

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: CC 11/2022

In the matter between:

THE STATE

v

ABED NDILYOWIKE

ACCUSED

Neutral citation: *S v Ndilyowike* (CC 11/2022) [2023] NAHCNLD 133 (01 December 2023)

Coram: SALIONGA J

Heard: 28, 29, 30, 31 August 2023, 01; 11, 14 and 15 September 2023

Delivered: 01 December 2023

Flynote: Criminal Procedure- Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003– Two counts of Assault by threat– Guilty plea on murder not accepted by State– State presented evidence on unlawful act and intention – Court satisfied that State proved its case beyond reasonable doubt on a murder charge.

Criminal law- Two counts of assault by threat– State presented evidence of three witnesses implicating the accused to the commission of the offences of assault by threat — Contradictions complained of not material to reject the witnesses' evidence- Accused's admissions in terms of s 220 of CPA supplemented the State case —Despite overwhelming evidence accused opted to remain silent– Court satisfied

that accused's election is not without consequences— Accused guilty on both counts 2 and 3 of assault by threat.

Summary: The deceased in this matter was in a long-term relationship with the accused, namely Abed Ndilyowike, as a boyfriend and girlfriend whereby the later used to visit her boyfriend at his mother's residence. On the 8 February 2021 during the late evening hours at the accused mother's residence, Oikalahenye village, the accused viciously hacked the deceased several times with a panga or machete on the head, face, neck and hand. The deceased died at the scene due to polytrauma resulting into hypovolemic shock. After hacking the deceased to death, he went to the neighbouring house of Cecilia Hautemo and threatened her as alleged in count two of the indictment. He also threatened to assault Yoolokeni Johannes.

Accused pleaded guilty to the charge of murder and gave a statement in terms of s 112 (1) (b) of the Criminal Procedure Act 51 of 1977 which was received and marked exhibit "F". However because accused did not admit an element of unlawfulness and intention, a plea of not guilty was entered in terms of s 113 of the CPA. On the two counts of assault by threat accused pleaded not guilty and made admissions in terms of s 220 of the CPA.

The state called only a single witness in as far as the murder charge is concerned whose testimony was found to be credible and satisfactory in all material respect. With regard to the charges of assault by threat the state led evidence of three witnesses who implicated the accused in the commission of the offences. The court accepted their evidence despite contradictions which were found not material to reject their evidence in its totality.

Held: that the s 112 (2) statement considered in tandem with evidence led by the state and his conduct after the incident was good pointers that accused unlawfully and intentionally killed the deceased.

Held further: that accused's explanation on the charge of assault on count 2 and 3 was not reasonably possibly true and is rejected not only as improbable but false beyond reasonable doubt.

ORDER

1. Count 1. The accused is found guilty and convicted of Murder with direct intent read with the provisions of Combating Domestic Violence Act 4 of 2003.
 2. Count 2. The accused is found guilty and convicted of Assault by threat in respect of Cecilia Hautemo.
 3. Count 3. The accused is found guilty and convicted of Assault by threat in respect of Joolokeni Haipinge.
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JUDGEMENT

SALIONGA JIntroduction

[1] The accused was arraigned on a charge of Murder on count 1, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 and two separate counts of assault by threat.

[2] Ms Hasheela appeared on behalf of the State whilst Mr Shipila represented the accused from the Directorate of Legal Aid.

[3] Accused pleaded guilty on count 1, being the murder charge. Mr Shipila counsel for the accused confirmed that the plea was in accordance with his instructions and prepared a s 112 (2) statement which was handed in and marked exhibit "F". In respect of count 2 and 3, accused pleaded not guilty and made admissions in terms of s 220 of the CPA. On count 2 and 3 he admitted to have visited the house of Cecilia Hautemo on the night of 8 February 2021 and requested her and Joolokeni Johannes to accompany him to his mother's house in order to go

and take or have a look at the deceased who he hacked to death with a panga. He denied to have assaulted or threaten them in any way.

Count 1

[4] The accused admits in his s 112 (2)¹ statement that on or about 8 February 2021 at his mother's house at Oikalahenye village, he had a fight with Lusua Nghidipo with whom he was in a domestic relationship. That their fight started on their way home to his mother's house from the local cuca shops where they had gone to socialize. They had been at the cuca shops since the late afternoon and while there they consumed some liquor. He had some beers although he does not recall how many but Lusua was drinking tomo, the traditional brew and would also drink from his beers.

[5] That on their way home, Lusua started quarrelling with him accusing him of flirting with other women at the cuca shops. Despite his denials and his efforts to calm her down, the quarrel became abusive in that Lusua started to insult him by calling him a male prostitute and saying that he has many women. By the time they got to the entrance of his mother's house, he told Lusua to go to their house and not to follow him into his mother's house anymore since they were arguing but she refused and said she was not going anywhere. Lusua told him that she would show him and that he would shit that day. His relationship with Lusua was punctuated by many such arguments that often ended in physical violence. When she started telling him that she would show him and that he would shit, he became angry and decided to push her away from the entrance.

[6] Accused further admitted that Lusua then started hitting him whereby he also slapped her with his open palms. She then ran to his room and emerged with a panga with which she threatened him. As Lusua had on previous occasions assaulted him including a time when she hit him with a brick on the head, he knew that she was capable of hacking him with the panga. She ran towards him and they fought for the panga until he managed to take it away from her. Lusua continued to insult him and to throw sand at him. At that point, he was totally consumed by anger and rage

¹ Criminal Procedure Act 51 of 1977 as amended.

thinking about how Lusia always insults and assaults him. In his fit of rage, he swung the panga at her several times. He does not recall how many times he swung it at her and he did not aim for any specific part of the body but he just swung angrily in her direction. Lusia suddenly fell to the ground and she was covered in blood. He knew what he had done and that he had hear (sic) hurt her terribly. At that moment, his anger subsided and was replaced with a sudden feeling of shock and regret.

[7] Also that he remembers thinking that he could have and should have run away once he took the panga away from her. He remembers thinking of the many times they were told to stay away from each other after they had similar fights before including the time when she hit him with a brick and the Police at Omufitu wa Nakashole also advised them to stay away from each other. He knew when he looked at Lusia laying there that this time they had gone too far. This time was different and he knew that he was going to jail. After seeing Lusia's state, he realized that she was no more. He had killed Lusia. He had hacked her on her neck, face and head. He handed himself in and he has been in custody since. He stands ready to face the consequences of his actions and ask that the court have mercy on him in sentencing him. He understand and accept that his anger is not a defence in law for his actions.

[8] The plea explanation depicts accused swinging the panga several times and hacking the deceased on her neck, face and head. That he knew what he had done and that he hurt her terribly. He understand and accept that his anger is not a defence in law for his actions. The accused having accepted that it can be deduced that he acted unlawful. However whether or not accused had intention to kill the deceased in view of what he explained in the statement is an issue for determination by this court from all the facts. The prosecution too did not accept the s (112 (2) statement and wanted to tender evidence to prove the unlawfulness and intention which they felt were not admitted. As a result a plea of not guilty on the murder charge was entered in respect of this count.

[9] The State called its first witness Ikumba Ileni of Oikalahenye village who is the mother of the accused. She testified that she was sleeping when the deceased called her through the window of the room and greeted her. She greeted her back.

Thereafter she heard the accused calling the deceased's name three times and they went away.

[10] It was her further evidence that thereafter she heard the accused calling 'mother', 'mother'. She responded that accused should not call her that time of the night. It then went quiet for a while and thereafter is when accused person came with a neighbour Secilia to their house. Secilia calling her saying "you are laying in your room while Abed had called me to come to your house" The witness asked her 'why did accused call you to my house' and told her that she was busy feeding her child. She only went outside after she finished feeding. She called Cecilia but there was no response that Cecilia had already left the homestead. She only saw the accused coming from the direction of his room with a panga in his hand. She asked him what he had in his hand which looked like a panga. Accused did not answer her he just said he was going to the police station. She went and collected a lamp from the room and when she lighted she saw something blackish lying on the ground. She came to see that it was Lucia who was in a pool of blood dead. Her evidence refuted accused version that Lucia was quarrelling and fighting with him because she did not hear them quarrelling or fighting.

[11] In cross-examination she confirmed an incident in which the accused was hit by the deceased on the head and has a visible scar to date. She could not say with what the accused was hit, but it looked like a panga was used since it was a deep wound. She further confirmed that about a year or two ago accused sought assistance from the police and they (accused and the deceased) were told to stay away from each other. The accused stopped going to her house, it was only the deceased who used to come to him. Prior to this incident the witness had also spoken to both of them to stay away from each other but to no avail.

Count 2 and 3

[12] The State's first witness in this regard is Cecilia Hautemo a neighbour to the accused. She testified that on the 8th February 2021, at night the accused came to get her from her house to go and see what he had done at their homestead. She was in her traditional thatched bedroom when the accused came calling her. The

witness testified that at the time the accused was calling her she did not answer him immediately. Accused then went to the girl's room. When questioned how she knew that that accused went to the girl's room if she was in the room, the witness testified that she heard a sound like a door being kicked. She then came out of the room running towards him asking what he was saying. When she met with the accused he held her jersey on the side of the neck. He said come fast, the bitch you use to say is my woman I killed her. Accused had a panga on his right hand and was pulling her with the left hand from where they met until outside her house in the field.

[13] It was Hautemo's further evidence that thereafter her son Joseph Haipinge came whilst accused was holding her. He pushed the accused away and told him to leave her alone. Accused then stopped strangling her on the neck but kept on holding her on the right sleeve of the jersey. At that moment her daughter Joolokeni was also present. She further testified that the accused told her again to hurry up and if she was not fast he will do the same to her as he had done to the other person. According to the witness accused made those threat utterances whilst still holding her in the same manner. She stated that she was scared because he killed the other person. She understood that to mean he will also kill her the way he killed the other person.

[14] Hautemo further testified that accused pulled her from her house until at the small entrance gate of their house. The accused only let off her jersey when they reached the small entrance. They entered the accused's house through the small gate which was outside their homestead. According to this witness she went inside the house on her own and was calling the owner of the house Hileni Ikumba saying "Mukwanekamba, Mukwanekamba what is here?" But she did not respond. They later ran away after they saw a person lying facing the Oukwanyama (north) direction with the head facing Ondonga (south) and they were scared. She did not give the accused permission to threaten her. Apart from pulling her to go with him, accused was telling her to be fast and if not he will do the same thing he did to the other person. In cross-examination the witness stated that all what the accused said was if she does not go there fast he would do what he did to the other person. She maintained that accused was pulling her until they reached the entrance of his house. She denied accused's instructions that he arrived first at their house and the

witness and her children followed him afterwards or she came because she was curious to see what happened.

[15] The testimony of witness Joseph Haipinge was that on the 8th February 2021, accused came to their house and woke up his mother Secilia and his sister Joolokeni Haipinge. He stated that when he came out of his room he found the accused holding his mother on a jersey against her neck and he had a panga with him. His mother was unable to breathe well and accused was telling them to go see what he had done there. He then pushed the accused person away so that he could leave his mother alone. The accused let go off his mother by the neck but kept on pulling her by the jersey up to the small entrance of his house.

[16] It was Mr Haipinge's evidence that they went up to the small entrance, accused entered first, and followed by his mother and then Joolokeni. He was the last person to enter the small gate. When they entered the accused's house, his mother was calling Mukwanekamba referring to accused's mother who took time to come out. Inside the house they saw the deceased lying after the accused lighted a torch. After seeing the lifeless body of the deceased his sister fell down and he picked her up. They then left home, picked up the children from their house and went to the neighbour's house. Him and Joolokeni stood in the field and called a neighbour to inform her of the incident. He knew the accused prior to this incident and stated that accused's behaviour on that day had changed as he was talking like someone who was not happy. In cross-examination the witness testified that he and his sister were behind following the accused person who was pulling their mother.

[17] Mbeha O Sibungo is a Senior Inspector and the Station Commander of Omungwelume police station. He received a call about a person who hacked his girlfriend to death at Oikalahenye village. He went to attend the report and was with the other two police officers. Upon their arrival they went in the house where accused person resides. They found the owner of the house and the deceased. They observed multiple cuts on the deceased's head. He further testified that the owner of the house informed him that the accused person told her that he was going to report himself to the police and that he had left with the murder weapon.

[18] Joolokeni N Haipinge was the last witness to testify in respect of count 2 and 3. She testified that on 7 February 2021 around 24h00 accused found them in their house. He kicked the door of her room open, entered the room and went to the other bed where no one was sleeping. He was calling Kandewu and had a panga in his hand. Accused went out and at that time she held the door of her room. He came at her door, again, overpowered her and entered the room. When he came in he got hold of her right arm saying she should go to his house and see because he killed the bitch they used to say was his girlfriend. He further said that if she was not going he will also kill her like he killed Nakadilo referring to the deceased. By then, he was still holding the panga. Because accused was holding and pulling her they then went outside the room. The witness demonstrated that she was in front of the accused who was holding her right hand side whilst moving out of the room. She was scared and felt that accused will kill her like he killed Nakadilo.

[19] Ms Haipinge further testified that when she went outside of the room, her mother and a brother were outside. The accused then left her and went to hold her mother by the jersey against her neck. He was saying they must go with him to their house so that she could go and see what he did otherwise if they were not going he will also kill her. He was still holding a panga. Later on accused left her mother's neck and held her on the arm. He then pulled her up to the small entrance of their house where he forced her mother to pass through the small entrance to their house. When they left their house and whilst accused was still holding her mother, Joseph her brother got hold of the accused and removed his hand from her mother's neck. There was altercation between the accused and his brother. She believed that accused had means to carry out his threats as at that stage he appeared very angry to her.

[20] In cross-examination it appears there were discrepancies between her evidence in chief and her answers to counsel's questions. There were also discrepancies in her evidence with regard to where her mother and a brother were the time she came out of the room, about the altercation she testified between the accused and her brother in trying to remove his hand off her mother's neck, on the exact words said by the accused and how her mother entered the small gate at the

accused homestead. I will come to the said witness's discrepancies in the evaluation of the evidence.

[21] At the end of the State's case, the accused closed his case without tendering any evidence.

Submissions by counsel

[22] Counsel for the defence, had an issue with the court's failure to exercise its discretion or discharge its duty to put questions to the accused on count 1. Counsel submitted that when s 112 (2) and 113 were considered in tandem and applied to the facts of this case, it should be taken to mean the state bore the duty to prove its case in the ordinary course. He thus submitted that the state has not proven all the elements of murder and the accused must be acquitted on that charge. Counsel further submitted that any other finding would be irregular in light of the provisions of s 112 (2) and 113 of the CPA. At the onset I disagree with counsel as the facts already admitted by the accused in s 112 (2) statement still stand.

[23] On the two counts of assault by threat counsel for the accused submitted that there were material contradictions in as far as the alleged threats are concerned between the evidence of Mrs Hautemo, Josef and Joolokeni. Their evidence are so divergent on material respects in that all the different versions of the witnesses cannot be true. Counsel further submitted that the evidence does not show that the accused threatened to kill the complainants in count 2 and 3 or to do any particular definable thing to them apart from their own assumption that they drew. Counsel contended that there was also no basis laid to show that they were reasonable in drawing those inferences. Therefore the accused should also be acquitted as the charges were unfairly brought against his client.

[24] Ms Hasheela counsel for the state had a different view though. She submitted that the evidence of Ileni Ikumba is clear that she did not hear the accused and the deceased quarrelling when they came in the house that night. Again officer Mbeha also did not see any injuries on the accused when he effected an arrest on the accused neither did he hear accused complaining of any injury or pain. Counsel

argued that accused intended to kill the deceased when he viciously hacked her several times with a panga a dangerous weapon on the head, face and neck which were vulnerable parts of the deceased's body.

[25] With regards to count 2 and 3 counsel submitted that, after killing the deceased accused went to the house of complainants in count two and three where he threatened to assault/kill them if they were not hurrying up to go with him. The accused physically tightly held the complainant in count 1 with one hand and on the other hand he was having a panga. The accused also kick open Joolokeni's room door while making threatening utterances. Counsel contended that his conduct instilled fear in the complainants' mind and believed that the accused had means to carry out his threats.

Evaluation and the Law applicable

[26] On counsel's submission that this court did not exercise its discretion or discharge its duty to put questions to the accused. It is trite that where the contents of s 112(2) statement are inadequate, a court should play a more active role to see to it that justice is done not only to the accused, but also to the State (*S v Kondo* 2012 (2) NR 415 (NLD). In this case after s 112 (2) statement was handed in the state indicated its intention to lead evidence. As such there was no need for the court to put questions to clarify issues which were not admitted, since evidence will be led and the court will have an opportunity to do question or ask for clarification.

[27] The question that arises is whether the State proved its cases beyond reasonable doubt in all counts? In order to answer the said question, the court will commence with the legal requirements pertaining to a single witness's evidence on a murder charge and thereafter the legal principle on the accused's rights to remain silent.

[28] Section 208² stipulates that an accused may be convicted of any offence on the single evidence of any competent witness. *S v Noble*³ sets out the criteria that a court should follow to sustain a conviction on this basis. When weighing such

² Criminal Procedure Act 51 of 1977 as amended.

³ *S v Noble* 2002 NR 67 (HC).

evidence, a court is to exercise caution. Furthermore such witness should be credible and the evidence should be of such a nature that it constitutes proof of the guilt of the accused beyond reasonable doubt.

[29] From Ms Ikumba's evidence on a murder charge, it is not in dispute that on the night in question when the accused and the deceased arrived in the homestead there was no fight or arguments. Ms Ikumba testified that she did not hear any. Ms Ikumba is a mother of the accused who testified against her son. He has no reason to falsely implicate him. Although she was a single witness, her evidence was clear and satisfactory. Another witness, officer Mbeha who effected an arrest on the accused also did not see any injury and did not hear any complain from the accused. To this end it is worth noting that the more probable explanation accused gave for his actions that night is contained in his statement in terms of s 112 (2). It appears from accused's explanation that the deceased provocative behaviour prompted him to act the way he did, however his averments in this regard remain unsubstantiated after the state's case.

[30] With regard to count 2 and 3, accused admitted to have gone to the complainants' house the night of the incident with a panga in his hand. What remains for determination was whether or not accused threatened to assault/kill the complainants as alleged in the charges.

[31] Counsel for the accused implored the court to reject the evidence of Mrs Hautemo, Josef and Joolokeni on the two counts of assault by threat on account that there were material contradictions. It appears the contradictions complained of were; mainly on the sequences of events, the exact words used by accused in threatening the witnesses, how and in which manner the complainant in count 2 was held, who entered the small gate first and how the three witnesses Mrs Hautemo, Joolokeni and Joseph left their house and that of the accused. It is common cause that Joolokeni testified on the altercation her brother had with the accused and that her evidence that accused was still holding her mother up until the accused homestead was not corroborated by other witnesses. Again her evidence that accused compelled her mother to enter accused's homestead through the small gate was

contradicted by that of her mother who testified that she entered accused's homestead on her own.

[32] In *S v Auala*⁴, the court correctly reasoned that experience has shown that two or more witnesses rarely give identical evidence with reference to the same incident or events. However regard must be had to the evidence as a whole in deciding whether or not the contradictions are sufficiently material to warrant the rejection of the State's version as contradictions *per se* do not render evidence unreliable.

[33] Three witnesses testified in this regard that accused tightly held the complainant on count 2 on the jersey by the neck. He also kicked the door of Joolokeni's room open (the complainant on count 3) while making threatening utterances and saying they should accompany him to his mother's house. The state presented persuasive evidence calling for a rebuttal but accused opted to exercise his Constitutional rights to remain silent. An accused's choice to remain silent can be a double edged sword.

[34] The dilemma was concisely articulated in *S v Katari*⁵ by the Maritz J when he stated that:

'It is trite that an accused cannot be compelled to give evidence against himself (Article 12(1) (f) of the Namibian Constitution) and has the right to be presumed innocent until proven guilty according to law, (Article 12(1) (d) of the Constitution). The entrenchments of those rights do not mean that an accused's election to remain silent in the face of incriminating evidence against him is without consequence in the overall assessment of the evidence by the Court.'

[35] In the instant matter accused's averments that the deceased was quarrelling or fighting him on that particular night was refuted by Ms Ikumbi's evidence on count 1. If there was any fight or quarrel, that question was not put to her and her evidence was not displaced in cross-examination. Accused knew his actions were not justified in law. Even after hacking the deceased with a panga he went to the neighbour's

⁴ *S v Auala* 2008 (1) NR 223(HC)

⁵ *S v Katari* (CA 124/04) [2005] (16 June 2005).

house leaving his mother in the house. He did not ascertain the extent of injuries or seek for urgent assistance from his mother. The s 112 (2) statement when considered in tandem with evidence led by the state as well as his behaviour after the incident clearly shows that accused acted unlawful and with intent to kill the deceased.

[36] It is common cause that on count 2 and 3 all witnesses who testified were at the scene and corroborated each other despite contradictions in evidence especially that of Joolokeni in cross-examination. The court in *S v Auala* above rightly articulated and that witnesses in this case did not give identical evidence. However if indeed accused's explanation that he only visited the complainants in order for them to go and see what he did, why was it necessary for him to carry a panga and even pull them. The accused's election not to testify in view of incriminating evidence in the present matter is not without consequence in the overall assessment of the evidence.

[37] Assault by threat is committed by inspiring fear that force will be applied and the test is subjective. Accused inspired fear in the minds of the complainants when regard is had that he had a dangerous weapon a panga with him, he uttered threatening words and the timing factor when he went there at twelve o'clock midnight. The evidence presented by the state precisely linked the accused to the commission of the two counts of assault by threat. It was further supplemented by the admissions accused made in terms of section 220 of the CPA. When the evidence is considered in its totality the said contradictions complained of are found not material to reject the witnesses' evidence. Therefore the court accepted the evidence as credible and probable and rejected the accused's version as improbable and false beyond reasonable doubt.

Conclusion

[38] In light of all evidence tendered before this court and despite the contradictions, which was found not material, the court is satisfied that the state has proved its case beyond reasonable doubt and accused has to be found guilty as charged.

[39] Consequently, the following order is made;

1. Count 1. The accused is found guilty and convicted of Murder with direct intent read with the provisions of Combating Domestic Violence Act 4 of 2003.
2. Count 2. The accused is found guilty and convicted of Assault by threat in respect of Cecilia Hautemo.
3. Count 3. The accused is found guilty and convicted of Assault by threat in respect of Joolokeni Haipinge.

J T SALIONGA

Judge

APPEARANCES

For the State

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