

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

Case no: CC 26/2022

In the matter between:

THE STATE

v

KYRKKI VAN WYK

ACCUSED

Neutral citation: *S v Van Wyk* (CC 26/2022) [2023] NAHCNLD 114 (2 November 2023)

Coram: KESSLAU J

Heard: 24 & 25 October 2023 & 27 October 2023.

Delivered: 2 November 2023

Flynote: Criminal procedure – Sentence – Maternal filicide – Accused convicted on charges of murder and attempted murder.

Summary: The accused was convicted on charges of Murder and Attempted Murder, both read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.

ORDER

1. Count 1: Murder (*dolus eventualis*) (read with the Combating of Domestic Violence Act 4 of 2003) - 22 years' imprisonment.
2. Count 2: Attempted Murder (read with the Combating of Domestic Violence Act 4 of 2003) - 8 years' imprisonment.
3. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 as amended, it is ordered that 4 years of the imprisonment imposed on count 2 should run concurrently with the sentence on count 1.

SENTENCE

KESSLAU J

[1] The accused pleaded guilty to one charge of Murder and another charge of attempted murder, both read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

[2] The accused, in a written plea explanation, admitted to all the elements on both counts.¹ The explanation also included events that led to her committing the offences and in short boiled down to a failed relationship that she was having with her boyfriend at the time. When returning home after another quarrel with her then partner she found the two victims at the neighbour's house and directed her anger towards them. She extensively and severely beat them up leading to the death of the victim in count 1 and serious injuries sustained by the victim in count 2.

[3] The State accepted the pleas of guilty as tendered. The admissions made by the accused on the murder charge supported intention in the form of *dolus eventualis*. The accused was thereafter convicted as charged.

[4] In determining an appropriate sentence, the well-established triad of factors being the personal circumstances of the accused, the interest of Society and the crimes committed should be considered.² Furthermore the aims of punishment to wit

¹ Exhibits "B" and "C".

² *S v Zinn* 1969 (2) SA 537 (A).

retribution, rehabilitation, deterrence and prevention should be considered together with a measure of mercy.³ While considering the purposes of punishment, this court will endeavour to effect a balance in respect of the interest of the accused and the interest of society in relation to the crimes. The circumstances of a case, however, might require that one or more of the factors could be emphasised at the expense of others.⁴

[5] The accused is 38 years old and before this court as a first offender. The accused clearly has remorse for her actions which she displayed by admitting to her guilt even as early as after her arrest when her warning statement was obtained.⁵ She has spent some 18 months in custody in pre-trial incarceration. The accused gave birth to 8 children of which, due to various unfortunate tragedies, four passed on. The 4 children who are alive are being taken care of by relatives. The accused is currently pregnant and is HIV positive.⁶ The accused on the fateful day was herself the victim of some domestic abuse in that she was first beaten and then her mahangu was taken from her by her then partner. She was furthermore triggered by the fact that he brought his new lover into her presence.

[6] The crimes of murder and attempted murder are serious both considered serious in nature. The accused directed her anger of the failing relationship towards her two innocent children. The youngest one was only four years old at the time and did not manage to escape the attack like his six year old brother who escaped and thus survived the relentless beating. From the photo plan it was established that the accused used various sticks and a whip to beat the two defenceless victims on all parts of their bodies. The four year old boy died of brain contusion and also had an injury on his face.⁷ The boy who survived the attack was found with a serious head injury and bruising all over his face.⁸ He only survived because he could fled the scene and his injuries is an indication that she also intended to kill him. The attack must have lasted some minutes however the accused did not take this time to reconsider her actions or to exercise self-control.

³ *S v Rabie* 1975 (4) SA 855 (A).

⁴ *S v Tjiho* 1991 NR 361 (HC); *S v Van Wyk* 1993 NR 426 at 448 D-E.

⁵ Exhibit "V".

⁶ Exhibit "W".

⁷ Exhibit "K".

⁸ Exhibit "M".

[7] Society expect from courts to mete out just punishment that is both fair to the community and the accused. Both the children were very young and of a vulnerable age. They were attacked by their own mother who normally should protect her children at any cost. The prevalence of crime committed in the context of domestic relationships is alarming.

[8] A family member testified in terms of s 25 of the Combating of Domestic Violence Act 4 of 2003 regarding the impact these crimes had on the family. She said they were shocked by the events. She furthermore told the court that the surviving boy is living under her care and was traumatized by the event to such an extent that it influences his behaviour. He also does not want to be in the presence of the accused. She conceded that the accused displayed remorse for her actions.

[9] I have considered sentences in similar matters and will apply same in order to obtain some uniformity whilst bearing in mind that the circumstances in each case are different. In a show of mercy towards the accused and, considering that the crimes were committed in a simultaneously exercised attack, a part of the sentence will be ordered to run concurrently.

[10] In conclusion the accused is sentenced as follows:

1. Count 1: Murder (*dolus eventualis*) (read with the Combating of Domestic Violence Act 4 of 2003) - 22 years' imprisonment.
2. Count 2: Attempted Murder (read with the Combating of Domestic Violence Act 4 of 2003) - 8 years' imprisonment.
3. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 as amended, it is ordered that 4 years of the imprisonment imposed on count 2 should run concurrently with the sentence on count 1.

E.E. KESSLAU
JUDGE

APPEARANCES

FOR THE STATE: V T Shigwedha
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