

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case no: CC 08/2020

In the matter between:

**THE STATE**

and

**PHILLIPUS HAFENI HAIHAMBO**

**ACCUSED**

**Neutral citation:** *S v Haihambo* (CC08-2020) [2021] NAHCMD 211 (29 April 2021)

**Coram:** SIBEYA J.

**Heard:** 16 April 2021

**Delivered:** 29 April 2021

**Flynote:** Criminal Procedure – Sentence – Murder with *dolus directus* – Accused killed his girlfriend, the mother to his son aged 3 years at the time of the murder — The murder was gruesomely perpetrated against the deceased by inflicting several stab wounds to the neck. The deceased was a helpless woman who attempted to flee the attack but the accused chased and caught up with her after which he stabbed her to death – Society calls for severe sentence – Accused deserved to be uprooted from society – Accused sentenced to 30 years' imprisonment

**Summary:** The accused was indicted in the High Court on the following charges: 1 – murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 and 2 – assault read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He pleaded not guilty to both counts, did not provide a plea explanation but opted to remain silent.

After evidence was led, the accused was found not guilty and acquitted on the charge of assault but was convicted on the charge of murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, with direct intention to kill (*dolus directus*) one Otiilie Mwatuvi Hanghuwo. The accused and the deceased were involved in a romantic relationship for 9 years of which in the latter 4 years, they lived together. A son who was 3 years' old at the time of the murder was born of the relationship.

*Held* that, the triad principles of sentencing should be considered: the crime, the offender and the interest of society, as well as the fourth element of mercy, but that should not be misplaced pity.

*Held* further that, the barbaric nature in which the accused committed the murder is unthinkable and deserves to be condemned in the strongest of words.

*Held* further that, time spent in custody awaiting trial should be judicially considered in sentencing.

*Held* further that, our society is abhorred by the senseless killings of vulnerable women and children and courts should hear their cries and impose severe sentences on serious offences like murder.

*Held* further that, remorse is a mitigating factor but if not expressed or exhibited, aggravates the sentence.

*Held* further that, the sentence to be imposed should be appropriate in the eyes of the society so that the accused can be accepted back in the community after serving

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his sentence. He should be regarded by society as having paid his dues, as a lenient sentence may lead the community to take the law into their own hands

## ORDER

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Count 1: Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 30 years' imprisonment.

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## SENTENCE

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SIBEYA J:

### Introduction

[1] This court in *S v Kashonga* in para [1] remarked as follows regarding the sanctity of human life:

‘... the accused deprived two people of their most valuable right, being the right to life. Life is a determinant of other human rights, for there should be life in order to enjoy other rights. States, Namibia, being no exception, have placed mechanisms in place to safeguard the universal right to life. Our Constitution guarantees the right to life and consistently prohibits killing another person.’<sup>1</sup>

[2] Life is sacred and courts should play their part in reminding society of this venerated blessing. Tampering with one’s life through murder therefore should be bravely condemned in the strongest of words. Our people should stand up and let their voices be heard in condemnation of murder committed particularly within a domestic set up against women and children. It will be sad if our people sleep or slumber as this precious right to life is spirited away by murderers. This court has time without number expressed its abhorrence of barbaric acts of murder committed

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<sup>1</sup> *S v Kashonga* (CC 05/2020) [2020] NAHCMD 293 (16 July 2020). See also Article 6 of the Constitution.

in our country. Human life should therefore be given reverence by all without fail. The harshness of the law, expressed in appropriately stiff sentences should descend on those who frustrate the enjoyment of life by committing murder.

[3] Determining an appropriate sentence to impose on an offender is one of the most difficult tasks of a judicial officer. This is attributed to the fact that a court is duty bound to consider a number of factors and circumstances during sentencing. Punishment can therefore not be thumb-sucked but must be guided by established principles relevant thereto.

[4] It is now trite that in considering punishment, courts should take into account the celebrated triad factors of sentencing, being the crime, the offender and the interests of society.<sup>2</sup> A fourth factor of mercy, worthy of consideration during sentencing has come to the fore, as set out in *S v Khumalo*.<sup>3</sup> Mercy should however not amount to misplaced pity. All the said factors should be considered in conjunction with the purposes of punishment, namely: deterrent, preventative, reformatory and retributive.<sup>4</sup>

[5] A balancing exercise among the different factors of sentencing is required although it may sometimes be unavoidable, based on the applicable facts, to emphasise one factor at the expense of the others.<sup>5</sup>

[6] Corbett JA (as he then was) in *S v Rabie*<sup>6</sup> stated the following while discussing the approach of a judicial officer to sentencing:

'[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 himself 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.'

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<sup>2</sup> *S v Zinn* 1969 (2) SA 537 (A).

<sup>3</sup> *S v Khumalo* 1973 (3) SA 697 (A) 698.

<sup>4</sup> *S v Tcoeib* 1991 NR 263.

<sup>5</sup> *S v Van Wyk* 1993 NR 426 (SC).

<sup>6</sup> *S v Rabie* 1975 (4) SA 855 (A) 866A-C.

[7] The accused was convicted of the murder of Otiilie Mwateuvi Hanghuwo, with intention to kill in the form of *dolus directus*, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He was found not guilty and acquitted on the second charge of assault.

[8] At this stage, the court is obliged as a matter of law, to impose a sentence that meets the justice of this case on the offence of which the accused has been convicted.

[9] With the backdrop of the above stated principles in mind, I commence with the evidence led by and for the accused in mitigation of sentence.

#### Evidence led

[10] The accused testified, *inter alia*, that he was born at Engela in Ohangwena Region and is currently 56 years old. At the time of the commission of the offence on 01 September 2019, he was residing in Walvis Bay with the deceased and their son who is currently aged 4 years old. He has four children of whom the last born is the 4 years old son with the deceased. When questioned by Mr. Malumani for the state regarding the whereabouts of his youngest son, the accused was at pains to respond and ended up saying that he does not know as to who is taking care of the child. He was in a romantic relationship with the deceased for 9 years of which the last 4 years before the commission of the offence he lived together with the deceased.

[11] He testified further that his father is deceased while his mother is still alive. His mother stays in his family house with other family members who are 24 in total. The accused stated that he takes care of the said 24 persons and appealed to this court for a lesser sentence in order to continue to take care of such persons. He dropped out of school in Standard 1. He was employed as a fisherman in Walvis Bay where he earned a salary ranging from N\$4 000 and N\$5 000 monthly and this employment was terminated in 2016. He has since carried out temporal work as and when that became available. He also received money from the Veteran Affairs office. He sent an amount of N\$1500 to his last-born son in December 2020 while in police custody.

[12] He was arrested on 01 September 2019 and has been in custody ever since. He is a first offender. He testified further that he suffers from back pain which has not been severe, to require medical attention.

[13] He testified further that he felt very bad about the death of the deceased as he was also related to her. His family, at their own initiative, assisted the deceased's family with burial preparations. The accused repeatedly testified that he did not cause the death of the deceased and persisted with his version that the deceased injured herself when he pushed her while she was holding a knife in her hand.

[14] The accused led the evidence of his mother Ms Lavinia Ndimati, an 80 year old Namibian resident of Engela. She testified that the accused is her only son and in her own words she cannot do anything without him hence she pleaded with the court to have mercy on him. She further corroborated the accused that her family supported the deceased's family with burial arrangements by providing a cow and money.

[15] The accused further called his uncle Mr Petrus Phillipus to testify. He also pleaded with the court to have mercy on the accused's mother and children by extending a hand of mercy to the accused. He apologised on behalf of his family to the court and the family of the deceased for the loss of life.

[16] In aggravation of sentence, the state called Ms Teopolina Nekuma, who testified, *inter alia*, that she originates from Engela and works at a factory in Walvis Bay. The deceased was her cousin. She testified that the deceased had 3 children aged 19, 13 and 4 years, respectively. It was her evidence that the deceased was a breadwinner for her family. At present the deceased's last-born son fathered by the accused resides with the deceased's mother at Engela. She has no knowledge of N\$1500 that the accused allegedly sent to his son. The accused appears not to have knowledge of the whereabouts of his son and this paints doubt over his claim that he sent N\$1500 to him in the circumstances.

[17] Foreseeably, Ms. Nekuma testified that the death of the deceased shocked her family. In her testimony which was charged with emotions. She stated that the

last time that she saw the deceased's youngest son was on 18 January 2021, when she was due to leave the north, destined for Walvis Bay. The deceased's last-born son who cried for his mother most of the time, cried when she was leaving and requested her to take him along to Walvis Bay so that he could go and see his mother.

[18] Ms. Nekuma testified further that she has not received nor heard of any apology from the accused. When questioned by Mr. Uariua who appeared for the accused that sentencing the accused to a lengthy period of imprisonment will not return the deceased back to life, Ms. Nekuma agreed. I pause to state that it is a fact that the deceased's life lost will not be regained and therefore nothing turns on this statement and it deserves no mention further. What is apparent from that statement however is that, Mr. Uariua demonstrated remarkable insensitivity to the feelings and pain of those who lost their loved one. I sound a word of caution to legal practitioners and litigants alike to be sensitive and considerate of others' feelings and pain.

#### Personal circumstances of the accused

[19] It is worth noting that the accused is a first offender at an advanced age of 56. He supports his mother who literally said that she cannot survive in the absence of the accused her only son. The accused supports his children and 24 other persons who reside in his house at Engela. His family supported the family of the deceased in the burial preparations and expenses. He has been in custody since the day of his arrest on 01<sup>st</sup> September 2019. He begged this court for mercy in sentencing.

[20] It was submitted by Mr Uariua that the accused loved the deceased a lot hence he followed her from their shack out of love and care. He submitted further that the accused should not be sentenced twice as his family which by extension includes the accused already paid the punishment for the offence by contributing to the burial preparation and expenses. This submission loses sight of the evidence that the contribution to the burial preparations and expenses was not initiated by the accused nor did the accused play any role. Nevertheless, I do not find the contribution to the burial preparations as a mitigating factor in this matter.

#### The crime

[21] The crime of murder perpetrated on the deceased Ms Otiilie Mwateuvi Hanghuwo is aggravated by the fact that the deceased and the accused were in a domestic relationship for years. They were involved in a love relationship for 9 years, 4 years of which they lived together. They were blessed with a son, currently 4 years' old, whom the accused has condemned to be an orphan after savagely attacking and killing his mother.

[22] What aggravates this matter is that when the accused was together with the deceased in their shack on 01 September 2019, the deceased shouted that: "Tate Hafeni you are killing me". Later the deceased was observed running from her shack where she stayed with the accused towards the direction of the shack of Mr. Reinhold with a knife stuck on her back. The accused ran after her. Upon arrival at Mr. Reinhold's shack, the accused tripped the deceased as a result of which she fell to the ground. She then crawled inside the sleeping room of Mr. Reinhold. The accused followed her, grabbed her and pulled her to the sitting room. He put her between his legs and stood over her. He then stabbed her twice or thrice on her neck. She screamed that: "You are killing me". The accused responded saying: "Yes I am killing you". He stabbed her again after which he turned away to leave.

[23] As the accused was leaving, the deceased moved her head and stretched her arm and said that: "You are killing me". The accused noticed and returned to the deceased, looked at her, grabbed her hair, turned her on the side and stabbed her again on the neck. He then pulled the knife and slit her neck. He later threw away the knife.

[24] There can be no pleasant murder but the barbaric nature in which the accused perpetrated the murder in question is unthinkable. This court is at a loss for words to express the condemnation that the actions of the accused deserve. No amount or choice of words can satisfactorily explain the gruesomeness of the attack on the deceased. It is evil to say the least. Whatever wrong a human being may commit, no person deserves to be attacked like the deceased.

[25] The deceased, a defenceless woman, after screaming that the accused was killing her, ran away for dear life with a knife stuck on her back. The accused, who



appears to have been hell-bent to kill the deceased, was not satisfied with the deceased's attempt to flee. He took chase after a woman who was fleeing from him like a predator pursuing prey. I state with confidence that a predator will be better placed than the accused as it will pursue prey as part of nature for its survival, while the accused had no reason to savagely pursue and attack the deceased. It is the reason why the accused could not offer a meaningful explanation for his actions because there is none. His actions are monstrous, committed by a stone-hearted criminal.

### Interest of society

[26] Our nation has become attuned to gruesome killing of vulnerable persons particularly within a domestic set up. This is unfortunate and courts are called upon to play their part to impose heavier sentences in these kind of offences as a response to the cries of society. Severe sentences are generally called for and courts should recognise the 'natural indignation of interested persons and the community at large should receive some recognition in the sentences that courts impose'.<sup>7</sup>

[27] It should be remembered that the interests of society can only be accorded due consideration if an appropriate sentence is delivered. Such interests cannot be served by a lenient sentence. The members of society must one day be able to accept the accused back in their midst with a feeling that the accused has demonstrably paid his dues.<sup>8</sup> A lenient sentence may ignite an uproar from society not to receive the offender back after serving a sentence, a situation that our courts cannot afford to have, lest our community lose faith in the justice system and take the law into their own hands.

### Analysis

[28] I have considered the mitigating factors favourable to the accused which include the fact that he is a first offender with four children. He supports his mother, and while it is not my intention to down play such support, his mother has survived

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<sup>7</sup> *S v Karg* 1961 (1) SA 231 (A).

<sup>8</sup> *S v Flanagan* 1995 (1) SACR 13 (A).

the period of one year and seven months that the accused has been in custody. While further incarceration may affect his mother to a certain extent, I am not persuaded that his mother cannot survive in the absence of the accused.

[29] Our law requires that the period that an accused spends in custody awaiting trial must be taken into account in reduction of the intended sentence, as stated in *S v Kauzuu*.<sup>9</sup> There is however, no mathematical formula that if an accused spends one year imprisonment awaiting trial, then his deserved sentence should be reduced by one year. The court is nonetheless expected to exercise its discretion judiciously and take into account such time spend in custody in reducing the sentence. This court will therefore consider the period spent in custody by the accused in the reduction of the sentence to be imposed.

[30] The accused did not show remorse at all. He is persisting in the fabricated version that the deceased injured herself and that he simply ran after her out of love and care and in order to ascertain her wellbeing. This version I found to be fabricated in that it amounts to insulting the intelligence of all parties involved in this matter. An apology from his family member is meaningless if it does not come from the accused. It is the accused who committed the offence and it is the accused who should show remorse as an indication or appreciation of the wrongfulness of his conduct and an undertaking that he will not commit such an offence again. I find that while an expression of remorse is a mitigating factor the lack thereof aggravates the sentence as the offender really then laughs at the justice system.

[31] Weighing the personal circumstances of the accused against the crime and the interests of society I find that the personal circumstances are far outweighed. I hold the view that retribution and deterrence should be emphasised in this matter. I further take into account that the accused may be rehabilitated and one day reunite with members of society after serving his sentence. Members of society should be able to welcome him back into their midst after paying his dues by serving an appropriate sentence.

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<sup>9</sup> *S v Kauzuu* 2006 (1) NR 225 (HC) at 232F-H.

[32] The gruesomeness of the murder *in casu* and the interest of society call for a lengthy custodial sentence mitigated to a certain extent by the personal circumstances of the accused as stated above.

### Conclusion

[33] Considering all the aforesaid factors inclusive of the personal circumstances of the accused, the period of time that the accused spend in custody, the crime and the interests of society, together with the reasoning and conclusions, I find that the accused must be uprooted from society for a long time. In the foregoing I am of the considered view that the sentence set out hereunder meets the justice of this case. In the result the accused is sentenced as follows:

Count 1: Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 30 years' imprisonment.

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O S SIBEYA  
JUDGE

APPEARANCES:

STATE:

I Malumani  
Of Office of the Prosecutor General  
Windhoek

ACCUSED:

I Uariua  
Of the Directorate of Legal Aid  
Windhoek