

REPUBLIC OF NAMIBIA



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

Case No: CC 22/2022

In the matter between:

THE STATE

v

TITUS IPULENI MUNDONGA

ACCUSED

Neutral citation: *S v Mundonga* (CC 22/2022) [2024] NAHCNLD 113 (10 October 2024)

Coram: KESSLAU J

Heard: 18-20 June 2024; 13 August 2024

Delivered: 10 October 2024

Flynote: Criminal Law – Murder – domestic relationship – requirements for private defence – private defence rejected – convicted on Murder (*dolus directus*).

Summary: The accused was arraigned before this Court on a charge of Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The accused raised self-defence, claiming that he was unlawfully attacked by

the deceased. The version of the accused is rejected in light of the eye witness- and circumstantial evidence.

ORDER

The accused is found guilty on Murder (*dolus directus*), read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

JUDGMENT

KESSLAU J

Introduction

[1] The accused was arraigned before this Court on a charge of Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The indictment reads that upon or about 14 July 2020, and at or near Oshitoo Village, in the district of Outapi, the accused did unlawfully and intentionally kill Saima Megameno Peelenga, an adult female person.¹ The summary of substantial facts² alleged that the accused and deceased were in a romantic relationship. Furthermore, that the accused stabbed the deceased several times on her face, chest and arms which then led to her death. The alleged stabbing happened on the same evening but during two different attacks on the deceased. It was alleged that after the first attack the accused left, however, he returned to the scene for another attack on the deceased.

[2] The accused, represented by counsel, pleaded not guilty to the charge. He elected to remain silent.

[3] Various documentary evidence was received into evidence by agreement and will be referred to in detail whenever necessary for purposes of this judgment.

¹ Exhibit 'A'.

² Exhibit 'B'.

Summary of the evidence

[4] Doctor Maria Nandjembo testified that she conducted an autopsy on the deceased and prepared a post mortem report.³ She noted a total of twenty stab wounds inflicted on the upper body of the deceased. These were found on the face, chest, arms and abdomen. Six of the wounds were noted on the back of the deceased. In her opinion, the fatal wound was a wound to the chest of the deceased. It was measured to penetrate 12,5cm into the chest, severing the aorta next to the heart and into a lung. The main cause of death was hypovolemic shock. It was the doctor's opinion that extreme force was used to cause the penetrative wounds. Furthermore, that the wounds were caused by a sharp object. She testified that, due to the nature of the various injuries and, even with immediate medical attention, the deceased had no chance of survival. She further testified that none of the injuries were sustained post mortem.

[5] Officer Ndjukuma testified that he attended the scene with Officer Mweya. He observed various footprints in- and outside the room of the deceased. The body of the deceased was found on a bed inside. He noticed multiple injuries on the body. The officer found a blue cap on the bed. Next to the bed a cell phone was found. He testified that the initial report was made by one Selma Peelenga. Her room is attached to the deceased's room and divided only by a single sheet of corrugated iron. The next day he received an Okapi knife, grey jersey, a watch and a pair of yellow shoes from Sergeant Mugowa. These items were covered in suspected blood spatter. The prints of the shoes matched those he saw at the scene. He photographed the scene, items and autopsy and compiled a photo plan.⁴ His evidence was left undisputed.

[6] Officer Mweya confirmed the evidence of the previous witness. He also noticed the shoeprints from the alleged attacker who was reported to be the accused. Further information led them to a room where they found the accused asleep. The shoeprints entering the room, matched the ones seen at the scene. After explaining to the accused his rights and the purpose of their visit, the accused did

³ Exhibits 'H' and 'J'.

⁴ Exhibit 'J'.

not deny stabbing the deceased. The officer asked the accused what weapon was used, upon which the accused told them an Okapi knife. He said the knife was in his room. Sergeant Mugowa, who was also present, then searched the room and found a blood smeared Okapi knife which the later handed to officer Ndjukuma.

[7] During cross-examination, it was hinted that the accused is relying on private defence in that the officer was asked if they found a panga and broken stick in the room of the deceased. Further, if any injuries were observed on the accused. The officer denied seeing any weapon in the room of the deceased or that he observed injuries on the accused.

[8] Matti Peelenga testified that the deceased was his cousin and that they resided in the same homestead. The accused is known to him. On 14 July 2020, after they shared dinner, they all went to their rooms. The rooms are situated in a line, one next to the other. His room was next to his sister Selma's room, who in turn was bordering the room of the deceased. He heard quarrelling voices coming from the room of the deceased and exited his room. The other family members also exited their rooms to see what was happening. He heard the accused said that he gave the deceased 'many things but she also goes out with other men'. The quarrel proceeded after which he heard beating or hitting noises coming from the room. The deceased was screaming: 'Maruru you are killing my child'; 'Maruru you have stabbed me in the eye' and; 'Maruru don't kill me'. The witness opened the door to the room of the deceased, however, the beating continued. The accused then exited the room and passed him with an Okapi knife in his hands. The witness entered the deceased's room and, with light from his cell phone, observed the deceased with multiple stab wounds laying on the bed. A small child was hidden underneath a blanket. The child had a wound on the fingers and was covered in blood. The child was removed from the room. The witness then saw the accused returning to the deceased's room whilst saying: 'you are not dead yet?'; 'how many things did I give to you?'; 'I slaughtered my goats and gave you thousands and thousands'. After the accused re-entered the deceased's room, the witness heard the beating noises again. The accused then exited and left. The police was then called.

[9] During cross-examination it was not disputed that the accused was present in the room of the deceased or that he returned for a second time. It was disputed that

the witness Matti was present, because the accused did not see him there. It was further disputed that a child was present in the room. It was put to the witness that, on the return of the accused to the room, he came looking for his cap and only went to the door without entering. This witness said he again went closer to the room of the deceased when the accused re-entered and heard the accused asking: 'Are you not dead yet?' The various words uttered by the accused were not disputed at this stage of the trial.

[10] Selma Peelenga testified that the deceased was her sister and they resided in the same homestead. The accused was known to her. On 14 July 2020, after dinner, they all went to their rooms. Her room borders the room of the deceased with a shared corrugated iron wall. She could hear the voice from the accused telling the deceased: 'Do you know I am Maruru'. This was followed by the deceased screaming 'Maruru you are killing me' and cries for help. She confirmed that they all went out of their rooms. The witness Matti was standing the closest to the door of the deceased's room. She was observing through a traditional wooden fence. She confirmed that Matti opened the door and then the accused exited. She overheard the accused telling himself that "I have slaughtered my goats..." She and the witness Lempie then went to call the neighbour and, on their way to exit the homestead, the accused passed them, re-entering the homestead. Cross-examination was concentrated on the various positions that the witnesses were observing the incident from.

[11] Herodia Peelonga, another sister to the deceased, confirmed her presence at the homestead during the incident. She confirmed the evidence of the other witnesses on what was seen and heard. She added that the accused and deceased were in a relationship. She confirmed that the accused were mentioning money and property that he gave the deceased and that she was disrespecting him. She confirmed that the accused then left the scene whereupon they found the small child of the deceased inside the room. She confirmed that the deceased was found with arms flung back in a pool of blood on the bed. Multiples injuries were visible on her body. She confirmed that the accused returned to the scene saying 'are you not dead, are you still saying hmm-hmm'. She confirmed that the accused re-entered the room and she then heard stabbing or beating sounds. The accused then left and the police arrived.

[12] In cross-examination, she was adamant that when the accused returned to the scene, he re-entered the room and that she heard more stabbing sounds. She testified that cell phones were used to make observations in the room and that a small lamp was providing further light.

[13] The last witness for the State was Lempie Nakale, another sister to the deceased. She testified that the accused is known to her as the boyfriend of the deceased. The accused is also known as Maruru. She confirmed that, after they went to their respective rooms on 14 July 2020, she heard screams from the deceased's room. She heard the deceased screaming for help and 'Maruru you are killing me'. She confirmed that they approached the room and when Matti opened the door, the accused exited with an Okapi knife in his hand. She confirmed that she and Selma went to call the neighbour and, when they exit the homestead, the accused re-entered. She then heard the accused saying: 'Did you not die yet, you are making hmm-hmm. I am now going to kill you; you did not die properly'. Upon returning with the neighbour she confirmed the deceased was found in a pool of blood. Her recollection on when the child was retrieved from the room, differs from the other witnesses in that it only happen when the neighbour arrived. In contradiction to the evidence of Matti, she did not see that the minor child was injured. The verbal threats, made by the accused to the deceased, were denied in the cross-examination of this last State witness.

[14] Accused testified in detail how he was summoned by the deceased to her homestead. On his arrival he found Herodia who told him that the deceased is busy in the kitchen. Whilst still talking, the deceased arrived and the two of them went into her room where she lit a small lamp. He denied that her child was present. The deceased then started quarrelling with him about his lack of providing her with money and the fact that he is discussing her with Herodia. After an extended oral argument about money, the deceased took his wallet and, when she saw there is only N\$50 inside, threw it at him. She then grabbed him by the collar and hit him on the head causing his cap to fall from his head. He pulled away in the direction of the door, however, the deceased picked up a wooden plank and started beating him with it whilst still holding him by the jersey. She was holding him with her left arm on the collar and beating him with her right arm. The first blow struck the inside of his right

arm, the second blow landed on the right side of his head and the third blow landed on his right side ribs. The plank then broke into pieces.

[15] While still holding him on his collar, the deceased moved back towards the bed, got onto the bed on her knees and reached behind the bed. She told him she is now getting the panga and she will see how he can stop those blows. The deceased then managed to get a hold of the panga from the floor behind the bed. She was still holding him by the collar and pulling him towards her. When she aimed the first blow with the panga in his direction, he managed to grab her right hand with his left hand, holding the panga away from them. He had a knife in his pocket. He removed the knife with his right hand and started stabbing her. He only stopped stabbing when he managed to wrestle the panga from her grip. He then threw the panga down in the direction of a table in the room. He could not say how many times he stabbed the deceased. While he was stabbing her, both of them were screaming. He left the deceased still screaming on the bed and exited the room.

[16] Within a distance of 2 metres away from the door, the accused realised that he left his cap inside. He returned to the door and, without entering, looked for the cap. He then heard another door opening and got afraid of what the other residents of the homestead will do to him. He then left the homestead meeting Herodia on his way out. He went to his father's house where he slept until the police arrested him. He confirmed that upon his arrest, he was still dressed in the same clothes and that the Okapi knife was confiscated from him. He had a lump on the head and broken ribs. He said even a doctor confirmed after an X-ray, that the ribs on his right side were broken.

[17] During cross-examination, the accused could not explain why his version of events, in particular the fact that he defended himself, was not put to the witnesses. Similarly, why the verbal threats and cries for help were not disputed and the presence of a panga was not canvassed with the family members in cross-examination. The accused conceded that he did not inform Herodia, when he met her on his way out, that he defended himself. Further, he conceded that he did not tell the police, the lower court or this court at the start of the trial that he acted in private defence. The accused's reply was that he was 'waiting to be asked'. He conceded that from the photo plan, depicting the floor surface of the room of the

deceased, there were no struggle marks visible in the sand of the extensive struggle that he testified about. The accused also said that he did not stay and call for medical help out of fear for the family of the deceased.

[18] When pointed out to the accused in cross-examination that if the deceased was using her right hand to attack with the stick, the injuries and blows would be to his left side and not on the right side of his body and thus in all probability he was lying about such attacks, the reply from the accused was that they 'were moving around a lot'. It was put to the accused that when he had control over the panga he was no longer in danger but only then started to stab the deceased. The accused explained that he was injured at the time and struggling to keep control over the panga.

Totality of evidential material

[19] Undisputed evidence before court is that the accused visited the room of the deceased on the particular night. It is undisputed that the accused left the room of the deceased with an Okapi knife in his hand and afterwards returned to the room. It is undisputed that the deceased was stabbed twenty times by the accused on various parts of her upper body, including her back, causing penetrative injuries. It is also undisputed evidence that these injuries caused the death of the deceased. The questions to be determined are, if there was an unlawful attack on the accused, if so did he act in self-defence and lastly if he exceeded the boundaries of self-defence by either intentionally or negligently applying excessive force in the circumstances of this case.

[20] The State submitted that the only reasonable inference to be drawn from the six wounds to the back of the deceased is that she was fleeing from the accused and that he was therefore not under attack. Thus, that the requirements for private defence were not met. On the contrary, counsel for the accused submitted that the version of the accused should be accepted as reasonably possibly true as he was the only person present with the deceased at the time.

The law applicable

[21] The learned writer C R Snyman defines the offence of murder as ‘the unlawful and intentional causing of the death of another human being’. The writer describes the elements of the crime as follows: ‘(a) causing the death (b) of another person (c) unlawfully and (d) intentionally’.⁵ Private defence may however justify an otherwise unlawful killing.

[22] For private defence to succeed, certain requirements must be met. Firstly there must be an unlawful attack upon a legal interest which had commenced or was imminent. Secondly the defence must be directed against the attacker, necessary to avert the attack and the means used to defend oneself must be necessary in the circumstances.⁶ The test is an objective one, and requires the court to put itself in the position of the accused at the time of the incident.⁷ Logic dictates that such defence would have more evidential value if disclosed at the earliest possible opportunity.

[23] In respect of contradictions in the evidence of State witnesses, in *S v Absalom*⁸ it was stated that:

‘Guided by the *dicta* stated in *S v Bruinders en ‘n Ander*⁹ and *S v Auala(1)*,¹⁰ the court reasoned that experience has shown that two or more witnesses rarely give identical evidence with reference to the same incident or events, and that 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; also, that contradictions *per se* do not render evidence unreliable.’

[24] Whenever the court is tasked with the drawing of inferences from circumstantial evidence, the two ‘cardinal rules of logic’ which should be considered, as established in *R v Blom*,¹¹ are:

⁵ C.R. Snyman *Criminal Law* 6 ed 2014 at 437.

⁶ *S v Naftali* 1992 NR 299; *Mwanyekele v State* (CA 15/2013) [2013] NAHCMD 301 (25 October 2013).

⁷ *Raymond Landsberg v The State* CA 25/94 Unreported High Court of Namibia, Judgment delivered on 1994.12.02; *Ntanjana v Vorster and Minister of Justice* 1950 (4) SA 398 CPD at 406 A-D; *Ntsomi v Minister of Law and Order* 1990 (1) SA 473 CPD at 529 C-D.

⁸ *S v Absalom (2)* (112 of 2016) [2017] NAHCMD 251 (4 September 2017) par 31.

⁹ *S v Bruinders en ‘n Ander* 1998 (2) SACR 432 (SEC).

¹⁰ *S v Auala (1)* the 2008 (1) NR 223 (HC).

¹¹ *R v Blom* 1939 AD 188 at 202-203.

'(1) The inference sought to be drawn must be consistent with all the proven facts; if it is not, the inference cannot be drawn; (2) The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct'.

[25] Furthermore, the cumulative effect of all the evidence has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt.¹² Proof beyond reasonable doubt does not mean that the State must exclude an unlimited number of imaginary or speculative possibilities for which no factual basis has been laid and which possibilities were not supported by evidence.¹³

Applying the law to the facts

[26] The accused was the only person present with the deceased during the attack and his version, if reasonably possibly true, should be accepted. The defence of the accused turned out to be one of private defence. Such was not clear from the start of the trial as the accused gave no plea explanation. It appears to develop as the case progressed and the full version was only disclosed when the accused testified under oath. Thus, the witnesses were not fully confronted with this version. According to the accused, he defended himself against an unlawful attack launched on him by the deceased who tried to cut him with a panga.

[27] None of the State witnesses mentioned that they saw a panga or pieces of a broken stick on the scene. The police, at the time of photographing the scene, had not find a weapon yet and would have certainly noted such if it was present. The accused testified that he threw the panga down next to the table. When looking at the photos of the room and table there is no panga or broken sticks to be seen.¹⁴ Furthermore, photos taken of the gravel floor of the room shows no sign of a struggle as described by the accused.

[28] The photos depict the deceased laying on a double bed that is pushed against the wall. Therefore, the explanation of the accused on how the deceased managed

¹² *S v HN* 2010 (2) NR 429 (HC).

¹³ *S v Van Wyk* 1993 NR 426 (SC).

¹⁴ Exhibit 'J' photos 13-26.

to hold him whilst being on her knees on the bed and at the same time reaching behind the bed to get the panga from the floor is physically impossible. Another puzzling piece is the evidence from the accused that with one hand he was holding the panga and the deceased whilst, with the other hand, removing his knife and opening it. The probability of opening an Okapi knife with one hand is unlikely. The manner in which he was assaulted by the deceased, in that while facing each other, she used her right hand to inflict injuries to the right side of his body, is another unlikely version. Additionally, no injury was noted on the accused. No evidence was presented regarding his visit to the doctor or an X-ray taken of his ribs. Even if the accused's version is believed, it means that the attack was over when he started stabbing because by then he was in physical control of the panga and thus no longer in danger. I find that the defence of the accused is an afterthought and is rejected as false.

[29] The witnesses for the State contradicted each other on the exact threats that they heard uttered from the accused to the deceased and at what stage it happened. There were also contradictions as to when the minor child was removed from the room. I find these to be minor and immaterial contradictions. In totality, I find the evidence presented by the State to be credible and reliable.

[30] The evidence is that the accused and the deceased were in her room. Serious threats could be heard made by the accused at various stages of the attack. The witnesses heard multiple stabbing or hitting noises after which the accused exited the room with an Okapi knife. He then returned and re-entered the room, made more threats, after which more stabbing sound were heard. The deceased was found with twenty penetrative wounds to her upper body. I am satisfied that the State proved beyond reasonable doubt that the accused murdered the deceased.

[31] Regarding the form of intent, the accused indicated in no uncertain terms to the deceased that he was going to kill her. He used a lethal weapon to stab her twenty times in the most vulnerable parts of the human body. He then returned to the scene for a second time to complete his task. From the facts before court, and the inferences drawn from these, I am satisfied that the accused committed the offence with direct intent.

Order

[32] The accused is found guilty on Murder (*dolus directus*), read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

E.E. KESSLAU
Judge

APPEARANCES

FOR THE STATE: R. Shileka
Office of the Prosecutor - General, Oshakati

FOR THE ACCUSED: N. Nyambe
Instructed by Legal Aid