

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: CC 8/2022

In the matter between:

THE STATE

v

NICOLAU PEYAHAMBA NGHUUMBWAVALI

ACCUSED

Neutral citation: *S v Nghuumbwavali* (CC 8/2022) [2024] NAHCNLD 45 (23 April 2024)

Coram: KESSLAU J

Heard: 20 March 2023; 22-24 March 2023; 13 -14 June 2023;
7 July 2023; 21 September 2023; 28 November 2023;
12 March 2024

Delivered: 23 April 2024

Flynote: Criminal Law – Murder – read with Combating of Domestic Violence Act 4 of 2003 – Circumstantial evidence – Accused pleaded not guilty – Defence of non-pathological insanity rejected.

Summary: The accused is arraigned before this court on a count of murder in that he buried his biological child alive causing death by asphyxia. The accused was

represented by counsel and pleaded not guilty to the charge. The accused relied on the defence of non-pathological insanity.

Held - Admissions made by the accused to several witnesses that he buried his child in combination with the circumstantial evidence presented by the State proved the offence of murder with direct intent beyond reasonable doubt.

Held - That the actions by the accused in lying to his family members about the whereabouts of the deceased and writing a letter was with the failed intention to defeat or obstruct the course of justice.

ORDER

1. Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty (direct intent).
2. Count 2: Defeating or obstructing the cause of justice – Guilty of attempted defeating or obstructing the course of justice.

JUDGMENT

KESSLAU J:

Introduction

[1] The accused was arraigned before this Court on count 1: Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) and, count 2: defeating or obstructing the cause of justice or an attempt to do so.

[2] The indictment¹ reads that upon or about the 21st of January 2020, and at or near Onadhi Village in the district of Ondangwa, the accused did unlawfully and intentionally kill Nghuumbwavali Joseph Tuyenikumwe, a two year old male human being by burying him alive causing him to asphyxiate. Whereas a domestic

¹ Exhibit 'A'.

relationship existed in that the accused was the biological father of the deceased. Allegations regarding the second count were that the accused on the same date and place wrote a letter stating that he took the deceased to live with relatives in Angola and, furthermore, informing witnesses that the deceased was returned to live with his biological mother. It was alleged that the accused made these false representations in an attempt to conceal the true circumstances under which the deceased died.

[3] The accused, represented by counsel, plead not guilty to the charges and elected to remain silent.

Summary of the evidence

[4] Hilja Nekondo Penda, the biological mother of the deceased, testified that the deceased was physically challenged. She testified that the deceased was almost three years old at the time of his death. She testified that, on Saturday 18 January 2020, she took the deceased to the homestead of his paternal grandmother to care for him while she left to find employment. The accused was not present when she delivered the child into the care of the grandmother. She testified that she received text messages from the accused which stated that he is sending their child to live with family members in Angola, as the grandmother cannot take care of him. The following Tuesday, she was informed that her child had passed on.

[5] During cross-examination, the witness conceded that when she delivered the child he had a black cotton belt tied around his waist. She denied that it had the symbolic meaning that a family member had died ('Oshipando') and said it was bought from a pharmacy in Outapi to 'prevent bad spirits and diarrhoea'. It was put to the witness that the accused was shocked by the black belt tied around the deceased as well as by his arrival at the homestead without prior arrangements.

[6] Josephine Angula testified that she is residing at the particular homestead. She testified that the accused instructed her and some other children to clear an area in the mahangu field, telling them they are cultivating. After they were done, she was instructed by the accused to bath the deceased because he was planning to return him to his biological mother. When she was done bathing the deceased, the accused took him, saying the mother is going to meet them at the roadside. After a

while, the accused returned and enquired if they have seen the spade. They could not tell him where the spade was. The accused then entered a shack and returned to the field. Thereafter, the accused left to visit a bar. During cross-examination, this witness did not alter any of her evidence and generally made a good impression.

[7] Phillipus Hamukwaya testified that he is living at his grandmother's homestead. The accused is his uncle. He testified that he last saw the deceased alive on 21 January 2020. On that day, the accused instructed him and five other children to clear an area in the mahangu field. Thereafter, the accused told Josphehine to bath the deceased. The accused told them that it is necessary, because he will be taking the deceased to the roadside as he is returning to live with his mother. The accused then went into the field and upon his return told this witness to collect the backpack of the deceased. Thereafter, accused returned to the field again. When the accused returned, he took the deceased with the backpack and said the mother will collect him at the roadside.

[8] Phillipus Hamukwaya further testified that after a while the accused returned and they then shared a meal. While they were eating, the grandmother enquired about the absence of the deceased whereupon the accused told her that the child was returned to his biological mother. He added that this was done because the grandmother had said that the accused is not the father of the child. The grandmother then apologised for making an enquiry and the accused went to his room. The next day after school he found the police at their homestead. He saw them entering the mahangu field and placing a white bag in the police van. In cross-examination, some minor contradiction between his oral evidence and written statement were pointed out. These include that he did not state in his statement that the accused instructed them to weed or that Josphehine was told to bath the child. The witness stuck to his version, saying that the statement was not read back to him.

[9] Hishimone Nelao Tregonia is an older sister of the accused. She testified that on 21 January 2020, the accused requested her to come to his room. They enter the room and sat on the bed. The accused took out a letter and kept it in his hand. As he remained silent, she asked him if what he wanted to say was written in the letter. The accused nodded in affirmation. She took the letter and read it. The content was to the effect that the mother of the accused gave him stress by saying that the

deceased is not his child and that the child is disabled. Furthermore, that the biological mother of the child, Nekondo, should come and fetch the child. Also stated in the letter was that the accused will take the child to family members living in Angola. There was also a remark that the biological mother agreed to this and that, if anyone enquires about the deceased, the response must be that he was taken to Angola. The letter ended with the words 'what is done, is done, we will not see that child anymore'. The letter was written in Oshiwambo.

[10] The witness said she got scared by the content of the letter and asked the accused where is the child. The accused remained silent and started crying. She asked again upon which the accused said he does not know where the child is. When she asked for the third time the accused replied: 'I buried the child'. The witness asked if she can inform their mother but the accused asked her to wait until the next day before telling. He also informed her that he buried the child at the edge of the mahangu field. She stayed with him through the night to prevent him from doing something irresponsible. The next morning, at 06h00, she went to visit her aunt Priscilla for advice. She handed the letter from the accused to her aunt who read it. They both returned to the room of the accused. Priscilla asked the accused where the deceased is, however, the accused did not answer and started crying. The witness and Priscilla then went to her mother to report the developments. Thereafter, the police was phoned. When the police arrived, the accused was questioned about the whereabouts of the child and they then all went to the edge of the mahangu field. The accused pointed in the general direction of the grave and the police excavated the body of the deceased together with his backpack containing his personal items.

[11] During cross-examination, the witness confirmed that the accused said he wrote the said letter. She confirmed that the deceased arrived with a black cloth tied around his waist ('Oshipando') which traditionally signalled death. Regarding the pointing out of the burial site, she said the accused indicated the direction of the site. Her mother then pointed out the exact area where the police found the corpse. She confirmed that the accused telephoned the deceased's mother to come and collect the child, however, that she refused and switched off her phone. It was denied in cross-examination that the accused wrote the letter, indicating that he did sign the

letter. It was also put to this witness that the accused was informed the next morning that he was the one who buried the child.

[12] Priscilla Jonna Hawakeshemunu confirmed that she is an aunt to the accused. She confirmed that Nelao Tregonia arrived early morning at her place informing her of the content of a letter written by the accused. She said the last sentence of the letter stated that 'you are no longer going to see this child, what is done is done'. She accompanied Nelao Tregonia to the homestead where they informed the grandmother Eufemia of the letter. She then went to the room of the accused where she found him crying. When asking the accused the whereabouts of the deceased he said 'I did not kill him, I just buried the child'. She confirmed the evidence that the police were called. Upon arrival, the accused directed them to the western side of the mahangu field.

[13] Cross-examination was concentrated on the presence of the black cloth tied to the waist of the deceased and its meaning. The witness' opinion was that such was a sign of mourning when worn around the neck.

[14] The grandmother of the deceased and biological mother of the accused, Eufemia Joseph Kafute, testified. She told the court that the deceased was delivered to their homestead by his mother two days prior his death. On the particular day, she left the homestead and on her return was informed by the accused that the deceased was returned to his mother. When she tried to get more information from the accused, he left to visit a bar. The next morning she woke the accused by knocking on his room. He answered and then started crying. It is here where Tregonia and Priscilla found her and reported the content of the letter to her. They also reported that the accused buried the deceased. The police was called and when they arrived they asked the accused where he buried the deceased. She said that the accused made a gesture towards the edge of the mahangu field. The accused then accompanied the group towards the area whilst crying constantly. He was then told to wait under a tree while she was instructed by the police to point out the cleared area for the purposes of taking a photo. In her presence, the body of the deceased was exhumed and removed by the police.

[15] During cross-examination, it was suggested that the accused and this witness had a bad relationship in that they frequently argued, resulting in feelings of inadequacy from the accused. She conceded that they had arguments, however, denied that it was frequent or that she told the accused the deceased is not his child. She also denied that she remarked that the child is 'stupid because of the death cloth tied to his waist'.

[16] Officer Mundjego testified that a report was received of a missing child with an allegation that he might have been buried. They departed to the village of Onadhi and arrived before 08h00 that morning. She went to the accused and, without explaining his rights, started questioning him as a suspect. The replies received from the accused will, for the aforementioned reason, not be considered for purposes of this judgment. The officer then called Officer Niinkoti to proceed as investigating officer. At one stage, Officer Mundjego saw the accused pointing in the direction of the mahangu field and they all proceeded in that direction. On their way, the accused sat down under a tree whilst crying. She confirmed the evidence of the grandmother indicating the possible burial site for purposes of the photo plan. This witness also confirmed that the body of the deceased was found buried at the site together with a black backpack containing his personal items. She testified that the body of the deceased was found with the upper part inserted into a white plastic maize bag. The child was dead. In cross-examination, it was pointed out to her that some of the witnesses testified that it was the accused who pointed out the grave.

[17] Officer Niinkoti confirmed the evidence of attending to a report of a missing child. This witness explained the rights of the accused in detail to him. Thereafter, he admitted that he buried his son in the mahangu field. The accused indicated to her that the spade he used was left behind one of the houses. The accused then took them in the direction where he buried the deceased. She said that the accused was crying at the time and looked as if he wanted to faint, he was thus left under a tree. They found a recently disturbed area in the mahangu field from where the body of the deceased was eventually recovered. She confirmed that the body of the deceased was found inserted head first into an empty maize meal bag. Together with the body a bag was found containing the clothes and personal documents of the deceased. The accused told her he buried the child because of remarks made by his

mother that the child is stupid, that he is not the father and that the accused is lazy. This witness confirmed the letter containing a message that the child is buried in the mahangu field and if anyone enquire about the child they should say he is in Angola with family. During cross-examination the witness insisted that all legal rights were explained in detail to the accused prior to making the admissions and the pointing out.

[18] Sergeant Asenanye testified that he is attached to the Criminal Investigation Unit at Okatope Police Station. He was in the presence of Officer Niinkoti and confirmed her evidence regarding the full rights of the accused being explained to him and the fact that the accused thereafter decided to take them to where he buried his child. The accused pointed to an area in the mahangu field where it was clear that the area was recently disturbed. He confirmed the events that followed up to the recovery of the corpse and the bag. During cross-examination, the witness added that the rights regarding the pointing out were explained to the accused. Regarding his omission from his statement that Officer Niinkoti explained the full rights of the accused, he replied that it was information that Officer Niinkoti had to mention in her statement.

[19] Constable Jafet testified that he arrived with Officer Mundjego. He confirmed that Officer Niinkoti took over the investigations. He confirmed the previous evidence from the officers up to the point where the body was recovered. He testified that he then transported the corpse to Omuthiya Police Mortuary without it sustaining any further injuries. He booked in the spade, white maize meal bag and backpack with clothes at the police station. During cross-examination, this witness was adamant that Officer Niinkoti explained all rights to the accused before he provided the information on the grave. He contradicted the other witnesses by saying that the accused never pointed in any direction. He said the mother of the accused decided where the burial site was.

[20] Officer Tjitunga testified that he is attached to the Scene of Crime Unit and was tasked with compiling a photo plan² of an alleged murder scene at the village of Onadhi. The scene were pointed out to him by the mother of the accused and the late Constable Khuchab. The photos depict a mahangu field in close proximity to a

² Exhibit "F".

homestead. It also indicates the mother of the accused pointing to a spot in the mahangu field and the process of digging into the dirt. On photos 15 and 16, which was taken before they started digging at the suspected burial site, it is clear that in comparison with the surrounding area, this area is cleared of vegetation and the ground surface appears to be disturbed. The photos depict the finding of the deceased's body with his upper part pushed into a white plastic maize meal bag.³ Another photo depicts a black clothing bag containing clothes and the personal documentation of the deceased next to the body.⁴ During cross-examination, it was pointed out to this witness that he never photographed the face of the deceased which remained hidden inside the maize meal bag. The officer said that the spade allegedly used by the accused was pointed out by the late officer Kharuchab.⁵

[21] Officer Nikanor testified that she is attached to the mortuary and confirmed that the deceased's body was received from a police officer and identified to her by a family member.⁶ She then handed over the body to Doctor Godwin who conducted the autopsy. During cross-examination, she confirmed that the body was received covered in a bag.

[22] Warrant Officer Tsuseb testified that he took some pictures during the autopsy. He compiled a photo plan from these which was received into evidence.⁷

[23] Doctor Godwin testified that he conducted an autopsy on the deceased and compiled a post mortem report.⁸ He found the body covered in dirt with the tongue protruding. His chief post mortem findings were of haematoma to the eyes, froth in the windpipe and congested lungs. He concluded that the cause of death was asphyxia or suffocation. He testified that without oxygen the human body will survive for a maximum of five minutes after which the brain will die. A secondary finding was of small blood clots under the skin of the head. In his opinion, this is usually caused by slight force to the head and was not as a result of the suffocation. He could not recall a black rope or cloth tied around the middle of the deceased.

³ Exhibit "F", photos 30-33.

⁴ Exhibit "F", photos 30, 31 and 34.

⁵ Exhibit "F", photo 11.

⁶ Exhibit "G".

⁷ Exhibit "H".

⁸ Exhibit 'J'.

[24] The accused testified under oath. He confirmed that his biological child, the deceased, was brought to the family homestead. He did not see when the child arrived. When first seeing his child, he noticed a black cotton line around his waist. According to him this is only worn as a sign that your child or father has died. He experienced feelings of confusion and was feeling 'bad'. Thereafter, his mother started to tell him that the disabled child is not even his. He went into his room and phoned the biological mother of the deceased enquiring if she brought the child. She confirmed and said that she cannot travel with a disabled child and neither can her family accommodate him. He then took some four headache tablets and slept. The next morning the police woke him and told him he killed his child. The accused testified that he has no recollection of killing the child or of writing the said letter explaining that the child was returned to family in Angola. The accused testified that he cannot remember pointing out the place of burial to the police.

[25] During cross-examination, the State pointed out to the accused that he did many cognitive actions whilst in this state of confusion. On a question on whether he killed the child because of the black cloth tied around the waist, the accused replied with: 'that thing it made me angry, I got angry and that is why I killed the child just because of that cotton'.⁹ He added that he did not know what he was doing because he was confused. When this part of his evidence was later pointed out to him he denied testifying that he was angry.¹⁰

The law applicable

[26] The esteemed writer, C R Snyman, defines the offence of murder as 'the unlawful and intentional causing of the death of another human being'. He listed the elements of the crime as: '(a) causing the death (b) of another person (c) unlawfully and (d) intentionally'.¹¹ A voluntary action or omission, causing the death of another person, qualifies as the cause of death if it is both the factual and legal cause of death.¹²

⁹ See record at 200, lines 15-20.

¹⁰ See record at 203 lines 19-20.

¹¹ C.R. Snyman *Criminal Law* 6 ed 2014 at 437.

¹² *Ibid* at 438.

[27] In *S v Hangue*¹³ the Supreme Court quoted the following passage from *S v Eadie*¹⁴ regarding the defence of temporary non-pathological criminal incapacity, where Navsa JA restated the position as follows:

'It is well established that when an accused person raises a defence of temporary non-pathological criminal incapacity, the State bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this Court that:

- (i) in discharging the onus the State is assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;
- (ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;
- (iii) evidence in support of such a defence must be carefully scrutinised;
- (iv) it is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.'

[28] It is trite law that the State bears the onus to prove the alleged offense beyond reasonable doubt, which does not mean proof beyond a shadow of doubt.¹⁵

[29] 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*,¹⁶ are:

'(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'.

[30] Further to that, it was stated in *S v HN*¹⁷ that:

¹³ *S v Hangue* 2016 (1) NR 258 (SC) at 280-281.

¹⁴ *S v Eadie* 2002 (3) SA 719 (SCA) (2002 (1) SACR 663) para 28.

¹⁵ *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB); *R v Mlambo* 1957 (4) SA 727 (A); *S v Van Wyk* 1993 NR 426 (SC).

¹⁶ *R v Blom* 1939 AD 188 at 202-203.

¹⁷ *S v HN* 2010 (2) NR 429 (HC).

'When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence. There is thus no onus on an accused to convince the court of any of the propositions advanced by him and it is for the State to prove the propositions as false beyond reasonable doubt.'

[31] In *S v Hoebebe*¹⁸ it was stated that:

'The Supreme Court in *S v Shaduka*¹⁹ endorsed the approach of Malan JA in the *Mlambo*²⁰ case which essentially amounts to the following: When an accused causes somebody's death by means of an unlawful assault and only the accused is able to explain the circumstances of the fatal assault, but he gives an explanation which is rejected as false, then the Court can make the inference that the accused committed the said assault with the intention to kill rather than with any other less serious form of *mens rea*.'

[32] The admissibility of admissions made by an accused is regulated in s 219A of the Criminal Procedure Act 51 of 1977, as amended (CPA). The relevant part states that:

'(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence . . .'

[33] The admissibility of facts discovered by means of an inadmissible confession is regulated in s 218 of the CPA and provides that:

'(1) Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information

¹⁸ *S v Hoebebe* (CC 13/2016) [2017] NAHCMD 218 (10 August 2017)

¹⁹ Case No SA 71/2011 (unreported) delivered on 13.12.2012.

²⁰ 1957 (4) SA 727 (A) at 738B-D.

given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused. (2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.'

Analysis

[34] The version of the accused is that his rights were not explained to him prior to making the admission of burying his child in the mahangu field. He also denies admitting the same to several of his family members and stating it in a letter. At the same time, it is his version that due to his 'confusion' he cannot recall what happened. Both these versions cannot be true. On that basis, the admission by the accused is accepted as part of the evidence. I will return to the defence of non-pathological insanity below.

[35] There are contradictions in the evidence presented by the State in the manner and by whom the actual burial site was pointed out. However, once the accused made the admission that the child was buried at the edge of the manhangu field and, with his general indication of the direction, the finding of the site was a mere formality. It is clear from the photo plan that the surface area at the site was recently disturbed and its discovery unavoidable. The person responsible for pointing out the site thus becomes irrelevant.

[36] The evidence presented by the State regarding the actual burial of the deceased is circumstantial as there was no eye witness account. There were some minor contradictions in the evidence from various witnesses in the role they played and the sequence of events. I find these contradictions immaterial. The evidence presented all supported the events that played out that day. The children were instructed to clear an area in the mahangu field. The accused instructed that the deceased be bathed and his personal belongings be prepared for his return to his mother at the roadside. The accused then left with the deceased and his bag. Thereafter, the accused returned enquiring about a spade and left again into the

field. Upon his return, the accused reported that the deceased was returned to his mother. Adding to that is the fact that the accused admitted to several of the witnesses that he buried the deceased in the mahangu field and pointed them into that direction. At this site, the deceased was found buried with his personal belongings with his upper body inserted into a plastic bag. The autopsy determined that the major cause of death was asphyxia. The only reasonable inference to be drawn from these facts is that the accused buried his child alive.

[37] The last question to be determined is if the accused, at the time of committing the offense, was suffering from non-pathological insanity and that he thus lacked the necessary *mens rea*. The accused from the outset denied killing the deceased without giving a plea explanation. It was only through instructions put to the witnesses during cross-examination that it appeared his defence is one of non-pathological insanity. When considering if this defence can be upheld to be reasonably possibly true, it is needed to consider his actions at the time.

[38] The evidence is that the deceased arrived at the homestead a few days prior to his death. The accused version is that the black cloth tied around the deceased indicated a death in the family and confused him. He drank four headache tablets and from there cannot recall any of the events.

[39] A person in a state of temporary insanity will not be able to instruct children to clean the burial area; gave instructions for the child to be bathed and items to be packed; lied to the family that he is taking the child to the road for the mother to collect him; enquired or look for a spade; dug a hole; put the child into a plastic bag; cover the grave; participated in a meal; explained to his mother that the child was returned; wrote a letter disguising his crime; have conversations with his sister and presented her with the letter and; admitted to his sister that he buried the child at the edge of the mahangu field. Furthermore, during cross-examination, it appears that the accused recalled certain selective pockets of events. Such is highly unlikely and thus the defence of the accused can safely be rejected as false beyond a reasonable doubt.

[40] Based on the evidence it is clear that the disappearance and burial of the deceased was carefully orchestrated. The deceased was not only buried but he was

inserted head first into a plastic bag. I am satisfied that the State proved that the accused murdered the deceased with direct intent.

[41] Regarding the count of defeating or obstructing the course of justice, it was proved beyond reasonable doubt that the action of the accused by writing the letter and making false reports to his family members was with the purpose of concealing his actions and to avoid prosecution. It was however unsuccessful, as the crime was discovered and I am therefore satisfied that the State proved attempted defeating or obstructing the course of justice.

[42] In conclusion the verdict is as follows:

1. Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Guilty (direct intent).
2. Count 2: Defeating or obstructing the cause of justice – Guilty of attempted defeating or obstructing the course of justice.

E E KESSLAU
Judge

APPEARANCES

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

THE ACCUSED: P M Hango
Instructed by Directorate of Legal Aid, Oshakati