

SOUTH AFRICA / JUDGMENT

S v Kesa and Another (CC19/2020)

[2022] ZAECMHC 47 (2 December 2022)

[2022] ZAECMHC 47**COURT**

Eastern Cape High Court, Mthatha

BEFORE

M.S. Jolwana

CASE / FILE NUMBER

CC19/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
[EASTERN CAPE
DIVISION: MTHATHA]
CASE NO. CC19/2020

In the matter between:

THE STATE
vs
THOBANI
KESA
Accused No.1
NTEMBEKO
KESA
Accused No.2

JUDGMENT**JOLWANA J:**

- [1] The accused have been charged with the murders of the four deceased persons all of whom are members of the Kesa household in Teenbank, Sterkspruit. The deceased in counts 3 and 4 are the father and mother of the two accused persons. The deceased in count 1 is their sister and the deceased in count 2 is their niece. They are also charged with arson which is count 5 relating to the burning of a home belonging to the deceased members of the Kesa family which was burnt down on that fateful early morning of the 22 July 2018.

[2] Both accused pleaded not guilty to all the charges and elected not to provide a plea explanation. The State called various witnesses and after it had exhausted them, it closed its case. At the close of the case for the prosecution both accused who were legally represented throughout the proceedings made an application for their discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 (the CPA).

[3] Section 174 of the CPA provides as follows:

“If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused

committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may turn a verdict of not guilty.”

[4] The evidence of the State was of a circumstantial nature as nobody knew how the fire that led to the death of the deceased started. The State called to the witness stand its first witness Mr William Kesa who testified that he was 80 years old at the time he testified. He knows, the two accused persons as they are both the sons of the deceased in counts 3 and 4, Mr Mqondiso Patrick Kesa and his wife Thubakazi Victoria Mbatyazwa both of whom are his brother and sister in law respectively. He explained that the deceased in count 1, Nobubele Hazel Kesa is the daughter of Mr and Mrs Kesa and the deceased in count 2, Olwami Hillary Kesa is the daughter of the deceased in count 1 and the granddaughter of the deceased in counts 3 and 4. In short, the accused are charged with the wiping out, in one day, of their own family, their own parents, sister and niece.

[5] The evidence of Mr William Kesa was that the relations between the accused persons and their parents were seriously strained to the extent that their issues were at some stage taken to the small claims court. There was an issue of a sum of R800.00 or so which the deceased in counts 3 and 4 had given to the accused to buy some building material but which the accused apparently squandered. He intervened in that dispute as a result of which the case was removed from the small claims court and an attempt was made to resolve it at home amicably. However, when the resolution of the issue or misunderstanding failed as the accused had apparently taken more money from their parents without permission, his brother, the late Mqondiso Kesa indicated that he was obtaining a protection order against the accused. It was that protection order that lead to the two accused person leaving their home at Teenbank to stay at his elder brother's house where the only person who stayed there was that brother's young daughter at Kromspruit about 10 kilometres or so from Teenbank.

[6] He received a phone call from the accused asking for the keys for his elder brother's homestead at Kromspruit. At some point shortly thereafter he went past his elder brother's homestead and found the accused already there inside saying that Nopopi, his elder brother's granddaughter had opened for them. However, Nopopi was not there. He left going to his own homestead and on the way he received another phone call from the accused. They asked him not to tell their father that they were at his elder brother's homestead at

Kromspruit. He, in any event, told their father that the accused were at his elder brother's homestead at Kromspruit.

- [7] With regard to the events of the 22 July 2018, the date on which the deceased died during the burning of their homestead, Mr William Kesa testified that he received a phone call from his niece informing him that his brother Mqondiso's homestead was on fire. This was at about 05h00 in the morning. He got into his vehicle and proceeded to the deceased's homestead. On his arrival there indeed the place was on fire and engulfed in smoke. There were already many people there and he was told that the fire started at about 02:00 in the early hours of the morning. He found that everything had burnt down including the people who lived there, the four deceased persons and he somehow managed to identify the deceased persons.
- [8] The cleaning up of the crime scene was started after the police had finished doing their work and had released it to the family. This cleaning up process revealed a sponge which when it was lifted up, had blood dripping from it. He testified that the accused persons were not where the incident occurred. In fact, they were at his elder brother's homestead in Kromspruit. A young man was told to phone the accused persons. Indeed, he phoned them to tell them about the incident and that their father's homestead had been set alight and that they should come. This young man was from the Tiyane clan which is the accused's mother's side of the family. The accused did not come. They then decided to drive to Kromspruit to fetch them from his elder brother's homestead. They brought the accused to the deceased's homestead. However, as the Kesa and Tiyane families they were mind boggled by the incident because as the incident occurred on 22 July 2018, the accused were supposed to go to court on the 27 July 2018 in connection with the protection order that their deceased parents had obtained against them. When the accused were questioned by family members, accused no.2 admitted that indeed they were supposed to go to court on the 27 July 2018 but accused no.1 would not admit that.
- [9] A decision was taken to drive to Kromspruit where the accused stayed at the time of the incident. He drove there together with the police. The homestead was searched. After searching the house, the police went to the toilet which was behind the house. This is where the police found what Mr William Kesa called an overall with blood stains which appeared to have been washed but the blood stains had not washed off properly. When the accused were asked as to whom that overall belonged, both of them did not know and even said that it was of a bigger size for them. However, the accused admitted staying in that homestead. The accused were arrested by the police.
- [10] Under cross examination Mr William Kesa confirmed that he never went to court to listen to the proceedings concerning the quarrel or dispute between the accused and their parents concerning the money which was to be used to buy building material. He confirmed that both accused left the deceased's home consequent upon the protection order having been issued against them. They left during July but before the 22 July 2018. It was put to him that accused no.1 denied being called telephonically and informed about the burning of his

homestead but confirmed being fetched by Mr Kesa. Mr Kesa insisted that they were called and they said they would come. They waited for them but upon realizing that the accused were not coming they decided to fetch them. He testified that the cleaning of the crime scene only took place after the accused had been fetched and had arrived. However, the police had already left when the cleaning took place. The person who picked up the sponge that had blood dripping from it was one of the people from the funeral parlour. He denied that accused no.1 participated in the cleaning and insisted that the cleaning was done by people from Golding Funeral Parlour.

- [11] When the sponge was discovered he called the police who came back again. That sponge was thrown away after the police had looked at it and went away. The police did not take the sponge with them or any portion thereof. He confirmed that sergeant Mda and other officers whose names he did not recall saw the sponge that had blood dripping from it. He testified that there was no blood on the floor. Blood was in the sponge and there were ashes around the area where the sponge was. He testified that the overall that was found in the toilet was not inside the pit of the toilet but was inside the toilet. He had never seen accused no.1 wearing the said overall before. The overall was taken away by the police. Mr Kesa confirmed that the police took away a tracksuit pants which he also called the bottom of the overall. He confirmed that the version of the accused that it did not have blood was true but said that it did have some blood stains which appeared to have been washed but the stains were still visible. He testified that what he said about the tracksuit pants being found not inside the toilet pit but inside the toilet was how it was reported

to him but he was in the house when it was found. Therefore, he did not dispute accused no.1's version that it was found inside the toilet pit. He did not see it when the police retrieved it.

- [12] when he was cross examined by the legal representative for accused no.2, Mr Kesa confirmed that he did not know the truthfulness of what the accused's mother said to him as he was not there when she gave him the money for the building material. He testified that when they arrived with the accused at Teenbank where the incident had occurred, accused no.2 cried upon seeing the situation. However, when he was told earlier at Kromspruit he did not show any reaction to what he was told.
- [13] The next witness for the State was sergeant Mda. He confirmed that on 22 July 2018 he attended the crime scene in this matter. He found dead bodies in a two roomed flat structure which was in the process of being extended. The first body was next to where he thought the wardrobe might have been because of the pieces of plank or wood that were there. The three other bodies were next to the window. The bodies were so badly burned that some body parts or limbs were separated from the bodies. The LCRC officers did their work and the forensic pathology people removed the remains of the deceased. The crime scene had a lot of water which was caused by the members of the community who were trying to extinguish the fire. After the bodies had been taken away he and his colleagues also left. However, at about 17:00 on that same day he received a call from one Mr Socatsha who requested them to return to the crime scene because some blood had been discovered during the cleaning of

the place. He returned to the crime scene with his colleague, Mr Belebesi and they were shown the spot where there was blood. Indeed, he saw what looked like blood in a burnt mat or floor rug. When he lifted the mat he could only get a piece of it. When he did all of that he was wearing protective hand gloves. He put that piece of mat or rug with other things he found there in a plastic bucket as they were wet and therefore could not be placed in a forensic bag at the time.

- [14] He was also shown the two accused persons who were not there earlier when he had visited the crime scene for the first time. He spoke to them and as he was speaking to them he noticed that the strings of the hood of the tracksuit top accused no.1 was wearing had blood stains. He asked the accused where they stayed and they said they stayed at Kromspruit. He asked them when was the last time they were at the homestead where the incident occurred and they said they had been there three weeks earlier. They told him that they left because of a misunderstanding with their parents which led to them being expelled from home. Accused no.1 told him that they were the ones who built the incomplete structure and that their mother had given them money for the building of the structure which they had squandered leading to them being expelled which was why they stayed at Kromspruit.
- [15] He told them that he was investigating the killing of their parents. Because of the blood stains he observed on the strings of the hood of accused no.1 he asked him to give it to him. Indeed, accused no.1 gave him the hood which he placed in a sealed evidence bag in their presence. The serial number for that evidence bag was PA 4002561679. He asked the accused to come with him to go and search at Kromspruit where they were staying. They agreed to come with him. Some family members followed them to Kromspruit. The accused opened for them on their arrival. He requested the family members not to enter the house but to remain outside so that they could do their police work properly. They searched the house and found a pair of jean trousers which had blood. The search took place in the presence of the accused. After they finished searching inside the house they searched around the premises in the yard. They also went to the toilet that was in the premises.
- [16] He peeped through the toilet pit and saw tracksuit pants. Its upper part was still dry but its bottom was wet. He could see that the wetness was still fresh and it did not look like it had been there for a long time. He took both the pair of jeans and the tracksuit pants with him to the police station. He decided to arrest the accused. Because the lower part of the tracksuit pants was wet, he dried it and thereafter packed them in evidence bags. He kept them safe in his custody ensuring that they were not tampered with. He had requested the forensic pathologist to take blood samples from the bodies of the deceased. He received those blood samples sealed and took them to their laboratory in Port Elizabeth after he had made all the relevant entries in their SAP13 register. The DNA samples which he received from the forensic pathologist were contained in sealed evidence bag number PA4007561855, PA4001790278, PA4002561856. The nike grey tracksuit pants recovered from the toilet was in sealed bag number PA4000876235. The brown jacket was in evidence bag number PW3000344503. This is the one that was recovered in the house at Kromspruit. The tracksuit

top was in sealed bag number PA 4002561679. This is the one he took from accused no.1. The pair of jean trousers was in bag number PA4002561853 which was recovered in the house at Kromspruit. There was also one blood kit in bag number PA4001825929. He took all these items to the laboratory in Port Elizabeth. The SAP13 register with all these details was admitted into the evidence. The acknowledgment of receipt of the delivery of the sealed evidence bags was also exhibited in court as exhibit "C".

- [17] Under cross examination sergeant Mda testified that when he went to the crime scene for the second time he saw a piece of mat or floor rug and that Mr Kesa must have been mistaken in his evidence when he spoke of a sponge as there was no sponge there. He further clarified that Mr Kesa was mistaken in referring to the discovery of an overall. What was in fact recovered was a Nike tracksuit pants which was recovered from inside the toilet pit. He further testified that the cleaning was done by family members and the accused did not participate in the cleaning. He further insisted that what he testified about in court concerning the reasons why the accused left their home at Teenbank was what accused no.1 told him. He disputed that he put the jacket in the load bin of his vehicle and insisted that he put it in evidence bag in their presence. He further testified that he took buccal samples from both accused and sent them for DNA analysis. He testified that some of the results of the DNA analysis revealed that the blood from the pair of jean trousers matched the DNA of the accused no.2. Further cross examination of sergeant Mda did not take the matter any further.
- [18] The next witness for the State was Sakhele Njadu. His evidence was that he is employed as a clerk of the court in Sterkspruit. In July 2018 in his capacity as such he dealt with criminal cases, small claims cases as well as domestic violence cases. On 20 July 2018 he had occasion to attend to the two accused persons. On that date it was the return date of a complaint that had been lodged by the accused concerning money. The accused told him that they wanted to be paid for services they had rendered at their home in building a house. They were demanding an amount of about R20 000.00. He called their parents into his office so that the complaint could be dealt with. It was accused no.1 who was doing most of the talking. When their parents came into the office they were with a young girl whom they said was their daughter. Accused no.1 said that they must be paid because even if it was another builder who had built the house he would have been paid. His mother said that if they wanted to be paid they would have to pay back all the money they spent in their traditional circumcision ceremony.
- [19] Accused no.1 became so agitated and was overwhelmed with anger and accused their mother of being difficult, with an evil heart, of being cruel and being a witch. Because of the exchanges that were taking place he requested them to leave the office. At that stage accused no.2 spoke to accused no.1 saying that they must leave together. Before they could leave accused no.1 uttered words to the effect that they must be told if they would get the money so that if they were not going to get it they could devise means of getting it. When accused no.1 uttered those words he was angry and rude to his mother and his impression was that

he was threatening her. That was the last time he had to deal with the accused persons.

- [20] Under cross examination Mr Njadu confirmed that it was accused no.1 who did most of the talking. It was put to him that accused no.1 denied that he was the one who attended to them and their parents on that day saying that he was only involved in the case of the protection order. Mr Njadu insisted that he never dealt with the accused persons on the issue of the protection order. He only dealt with them in respect of the issue of the small claims case. Mr Njadu further insisted that the accused were demanding R20 000.00 payment from their mother. He further insisted that accused no.1 did accuse their mother of being evil, cruel and a witch and that he did say that their mother must tell them if she would pay them or not so that they could make other ways of getting the money from her.
- [21] It was put to Mr Njadu that accused no.1 did not demand money from their parents in the presence of the other official. He merely informed that other official, not Mr Njadu that their mother had promised to pay them for building the house and that they wanted her to make good on that promise. Mr Njadu insisted that he was the official who attended to the accused's small claims case. Mr Njadu further testified that during that meeting in his office on the 20 July 2018 accused no.2 was quiet and accused no.1 was doing the talking. Accused no.2 merely said that they must leave. He confirmed that accused no.2 was trying to stop his brother and preventing the situation from escalating. Accused no.1 and his mother were talking over each other in high voices at the time. Mr Njadu testified that the only other official present in his office was an intern who did not attend to members of the public. That intern did data capturing in respect of domestic violence files in her computer.
- [22] The next witness for the State was Sinentlahla Kesa. Her evidence was that she was 21 years and resided at Kromspruit in Sterkspruit. She knows both accused as they are from the same family as herself. In July 2018 she was at Kromspruit when accused no.1 arrived asking for the key for a house in her home in which nobody stayed. At the time nobody stayed there as she had left to stay with her other family because she had a little baby. Accused no.1 further indicated that the following Monday they would be going to court. On another Monday she was approached by police asking her if she knew a particular grey tracksuit. She confirmed to the police that that tracksuit belonged to accused no.1 as she usually saw him wearing it. When the police approached her the accused had been staying at her home for about a week. The said tracksuit was actually a tracksuit top. It was put to Sinentlahla that accused no.1 was saying he indeed got the key from her at the place where she was staying but they never stayed with her at her home and she confirmed the accused's version in this regard. It was further put to her that accused no.1 denied owning the

tracksuit. Sinentlanhla testified that she did see him wearing it. She would see him wearing the same tracksuit because when she went to her boyfriend's place she would walk past her home in which the accused stayed at the time. She would see him wearing it. Even when her grandmother was being buried, accused no.1 was present and wearing the said tracksuit. She explained that the funeral she was referring to was not the funeral of the four deceased persons in this case. She was referring to the funeral of her direct grandmother. She insisted that accused no.1's denial of

his knowledge of the tracksuit was a lie.

- [23] Sergeant Mda was recalled for further cross examination by Mr Gxaba who previously represented accused no.1. During the said further cross examination, it was put to him that accused no.1 had been asked by Mr Kesa to clean the floor. As he was doing so he saw something that looked like blood. Sergeant Mda disputed this as lies. It was further put to him that if there was any blood in accused no.1's clothing it would have gotten there when he participated in the cleaning. Sergeant Mda denied this saying that after he was told that a blood like substance had been found on the floor he told Mr Kesa and others to stop the cleaning process. It was further put to him that the tracksuit top hood strings were stained by a maroon roof paint. Mr Mda maintained that that was not true. What he saw in those tracksuit top hood strings was blood stains which was why he confiscated it from him.
- [24] The next witness for the State was Dr Jwaqa. He testified that on 24 July 2018 he performed autopsies on four bodies of the deceased who had sustained 100% burns. He testified that the said bodies had burned so severely that they were beyond recognition. He completed a medico legal report on each of the bodies. He further testified that burned bodies do not bleed, they do not lose blood, they lose fluid. He explained that the presence of blood would indicate another cause for the bleeding as burned bodies do not bleed.
- [25] The last State witness was warrant officer Francis-Pope. She testified that she works at the SAPS biology unit in Cape Town. On 29 July 2019 she attended to the analysis of four reference samples, being two from the deceased persons and another two from the two accused persons and completed a report. Her findings were that the blood that was found in the pair of jean trousers was accused no.2's own blood and not that of any of the deceased persons. The DNA found in the tracksuit pants was from an unknown male person. She had requested that reference samples from the deceased in count 3, Mr Mqondiso Kesa and the deceased in count 1, Ms Nobubele Kesa be obtained for comparison purposes from their biological relatives. However, that did not happen. Therefore, with the samples that she had, the only positive conclusion she could make was that the DNA of Thomokazi Kesa which is the deceased in count 4 whose reference sample was in the evidence bag with reference number PA4002561855 was read into the possible blood found in the tracksuit top with evidence reference number PA4002561679. Therefore, the blood in the tracksuit top strings confiscated from accused no.1 was that of his mother, the deceased in count 4. With this last witness, the State closed its case.
- [26] The evidence of the witnesses who were recalled at the instance of accused no.1 did not take the matter any further or add any value either way save to confirm what had already been testified about in some respects. With the State's case having been closed both accused made applications for their discharge in terms of section 174 of the Criminal Procedure Act. The legal position with regard to an application in terms of section 174 was stated in the case of *S v Lubaxa* 2001 (2) SACR 703 (SCA) at 707 as follows:

“[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary mero motu, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.

- [19] ... Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognized by the common law principle that there should be ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135 C–E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, should at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.”
- [27] On the consideration of the evidence presented by the State, the case against accused no.2 is at best, weak. The only way that that picture could potentially change is if he enters the witness box and incriminates himself. As the Supreme Court of Appeal stated in *Lubaxa*, this is impermissible. In all of the evidence of the State, there is nothing that points to accused no.2’s participation in the arson that took place or any of the events which might have led to the death of the deceased on the basis of which a court acting reasonably might convict him. The fact that he, like accused no.1, also had a motive for killing the deceased does not amount to evidence that he might have done so.
- [28] However, the same cannot be said about accused no.1. For instance, there is evidence of blood having been found in the flat roofed structure that was razed to the ground and in which the deceased died. The evidence of Dr Jwaqa was that burnt bodies do not bleed. This means that the blood found at the crime scene could have been from the bleeding that happened before the deceased burned to death. The tracksuit top hood strings which accused no.1 was wearing had what looked like blood according to the evidence of sergeant Mda. The evidence of warrant officer Francis-Pope was that indeed that blood like substance found in those strings of accused no.1’s tracksuit top was the blood of his own mother, the deceased in count
4. The possible blood found in the tracksuit pants could not be matched with any of the deceased. However, it was established that it was blood from a male person. The only male person in that burnt house was the deceased in count 3, the father of the two accused, Mr Mqondiso Kesa. All of this evidence cannot be ignored. Clearly accused no.1 has a case to answer and if he so testifies, his evidence may very well lead to his acquittal depending on

the evaluation of all the evidence including his own and that of any witnesses he may choose to call to testify on his behalf.

[29] The insufficiency of the State's evidence against accused no.2 which falls far below the minimum threshold must lead to the inescapable conclusion that he must be acquitted and discharged. It would be plainly incorrect and contrary to the established principles of our criminal jurisprudence not to discharge him despite the weaknesses of the State's evidence against him in the hope that he might supplement it by means of self-incrimination. The suspicions about accused no.2's complicity to the crimes committed do not amount to evidence on which a court can convict him.

[30] In the result, I make the following order:

1. Accused no.2's application to be discharged in terms of section 174 of the Criminal Procedure Act is granted on all counts and he is accordingly acquitted and discharged.
2. The application by accused no.1 to be discharged in terms of section 174 of the Criminal Procedure Act is refused.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: L. Pomolo

Instructed by: National Director of Public Prosecutions

Mthatha

Counsel for accused no.1: O.N. Mankanku

Counsel for accused no.2: J. Slabbert

Instructed by: Legal Aid South Africa

Gqeberha

Date heard: 30 November 2022

Date delivered: 02 December 2022

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Prepared on 12 October 2026 · Esheria