

SOUTH AFRICA / JUDGMENT

S v Kekana and Others (SS65/2021) [2022] ZAGPJHC 1065 (7 March 2022)

[2022] ZAGPJHC 1065

COURT

South Gauteng High Court, Johannesburg

BEFORE

Malangeni

CASE / FILE NUMBER

SS65/2021

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no: SS65/2021

(1)

1. REPORTABLE: YES/NO

(2)

2. OF INTEREST OF OTHER JUDGES: YES/NO

(3)

3. REVISED

In the matter between:

THE STATE

and

KEKANA TSHEPISHO

1st Accused

MOTSEOTHATA CIDRAAS BOITUMELO

2nd Accused

LEGODI MADIMETJA JOSEPH

3rd Accused

MOHAMMED VICTOR NKOSINATHI

4th Accused

JUDGMENT:

MALANGENI AJ:

1. The four Accused persons appear before this Court facing the following charges:
 - (a) MURDER
 - (b) AND 3X ATTEMPTED MURDER.
2. They all pleaded not guilty to all the respective counts and elected to remain silent.
3. The issue to be determined at this stage is the admissibility of the video footage . The state led evidence of various witnesses, in the main trial, I decided to select the evidence of three (3) witnesses whose evidence was referred to by the State whilst laying basis for application for the admissibility of the video footage. The State Counsel further referred this Court to Sv Mdlongwa 2010(2) SACR 419 (SCA).

Those witnesses are the following: (i) Ms Judy Twala whose brief evidence is that she is employed by Independent Investigative Directorate (IPID) as an investigator. As part of her duties, she investigates cases involving Police, for example when they are involved in committing offences. On the 10th of March 2021, she was on standby duties and was summoned to a scene at De Beer Street in Braamfontein. On arrival at the scene she was informed that there were students allegedly shot by Police and further a bystander had allegedly been shot dead also by

Police. She was shown a male person who was lying down. Through her investigations, she was given a USB containing footage from My clinic, further got other footages from JIT College and other one from JMPD. She organized a meeting with the POPS Commanders to view the video footage at IPID Offices, that happened and individuals were pointed. She is the one who took these footages to forensic in Pretoria for analysis.

(ii) Captain Nqontso from Forensic Section testified briefly as follows: She is the one who analyzed these footages using the equipment best used for this purpose at her offices. She enlarged photos. According to her, there was no evidence of tempering or interference.

(iii) Captain Shange: his brief evidence is that he was the Commander of the accused persons on the date of the alleged incident (10th of March 2021). He knew nothing about this alleged incident until he watched video footage at the IPID's Offices that is where he identified the members.

4. The Counsels for all Accused persons, object to the admissibility of the video footage on the following grounds:

- a. Originality;
- b. Authenticity;

- c. That Ms Twala mentioned three video footages she received (namely one from Dr Sedibe of My Clinic, one from JIT College and the other one from JMPD).
4. I asked the parties to file heads of arguments on the subject matter but after having an afterthought about the nature of the objection I ordered that a trial within trial be held. I decided to follow this route of a trial within trial being fully alive to different authorities on whether or not trial within a trial is an option or to put it differently, there has been different thoughts in respect of how the admissibility be done in instances of dispute or objection. I intended to make sure that there is fairness to all the respective parties and further to see to it that justice is done. In *RV Hepworth* 1928 AD 265 at 277, Curlewis JA stated that “A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figurehead, and he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done.”
5. The different views on the question of a trial within a trial appear on the following authorities:
 - a. In *S v Baleka and others* (3) 1986(4) SA p 1005 (T), Vandijkhorst J said at 1026 C-D: It follows from what I have said above that I deal with any other type of real evidence tendered where its admissibility is disputed. The test is whether it is relevant. It will be relevant if it has probative value. It will only have probative value if it is linked to the issues to be decided. That link will often have to be supplied by evidence of identification of voices on the tape, where the identity of a speaker is in issue. This proof of relevancy need only be prima facie proof. Consequently, no trial within a trial should be held on the question of admissibility. See also *S v Singh* 1975(1) SA 330(N);
 - b. I view the following authorities as in favor of a trial within a trial when there is a dispute over admissibility: In *S v Mpumlo and others* 1986(3) SA 485 (E) Mullins J stated at 490H- I “that a video film like a tape recording, is a real evidence, as distinct from documentary evidence, and, provided it is relevant, it may be produced as admissible evidence, subject to course to any dispute that may arise either as to its authenticity or the interpretation thereof” I wish to refer also to *Motata v Nair* NO and Another 2009(1)SACR 263(T) (2009(2)SA575) Para 21. Unreported Western Cape Division decision: CC03/2014. *The State v Zwelethu Harold Joseph Mthethwa*, delivered on the 16th of March 2017 by Goliath, DJP.
6. The law dictates that the state bears an onus of proof when it comes to the requirement for admissibility of audio and tape recordings in a criminal trial. In trying to discharge this onus, the state led evidence of Mr. Solomon Ruwende whose brief evidence is that he works for the Johannesburg Institute of Engineering as a Technician. He monitors all the laboratories and everything that has to do with technology, including computers and cameras. The cameras are serviced quarterly, the CCTV deletes information in every three months. He is

the only person responsible for these cameras. He said nobody can access the cameras as the system needs password. His boss instructed him to download the clip showing from outside their premises. The video shows the way the man was shot from the Doctors Surgery to his car. He downloaded the video into a USB and handed it to the Investigating Officer (Ms. Twala). During cross-examination by legal representatives, it transpired that he also gave Ms. Twala another footage depicting from inside the College to the outside since there were students that were also injured. He further mentioned that he has a Degree in Information Technology and has been doing his job for eight years. That the device he downloaded into is not capable of being edited.

7. The State's case was closed in respect of a trial within a trial and all legal representatives closed their case without leading any evidence.
8. The State submitted that a video footage be admissible. Mr. Ruwendo is the one who retrieved the footage from the CCTV camera. He went for a course and has a Degree in Information Technology. Video footage is a real evidence and it needs to be used for that purpose. She further stated that Ms. Twala referred to three videos and amongst them she mentioned the video footage she got from the college. She is going to use the video from the College that was mentioned by Captain Nqontso in her report as T33/1-Pictures 1-23. If there was any interference Captain Nqontso would be able to identify such. There is no need to recall witnesses already testified in the main trial as their evidence would not bring something new, Mr. Ruwendo proved originality and authenticity. All the pre-requisites were qualified as is required by Mdlongwa's case.
9. The legal representative's arguments bear similarities. They submit that they are in the dark as to which video footage to be viewed as Ms. Twala referred to a number of footages. Mr. Ruwendo mentioned having given two videos to Ms. Twala whereas the latter did not mention having received video footage from Mr. Ruwendo and did not mention the number of video footages she received from the College save to mention that she received video footage from JIT. The Investigating Officer was not called to corroborate the evidence of Mr. Ruwendo. On the issue that evidence in the main trial cannot be used in the trial within a trial, Mr. Netshipise referred me to *State v Giovanni Kannemeyer and Ricardo van Vuuren*, case no. SS50/99 (Cape of Good Hope Provincial Division) delivered on the 8/7/1999 and also to a foreign Judgment: *Hassan v State* (2016) LPELR – 42554(SC) Page 1 at 15. They concluded by saying the application by the State should fail.
10. Deducing from all authorities I referred herein including the Mdlongwa one referred to by the State, it is clear that video footage is a real evidence with its formalities distinct from those of documentary evidence. Examples of items in terms of real evidence were stated in *S v M* 2002(2) SACR 411 (SCA) ET 432: Real evidence is an object which upon proper identification becomes, of itself, evidence (such as a knife, photograph, voice recording, letter or even the appearance of a witness in the witness-box). On the authorities that I have been able to find, I am unable to find one declaring a video footage inadmissible. In *S v Ramgobin and others* 1986(4) 117(N) at 135 F-H. The Court held that for video tape

recordings to be admissible, the state had to prove beyond reasonable doubt that the recording is original, that they relate to the incident in question and that no interference with the recording had taken place. In *S v Mdlongwa* (Supra), chain evidence was intact that is why it was not questionable. The Court concluded that neither authenticity nor originality of video footage could be rejected. Whereas in the case under discussion, the Counsels see a missing link in the evidence of Ms. Twala as they claim that the evidence of sources from where she obtained these video footages was not led.

11. I do not have any reason to doubt the expertise of Mr. Ruwendo. He mentioned that he has a Degree in Information Technology. He is the only one responsible for taking care and monitoring the cameras at the College. His evidence is sufficient to prove originality and there is no evidence tendered to the effect that when such material landed on the hands of Ms. Twala it was contaminated. Further from his evidence, I do not see anything to suggest that the originality of the footage was compromised.
12. When it comes to real evidence, originality and authenticity may not be proved simultaneously. In *Nkola John Motata v D Nair and another*, case no. 7023/2008 page 2/ paragraph 28, the Judges referred to *Sv Baleka and others* (1), Van Dijkhorst J observed that the learned Judges in *S v Singh and another*, had not differentiated between originality and authenticity. As stated by him at 195H: “Originality is a requirement following from the so-called best evidence rule and is considered when admissibility is decided upon. Authenticity is not a question of admissibility, but of cogency and weight.”
13. I agree with the legal representatives that evidence used in the main trial may not be used in a trial within a trial.. The only exception I know of is when the parties reach an agreement for its use.
14. I further agree with the State that even if she recalled them (witnesses that testified in the main trial), they would not introduce any new evidence. They would not change the colour of the proceedings. The evidence of Mr. Ruwendo in respect of the JIT footage the state intends to use , negate the objections by the defence Counsels and closes any missing link on the evidence of the State. It is now clear that Mr Ruwendo of JIT College handed over the video footage to Ms. Twala. I am convinced that his evidence left a positive impression and I cannot find no reason not to accept that this is an authentic video captured on a camera of JIT College and retrieved by Mr. Ruwendo, who is a Technician at JIT College. So the originality is now best known. In paragraph 24 of *Mdlongwa’s* case, the learned Salduka AJA as she then was stated that, it need not be established that the original footage was used because the purpose of introducing the video footage into evidence was to identify the scene and to identify the culprits.
15. I accordingly issue the following order:-
 1. Application by the State is granted.
 2. The State is allowed to lead the contents of the video applied for.

MALANGENI

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 7 March 2022.

APPEARANCES:

On behalf of the Applicant (State): Ms Moseki~Khumalo

On behalf of accused no.1:

Mr Mohope

On behalf of accused no.2:

Mr Netshipise

On behalf of accused no.3:

Mr Ndaba

On behalf of accused no.4:

Mr Vilakazi

Date of hearing: 03 March 2022

Date of judgment: 07 March 2022

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