

SOUTH AFRICA / JUDGMENT

S v Kekana (CC48/2023) [2024] ZAGPPHC 1223 (27 November 2024)

[2024] ZAGPPHC 1223

COURT

North Gauteng High Court, Pretoria

BEFORE

Mosopa

CASE / FILE NUMBER

CC48/2023

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

C48/2023

DATE: 15-10-2024

CASE NO: CC48/2023

In the matter between

THE STATE

and

NGAGALELA KEKANA

Accused

SENTENCE

MOSOPA, J:

This is judgment on sentence on 16 August 2024 this court found Mr Ngagalela Kekana guilty of one count of murder read with the provisions of section 51(1) of Act 105 of 1997. The conviction is a sequel to the state proving its case against the accused beyond reasonable doubt.

After such conviction the accused asked that the matter be adjourned so that he can obtain a pre-sentence

report. At the verdict stage I made a pronouncement that the murder is premeditated.

The accused did not testify in mitigation of sentence, but presented a pre-sentence report which was admitted into evidence as EXHIBIT J. In the pre-sentence report the accused's personal circumstances were recorded as follows:

1. That he was born on 13 April 1984 and he is currently 40 years old. In 2022 at the time of the commission of the offence he was 38 years old.
2. Accused dropped out from school in grade 11 and this was after the accused repeated the grades and his family decided that he was too old for that grade and that he must go and seek employment.
3. Accused has one previous conviction of assault with intention to do grievous bodily harm, which was in 2005.
4. He was born in the village of Zebediela Limpopo province from a family of six children and he is the fifth born child.
5. Accused lost his father on 5 September 2024 while he was in custody pending finalisation of his trial matter. It is because of his incarceration that he could not attend his father's burial. Accused's mother, aged 93 years, is a sickly person and this has caused stress and anxiety on him as he feels helpless and unable to be there for his family. But his family members still visit him in prison.
6. Accused met the deceased who was his girlfriend in 2015, but the relationship developed into a serious one in February 2016 when he moved in and stayed with the deceased in the same property.
7. The accused has no children with the deceased. He also does not have any child outside this relationship. In 2021 the deceased fell pregnant with his child, but unfortunately had a miscarriage. Accused blamed the deceased for such a miscarriage because she refused to stop smoking during her pregnancy.
8. The accused is now two years in custody pending finalisation of his trial matter as he was denied bail.
9. After leaving school the accused was employed by his uncle as a driver. He also did painting work and gardening services for various households. He earned an amount of R350 per day, he used the money for himself and for the maintenance of the deceased.

Section 11 of the Constitution of the Republic of South Africa enshrines a right to life and makes the following provision:

"Everyone has the right to life."

This is an absolute right conferred by the Constitution to every person in the Republic. This is a right which is also enjoyed by the accused despite him arbitrarily and in a callous manner terminating the deceased's right to life.

Section 10 of the Constitution guarantees the right to human dignity and makes the following provision:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

The accused failed to treat the deceased with dignity even in her death. After killing the deceased, he left the body of the deceased in a naked state. He moved away from the deceased's place of residence and he behaved as if nothing unusual happened in there. Despite knowing that the deceased was dead when he left, he met Degracia and he only told her that the deceased was injured but failed to inform her about the death of the deceased

In S v SMM 2013

- (2) SACR 292 (SCA) at paragraph 13 the court dealt with what has to be considered when imposing a sentence and stated that:

“I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. As Corbett JA put it in S v Rabie:

'A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.'

When considering the personal circumstances of the accused as gleaned from the pre-sentence report, it is clear that the accused was raised in a very stable environment. The accused was raised in line with strict Christian values, his discipline was maintained by his father who was also a pastor in a Zion Christian Church.

Based on his developmental background, his family had high expectations for him. Despite the accused having a drinking problem in his adult life, he was raised in a family where behaviours such as drinking and smoking were discouraged.

Accused did not have children of his own. He was expecting the deceased to bear a child for him, but unfortunately, she miscarried, however, I fail to understand why the accused is blaming the deceased for such a miscarriage, considering that an experience of losing a child is being, is traumatic.

The accused is not a first offender, but for the purpose of these proceedings I am going to treat the accused as a first offender as his conviction is more than 10 years.

According to Degracia, the state witness, the accused will at times assault the deceased in full view of the members of the community.

According to the accused, as gleaned from the pre-sentence report, he was convicted of assault with intention to do grievous bodily harm and he paid a fine of R500. The complainant being the deceased in that matter. Such record cannot be traced by the state, but this confirms Degracia's account that the accused would at times assault the deceased.

On the night before the deceased met her death, Degracia heard them arguing and according to her, she also heard a sound coming from inside the deceased's shack which she described it as if the shack was moving.

Degracia and the landlady when they went inside the shack after discovering that the deceased has passed on, they saw the curtain, which was dividing the shack into rooms, on the floor.

It is correct as contended by both Mr Alberts and Mr Molokomme that considering the upbringing of the accused, he disappointed his family.

The family of the deceased could not bury the deceased nor could they travel from the Free State province to come and bury her. Everything was left for Ms Gloria Khubeka, the landlady, to see to it that the deceased is buried with the assistance of donations from members of the community as indicated in the victim impact statement and the pre-sentence report.

Not being a family member of the deceased, she was left with the responsibility of performing rituals which normally follow the burials in terms of the African custom. She had to distribute the belongings of the deceased because her family could not afford transport money to Gauteng province where the deceased lived.

It cannot be said how the death of the deceased impacted or affected her family as they could not be traced to give their side of their story. However, the death of the deceased seriously impacted on Ms Khubeka, Degracia and other members of the community.

This is due to the fact that Degracia and Ms Khubeka are the first people to see the body of the deceased when they went inside the shack to enquire as to what happened to the deceased. This had a very serious effect on

Ms Khubeka as she could not walk on the street alone, she could not sleep at night and is now afraid of men, including her boyfriend.

She expressed the deceased's love for her three dogs and mentioned that the deceased would share everything that she ate with those dogs.

It is clear from the victim impact statement and the pre-sentence report that the death of the deceased left the community of Olievenhoutbosch traumatised.

In *S v Mhlakaza* 1997 (1) SACR 515 (SCA) Harms, J when considering the interests of the community stated that:

"The object of sentencing is not to satisfy public opinion but to serve public interest. A sentencing option that caters predominantly

or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate

sentence, even if the sentence does not satisfy the public."

However, it is acceptable for the court to take account of public feelings as was expressed in the matter of *R v Karg*. It is also permissible to have the permanent removal from society of an offender as the main aim of sentencing as long as the sentence is not imposed for the sake of deterrence of others and is not grossly in excess of a sentence which would otherwise have been fair.

In the light of the current high levels of violence and serious crimes in this country, when sentencing such crimes, the emphasis should be on retribution and deterrence.

This matter involves a case of femicide or intimate partner and numerous instances of gender violence perpetrated by the accused to the deceased. They have been in a love relationship since 2016 and lived together even though the accused has his own property as well, in a relationship which can be described as violent.

In *S v Kasongo* 2023 (1) SACR 321 (WCC) the court when dealing with gender-based violence crimes stated that:

"[13] In explaining gender-based violence, she said intimate partner violence was the common form of violence that women experienced,

perpetrated by an intimate partner and the most common types were physical, sexual and emotional abuse. Gender-based violence

explained the role of gender and power dynamics in the use of violence by men against women and girls. Male control was part

of the gender-based violence. Male partner controlling behaviour was an undisputed part of violence in intimate partner relations. This was described by women and included the male partner controlling the partner's relationships with important

others such as family and friends which was often the victim's support system. Monitoring her phone and communications with others was therefore a common behaviour reported by women. Stalking was part of the controlling behaviour and the motivation was to gain information about the victim - such as who she met. It was also a form of psychological abuse as stalkers made sure that they were seen and used this as a threat."

Further at paragraph 15:

"The killing of women by male intimate partners was the most extreme form of intimate partner violence. Her research showed that almost 3 women were killed by their intimate partners per day in South Africa. The data from 66 countries in 2013 found that globally 33% of homicides of women were committed by an intimate partner. In comparison, in 2017, 52% of women were killed by intimate partners. Intimate femicide is much more common in South Africa than in most countries of the world. 52% versus 36% indicated that our rate was almost 5 times the global rate."

South Africa is a very violent country to live in, with a recent crime statistic showing that 70 people are killed every day. Despite the government's effort to educate the nation about the dangers of gender-based violence and the consequences thereof through campaigns, TV adverts, etcetera, it appears that the government is losing a battle against such a fight.

As already alluded elsewhere in this judgment, the accused is convicted of murder which resorts under the provisions of section 51(1) of Act 105 of 1997 which attracts a minimum sentence of life imprisonment.

Section 51(3) of Act 105 of 1997 provides for a deviation of the, of imposition of the prescribed sentence if substantial and compelling circumstances can be found in the case of the accused.

However, there is no onus on the accused to prove such circumstances, but he should at least pertinently raise such circumstance for consideration if he wants the court to consider them seriously (see the matter of S v Roslee

[2006] ZASCA 14; 2006 (1) SACR 537 (SCA) at paragraph 33).

In Malgas the court caution not to deviate from the prescribed minimum sentences for flimsy reasons. It is important to note that the concept substantial and compelling circumstances is not statutorily defined.

As a rule, prescribed sentences are a point of departure and where a departure is called for, a court should not hesitate to depart. It is also important to note that in this minimum sentence regime the traditional factors considered in sentencing are still playing a role.

Malgas has been followed by courts in South Africa and including the Constitutional Court as it was confirmed in the matter of S v Dodo.

Mr Alberts on behalf of the accused contended that I must find that substantial and compelling circumstances are in existence in the case of the accused, more especially taking into account the following:

1. How his family perceived him.
2. His personal circumstances, and;
3. What his employers are saying about him.

Mr Molokomme on behalf of the state contradicted that and contended that the accused did not show the existence of substantial and compelling circumstances.

In the pre-sentence report it was stated that the accused does not take responsibility of his actions and denies killing the deceased. The report further states that:

“The accused was observed as calm, but verbalised and showed no remorse. Instead, he verbalised regret for leaving the deceased on her own when he could have stayed and possibly prevented her death. The accused verbalised feelings of guilt and regret for not being able to protect the deceased and further indicated that he has been extremely stressed and continuously worried about the future and what would happen to him since the incident occurred.”

This shows the conduct of a person who lacks remorse but has self-pity. He fails in the entire report to express a shred of sympathy to the family of the deceased for the loss of their child. This to me shows that the accused is not a suitable candidate for rehabilitation. For one to be rehabilitated he must first accept his wrongdoings and deal with such.

Despite the court’s finding and rejecting his version of events as false beyond doubt, he repeats such account before the probation officer. He went on and gave falsehood in the as he mentioned that after coming back from indulging in alcohol, he first went to his shack to change his shirt because it was dirty as it had make-up and lipstick stains, and he did not want to fight with the deceased over that. Forgetting that he testified earlier that he went to his shack for the purpose of sleeping before he proceeded to the deceased’s place, but he could not sleep because of the arrival of the person who wanted to purchase the deceased’s dogs.

I am alive to the fact that the accused has been in custody for a period of two years pending finalisation of his trial matter, however, such a period of incarceration does not constitute a substantial and compelling circumstances, but must be cumulatively be considered with other factors in the matter (see the matter of *S v Radebe* 2013 (2) SACR 165 (SCA)).

From the bar Mr Molokomme stated that it has come to the attention of the state that currently the deceased’s mother is seriously sick. This added pain is due to the fact that they could not bury their child, and they could not afford the luxury of travelling for the purpose of burying the deceased.

Ms Khubeka in her victim statement indicated that when she met the deceased, she presented a face of a desperate person who was desperately in need of employment. This indicates the poverty level that was endured by the deceased in her lifetime. Accused took advantage of such circumstances as he was the sole provider.

Senseless killings, more especially killings of the most vulnerable in the community, women and children, must come to an end. This court must not shy away and be fearless in imposing the sentence that befits your conduct when you were killing the deceased, considering how the crime impacted the people who lived and shared fond memories with the deceased.

The sentence must have the effect of teaching you to respect human life and learn to treat human beings, irrespective of their gender, with dignity and respect.

Having said that, having said the above, I find no existence of substantial and compelling circumstances in your case and you should be sentenced as prescribed by the law. You killed an innocent and defenceless person with a firearm.

It might be that Ms Degracia's account is not in line with the injuries sustained by the deceased at post mortem. You in a barbaric and senseless manner shot at the deceased and left her dying on top of her bed. The towel which was covering the deceased's head indicates your attempt to stop the bleeding that you caused to the deceased. You then left the deceased naked there.

No amount of sentence can bring back the life of the deceased. No amount of sentence can heal the hearts of the people who were impacted by your actions. You need to be removed from society permanently and for a very lengthy period so that women and children can live better knowing that you cannot harm them.

In the result it is my considered view that the following sentence is an appropriate sentence looking at the circumstances of this murder:

On the count of murder read with the provisions of section 51(1) of Act 105 of 1997 you are sentenced to life imprisonment.

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MOSOPA, J

JUDGE OF THE HIGH COURT

DATE:

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