

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX

vs

TONA MOHOLISA

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete  
on the 23<sup>rd</sup> June 2000

The accused a mosotho adult appeared before this court on a charge of murder it being alleged that on the 29<sup>th</sup> March 1998 and at or near Maputsoe in the district of Leribe, he did unlawfully and intentionally kill David Pheello Maseela. To this charge the accused pleaded not guilty.

In support of the charge, the crown called P.W.1 Tsae Moholisa, the elder brother of accused who told the court that on the 28<sup>th</sup> March 1998 he had been drinking beer at the party and that he asked the deceased to lend him a musical cassette so as to dub. On the following day he went to the home of the deceased where he found Mangoetsi Malakoane who was employed as a maid by the deceased. He says he asked Mangoetsi to borrow him the cassette so that he could dub its music. Mangoetsi obliged and gave him the cassette; he then left.

It appears the deceased became annoyed when he got to know that P.W.1 had taken the said cassette; the deceased then looked for P.W.1 until he found him at a shebeen. A quarrel ensued and P.W.1 tells the court that the deceased, who was then in an angry mood hit him with a fist in the face and took away his cassette. It also appears that P.W.3 Mokoatle Mahase was also fisted by the deceased when he tried to intervene.

P.W.3 when giving evidence told the court that on that day the deceased had entered the shebeen and had angrily demanded his cassette from P.W.1 and had hit the latter and that when he tried to intervene, the deceased had also hit him in the face and had chased him.

P.W.2 Mangoetsi Malakane's evidence shows that P.W.1 took the cassette in the absence of the deceased. This annoyed the deceased. P.W.2 then told the court that after the deceased had retrieved his cassette from P.W.1, he went back into the sitting room where his two visitors from Maseru were seated.

She says that soon thereafter she saw three men approaching the yard and one of them, being the accused inquired where the deceased was. She says the two men accompanying the accused carried sticks.

She says that the deceased then appeared on the doorway and greeted them saying "Brothers come inside". The accused then said "BX, I don't like what you have done to my brother" and deceased said "Come in, I am not fighting, though you look fighting."

She says she then saw the deceased turning back into the house but was then bleeding profusely; he held on to a stove and then fell down. Screaming, she rushed to call the two visitors who rushed into the kitchen to find the deceased bleeding profusely and lying on the kitchen floor. She says she went to report the matter to the wife of the deceased who was at work in one of the Maputsoe factories.

Under cross examination by **Mr Teele** for the accused, she explained that when the three men arrived, she was standing behind the deceased on the kitchen doorway as she had just thrown some dirty dish water away and was also in the way to the toilet. The arrival of the three men stopped her in her tracks because she observed that they were in a fighting mood and the two were carrying sticks. She agreed that the accused carried no stick at that time. She was also taken to task by **Mr Teele** about the version at the preparatory examination where she is recorded as having said that the deceased told her that he had assaulted P.W.1 with fists over the cassette.

Though she stood immediately behind the deceased P.W.2 seems not to have seen the accused actually stabbing the deceased.

“Question: You did not see the deceased being injured?”

Answer: I only saw when he turned and was bleeding.

Question: At the P.E. you said “accused then stabbed the deceased with the knife?”

Answer: I did not see the stabbing - at the P.E. I might have said I saw him being stabbed.”

She denied categorically that the deceased ever attacked the accused with fists but insisted that the deceased was all the time inviting the accused and his companions to come inside. She says the accused would be lying if he says he was attacked with fists by the deceased on that day.

P.W.3 Mokoatle Mahase was a witness who was called last by the Crown Counsel **Ms Maqutu** and his evidence changed the whole complexion of the crown case and in brief his testimony went on like this: After he had been assaulted by the deceased, he ran away to his wife's home where he was staying. He found the accused and told him that the deceased had assaulted P.W.1 his elder brother over some cassette. He says the accused, and his father-in-law then went to the home of the deceased, and he also accompanied them; he was also carrying a stick.

He says they found the deceased already at his home. He says the deceased appeared on the doorway and talked to the accused. He says he then saw the deceased suddenly attacking the accused with fists and that he saw when the accused took out a knife and stab the deceased in the chest area. They then left the yard after the deceased had retreated back into his house bleeding.

**Mr Teele**, in all fairness, did not even cross examine P.W.3 because P.W.3 was indeed totally favourable to the defence and **Ms Maqutu** should have prudently made him available to the defence; his evidence rendered no credit to but tarnished the crown case. The crown having closed its case **Mr Teele** also elected to rest his case without calling the accused.

In this case the crown had the duty and onus to prove the charge of murder beyond all reasonable doubt and upon the evidence adduced **Ms Maqutu** candidly conceded that the crown had failed in this regard. The stabbing of the deceased was however unlawful and unjustified. The evidence of P.W.3 even if believed shows that the stabbing was an excessive reaction on the part of the accused; his life was not in danger and he used a lethal weapon inflicting a mortal wound on the deceased. Though provoked by the incidents that had occurred that morning he ought to have foreseen that death would result when he stabbed the deceased with the okapi knife. **Mr Teele** also candidly conceded that the accused exceeded the reasonable bounds of self-defence.

In the circumstances of this sad and tragic case, I find the accused guilty of the crime of culpable homicide, and my assessors agree.

**Ms Maqutu** informs the court that she has no record of the accused's previous convictions.

Sentence: The court finds that the stabbing of the deceased was unlawful and unjustified. Having considered the mitigating factors raised by **Mr Teele**, the court finds that the unlawful act of the accused has caused the wife of the deceased to become a widow and her children orphans. For this the wife of the deceased has all rights to claim substantial compensation in a civil court

The sentence of the court is the following:

Five years imprisonment or M2,000 half of which is suspended for three years on conditions that the accused is not convicted of an offence involving violence to person for which he is sentenced to a term of imprisonment of six months without an option of a fine.

S.N. PEETE

JUDGE

For Crown: Ms Maqutu

For Defence: Mr Teele