

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
SENTENCE

Case No: CC 4/2020

In the matter between:

THE STATE

v

VENSINLAUS MBANGU MUTERO

ACCUSED

Neutral citation: *S v Mutero* (CC 4/2020) [2024] NAHCNLD 14 (1 February 2024)

Coram: KESSLAU J

Heard: 10 November 2023; 27 November 2023; 12 December 2023; 14 December 2023

Delivered: 1 February 2024

Flynote: Criminal Procedure – Murder - Read with the Combating of Domestic Violence Act 4 of 2003 - Accused pleaded not guilty to both counts of Murder – Accused convicted as charged.

Summary: The accused was convicted on two counts of Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003, of unlawfully and intentionally killing his wife and biological son by shooting them with a firearm. Sentencing principles and objectives re-stated.

ORDER

1. On count 1: Murder with direct intent (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) - 21 years' imprisonment.
2. On count 2: Murder with direct intent (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) - Life imprisonment.
3. Exhibits 1, 2, 3, 4 and 5 (being a firearm, magazine, live bullet and two spent cartridges) are forfeited to the State in terms of s 35(1)(a) of the Criminal Procedure Act 51 of 1977.
4. In terms of s 10 of the Arms and Ammunition Act 7 of 1996 the accused is declared unfit to possess a firearm for a period of two years (calculated from the date of his release).

SENTENCE

KESSLAU J

Introduction

[1] The accused was convicted of the murders of his wife and biological son (both with direct intent) and is before this court for sentencing. The State did not prove any previous convictions against the accused.

[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 above.¹ This court will also endeavour to balance and harmonize the above factors 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] Another aspect to consider during sentencing is the fact that the accused was convicted of two counts of murder and the cumulative effect of the combined sentences might result in an excessively lengthy term of imprisonment. The accused being 53 years old might therefor effectively receive an informal 'death sentence'. 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.³

[4] 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.⁴ Counsel for the State requested 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.'⁵

[5] Regarding the interest of Society the following that was stated in *S v Seas*⁶ 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

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).

² *S v Van Wyk* 1993 NR 426.

³ *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).

⁴ *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).

⁵ At 32 B-C.

⁶ *S v Seas* (CC 17/2017) [2018] NAHCMD 245 (17 August 2018).

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. . . . 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.'

[6] In terms of section 25 of the Combating of Domestic Violence Act 4 of 2003, a family member testified regarding the impact of the crimes on the deceased's family. Hilde Nangula, 72 years old, testified that the deceased in count 1 was her daughter and the deceased in count 2 her grandson thus being the mother-in-law of the accused. She testified that when the accused got romantically involved with their daughter they provided the couple with a plot of land to start their life. She also testified that her daughter, at the time, was producing bricks which business she then handed over to the accused when she found alternative employment.

[7] She also testified that her deceased daughter left behind three minor children who are now being cared for by her and her husband. They are both pensioners and struggle to make ends meet. She conceded that the accused compensated them with money after he was ordered to do so by the community court. The money was used for the funerals and expenses surrounding the erection of grave stones for her deceased daughter and grandson. In conclusion she said that since the death of her family members at the hand of the deceased she has developed hypertension and is experiencing feeling of sadness and pain. She blames the accused for the death of her family members and additionally for 'dragging her from court to court'. It therefore appears that the parties have unresolved problems additional or arising from this case.

[8] The personal circumstances of the accused was placed before court by the accused testifying under oath. His evidence was that he was 45 years old at the time and, with the 8 years that has since passed, is now 53 years old. He completed Grade 12 in 1995 and has no previous convictions. His father is still alive and 78

years old. He was married to the deceased for a period of ten years. They had three children together which one is now the deceased in count 2. Their two remaining children are being cared for by the maternal family. The accused has four additional children of whom three were born after he was released on bail on this matter before court. These four children are staying with their respective mothers who are uneducated and unemployed.

[9] The accused further testified that prior to his arrest he had a brick making business earning approximately N\$ 50 000 per month. He testified that after his arrest he lost all his equipment, vehicles and some household properties. He alleged that these items were plundered by his in-laws. The accused alleged that with the assistance of the police one of the vehicles was recovered from his mother-in-law however it was stripped of all parts. According to the accused the estimated value of the lost items is between N\$ 300 000 to N\$ 400 000. He spent a period of approximately 3 years and five months in custody. The accused contributed money towards the funeral of the two deceased and additionally paid compensation towards the grieving family.⁷ Accused requested a lenient sentence as he 'does not know how this accident happened'. The accused conceded that he is the cause of his children's current suffering and furthermore that it was irresponsible to father three children whilst a double murder case was still pending.

[10] From the facts of this matter it appears that the accused initially cooperated with the investigation to some extent in reporting himself to the police and subsequently making a statement and confession. After his incarceration he suffered substantial monetary losses and furthermore compensated the family of the deceased.

[11] The accused failed to show any remorse at any stage of proceedings in this court and is still denying that he intended to kill the deceased. He is referring to the murders as 'an accident'. He said that his mother-in-law was the person who stole one of the vehicles however could not give an answer as to why these allegations were not put to the witness when she testified.

⁷ Exhibits "Y1-5".

[12] The crimes that the accused stood convicted of are extremely serious and even more so because it was committed in a domestic context. Jealousy and distrust, as in so many domestic relationships, were the causes for these crimes. The deceased in count 1 was his wife of ten years. She was shot twice and her wounds are indicative that she was covering her head for protection when the two bullets were fired into her head. She was left to die without any attempt from the accused to assist or get some help.

[13] The deceased in count 2, the biological son of the accused, was shot in cold blood. This happened while the deceased's only act was to approach his father to greet him. He was shot in the head at point blank and had no chance of survival. The accused, at this stage, had already killed his wife and for that reason the second murder was even more apprehensible. Both these victims were murdered by the person who was supposed to protect them from harm.

[14] It was submitted by the State that the accused be declared unfit to possess a firearm in terms of s 10 of the Arms and Ammunition Act 7 of 1996. Defence counsel had no objection to such an order being part of the sentence.

[15] After careful consideration of the above the accused is sentenced as follows:

1. On count 1: Murder with direct intent (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) - 21 years' imprisonment.
 2. On count 2: Murder with direct intent (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) - Life imprisonment.
 3. Exhibits 1, 2, 3, 4 and 5 (being a firearm, magazine, live bullet and two spent cartridges) are forfeited to the State in terms of s 35(1)(a) of the Criminal Procedure Act 51 of 1977.
 4. In terms of s 10 of the Arms and Ammunition Act 7 of 1996 the accused is declared unfit to possess a firearm for a period of two years (calculated from the date of his release).
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E.E. KESSLAU
JUDGE

APPEARANCES

FOR THE STATE: V. T. Shigweda
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FOR THE ACCUSED: A. Shiningayamwe
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