

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
SENTENCE**

Case No: CC 7/2021

In the matter between:

THE STATE

v

MENAS THOMAS HIFANYE

ACCUSED

Neutral citation: *S v Hifanye* (CC 7/2021) [2023] NAHCNLD 137 (6 December 2023)

Coram: KESSLAU J

Heard: 20 October 2023; 3 November 2023; 20 November 2023

Delivered: 6 December 2023

Flynote: Criminal Law- Sentence- Rape- double Murder- Robbery- accused a repeat offender- determining an appropriate sentence- triad factors considered- mercy not to be misplaced pity- aims of punishment restated- evidence in terms of s 25 of the Combating of Domestic Violence Act 4 of 2003 on the impact of the crime.

Summary: The accused was convicted on charges of Robbery with aggravating circumstances, as defined in Section 1 of the Criminal Procedure Act 51 of 1977 as amended; Murder (read with the provisions of the Combating of Domestic Violence

Act 4 of 2003); Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) and; Contravening Section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the Combating of Domestic Violence Act 4 of 2003). The facts of the matter are that the accused attacked, robbed, and raped his own grandmother whilst killing two of his young cousins in the process. This is a person that was raised by the same grandmother and lived in her house. The two boys, both being young children, were attacked and killed in the most gruesome manner by being beaten to death with a mopane stick on their heads. The attack caused fractures of the occipital and parietal bones and contusion of the brain lobes. They were beaten with extensive force, so much so, that it fractured their nasal and aural cavities. These crimes were perpetrated whilst the victims were supposedly safely asleep in their house. The victim of robbery and rape described it best when comparing the actions of the accused to that of an animal. She was 74 years old at the time and was therefore vulnerable due to her old age and reduced eyesight. The accused was a repeat offender having previously been convicted and sentenced for Assault with intent to do grievous bodily harm and housebreaking with intent to steal and theft. These offences were committed whilst accused had been released on early remission for a previous conviction of housebreaking with intent to steal and theft.

Held: that the actions of the accused were brutal and merciless in that he took two lives and negatively changed the lives of others permanently leaving them in a state of sadness and despair.

Held further: that from the previous convictions of the accused it is clear that he failed to rehabilitate during his previous periods of incarceration.

Held also: that the personal circumstances of the accused are far outweighed by the gravity of the offence and the interests of society and it follows that he should be removed from society for an extended period of time.

ORDER

1. Count 1: Robbery with aggravating circumstances (as defined in Section 1 of the Criminal Procedure Act 51 of 1977) -10 years' imprisonment.

2. Count 2: Murder with direct intent, in respect of Ndapuka Linus, (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Life imprisonment.
3. Count 3: Murder with direct intent, in respect of Thomas Ndapuka Malakia, (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Life imprisonment.
4. Count 4: Contravening Section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the Combating of Domestic Violence Act 4 of 2003) – 15 years' imprisonment.
5. It is ordered that Exhibits 1 and 2 are forfeited to the State.

JUDGMENT

KESSLAU J

[1] The accused was convicted and is to be sentenced on the following charges: Count 1: Robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977 as amended (CPA); Count 2: Murder with direct intent (read with the provisions of the Combating of Domestic Violence Act 4 of 2003); Count 3: Murder with direct intent (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) and; Count 4: Contravening Section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the Combating of Domestic Violence Act 4 of 2003).

[2] In the demanding task of finding an appropriate and suitable sentence this court will take into account the triad of factors being the interest of society, the personal circumstances of the accused and the crime committed. The aims of punishment *to wit* retribution, rehabilitation, deterrence and prevention will form part of the factors to be considered during sentencing. Finally an element of mercy will form part of the sentencing without it being misplaced pity.¹ This court will also

¹ *S v Zinn* 1969 (2) SA 537 (A); *S v Tjiho* 1991 NR 361 (HC); *S v Katale* (CC 5/2021) NAHCNLD 80 (2 September 2022); *S v Rabie* 1975 (4) SA 855 (A); *S v Ganes* 2005 NR 472; *S v Tjiho* 1991 NR 361 (HC).

endeavour to balance and harmonize the above factors during sentencing whilst being mindful of the fact that in some circumstances during sentencing, it might be necessary to emphasise one factor at the expense of another.²

[3] The State proved two relevant previous convictions in terms of s 271 of the CPA. The first was from the year 2016 for the offence of Assault with the intent to do grievous bodily harm.³ The accused disputed same however after evidence was presented from the Investigating Officer in the matter and an official from the Correctional Facility, the conviction was proved beyond reasonable doubt and received into evidence.

[4] The second conviction, admitted by the accused, was for Housebreaking with the intent to steal and theft on which he had to serve 24 months of effective imprisonment.⁴ The evidence presented to prove the first conviction included documentation from the Correctional Facility indicating *inter alia* the sentences imposed and the fact that the accused was with regard to the second sentence released seven months prior the release date on remission on 7 February 2019⁵. A week later the offences that are before court now were committed and the accused re-arrested. He then served the last seven months on the previous sentence and from there was kept in custody without bail. The accused was thus pre-trial incarcerated for this matter for a period of four years and approximately two months which period will be considered during sentencing. It has to be said however that the accused added to the delay in finalizing the matter by refusing to accept his guilt from the outset.⁶ His plea of not guilty was obviously in his rights however he cannot now claim that his decision should bear no consequence on him.

[5] A family member of the two deceased testified in terms of s 25 of the Combating of Domestic Violence Act 4 of 2003. The uncle of the accused, Ndapula Hipamwamo, testified that the deceased in count 2 was his biological son with the deceased in count 3 his nephew. The victim Jakobina Johannes in counts 1 and 4 is

² *S v Van Wyk* 1993 NR 426.

³ Exhibit "MM".

⁴ Exhibit "JJ".

⁵ Exhibits "KK1" and "KK2".

⁶ *S v Thomas* (CC 19/2013) [2023] NAHCMD 680 (26 October 2023).

his mother and grandmother to the accused. He testified that both the deceased were staying with their grandmother to assist her in daily tasks and also to attend school. He testified that their deaths left a huge gap in their family. He requested that the accused receive a sentence of life imprisonment. A written statement⁷ was handed in from the victim Jakobina Johannes. She stated that due to the attack on her by the accused, her grandson, she has lost a part of her right ear and partial use of her left hand. Furthermore that the two deceased are dearly missed by her as they were her only support in the house and that they were performing well at school before their brutal deaths. She stated that the event has left a scar in her life and that the accused at no stage displayed any remorse.

[6] The accused presented his personal circumstances by testifying under oath. He is currently 31 years old. He fathered three children born in 2009, 2011 and 2017. The ages of these children given by the accused did not correspond mathematically with the years born. His children were born from two different women and they are living with their mothers. The accused testified that both his parents are deceased with his father passing on without the accused ever meeting him. After the death of his mother the accused was living with his uncle Ndapula Hipamwamo and his grandmother Jakobina Johannes. He and another child were assisting around the homestead of his family and took turns to attend school. He left school at Grade 6 because conditions were just too hard. The accused said that he is feeling 'bad' for committing these offences and that he blames himself. He realised he has done wrong and is feeling remorse. He furthermore said that he realised he hurt a lot of people by not earlier admitting his guilt and for putting the witnesses through a trial. He asked his uncle to convey an apology to the family for their losses. He also testified that since his arrest for this matter he is treated for hypertension and asthma.

[7] During cross-examination of the accused, the State pointed out that he re-offended within a week after his early release on the previous matter. The accused furthermore agreed with the State that a lengthy term of imprisonment should be imposed and that the society should be protected from him. When questioned by the State regarding the crimes of robbery and rape committed against his grandmother,

⁷ Exhibit "NN".

the accused chose not to answer. I honestly cannot find that the accused showed any true remorse for the horrific crimes he committed and the little he showed is unfortunately too late to make any difference to the people impacted by his actions.

[8] Regarding the interest of Society the following that was stated in *S v Seas*⁸ finds application in this matter:

'The Courts are not only under a duty to uphold the rule of law and to give effect to the fundamental rights of all persons as enshrined in the Namibian Constitution – the rights of children and the right to life – but equally has the duty to reflect society's indignation and antipathy towards those making themselves guilty of such heinous crimes. This usually finds expression where retribution and deterrence are the main objectives of punishment. It was submitted that society would not benefit from the accused being given a lengthy custodial sentence; that it might have a deterrent effect, but it would not bring back the child. I respectfully do not agree with counsel's submission. Though nothing in life could possibly bring the Ava back to life, society expects that offenders be punished for the pain and suffering caused to others and that the sentences imposed should serve as a deterrence to other likeminded criminals. Retribution as a purpose of punishment is a concept that is premised on the understanding that once the balance of justice in the community is disturbed, then the offender must be punished because that punishment is a way of restoring justice within that community. It is only when the offender has paid his or her dues and has reformed that they would be welcomed back to take up their rightful place in society.'

[9] *In casu* the accused attacked, robbed, and raped his grandmother whilst killing two of his young cousins in the process. The actions of the accused were brutal and merciless. He took two lives and negatively changed the lives of others permanently leaving them in a state of sadness and despair. The accused showed no signs of regret after these crimes were committed. On the contrary, after he left the victims dead and injured he went home, had a good night's rest and the next day spent his loot drinking alcohol and getting a haircut at the open market as if nothing had happened. He furthermore pretended to care by visiting the police station and hospital enquiring about his grandmother. He is clearly a danger not only to his own family but to the whole of society. From the previous convictions of the accused it is clear that he failed to rehabilitate whilst incarcerated. The personal circumstances of the accused are far outweighed by the gravity of the offence and the interests of

⁸ *S v Seas* (CC 17/2017) [2018] NAHCMD 245 (17 August 2018)

society and it follows that he should be removed from society for an extended period of time.⁹

[10] I am mindful of the fact that due to the multiple counts that the accused was convicted of, the cumulative effect of these combined sentences might result in an excessively lengthy term of imprisonment. That in turn can take away all hope of release in the mind of a convicted person. Such a result would be contrary to the values and aspirations and the right to human dignity protected in Art 8 of the Constitution.¹⁰

[11] This court also considered sentences imposed for similar offences in an attempt to satisfy the principle of uniformity whilst bearing in mind that the facts of each matter are different.¹¹ Both counsels suggested life imprisonment for the two counts of murder. In that regard the following was stated in *S v Tcoeib* (supra):

‘ . . . (I)t is resorted to only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such a sentence.’¹²

[12] Additionally, when considering life imprisonment as a form of punishment, I will have regard to s 99(2) of the Correctional Service Act 9 of 2012 which states that:

‘Where a person sentenced to life imprisonment . . . is sentenced to any further term of imprisonment, such further term of imprisonment is served concurrently with the earlier sentence of life imprisonment . . .’

[13] Robbery (with aggravating circumstances), Murder and Rape are the most serious offences and unfortunately very prevalent throughout our country. The

⁹ *S v Kasimeya* (CC 05/2015) [2018] NAHCNLD 29 (06 April 2018).

¹⁰ *S v Tcoeib* 1999 NR 24 (SC); *Gaingob v The State* (SA 7 and 8 - 2008) [2018] NASC (6 February 2018) *Kamahere v Government of the Republic of Namibia and others* 2016(4) NR 919 (SC).

¹¹ *S v Kauaria* (CC 11/2011) [2018] NAHCMD 74 (29 March 2018); *S v Jacobs* (CC 1/2017) [2018] NAHCMD 49 (07 March 2018); *S v Ngonga* (CC 05/2013) [2018] NAHCNLD 47 (18 May 2018); *S v Unengu* (CC 14/2013) [2015] NAHCMD 43 (05 March 2015); *S v IK and another* (CC 13/2021) [2023] NAHCMD 587 (22 September 2023).

¹² At 32B-C.

victims in all these charges were close relatives of the accused adding to the ever increasing levels of violent crimes committed in a domestic setup. These crimes were perpetrated whilst the victims were supposedly safely asleep in their house. The victim of robbery and rape, Jakobina Johannes described it best when comparing the actions of the accused to that of an animal. She was 74 years old at the time and was therefore vulnerable due to her old age and reduced eyesight. The accused violated the bodily integrity of his own grandmother by attacking, robbing and raping her. This is the women who took him in and helped to raise him whilst being herself a person living without a fixed income. She suffered a multitude of serious injuries to the head, multiple lacerations to the scalp and a mutilation of the right ear.¹³ These injuries caused her to stay in hospital for a considerable period.

[14] The two boys, both being young children, were attacked and killed in the most gruesome manner by being beaten to death with a mopane stick on their heads. The attack caused fractures of the occipital and parietal bones and contusion of the brain lobes. They were beaten with extensive force, so much so, that it fractured their nasal and aural cavities. Their grandmother had to endure the additional trauma of regaining consciousness next to the two mutilated bodies of her grandchildren.

[15] I can find no substantial and compelling circumstances present regarding the count of rape and thus the minimum prescribed sentences in s 3 of the Combating of Rape Act 8 of 2000 is mandatory. Section 3 details a list of individual circumstances that should be proven before the minimum sentence of fifteen years is applicable. The evidence before court is that three of these finds application in that it was proven that the victim of rape had suffered grievous bodily harm as a result of the rape,¹⁴ was by reason of age exceptionally vulnerable,¹⁵ and the convicted person used a weapon for the purpose of or in connection with the commission of the rape.¹⁶

[16] Taking all the relevant factors and circumstances into account, I consider the following sentences to be appropriate:

¹³ Exhibit 'S'.

¹⁴ S 3(1)(a)(iii)(aa)

¹⁵ S 3(1)(a)(iii)(bb)(B)

¹⁶ S 3 (1)(a)(iii)(ff)

1. Count 1: Robbery with aggravating circumstances (as defined in Section 1 of the Criminal Procedure Act 51 of 1977) – 10 years' imprisonment.
2. Count 2: Murder with direct intent, in respect of Ndapuka Linus, (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Life imprisonment.
3. Count 3: Murder with direct intent, in respect of Thomas Ndapuka Malakia, (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – Life imprisonment.
4. Count 4: Contravening Section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the Combating of Domestic Violence Act 4 of 2003) – 15 years' imprisonment.
5. It is ordered that Exhibits 1 and 2 are forfeited to the State.

E.E. KESSLAU
JUDGE

APPEARANCES

FOR THE STATE: S. Petrus
Office of the Prosecutor - General, Oshakati

FOR THE ACCUSED: L.S. Kabajani
Directorate of Legal Aid, Oshakati