

IN THE HIGH COURT OF LESOTHO

HELD AT BUTHA-BUTHE

CRI/T/55/2006

In the matter of:

REX

V

**TEBOHO MLANGENI
MPOKATSI LEHLOESA**

JUDGMENT

**Delivered by the Honourable Justice T. Nomngcongo
on the 28th April 2009**

The accused are charged with murder and assault with intent to do grievous bodily harm in that upon or about the 11th June 2005 and at or near Phaphama in the Butha-Buthe district they, each or both unlawfully and intentionally killed Lehlohonolo Mlangeni and also unlawfully and intentionally assault 'Matiisetso Mlangeni by stabbing her with a knife with intent to cause her grievous bodily harm.

The crown first called Tani Mngomeni (Pw1) who testified that on that day he responded to an alarm raised from A1's home. He

proceeded there and found the A1 cradling his father Lehlohonolo Mlangeni (the deceased) and he saw blood on his forehead. A1 was preventing people from helping his father. The witness went about arranging for transport to take deceased to hospital. Before doing that he had observed A2 and one Mabote going out of the deceased's house and running away. A2 was dressed in a black lumber jacket.

Having obtained transport the deceased was conveyed to hospital. On arrival there they were informed deceased was already dead. A1 was present throughout and they went to the police together to report what had happened.

The only point made by Counsel for A1 Mr Mohau under cross examination was that A1 was not just preventing people from assisting his father but wanted to make sure he was not tampered with until transport arrived. Mr Lesuthu for A2 said that A2 was

never inside deceased's house. The witness insisted that he had seen him coming out of the house.

The next witness was deceased's wife 'Matiisetso Mlangeni (Pw2), and A1's mother. She says that on the date in question A1 arrived at the house at around 7p.m. One of his children alerted her and her husband of this arrival and she joined her husband outside to hear the complaint of A1 that some boys were assaulting him. There were indeed two people in the company of A1 who was crying and saying that the boys said he owed them. The deceased asked one of the boys who was wearing a blue blanket how much A1 owed them, whereupon the boy hit A1 with a fist – The assailant then asked that the matter be discussed in the house. The witness says that she did not accede to this request whereupon the man in a blanket struck A1 again, causing the deceased to intervene by trying to separate the two. The blanketed one then made a stabbing movement at the deceased. The deceased then picked up a mop and with its stalk struck the blanketed one. The

stalk broke. Deceased then fell down. The witness picked up a brick and struck the blanketed one with it. He in turn picked up the same brick and threw it back at her striking her on the right cheek. She fell down unconscious. She came to finding herself back in the house. She did not know how she had made it back there.

This witness's sister 'Matsele was in the house and she took her to hospital. On the way she realized that she was bleeding and on inquiry she was told by one of her children that she had been stabbed. She made it to hospital only there to find her husband dead. At this point the witness was so distressed that the court had to adjourn to give her time to regain her composure.

When the court re-convened she testified that her injuries were attended to and she was given an injection. She went back home. At some point she was given a medical form which a doctor filled.

At home following a report by her daughter Tiisetso, she discovered that money in an undisclosed amount, her handbag and cell-phone were missing. She has been ill ever since and her cheek is always swollen. She still has an open wound on that spot.

The thrust of the cross-examination of this witness was that A2 stabbed the deceased because he had been struck first with a mop and had been grabbed by him. It was suggested also that he stabbed in the course of disengaging himself from the deceased as he grabbed him. This was denied by this witness who insisted that accused 2 stabbed first and was hit after.

The next witness 'Makeneuoe Mlangeni, is the deceased's daughter. She testified that on the fateful day A1, his brother, arrived with two other boys. A1 knocked at the door but they did not respond to the knock. He insisted that they open because they boys with him had taken his shoes. He asked that his father, be called. She and her siblings obliged and the deceased was called.

He came out with his wife, Pw2 and the siblings. Outside deceased asked what was happening. One of the boys then said that the matter must be discussed in the house. Deceased refused this request. The witness then saw one of these boys stab his father. She was then sent to fetch a hosepipe from the garage. She went with a sibling, Mehauhelo on the errand. As they did A1 together with his companions went into Pw2's bed-room. The witness and Mehauhelo went to expel the group from the bedroom. They found the bed turned up side down and the wardrobe open as well as a blanket chest.

When the pair went out they found both their parents fallen down. They tried to assist their father but A1 wouldn't hear of it and insisted that he had hands and he would carry him. The witness actually said he rebuked them. The witness did not quite clarify how her mother was taken into the house but she says she then went into the house where her mother was. She was subsequently taken to hospital. She learned at the hospital that her father was

dead. At this juncture this witness like her mother before started sobbing unconsolably and the court had to adjourn. I am told it became so bad she had to receive medical attention.

When the witness took the stand again she testified that on coming back from the hospital they found a blanket that had been worn by the boys who were accompanying A1 that evening.

Later the witness was called to prison where she identified A2 from a group of about seven boys.

The witness then, repeated that she saw A1 and his companions enter the bed-room. They were running when they did and A1 was in front. She saw them come out. They were carrying a small brown bag. It was carried by A2.

Cross-examination of the witness sought to show that the accused never entered the house that evening. The witness insisted that they did.

The next witness Mohapi Ramoepane, a member of the Lesotho Correctional Services, had on the 11th June 2005 lent a blanket to A2 on a chilly night. The following day when he asked for it A2 said he had left it at home, only to be surprised later when he was asked to identify the blanket by the CID. There is no dispute that it is the blanket that was found at the scene of deceased's killing.

Ex staff Sergeant Manyeli testified that he held an identification parade where A2 was identified. There is no dispute in this regard.

The prosecutor then called Retselisitsoe Motsiri whom they declared an accomplice witness. I duly warned the witness that as such he must answer all questions lawfully put to him fully and to the satisfaction of the court and that if he did so he would be

discharged from liability for this offence. He went on to testify that on the 11th June 2005 he met A1 near Ha Sekila in Butha-Buthe town. He asked him where A2 was. He apparently mentioned him by name. He asked him for what reason he wanted A2. He said that he owed A2 a sum of M150.00 and he was going to pay him. The time was six o'clock or after that. He proceeded with A1 to a place called "Litakaneng" where people play dice – a form of gambling. They found A2. A1 and A2 engaged in a conversation. A1 asked A2 to accompany him to his home to fetch A2's money. Now that is strange because it was A2 who was apparently owed money and A1 was supposed to pay it.

It was at this stage that Mr Tlali for the crown sought to declare this witness hostile. I had not up to then gained the impression that the witness was in any way hostile because he was answering questions put to him by Mr. Tlali in a straight forward manner. When the application was made no reference was made to section 274 of the Criminal Procedure and Evidence Act 1981. It reads:-

“(1) Any party in any criminal proceedings may impeach or support the credibility of any witness called against them or on his behalf in any manner and by any evidence in and which, if the proceedings were pending before the supreme court of judicature in England prior to the fourth day of October 1966, the credibility of the witness might be impeached or supported by that party, and in no other manner and by no other evidence.

(2) Any party who has called a witness who has given evidence in any criminal proceedings (whether that witness is or is not, in the opinion of the judicial officer presiding thereat, adverse to the part calling him) may, after he or the judicial officer has asked the witness whether he has or has not previously made a statement with which

his evidence in the proceedings is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion, when it was made, have been mentioned to the witness prove that he previously made a statement with which his evidence is inconsistent, and thereafter be cross-examined as if he had been declared a hostile witness by the party calling him.”(My underlining)

The words I have underlined mean, in my view that the witness sought to be impeached must have given evidence in the sense that he has completed his testimony. This seems logical because everything must be heard before it can be decided in which respects the present testimony is inconsistent with the previous one made. The impeachment procedure cannot therefore be invoked while the witness is still giving evidence. In this case, mid-evidence the crown obviously felt that the witness was taking an

unexpected trend and immediately sought to cross-examine him as a hostile witness. That was pre-mature. I did not allow it.

Be that as it may the witness then went on to testify that A1 had said to A2 “Brother let us fetch my money”, emphasizing that it was A1’s money that was to be fetched from A1’s home. They spent some time in the “Litakana” before they finally left for A1’s home. He says he remained at the gate to A1’s home when the latter and A2 proceeded to the homestead. They got to the door and A1 knocked and called his sister Tiisetso. The door was opened and out came deceased, his wife and the sister Tiisetso. They asked what was happening and A1 said he owed the gentleman he was with him and asked for money to pay him. Apparently this was addressed to the deceased who the witness says replied that they did things in the streets and then had the audacity to bring them to his house. Afterwards he saw the deceased strike A2 with a mop. A2 then landed a blow on the deceased and a fight ensued. It ended when A2 pulled away from

the deceased who was holding him by the blanket. The blanket fell. Pw2 had picked up a brick with which she struck A2. A2 in turn took the brick and struck back at her. She fell down. The witness then fled because as he puts it he had thought they had come to settle a debt but it had turned out into a fight.

The witness emphasizes that he did not go inside deceased yard. He says A1 also seemed to have joined in the fight because he had a brick in his hand; he does not say on whose side he had joined the fray. He did not see him use it. From this time the witness met the accused again in prison where he had occasion to ask A2 about the events of that day. A2 said then that the deceased had fought him and had not paid him his money.

The witness ends up by saying he is not related to any of the accused and they are mere acquaintances. A2 lived near where he himself lives.

Under cross-examination he denies ever entering deceased's house or taking money, a cell-phone and a bag from it. He denies that A2 "just" attacked the deceased. By that I suppose it is meant that it was deceased who attacked first.

When the Crown called its last witness, the magistrate, His Worship Phethisa Motanyane, it purported to hold what is usually called a "trial within a trial". The purpose of a trial within a trial is to determine whether a statement or confession was freely and voluntarily made by an accused person. The usual procedure is to call first the police who would have been the first to whom this statement was made. The circumstances under which the statement was made are investigated at that stage because obviously an accused would ordinarily not know that after having made a statement to the police he still has to have it reduced to writing before a magistrate.

In the instant case, before making the statement before the magistrate the accused said he had made a similar statement the previous day to a CID officer by the name Motlomelo. Motlomelo was not called to establish the circumstances under which the statement was made to him. Motlomelo must have been the person who encouraged the accused to appear before a magistrate because between the accused and he only could have known that he had to do so. It actually follows from this that it cannot be true as appears from the confession form that he was not encouraged by any person to make a statement before the magistrate.

In the circumstances I am not satisfied that the statement was freely and voluntarily made and I will therefore have no regard for it's the contents.

That was the end of the case for the crown.

Accused 1 then gave evidence in his defence. He said on the day in question he was sent to town by his father to buy a safety pin.

On the way he saw accused 2. When he did he hid himself because he owed him M150.00 for a phone. On the way he met Retselisitsoe Motsiri and he asked him where is A2 so that he should pay him. This is strange to note as he had only shortly before hidden away from precisely because he owed him. Be that as it may, Retselisitsoe then said A2 had been looking for him and he was somewhere where dice are played. He went there and found accused 2. Accused 2 then said he was not letting go of him until he paid. He slapped him and they proceeded on their way to his home. He hit him again on the way. He hit him once more when they arrived at his home. He knocked at the door of his home and his sisters and parents appeared. They protested that they had brought street affairs to the home stead. A2 then struck him with a fist and he fell down. He saw him fighting with his father (deceased). He took a brick which apparently he did not use. In the meantime he saw that her mother had fallen down. He, apparently with his sisters took her into the house. He returned and found his father fallen down. He cradled him and sent his

younger brother to bring a mattress. Chopho then phoned for a vehicle. Many people had now gathered. A1 denies that he prevented people from assisting his father. He denies that Pw1 was at the scene at this time. He arrived only later when deceased was being transported to hospital. Deceased was taken to hospital where he was announced dead.

After this he with other family members went to the police and he gave a statement. Life went on until one day police arrived carrying guns. They took him away hand – cuffed from behind. He was taken to the CID where he was shackled and laid on a bloody blanket. At the CID he was suffocated until he passed out. When he came to he was suffocated again and beaten with sticks. He was asked if he still denied killing his father. He then said he had stabbed him with a knife and killed him.

He ultimately met A2 and they were beaten with sticks together. Motlomelo of the CID then advised the A1 to go to a magistrate if

he wished to go home to bury his father. He coached him on the sort of question a magistrate would ask him. He was eventually taken before a magistrate. He told him he had been assaulted and the magistrate said in that event he would not take any confession from him. He then changed and said he was lying. He said he was beginning to doubt but nevertheless asked him if he was ready to make a confession and he answered in the affirmative. After the magistrate had written he told him to put off his clothes so that he should look at his body. I pose here to remark that I don't believe a magistrate would do that sort of thing. Be that as it may, the police seemed satisfied with the way things had gone and they told him he was going home soon. He was only shocked when he arrived at the charge office only to be told that his things were complete and he was going to jail where he was escorted with A2 at gun-point.

Asked by Mr Lesuthu, A1 said he had gone to his home for protection apparently from A2.

Under cross-examination accused finds it difficult to explain why he sought out A2 when he had given the impression initially that he was afraid of him. He would have us believe that he did not know him well having seen him only once a month previously in the company of Pw6, Motsiri when they were drinking. He does not explain how then he got to get a cell-phone from a virtual stranger on credit. He says he got to know the name of A2 in prison but then turns around to say that he sometimes forgot his name and other times remembered it. He says he hardly knew Pw6, yet he is the person he asked after A2 from. He is evasive as to how-whether by name or not he asked the whereabouts of A2. He says none of this would have happened had his father agreed to pay A2. In other words he puts the blame on his father, that A2 stabbed him to death. I have not come across a more callous attitude. He took A2 to his home so that his father should pay him what was owed not by his father but himself. He had not ascertained whether his father would agree to pay A2 or not. Not

unnaturally his father told him he had nothing to do with street arrangements, whereupon A2 became violent, first striking A1 in what I believe, if it happened, at all was a staged attack.

A1 was a very unsatisfactory witness he was evasive and giving ridiculous stories. According to him he had been sent by his father to buy a safety-pin. Instead of delivering it he goes about seeking people he owed yet he had no money to pay them. He says he was expecting his father to pay him. He could not have had that expectation. His father clearly demonstrated that he was not the sort of person to be trifled with in that manner and I have no doubt this accused knew it. A1 did not go to his father with A2 for the purpose he proclaims. That purpose was testified to by Pw2, A1's own sister. As soon as the deceased and his wife Pw3 had been disabled the accused went about ransacking their bed-room taking with them a cell-phone, a purse and money. Pw2 was a straight forward witness whom I believed in all respects. She had no reason to implicate her own brother.

A2 did not give evidence in his own defence. His counsel contended himself with saying that his evidence would be the same as that of Pw6. That is not sufficient. That witness said that he was far from the scene. The suggestion that he was acting in self defence is rejected. One cannot invade another's homestead and then claim, even if that person struck first, that he was acting in self defence. He stabbed deceased at least seven times on very vulnerable parts of the body.

A1 took A2 to his father. He knew that his father could not brook the nonsense they were coming up with and that it would be resisted. Clearly he foresaw the scenario that then unfolded. The assaults that he alleges were inflicted on him by A2 were simply stage acts.

Both accused are guilty of murder.

In the course of the assault on the deceased his wife tried to come to his assistance. She was also viciously attacked by A2 with a brick and later stabbed with some sharp object. It could not have been by any other than the A2 who appeared to be in a stabbing frenzy. A1 was the author of the whole scheme. He never at any point of the fight tried to come to the assistance of his parents in manifestation of a common purpose. (**S. v Mgedezi 1989 (1) SA 687 at 706 AB**) He cannot escape liability for the assault on his mother.

They are both guilty of assault with intent to do grievous bodily harm.

My assessors agree.

T. NOMNGCONGO
JUDGE

For Crown : Mr. Tlali
For Accused 1 : Mr Mohau
For Accused 2 : Mr. Lesuthu

IN THE HIGH COURT OF LESOTHO

CRI/T/55/2006

**In the matter of:
REX**

V

**TEBOHO MLANGENI
MPOKATSI LEHLOESA**

REASONS FOR SENTENCE

The accused were convicted of murder with extenuating circumstances. In mitigation it was argued on their behalf that they are young men with no previous convictions. Mr Lesuthu had promised that he would submit heads of argument in elaboration of these submissions. He did not.

My assessors and I have pondered over these arguments in the light of the evidence in the trial. The accused planned the whole operation from a place called “Litakaneng” which I am advised is a place of ill-repute. The deceased was at his home with his family and did not owe either of them anything. Instead A1 owed his father at least respect. Rather than that he collected a friend of his and they went to extort money out of his father. For that purpose they pretended that they were at logger-heads with A2 when the deceased resisted their machinations A2 then set about stabbing him over and over until he died. A1 then says that it was his own father’s fault that he did not pay up and thus got himself killed.

The accused may be young men and I take that into consideration. But their actions were nothing short of callous.

Other young men must be taught that they should take responsibility for their actions. We have seen by ourselves the trauma that the family has been subjected to by what they saw on the night of deceased's murder. A1's mother and his sister all but collapsed while they gave evidence during the trial.

The accused are sentenced as follows.

Count I - 20 years imprisonment

Count II - 5 years imprisonment.

My assessors agree.

**T. NOMNGCONGO
JUDGE**

For Crown : Mr Tlali

For Accused 1: Mr Mohau

For Accused 2: Mr Lesuthu