

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**REX**

**vs**

**THABISO LUKA**

**Coram:** Hon. Hlajoane J  
**Date Hearing:** 6 – 12 – 11, 8 – 12 – 11, 18 – 12 – 11.  
**Date of Judgment:** 29<sup>th</sup> February, 2012.  
**Date of Sentence:** 15<sup>th</sup> March, 2012

*Summary*

*Murder – eye witness aged 4 years at the time of the murder – His information leading to arrest of accused – Accused pleading alibi – such alibi only pleaded and not substantiated – On second count of theft – Crown relying on hearsay evidence – Accused convicted of murder and found not guilty and discharged on theft count.*

## **JUDGMENT**

[1] The charges against the accused have been that upon or about the 5<sup>th</sup> day of November, 1999 and at or near Lesobeng Ha Mosa in the district of Thaba-Tseka, the accused did unlawfully and intentionally kill 'Mantsohali Mosa and also steal from the home of the deceased some property mentioned in the indictment belonging to the deceased.

[2] The crown led evidence of four crown witnesses in all.

[3] The first witness is Nthoesele Mosa, the son of the deceased. He claims to have been born in 1995 and that when the murder took place he was four years old. He was sleeping with his mother in the thatched round house on the 5<sup>th</sup> November, 1999.

[4] As they were sleeping he noticed Thabiso enter the house in which they were sleeping. He asked him what he wanted and Thabiso showed he was going to the mill. He then saw Thabiso strike his mother with a stick and then strangled her.

[5] Thabiso had just demanded for the keys for the other flat roofed house but deceased did not give him the keys.

[6] The witness showed that when all that happened it was at night. He was able to identify Thabiso by his voice. Also that because the door was left opened he could see him as there was moon light.

[7] He then said Thabiso then left the deceased taking the keys for the flat with him. He entered the flat, took some property from there and left. Note that the witness never said he followed Thabiso to the outside.

[8] Nthoesele showed that Thabiso used to stay with them at deceased's place looking after their animals. He said he never saw Thabiso thereafter in his village.

[9] The cross examination to this witness was to the effect that Thabiso was going to say that when the events took place he had already left the deceased's home some three days earlier . This was however denied by the witness.

[10] This witness could however not identify the accused before Court. He only said he could remember that it was Thabiso who used to stay with them as a herdboys who killed his mother as he told the police when events were still fresh.

[11] The second witness Sephelane Mosa told the Court that he knew the accused as the person who used to be a herdboys at deceased's place. He said he last saw the accused on the evening preceding the night of the deceased's death.

[12] He said they are neighbours with the deceased as they even share the forecourt. That he had cordial relations with both the deceased and the accused. The witness saw the accused bringing the animals home that evening, and he knew that the deceased's husband was not at home

but in Maseru as he had even asked him to look after his family in his absence.

[13] The witness showed that as neighbours he used to have a chat with the accused and in their conversation the accused never intimated to him about his intention to leave deceased's home. Also that it could not be true that he had left the village three days prior to that of deceased's death.

[14] The witness had received a report whilst he was already at work about deceased's death. He came home and found that it was true the deceased was no more. They must have sent out for the accused as he said the accused was then no where to be found.

[15] The witness came to the conclusion that it was the accused who had killed the deceased because the accused had just disappeared and also following the explanation from P.W.1. The witness had given his statement to the police but said it was never read back to him. He had to go for the second time after he had learned of stolen property from deceased's place.

[16] The witness said though he had mentioned about the missing items from deceased's place to the police, he was amazed to realize that there was nothing in his statement about the missing property.

[17] P.W.3 'Mathupe Mosa who is P.W.2's wife told the Court that she also knew the accused as he used to stay in the village near her place. She also confirmed that the accused was still in their village on the

evening preceding deceased's death. But that in the morning the accused was nowhere to be found.

[18] The witness had gone to deceased's place in the morning. She found her with P.W.1 in the house but could realize deceased was sleeping in an unusual manner. She went and called another woman and together got an explanation about what had happened from P.W.1. She is the one who raised an alarm.

[19] P.w.4 'Maparamente Mphohle also told the Court that the deceased was her neighbor and also knew the accused as the person who used to herd deceased's animals. She too had seen the accused still at deceased's place on the evening preceding the day the deceased was found dead in the house.

[20] She had been called by P.W.3 to deceased's house to come and see the unusual manner at which the deceased was sleeping. They both realized that the deceased was no more. P.W.1 also explained to them as to what had happened. It was the same story as P.W.1 had told to the other witnesses. She also noticed that there was some property missing from deceased's other house.

[21] The witness said she came to know of what property was missing from deceased's husband. When asked as to why her statement said nothing about the missing property she said she could have forgotten to mention that to the police as she was on that day scared but as she was giving her evidence she became more relaxed.

[22] This witness also denied when it was suggested to her that accused was going to say he had left the village three days prior to the day of deceased's death. She said deceased left on the morning of deceased's death. She was also told by P.W.1 as to how deceased met her death.

[23] The crown at this juncture informed the Court that all the investigating officers are late. He however after they had discussed the matter with the defence counsel handed in three pieces of statements which were handed in by consent of both counsel.

[24] The first statement being that of D/Tpr Makhele who cautioned the accused, asked for an explanation, charged him of murder and theft, and then arrested him. The statement showed that the accused even handed over some property listed therein and explained about such property. The property was seized as exhibits.

[25] The second statement being that of the identifying witness Mosa Tsitso, the brother to the deceased. He identified the body on the 23<sup>rd</sup> November, 1999 at Mantsonyane hospital as being that of the deceased 'Mantsohali Mosa.

[26] The last being the post-mortem examination which showed the cause of death as strangulation.

[27] All the admitted evidence was read into the machine to form part of the record and was marked as exhibits.

[28] After the close of the crown case the accused took the witness stand and testified. He confirmed that he used to stay at deceased's

place as a herdboys. He had worked for a year. He had been promised to be paid with a cow at the end of the term of their contract, though he did not specify as to whether it was going to be a cow or money equivalent to a cow.

[29] Accused said at the end of his term he took his belongings and left. He said he left because he had not been paid. He denied that he left the deceased dead when he decided to leave for good, also that he never took with him deceased's property as he left. He also said P.W.1 was still young when he left. He admitted that deceased's husband was not at home when he so decided to leave.

[30] When the accused left he had not notified the deceased's husband that he was going to leave. He said they had promised to pay him. That when deceased's husband left for Maseru he had promised to come and pay him when he came back from Maseru. He said he did not have any bad blood against the deceased and her husband despite the fact that they had not paid him

[31] Accused said it was true that he was seen with deceased's animals on the evening before he left. That was confirming what P.W.1, P.W.2 , P.W.3 and P.W.4 had said in their evidence. According to the accused he had told the deceased that he was leaving because he had not been paid. He said he left in the morning before sunrise. He never went back to deceased's place for his payment.

[32] Looking at the crown's evidence we find that P.W.1 has been the only eye witness. He says he is now seventeen years old and that when the murder occurred in 1999 he was only four years old.

[33] The defence has challenged the evidence of P.W.1 in that the crown evidence hinges on the allegations communicated to the witnesses by P.W.1 only. His argument is also based on the fact that the witness, P.W.1, could not identify the accused before Court. Also that P.W.1 remembers the date of his mother's death yet cannot identify the accused before Court.

[34] The defence has not only doubted P.W.1's age and level of development, cultural and background and standing, but also argued that P.W.1 may put up a false story because he thinks that the truth is unlikely to be sufficiently plausible.

[35] The message conveyed by what is being said by the defence is that P.W.1 despite his age at the time, was in a position to have seen what actually brought about his mother's death but has decided to run away from the truth as the truth is unlikely to be sufficiently plausible.

[36] P.W.1's evidence has been that he saw what happened. He clearly identified the person he knew to be Thabiso Luka at the time. He identified him by his voice, and even saw him as the door was left opened and there was moonlight. That Thabiso used to herd his parents' animals and was staying with them.

[37] The accused has not denied that he is Thabiso Luka and that he used to stay at deceased's place heading animals at that point in time. P.W.1 said Thabiso demanded for keys for the other house which he managed to take after assaulting and throttling the deceased.

[38] P.w.1 was asked if he was interviewed by the police and he replied in the positive. When asked if he made a statement to the police he said he did not know if they were recording what he was telling them. It would seem that P.W.1 was asked about what had happened whilst he was at home when the police visited the scene, as he said I reported to the police at my place, not at the police station.

[39] The defence put to P.W.1 that in 1999 he was still too young that he could not be interviewed but P.W.1 said he was interviewed by police. So that if that was the case P.W.1 must have been asked to explain immediately after the events had taken place.

[40] I would not doubt the fact that at that age P.W.1 could not have known the date, month and year so that it was the police who wrote the dates down on their own.

[41] The crown has shown that P.w.1 recorded his statement. It was only in his addresses that the defence said P.W.1 never recorded any statement which fact he had failed to put under cross examination.

[42] Again P.W.2, P.W.3 and 4 have shown in their evidence that accused only left deceased's place on the morning of deceased's death. But the defence in cross examining the witnesses never rebutted that

piece of evidence. In fact what the accused said in his evidence was that he left in the morning after collecting his clothes.

[43] In cross examining the witnesses it was like the accused was going to say that he had left the deceased's place some three days prior to deceased's death. But his evidence showed that he only came to know of deceased's death on his arrest, which was a year after the death of the deceased.

[44] Under cross examination the accused did not deny when he was told that P.W.2 had said he had seen him on the evening preceding the morning of deceased's death. He said he left because he had not been paid, yet when deceased's husband left for Maseru had told him he was going to pay him on his return.

[45] The accused under cross examination was like he was going to plead an *alibi* but that was not to be as he gave his evidence. The defence of *alibi* was not substantiated. Instead accused admitted he was seen by P.W.2 on the evening preceding the morning that the deceased was found dead in her house. The accused was contradicting himself.

[46] He had said he had forgotten or could not recall the day that he left the deceased's place, yet he said it was three days prior to that when the deceased met her death. That would be another contradiction on accused's testimony which would tend to impact negatively on his credibility.

[47] Surprisingly the accused had left the place without having been paid, but never bothered to come back to the village to demand his payment. He never reported to anyone that he had not been paid, not even the chief or his parents.

[48] P.W.1 may have been young when the events took place and may have been reminded of what he had told the police immediately after his mother's death before he gave his evidence before this Court. But what he told the police at that time led to the arrest of the accused and his parents' property being found with the accused.

[49] The accused has just given a bare denial and contradictory evidence in his plea of an *alibi*. On this point the crown referred to **Jones and Buckle**<sup>1</sup> where it was said,

“a bare denial of liability or a defence of general issue shall not be admissible.”

He has not given his side of the story.

[50] The accused had failed to tell this Court as to where he was on the day in question leaving the Court with no option but to take the crown's evidence as the one plausible. His evidence as already shown above was riddled with fabrications and inconsistencies hence why it is not worthy of belief.

[51] Relying on **Schwikkard**<sup>2</sup> the defence has argued that it is possible for the Court not to convict the accused person even if he does not

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<sup>1</sup> The Civil Practice of the Magistrate Court in South Africa; 7th Edition at 195

<sup>2</sup> Principles of Evidence 1997 Juta & Co Ltd 394

adduce evidence. This would be where the Court is satisfied that the prosecution has failed to prove his guilt.

[52] P.W.1 has struck me as being a credible witness in that he did not want to commit himself in saying that he could identify the accused before Court. If he so much wished to press for a false conviction he could have said he identified the accused as the person who killed his mother. He only remembered the name.

[53] The defence relying on the case of **S v Guess**<sup>3</sup> argued that it would be wrong to reject the explanation of the accused merely because the crown witness appears to be acceptable and accused's evidence therefore to be rejected. But in *casu* it would not only be accepting the crown's evidence but that the accused has failed to put his side of the story or bring in evidence to substantiate his defence of *alibi*.

[54] The defence also quoted from **S v Munyai**<sup>4</sup> where the following has been stated;

“Even if the state case stood as a completely acceptable and unshaken edifice, a Court must investigate the defence case with a view of discerning whether it is demonstrably false or inherently so improbable as to be rejected as false.”

[55] The accused pleaded an *alibi* and said when the murder took place he had already left the deceased's place some three days prior to the killing. He had said he had not been aware of the deceased's death until

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<sup>3</sup> 1976 (4) S.A. 715

<sup>4</sup> 1986 (4) S.A. 712 at 715

he was arrested. He had also said he could not remember the time he left deceased's place. But it had been put to the accused in cross examination that P.W.2 said he (accused) was seen with deceased's animals on the evening before he (accused) left and accused said that was correct.

[56] On the basis of accused's evidence could it then be said his version was reasonably possibly true? No. The contradictions in accused's testimony was an indication that his story was false, and therefore had to be rejected.

[57] The crime of murder as we already know consists of unlawful and intentional killing of a human being. The post-mortem report has shown that the cause of death was strangulation. P.W.1 did witness the killing by strangulation.

[58] The identity of the accused was without question. He was seen and heard by P.W.1 who slept in the same house with the deceased. He was seen by the crown witnesses on the evening preceding that of deceased's death but disappeared in the early morning of the next day when deceased was found dead. His explanation has been very unsatisfactory.

[59] Again the accused under the circumstances of this case was the only person who would have a motive to harm the family of the deceased. He had not been paid as he had expected and that must have made him bitter. He should not be believed when he said he still felt

alright despite having not been paid his price if one may call it that. He even said he left because he had not been paid.

[60] It would not be unreasonable to conclude that he did not even bother to come back for payment because he knew that he was responsible for the death of the deceased.

[61] On the second count, P.W.1 said the accused demanded for the keys for the other room. He did not say that he followed the accused to the outside. The witness who testified to the question of missing property at deceased's place relied on hearsay. They were only told by deceased's husband of the items that went missing. The husband to the deceased was never called before Court to come and tell us of the missing items.

The appropriate verdict is as follows;-

[62] May the accused please stand up.

[63] Count I: The crown has managed to establish its case beyond a reasonable doubt in respect of this count. You are thus found guilty of murder as charged.

Count II: In respect of this count of theft, the crown has failed to prove its case and you are thus found not guilty and discharged in respect of this count.

My Assessors agree with my findings.

## Sentence

[64] The court has been told that the accused had been languishing in prison awaiting trial in this case. The court had become worried about the length of time the accused had been kept in prison awaiting his trial.

[65] The court was however relieved when it was later explained that in fact it was not because the accused was awaiting trial but rather he is in prison serving his sentence in another matter where he had been convicted of rape.

[66] The accused is therefore not a first offender but because the charge and conviction of rape and the charge of murder are not related, the conviction for rape should not be considered when dealing with previous convictions in this case.

[67] In extenuation of sentence however the court was asked to consider the fact that the accused during the commission of the offence was still immature as he was only 20 years old. Coupled with the fact that he was at the time just an illiterate herdboy.

[68] There had also been no premeditation on the part of the accused. Also that the accused just lost it as he had not been paid his salary. Accused has lost both parents but has no children of his own as he never married.

[69] But in aggravation of sentence, the court was informed that the accused had killed a mother in full view of her son. Deceased had relatives, family and members of society who were looking up to her for maintenance, guidance, security and support.

[70] The court having looked at both the evidence in extenuation and aggravation of sentence found that the appropriate verdict therefore should be;

Guilty of murder with extenuating circumstances.

[71] The accused has however killed an elderly woman in front of her little son. Accused may have been angered by the fact that he had not been paid his salary but that can never be considered a justification to have acted as he did. No one is to be allowed to take the law into his own hands.

[72] The was told that the accused is already in prison serving his ten year term of imprisonment for rape. Though it had been said that this case has been hanging over him for years, that may well be so, but the truth has unfolded that the case started in 1999 but could not take off at that time as the accused could not be traced. He was only arrested in 2002.

[73] In the circumstances of this case the appropriate sentence would therefore be:-

May the accused please stand up.

[74]            You are sentenced to a term of five years imprisonment.

A.M. HLAJOANE

JUDGE

For Accused : Mr Mofoka & Mr Tsoeunyane

For Crown : Mr Lephuthing & Mr Tsenoli

Assessors : Ntate Ramaema

Ntate Ntsala