

REPUBLIC OF NAMIBIA



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

SENTENCE

Case No: CC 10/2020

In the matter between:

THE STATE

v

LINOS POMBILI TUHAFENI

ACCUSED

Neutral citation: *S v Tuhafeni* (CC10/2020) [2022] NAHCNLD 28 (25 March 2022)

Coram: SALIONGA J

Heard: 21 and 22 February 2022

Delivered: 25 March 2022

Flynote: Criminal Law –Sentencing – Murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Triad factor considered -- Court duty bound to balance the interests of the society against that of the offender - Court in appropriate situations may give more weight to certain factors as opposed to others depending on the circumstances of each case – Aggravating factors present which

outweigh mitigating factors—Offence prevalent and very serious – Long custodial sentence inevitable—Accused sentenced to 30 years imprisonment.

Summary: Accused has been convicted of murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. In determining an appropriate sentence this court is required to have regard to the main principles applicable to sentencing as well as the main purpose of punishment namely prevention, deterrence, reformation and retribution. In addition the court is required to strike a balance between the personal circumstances of the accused, the circumstances relating to the crimes committed and the interest of society in relation to the crime itself. The State led evidence of the sister of the deceased while the accused testified in mitigation. The court finds no compelling reason why it should deviate from the sentencing precedent followed in similar cases where an accused has been convicted of murder with direct intent and the offence was committed within domestic relationships. A lengthy custodial sentence is inevitable that will not only serve as specific deterrence to the accused, but also as a general warning to like-minded criminals. Accused in the present matter is sentenced to thirty (30) years imprisonment.

ORDER

Accused is sentenced to thirty (30) years imprisonment.

JUDGMENT

SALIONGA J:

Introduction

[1] On 20 January 2022 this court convicted the accused of murdering the deceased with whom he was in a romantic relationship¹. The incident happened in the evening of 25th March 2019 at or near Katima Mulilo in the district of Katima Mulilo. At the trial and during these proceedings, the accused is represented by Mr. Camm instructed by Legal Aid in the Ministry of Justice and Mr. Shileka from the Prosecutor Generals' Office represented the State.

[2] The matter was postponed to 21 and 22 February 2022 to enable counsel to prepare written heads of argument in respect of mitigation and aggravation of sentence. Accused testified in mitigation while Chalima Masunda, the deceased's sister testified in aggravation. It is now the duty of this court to sentence the accused for his ill deeds.

[3] In considering what an appropriate sentence for the accused would be, it is requisite upon this court to have regard to the main principles applicable to sentencing as well as to the main purpose of punishment namely; prevention, deterrence, reformation and retribution. In addition the court is required to strike a balance between the personal circumstances of the accused, the circumstances relating to the crime committed and the interest of society in relation to the crime itself.

¹ *S v Tuhafeni* (CC 10/2020 [2022] NAHCNLD 4 (20 January 2022)

Mitigation

[4] The accused testified that he is 36 years old and was 33 years old at the time of the commission of the offence. He is a first offender. He started school at the age of 13 at Ondombe Combined School in the Ohangwena region. At the age of 23 he left school while in grade 8 in 2008. He had to assist in herding his father's cattle. He thereafter left for Swakopmund in the Erongo Region where he learnt the building trade. Before he was incarcerated he was a builder in Katima-Mulilo in the Zambezi region. He earned a monthly salary of N\$ 7000 to N\$ 8000.

[5] It was accused's testimony that he financially supported the deceased and her children although he had no children born of their relationship. He contributed N\$1000 monthly for their household expenses and sometimes would give her children pocket money. He is unmarried but a father of 3 kids two girls aged 10 and 5 years' old and, a boy aged 6 years. These children are schooling but he is not sure in which grades they are. His two daughters are staying with his mother at Endombe village and the boy is staying with his biological mother, accused's ex-girlfriend.

[6] According to the accused both his parents are still alive and staying in Etomba village. He has five brothers of whom he is the 2nd youngest and four older sisters. He was a sole breadwinner for his family and his parents were financially dependent on him. He used to send them N\$ 2000 every after two to three months. Accused stated that he is sorry for the terrible thing he did and he will not repeat the offence in future. He further stated that he would have asked for forgiveness from the children and the family of the deceased if they were in court.

[7] The state led evidence of Chalima Masunda the sister of the deceased in aggravation. The evidence of Masunda was mainly to the effect that she was not aware of any problem between the deceased and the accused. She visited them on five occasions but did not hear any complaint from her late sister. On the 19th March 2019 she overnighted at their place and she received a warm welcome. Therefore she has no

problem forgiving the accused although he was supposed to ask for forgiveness from the person he killed.

Nature of the Crime and interest of society

[8] At the forefront of the crime is the loss of life as a result of unruly behavior of the accused. The right to life is protected under our Constitution and should not be callously and unjustly taken away. The crime of murder you had committed is very serious, callous and heinous and is prevalent not only in the Northern Local Division but across the country. Accused in this case irrationally ended his girlfriend's life and robbed her children of a mother figure, caretaker and a breadwinner. As a result of his action the deceased's sister who is also unemployed resumes the mammoth responsibility of looking after deceased's five children.

[9] When dealing with the interest of society, the reaction of society, in my view, is a valid consideration in the court's determination of an appropriate sentence. Our society is currently experiencing high levels of violent crimes in particular against women and vulnerables. Society expects the courts to impose sentences that suitably match the gravity and prevalence of the offences committed. Although in all fairness the interest of society requires that offenders receive punishment which is neither too severe nor too lenient the community will lose faith in the criminal justice if too lenient sentences are imposed.

[10] The prevalence of domestic violence and the compelling interest of society cannot be stressed more than just reinstating what the court in *S v Bohitile*² held that;

'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

² *S v Bohitile* 2007 (1) NR 137 (HC)

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'.

[11] Mr. Shileka, Counsel for the State correctly submitted that the offence accused was convicted with is serious and was committed in a secluded place where it was only the accused and deceased who witnessed the incident. He further submitted that accused got an opportunity to testify but failed to fully take this Court into his confidence and tell what caused him to kill the deceased. He argued that in this case accused abysmally failed to offer any apology for killing the deceased and his last minutes apology after being convicted does not mean anything. Mr. Shileka further argued that this is a classical case where the Court should step in and impose a sentence which can conciliate the deceased's relatives who have not yet traditionally received any formal apology neither compensation for the unlawful killing of their loved one. He therefore submitted that an appropriate sentence in this matter should be a custodial sentence of 35 years imprisonment.

[12] On the other hand, Mr. Camm for the accused while acknowledging that the offence of murder attracts sentence of direct imprisonment, humbly submitted that the accused does not pose any threat to the society. Mr. Camm further submitted that there are substantial and compelling circumstances that exist. That he argues that the accused stabbed the deceased only once, the offence was not planned but happened in the heat of the moment when there was an argument between the accused and the deceased. Also that his relationship with the deceased was a good one as confirmed by Chalima Masunda the sister to the deceased. In any event accused was adversely affected by the death of the deceased and expressed remorse during the trial and in mitigation.

[13] Counsel further submitted that the accused at the age of 36 has been an exemplary citizen until his first conviction on this matter. That the accused has been in

custody from the date of his arrest³ up to now, a period that should have an effect of reducing the lengthy term of imprisonment. He further submitted that accused was remorseful. He would have asked for forgiveness from the children and family of the deceased if they were in court. In his view the fact that the accused denied guilt during the trial does not mean that the accused is in fact unremorseful. Therefore counsel pray for a sentence of 15 years imprisonment of which 5 years is wholly suspended.

[14] Having heard the accused's mitigating factors and arguments by both counsel sight should not be lost that the accused has been convicted of a very serious offence of murder with direct intent. The deceased was a young woman with five children who were depended on her. Those children are deprived of a mother's love and nurturing. Though the deceased was unemployed she was staying and looking after her children with income she earned by buying and re-selling items. It is indeed a dreadful thing to lose a mother at an early age and grow up without motherly love guidance and inspiration.

[15] Another aggravating factor is that after the accused murdered the deceased he walked out of the room where he was with her as if nothing had happened. He bypassed the deceased's daughter without saying a word about the injury the deceased sustained inside the room. The accused did not render any assistance to the injured deceased neither did he call for medical assistance. Instead he left to his shack where he was found with a serious stab wound on his neck and cheek.

[16] While I agree with counsel for the accused that remorse and time spent in custody awaiting trial are mitigation factors during sentencing, accused *in casu* did not show remorse or that he regretted his action. In this regard it is pertinent to refer to the matter of *S v Matyityi*⁴, where a distinction between regret and remorse was drawn as follow:

³ The 25 March 2019

⁴ *S v Matyityi* 2011 (1) SACR 40 (SCA) See also *Scheifer v S* (SA 29/2015) [2017] NASC 37 (12 September 2017)

‘There is moreover a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself at having been caught is a factual question. It is to the surrounding actions of the accused, rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence...’

[17] I share and endorse the sentiments expressed by my brother Liebenberg J, in *S v Nowaseb*⁵ when he said:

‘The accused’s proclaimed penitence is not sincere and that he did not fully take the court into his confidence. On the contrary, he tried to mislead the court by presenting his own set of facts far removed from what actually transpired on that fateful evening. Here I am referring to the alleged physical altercation he had on that fateful morning when he was attacked outside his house. Such conduct does not connote ‘repentance, an inner sorrow inspired by another’s plight or by a feeling of guilt ...’ I am therefore unable to find that the accused demonstrated any remorse for the crimes he committed. I remained unimpressed by the accused proffered remorse’.

[18] The accused *in casu* throughout the trial did not give any impression that what he did under the circumstances was wrong and that he regrets it. He presented to court his own set of facts far different from what actually transpired on that fateful evening and blamed the deceased for causing her own death. He failed to offer any apology for killing the deceased when he met the deceased’s sister Chalima Masunda. These factors coupled with his repetitive claim of self-defence does not amount to or show genuine remorse.

[19] It is apparent from the evidence that the deceased in the matter died a slow, cruel and brutal death at the hands of the accused with whom she had a romantic relationship. The injuries inflicted on her were on a sensitive and life-threatening part of

⁵ *S v Nowaseb* (CC 14/2020) [2021] NAHCMD 86 (01 March 2021)

the human body. The deceased suffered a frightening wound that fractured a rib. From the evidence presented, the deceased was received in the Katima Mulilo hospital in a very bad condition. More than 1 liter of blood was drained and the deceased was resuscitated without any success. Doctor Simbi in his medico-post-mortem report noted a 2 cm long sutured cut on the 3rd intercostal space anterior aspect and a wound penetrating into the chest near the parasternal edge. He further observed a fractured 3rd rib on the parasternal region and noted 1100ml of blood in the right pleural cavity. The degree of injuries manifests how brutal and vicious accused attacked this vulnerable and defenseless young lady whom he was supposed to care and protect.

[20] In *S v Flanagan*⁶ the court rightly held that the interests of society are not served by a sentence which is too lenient nor one that is too startlingly inappropriate. After all, it is the members of society who one day have to accept the accused back in their midst; which process might be troubled when there is a perception that the sentence given to the accused was too lenient and he or she does not deserve to be admitted back into society.

[21] Notwithstanding the above, the sentencing court should not give in to the expectations of society at the expense of the accused or the interests of justice when it comes to sentencing; but, at the same time the courts should not ignore society's reaction of resentment and public outcries against those who make themselves guilty of committing heinous crimes. Given the gravity of the murder and the circumstances in which it was committed in my view, a lengthy custodial sentence is inevitable. Not only will this serve as specific deterrence to the accused, but also as a general warning to like-minded criminals.

Conclusion

[22] That being the case, I find no reason why I should not follow the sentencing precedent followed by this court in murder cases where an accused person has been

⁶ *S v Flanagan* 1995 (1) SACR 13 (A)

convicted of murder with direct intent to kill and committed in a domestic set up, like in *casu*. The aggravating factors outweighed the mitigating factors. It follows therefore that the proposed sentence of fifteen years of which five (5) years imprisonment are suspended is far too disproportionate to the crime of murder with direct intent to kill for which the accused was convicted of.

[23] In the result;

The accused is sentenced to thirty (30) years imprisonment.

J. T. SALIONGA
JUDGE

APPEARANCES

STATE:

Mr. R Shileka

Office of the Prosecutor-General, Oshakati

ACCUSED:

Mr. A Camm

Directorate of Legal Aid, Grootfontein