REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

Case No: CC 5/2021

In the matter between:

THE STATE

v

PAULINU MATEUS KATALE **ACCUSED**

Neutral citation*: S v Katale* (CC 5/2021) [2022] NAHCNLD 80 (2 September 2022)

Coram: SMALL, AJ
Heard: **30 - 31 August 2022**
Delivered: **2 September 2022**

Flynote: Criminal Procedure-Sentence-A Court must impose an appropriate sentence-Lengthy sentences of imprisonment have diminishing returns and can eventually be so long that it subjects the accused to cruel, degrading, and inhuman punishment that infringes their right to human dignity enshrined in the Namibian Constitution

Criminal Procedure-Sentence-The persistent demand for more severe sentences to be imposed on offenders for specific crimes should not blind a Court-Public expectation is not synonymous with the public interest- Courts serve the interests of

society and should not be insensitive to or ignorant of general feelings and expectations-Court may not blindly adhere to that.

Criminal Procedure-Sentence - Uniformity of sentences, may be desirable-The desire to achieve such uniformity cannot be allowed to interfere with the free exercise of his discretion by a judicial officer in determining the appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged.

Summary: The accused was convicted by the Court in respect Arson and Murder with direct intent read with the Combating of Domestic Violence Act, 4 of 2003. He was sentenced to an effective of 25 years imprisonment on the two charges after the part of the arson sentence was ordered to be served concurrently with the sentence imposed on the murder charge.

ORDER

Count 1: Arson – Five [5] years' imprisonment.

Count 2: Murder read with the Combating of Domestic Violence Act, 4 of 2003– Twenty-three [23] years' imprisonment.

In terms of section 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that three years imprisonment of the sentence imposed on count 1 be served concurrently with the sentence on count 2.

SENTENCE

SMALL AJ:

Introduction

[1] On 25 August 2022 I convicted the accused of Arson and Murder read with the Combating of Domestic Violence Act 4 of 2003. I found that the accused committed the murder with a direct intention to kill.[1]

[2] Ms Nghifewa still represents the accused, while the State is now represented only by Ms Petrus. Ms Petrus called the deceased's cousin, Paulina Nandule Kamoho,[2] as the deceased's next of kin to give evidence and express her view concerning the crime, the person responsible, the impact of the crime on the deceased and her family, and the need for restitution and compensation.

[3] The witness, a 24-year Angolan citizen presently residing in Windhoek, said the deceased was her cousin and the daughter of her mother's sister. She related that the deceased, originally from Angola, had three daughters. At the time of the deceased's death, the firstborn was four years old, the second-born three years old, and the youngest three months old. The witness said the elder children were being looked after by family members residing in Angola. The youngest child, unfortunately, passed away in an Angolan hospital about five months after the deceased was killed. This witness took the second-born and the youngest child to Angola after the accused killed the deceased. She said the deceased assisted the family in Angola with money when alive by working in Namibia. The family relied on these contributions as living conditions in rural Angola are dire due to prolonged droughts. The family now must take care of the deceased's two remaining children without her regular financial contributions. The witness however did not suggest any sentence she considered appropriate or indicated a need for restitution and compensation.

[4] The accused did not give evidence in mitigation, but Ms Nghifewa placed his personal circumstances on record from the bar during her submissions.

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[1] *S v Katale* (CC 5/2021) [2022] NAHCNLD 79 (25 August 2022)

[2] In terms of section 25(2) of the Combatting of Domestic Violence Act 4 of 2003

Submissions by the Counsel for the Defence and for the State

[5] Ms Nghifewa submitted that the accused is an Angolan. He was born on 16 May 1977 and is presently 46 years old. He in 1993 completed Grade 3 whereafter he left school. He had a house of his own in Ongandjera which has since been destroyed and nothing is left of it. He has no other properties and does not suffer from any terminal illness. He is unmarried and has lived in Namibia since 1993, when he was 16 years old. He moved here to look for employment as he is from a previously disadvantaged background.

[6] He has been working as a builder since he was young and worked for himself or worked against payment. He would earn depending on the work done by building houses in the villages. He has been the breadwinner for his family back in Angola until the date of his arrest. He was never granted bail after his arrest and has been in custody since 5 February 2019 at Okahao police station. At 46 years of age, he is a first offender with no previous convictions and has been a good-standing member of society.

[7] The accused has five children. Mateus Mateus, born in 2002, lives in Ongandjera with his grandparents and his mother and attends school in Ongandjera. Naambo Mateus was born in 2004, attending school in Ongana and living with her mother. Shikongo Mateus was born in 2007 and is living with his grandmother. Veronica Mateus was born in 2010, living with her grandmother, and Elder Mateus was born in 2013, living with her mother and attending school in Ruacana. Both his parents are deceased. He previously contributed to the support of all the children but has been unable to do so after his incarceration.

[8] Although they differed on the application, opposing counsel seemed to be *ad idem* as to the principles applicable to sentencing. Both referred the Court to numerous decisions on sentences. When I do not specifically deal with a case referred to in their respective heads of argument am not overlooking those cases but believe that it reiterates similar principles as the cases I will refer to hereinunder.

[9] Ms Nghifewa requested the Court to pass a rehabilitative sentence that will not break the accused. She further submitted that the sentence should be blended with mercy. Although she did not suggest what she considered to be an appropriate sentence, she did request the court to order the sentence on the Arson conviction to run concurrently with the sentence on the Murder conviction.

[10] Ms Petrus submitted that violent crimes against vulnerable members of society are rampant in the Court's jurisdiction, and despite the lengthy custodial sentences imposed, it shows no signs of abating. In this case, the accused, chased after the deceased when she ran away, caught up with her, and beat her to death with a building brick

[11] She further submitted that it is trite that the punishment should also fit the crime committed. She pointed out that the seriousness of a crime of murder perpetrated in a domestic context are echoed in many cases. She referred the Court to oft-quoted passage in *S v Bothile*[3], where Smut AJ (as he then was) 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.'[4]

[12] Ms Petrus argued that the accused gave no explanation for what he did and showed no remorse whatsoever. Therefore, she submitted, relying on,

[3] *S v Bothile* 2007 NR (1) 137 (HC)
[4] Ibid paragraph 21

amongst other cases on *State v Uri-Khob*[5] that a long term of imprisonment would be appropriate.

She submitted that a sentence of four [4] years imprisonment in respect of the Arson and thirty-five [35] years imprisonment for the Murder would be appropriate.

Approach by the Court in sentencing

[13] In the court's determination of what punishment is appropriate in this case, I will have regard to the triad of factors, namely the personal circumstances of the accused, the offence and the crimes committed and the interests of society. Punishment must fit the criminal as well as the crime. Considering the circumstances, it should be fair to the community as far as possible but also blended with a measure of mercy.[6]

[14] I will strive to balance the accused's and society's interests. Though all the general principles applicable must be considered, balanced, and harmonised when applied to the facts, I need not give them equal weight or value. The circumstances of a case might require emphasising one or more at the expense of others.[7] The primary purposes of punishment are deterrence, prevention, reformation, and retribution. At the same time, deterrence is the all-important object of a sentence with the other aspects as accessories. Retribution is of lesser importance in modern times. However, in sentencing, the difficulty arises not from the general principles applicable but from the complicated task of harmonising and balancing these principles and applying them to the facts.[8]

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[5] *State v Uri-Khob* (CC 11/2012) [2013] 137 NAHCMD (21 May 2013) See also *S v Shilamba* 2017 (1) NR 211 (NLD),

[6] *S v Zinn* 1969 (2) SA 537 (A) and *S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR 639); *S v Rabie* 1975 (4) SA 855 (A) at 862G – H; *S v Seas* 2018 (4) NR 1050 (HC) paragraph 23

[7] *S v Van Wyk* 1993 NR 426 (SC) (1992 (1) SACR 147); *S v Seas* 2018 (4) NR 1050 (HC) paragraph 23

[8] *S v Van Wyk* 1993 NR 426 (SC) at 448B-F approving and applying *S v Zinn* 1969 (2) SA 537 (A) at 540G-H and *S v Khumalo and Others* 1984 (3) SA 327 (A) at 330D-I and the authorities collected there.

[15] In *S v Rabie*[9] Holmes JA quoting from Gordon Criminal Law of Scotland (1967) at 50 at 862A-B explained the differences between the different theories as follows:

'The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation... The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment.'

[16] I agree with what Corbett CJ stated In *S v Rabie*[10]:

'A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.'[11]

[17] In *S v Banda and Others*[12], while dealing with the interest of the community, the Court pointed out that Courts fulfil a vital function in applying the law in the community. The Court operates in society, and its decisions impact individuals in the ordinary circumstances of daily life. It covers all possible grounds. The Court promotes respect for the law through its decisions and the imposition of appropriate sentences. In doing so, it must reflect the seriousness of the offence and provide just punishment for the offender while also considering the offender's circumstances.

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[109] *S v Rabie* 1975 (4) SA 855 (A)

[?] *S v Rabie* 1975 (4) SA 855 (A) 866B-C,

[11] Referred to in *S v Banda and Others (supra) at* 354A-C; See also S v Zinn 1969 (2) SA 537 (A) at 541D-E and In *S v Harrington* 1989 (2) SA 348 ZSC at 362E-H where the Court stated that a sentencing court should never assume a vengeful attitude and correctly in my view quoted from Francis Bacon's essay 'On Revenge' which stated: 'Revenge is a kind of wild justice which, the more man's nature runs to, the more ought law to weed it out.'

[12] 1991 (2) SA 352 (BG) at 356E-F

[18] I also agree with what was stated in *R v Karg* [13] in respect of the importance of retribution, especially while violence against vulnerable persons continues relentlessly in the Namibian society:

'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.'[14]

[19] The sentencing Court however cannot be requested or required to revenge the deceased's death. It is important to consider what was stated in *S v Harrington* [15] where the Court said that a sentencing court should never assume a vengeful attitude and quoted with approval from Francis Bacon's essay 'On Revenge' which stated:

'Revenge is a kind of wild justice which, the more man's nature runs to, the more ought law to weed it out.'

[20] In *S v Gaingob and Others*[16] the Namibian Supreme Court warned against lengthy sentences of imprisonment that have diminishing returns and thus eventually subjecting the accused to cruel, degrading and inhuman punishment that infringes their right to human dignity enshrined in the Namibian Constitution.[17]

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[13] *R v Karg* 1961 (1) SA 231 (A) at 236A-B. Also see *S v Kanguro* 2011 (2) NR 616 (HC) paragraph 9 and *S v Schiefer* 2017 (4) NR 1073 (SC) paragraph 30

[14] See also *S v Bothile* 2007 NR (1) 137 (HC) paragraph 21 and *S v Matlata* 2018 (4) NR 1038 (HC) paragraph 30, *S v Kadhila* [2014] NAHCNLD 17 (CC 14/2013; 12 March 2014).

[15] *S v Harrington* 1989 (2) SA 348 ZSC at 362E-H

[16] *S v Gaingob and Others* 2018 (1) NR 211 (SC),

[17] See also *S v Matlata* 2018 (4) NR 1038 (HC) paragraph 35

[21] A court searches for an appropriate sentence in each case. It, however, does not mean that there is only one such appropriate sentence. No court of law is perfect. The court is the community's arm dedicated to making assessments for proper sentences. The court's sentence judgement is essentially its evaluation of what is fair in the circumstances of a given case. It is, however, not a scientific calculation. A sentence cannot be objectively measured and then snipped off in the correct lengths.[18] It has been said that:

'Sentencing, at the best of times, is an imprecise and imperfect procedure and there will always be a substantial range of appropriate sentences.'[19]

[22] There is a persistent demand for more severe sentences to be imposed on all offenders for all crimes. The apparent foundation for this demand is a steadfast belief that no punishment can be too harsh and that the more severe it is, the better it will protect society. Public expectation is not synonymous with the public interest. Although the courts must serve the interests of society and not be insensitive to or ignorant of general feelings and expectations, they may not blindly adhere to that. Remarks or submissions that public expectation equates to the public interest are inconsistent with the applicable principles of law and, therefore, of no assistance to the court.[20]

[23] In determining an appropriate sentence, a court should strive to accomplish and arrive at a reasonable counterbalance between these elements to ensure that one factor is not unduly accentuated at the expense of and to the exclusion of the others. The process is not merely a formula, nor is it satisfied by simply stating or mentioning the requirements. What is necessary is that the Court shall consider, try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its

[18] *S v Martin* 1996 (2) SACR 378 (W) at 381E-G
[19] *Smith v The Queen* 1987 (34) CCC (3d) 97 at 109-110 by McIntyre J in the minority judgment as quoted in *S v Vries* 1996 (2) SACR 638 (Nm) at 643f-g; *S v Vries* 1998 NR 244 (HC) at 249G-H
[20] *S v Makwanyana and Another* 1995 (3) SA 391 (CC) at 431C-D, *S v Hanse-Himarwa* (CC 05/2018) [2019] NAHCMD 260 (31 July 2019) paragraph 33

welfare and concern. This conception, as expounded by the Courts, is sound and is incompatible with anything less.[21]

[24] I find no fault with the caveat in *S v Reddy* [22] stating:

'Though uniformity of sentences, that is of sentences imposed upon accused persons in respect of the same offence, or in respect of similar offences or offences of a kindred nature, may be desirable, the desire to achieve such uniformity cannot be allowed to interfere with the free exercise of his discretion by a judicial officer in determining the appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged.' [23]

[25] The accused lived in a domestic relationship with the deceased before the incident. They were not married and had one child together. The accused never told the Court why he killed the deceased. The arson and the murder however happened a few weeks after the deceased left their previously shared house. I must still consider accused's human frailties as affected by the circumstances surrounding the commission of the offence in question and balance those frailties against the evil of the offender's deed. This is not an easy task as the accused has never taken the Court into his confidence.[24]

[26] In *S v Tomas,*[25] Liebenberg J explained it as follows:

'Whereas the accused did not take the Court into his confidence and come clean as to what led to the incident during which the deceased was killed, the only conclusion to reach is that this was a senseless killing where a much weaker and defenceless person, the accused's own girlfriend and the mother of his only child, became the victim of the one who

[21] *S v Banda and Others* 1991 (2) SA 352 (BG) at 355A-C

[22] *S v Reddy* 1975 (3) SA 757 (A) at 759H-760B; See also *R v Karg* 1961 (1) SA 231 (A) at 236G-237A and S. v Ivanisevic and Another, 1967 (4) SA 572 (AD) at p 575

[23] See also *S v Kramer and Others* 1990 NR 49 (HC) at 62H and *S v Nanyemba,* CC 12/2018) [2021] NAHCNLD 42 (27 April 2021) paragraph 14

[24] *S v Seegers* 1970 (2) SA 506 (A) at 511G: 'Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined'. See also *S v Kapia and Others* 2018 (3) NR 885 (HC) paragraph 16

[25] *S v Tomas* (CC 02/2012) [2012] NAHC 222 (03 August 2012) paragraph 11

was supposed to protect and love her. The deceased died a violent death and after the assault was left at her own mercy until she succumbed. It seems unthinkable that anyone could be driven to such anger or rage and is provoked to act in the manner the accused did; yet, he remains unwilling to share that reason, if there were to be any, with the Court. If that is done with the view of lodging an appeal, then it is something he has to live with, for the absence of remorse in the circumstances, is indeed an aggravating factor. Whereas the Court has already found that the murder was pre-meditated, this is another aggravating factor and one that weighs heavily with the Court when considering sentence.'

Many of the facts of this case are sadly like the facts of the above-quoted matter which tell their own story.[26]

[27] I must consider any substantial time spent in custody awaiting trial. It is not a mitigating factor that lessens the severity of the criminal act or the accused's culpability. However, a court tasked with imposing an appropriate sentence cannot ignore the accused's substantial time in pre-trial custody pending his conviction and sentence. A court must accord sufficient weight to such time spent in custody and consider it together with other relevant factors to arrive at an appropriate sentence. Although it has been said that taking it into account does not mean simply deducting the time spent in custody from the intended punishment, this does not mean a Court cannot do this when it considers it appropriate.[27]

[28] The accused had no scruples to set the hut where deceased resided with her children, one being his own three-month-old child on fire. The accused in this matter also executed the murder in a callous and cold-blooded manner. First, he chased after the fleeing deceased after setting her house on fire, caught up with her, overpowered her and beat her repeatedly with a building brick on the head. The deceased, a young woman of twenty-four years died on the scene. She was a defenceless victim and had no chance of escaping what was to be her fate at the hands of the accused.

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[26] However, the *Tomas* case's accused was 20 years younger than the accused in this matter. Furthermore, in the former matter, there was evidence that the murder was premeditated.

[27] *S v Kauzuu* 2006 (1) NR 225 (HC) at 232E-G quoting numerous South African cases that set this principle. See also *S v Seas* 2018 (4) NR 1050 (HC) paragraph 27 and *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 262 (30 June 2020) paragraph 11, *S v Nanyemba* (CC 12/2018) [2021] NAHCNLD 42 (27 April 2021) paragraph 10

[29] After killing her, the accused fled the scene to escape the consequences of his act. He however remained in the area surrounding the crime scenes and told a state witness why he set fire to the huts. Due to the quick reaction and interference of community members and the police he was arrested the same night. The motive for the murder remains unknown, and the court cannot speculate to find such a reason. This is thus doomed to remain another senseless killing of a young woman. This, if anything, however, aggravates the crime.[28]

[30] I wish to reiterate what I said in *S v Ncamushe* [29] and repeated in subsequent cases[30]:

> 'Gender-based violence and murders have reached unacceptable levels in Namibia. I get the impression that for some inexplicable reason, some males, I deliberately do not call them men, believe that women are their property to do with as they please. The Courts cannot allow this perception to continue, and society rightly expects that perpetrators of such crimes, and anyone who contemplates it, should expect substantial sentences if convicted.'

[31] Taking into consideration the principle on the cumulative effect of sentences, this court finds that counts 1 and 2 are closely related in time, space and circumstance. Counts 1 and 2 therefore fits hand in glove with the profile of sentences imposed thereon to be served concurrently either fully or in part.

[32] Considering all the aforesaid factors, reasoning, and conclusions, I hold the view that the sentences set out hereunder are appropriate of this case. In the result the accused is sentenced as follows:

Count 1: Arson – Five [5] years' imprisonment.

Count 2: Murder read with the Combatting of Domestic Violence Act, 4 of 2003– Twenty-three [23] years' imprisonment.

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[28] *S v Alexander* 1998 NR 84 (HC) at 87C-E

[29] (CC 10/2017) [2021] NAHCNLD 45 (18 May 2021) paragraph 29 Also see:

[30] S v *Katsamba* (CC 14/2018) [2021] NAHCNLD 113 (6 December 2021*)* paragraph 28 and *S v Domingo* (CC 9/2020) [2021] NAHCNLD 115 (16 December 2021) paragraph 27

In terms of section 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that three years imprisonment of the sentence imposed on count 1 be served concurrently with the sentence on count 2.

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D F Small

Acting Judge

APPEARANCES:

STATE:	Ms. S. Petrus Office of the Prosecutor-General, Oshakati
ACCUSED:	Ms. N. Nghifewa Directorate of Legal Aid, Outapi