable members of society. Life, being the primary right on which all other rights are dependent upon should be respected and protected⁴. It is therefore not in the interest of society when persons like the accused trample on the values and rights of their spouses, life companions and loved ones only to make their authority felt.⁵ Society expects the courts to impose appropriate sentences to those who make themselves guilty of crime thereby upholding and promoting respect for the law. This is important in order to ensure that those who are aggrieved do not resort to taking the law into their own hands to take revenge.

Evaluation of the circumstances of the crime

[7] Murder is regarded as a serious offence. It is one of the offences that have become very prevalent in our country.⁶ In this case the seriousness of the offence is

⁴ Article 6 of the Namibian Constitution.

⁵ *S v Kadhila* (CC 14/2013) [2014] NAHCNLD 17 (12 March 2014).

⁶ *S v Puleni* (CC 7/2013) [2018] NAHCMD 206 (6 July 2018).

heightened by the fact that it was committed in a domestic setting. In *S v Bohitile*⁷ the court said the following:

‘The prevalence of domestic violence and the compelling interest of society to combat it, evidenced by the recent legislation to that effect, require that domestic violence should be regarded as an aggravating factor when it comes to imposing punishment. Sentences imposed in this context, whilst taking into account the personal circumstances of the accused and the crime, should also take into account the important need of society to root out the evil of domestic violence and violence against women. In doing so, these sentences should reflect the determination of courts in Namibia to give effect to and protect the constitutional values of the inviolability of human dignity and equality between men and women. The clear and unequivocal message which should resonate from the courts in Namibia is that crimes involving domestic violence will not be tolerated and that sentences will be appropriately severe.’

[8] The accused took away the deceased’s life for a flimsy reason - the accidental damage of a plastic chair bought some four years back at a price of N\$ 30. The accused confirmed in cross-examination that the chair did not break because of any fault on the part of the deceased but merely because it was old and had been exposed to the sun. His attack on the deceased was therefore unprovoked. He ignored his son’s request to desist from attacking the deceased, and he physically wrestled with him to maintain grip and possession of the axe handle. He pursued the deceased even after she had ran out of the house already injured, caught up with her and continued to assault her thereby inflicting injuries which caused her death.

[9] Even after the deceased collapsed, the accused was not alarmed. It was their son Isak Isak aged 21 at the time, and in whose arms the deceased tumbled for the last time who covered her with blankets and contacted the neighbours to arrange for transport. According to him,... “the accused remained standing there doing nothing as if he had not done anything...”. He did not even make an effort to inspect the condition of his wife.

⁷ *S v Bohitile* 2007 (1) NR 137 (HC).

[10] Despite the fact that the deceased nearly fell down when the chair broke as she sat on it, the accused was not concerned about her wellbeing but rather about the fact that he is the one who bought the chair, *albeit* for an acknowledged inexpensive amount. Hence, it is apparent from the evidence that the accused valued a plastic chair more than the bodily integrity of a fellow human being, his wife. His anger and behavior was uncalled for and irrational under the circumstances. This court has echoed in a number of judgments, thus:

'...anger is a common occurrence and society expects its members to keep their emotions sufficiently in check to avoid harming others, and those who seek solutions to problems through violence must be severely punished'.⁸

[11] The only reason advanced by the accused to lessen his blameworthiness is the fact that he had consumed traditional or home brew named "tombo" quite excessively prior to the incident. Although he knew what he was doing, he testified that the tombo he imbibed contributed to what happened on the day. However, the accused did not adduce any evidence to show that his conduct was influenced by intoxication.⁹

[12] The evidence of his son rules out intoxication on the part of the accused. Though he only joined his parents after he returned from herding goats, he did not see the accused consume tombo for the duration that he was with him that evening. According to him, his father was "fine" and did not seem intoxicated. This evidence has credence in that the witness knows the accused well as they lived together. Also, it cannot be said that the witness was bias against the accused because he also gave evidence favourable to him in these proceedings when he pleaded with the court to give him a lenient sentence.

[13] Even on his version, the accused clearly remembers the events leading up to the assault. It was shown that after consuming tombo, accused went to do his household chores of cutting logs with an axe some distance away from the homestead. He finished doing so in an orderly manner. He returned to the homestead without losing his way. He

⁸ Among others, *S v Nghipulenga* (CC 12/2021) [2021] NAHCNLD 01 (19 January 2021).

⁹ See *S v Kadhila* (CC 14/2013) [2014] NAHCNLD 17 (12 March 2014) page 6-7.

remembered everything he did prior to sitting with the deceased. When the chair broke he searched for an object to use to assault the deceased and chose an axe handle among the items that were nearby. He hit the deceased with it. When the axe handle was thrown behind the zinc room by his son he went to collect it and pursued the deceased outside the homestead where he continued to assault her.

[14] It is further noted that it was not the first time the accused consumed tombo and on the evidence before court, on all other occasions he consumed tombo he did not resort to violence. I am of the view that the issue of intoxication should not be accorded weight considering that it had no impact on him.

[15] Case law has shown that in some cases, substance abuse prior to commission of a crime can even be regarded as an aggravating factor.¹⁰

[16] Although the deceased was not employed, she played an important role in her family. She helped her family meet their day-to-day needs by selling items and thereby generating income. She was also the one who looked after the family's home at Okatope village during the time the accused was at work at Okaukuejo. The demise of the deceased in this case left a void in the lives of her children. In his evidence, Isak Isak testified that his mother's death caused him to perform poorly in his grade 10 exams. He was hurt because his mother was deceased while his father was in custody. His younger brother Toivo also dropped out of school and started smoking. When advised to desist from substance abuse, Toivo retorts that they should first exhume his mother - that's when he would put an end to it. It would appear that the deceased's last born is still mourning and is doing so in a self-destructive manner. Surely, life will never be the same again.

[17] This court recognizes the fact that our society is overwhelmed by the prevalence of offences of this nature. Violence in homes lingers unabated despite the harsh sentences meted out by the courts. Those who commit these heinous crimes put families through immeasurable pain. When they later on express remorse, it boggles

¹⁰ See *S v Uirab* (CC 07/2015) [2016] NAHCMD 350 (10 November 2016).

one's mind at what became of them at the time. Undoubtedly, they well knew at the time of the commission of the offence that once taken away, not even their deepest regret afterwards or the harshest punishment can ever bring back the lost precious life. Accordingly, courts will not relent in imposing fitting sentences to those who make themselves guilty of these offences.

[18] The court takes into account that the accused mercilessly killed the deceased who was defenseless. The circumstances of the case are such that this court cannot attach equal weight to all the objectives of punishment.¹¹ In this regard retribution and deterrence stands out and ought to be emphasized.

[19] In this matter, the significance of the accused's advanced age (60 years) has been outweighed by the seriousness of the offence committed.¹²

[20] Similarly, not much weight can be attached to the fact that accused is the only breadwinner for the surviving children because "unfortunately this is one of the consequences of crime"¹³. Besides, the accused testified in mitigation that he will still be able to provide financial support to the children even when incarcerated. He is waiting for his pension to be paid out as he has just retired.

[21] After due consideration of all the evidence and factors in mitigation including the age of the accused, his contrition, the fact that he is a first offender and that the offence was not premeditated against aggravating factors such as the fact that the accused brutally murdered his own wife who was defenceless, the motive behind the commission of the crime being anger as a result of the accidental damage of the chair, and the

¹¹ "...It is permissible to accord different weights to the different relevant factors when considering what sentence to impose, even to the extent that mitigating factors have no actual effect on the sentence, especially if the crime is really serious..." (*Gariseb v The State* CC 5/2003 Delivered on 22 June 2009). See also *S v Van Wyk* 1993 NR 428.

¹² In *S v Barnard* (CC 5/2013) [2018] NAHCMD 225 (25 July 2018) the accused killed his wife by shooting her with a fire-arm. He was sentenced to eighteen (18) years imprisonment of which eight (8) years were suspended. However, in that matter the accused was sixty five (65) years old at the time of sentence. He was of ill health and it was found that alcohol combined with prescribed drugs played a role.

¹³ *S v Shekunyenga* (CC 05-2012) [2015] NAHCMD 283 (20 November 2015) par 5.

accused's overall blameworthiness, it is my conclusion that a lengthy custodial sentence is inevitable.

[22] In the result the following order is made:

1. Count 1 - Murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 – The accused is sentenced to 25 (Twenty-Five) years imprisonment.

D C MUNSU
ACTING JUDGE

APPEARANCES

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