

SOUTH AFRICA / JUDGMENT

S v Nyalungu and Another (REV:96/2021) [2021] ZALMPPHC 83 (19 November 2021)

[2021] ZALMPPHC 83

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago, Semenya

CASE / FILE NUMBER

REV:96/2021

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE

REV: 96/2021
In

the matter between: THE
STATE
And
BOBO
MIKE
NYALUNGU
FIRST
ACCUSED
NTOKA
CALVIN
MOTSHOLANE
SECOND ACCUSED
REVIEW

JUDGEMENT

KGANYAGO J

- [1] The two accused appeared in the regional court, Mahwelereng on one count of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act[1] (CLAA). Both accused are legally represented. At the commencement of the trial, the accused were appraised of their right to have two assessors assisting the presiding magistrate, and they chose that the two assessors be appointed.
- [2] The two assessors were duly appointed to assist the presiding magistrate. The two accused have pleaded not guilty to the charge that they are facing, and thereafter the State led the evidence against the accused. The two accused have also testified in their defence after the State had closed its case. Counsel for both the State and the accused have addressed the court on the merits of the case, and thereafter the court a quo postponed the matter for judgment. The two assessors have been present throughout the trial until the closing address on merits by the State and defence.
- [3] On the day on which judgment was supposed to be delivered, the court a quo could not do so, as one of the assessors had lost interest in further acting as an assessor due to the dissatisfaction about payment of his stipend, and had withdrawn himself from the proceeding as per a letter which he had submitted. That resulted in the court a quo been unable to deliver its judgment as planned as it was now left with one assessor.
- [4] Without giving the accused legal representatives and the State an opportunity to address the court a quo whether the matter may be proceeded without the second assessor, the court a quo brought the matter to this court on special review in terms of section 304(1) of the Criminal Procedure Act[2] (CPA).
- [5] I have requested the comments from the office of the Director of Public Prosecutions (DPP). The DPP has provided me with a valuable opinion and I am indebted to them. According to the DPP, the matter should be referred back to the court a quo for the parties to submit arguments whether the court a quo may proceed with the trial with the remaining assessor or not.
- [6] The court a quo is not sure whether it is properly constituted as there is only one assessor remaining, and it therefore seeks directives from this

court. Section 93ter (1) of the Magistrates' Courts Act[3] (Act) provides as follows:

“(1)The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-

(a)before any evidence has been led; or

(b)in considering a community-based punishment in respect of any person who has been convicted of any offence

summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.”

[7] The two accused are appearing in the regional court on a murder charge and in terms of section 93ter (1) of the Act, a judicial officer at that trial must be assisted by assessors unless such an accused request that the trial be proceeded with without assessors. It was settled in *S v Gayiya*[4] that section 93ter (1) is peremptory, and that it ordains that the judicial officer presiding in the regional court before which an accused is charged with murder shall be assisted by two assessors at the trial, unless the accused request that the trial proceed without assessors. The court further held that it is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor.

[8] In the case at hand, the accused at the commencement of the trial chose that the judicial officer in their matter be assisted by assessors. The section prescribes two assessors, and it is after the accused have made a choice that a judicial officer had a discretion to either summon one or two assessors to assist him/her. In this case the judicial officer had summoned two assessors who have been assisting him throughout the trial until both the State and defence have addressed the court a quo on the merits of case, when one assessor decided withdrew himself from the proceedings. The question is what remedy does the court a quo have in the situation in which it finds itself in.

[9] Section 93ter (11) of the Act provides as follows:

“(a)If an assessor-

(i)dies;

(ii)in the opinion of the presiding officer becomes unable to act as an assessor;

(iii)is for any reason absent; or

(iv)has been order to recuse himself or herself or has recused himself or herself in terms of subsection (10),

at any stage before the completion of the proceedings concerned, the presiding judicial officer may in the interest of justice and after due consideration of the arguments put forward by the accused person and the prosecutor-

(aa)direct that the proceedings continue before the remaining member or members of the court;

(bb)direct that the proceedings start afresh; or

(cc)in the circumstances contemplated in subparagraph (iii), postpone the proceedings in order to obtain the assessor's presence:

Provided that if an accused person has legal representation and the prosecutor and the accused person consent thereto, the proceedings shall, in the circumstances contemplated in subparagraphs (i), (ii) or (iv), continue before the remaining member or members of the court.

(b)If, at proceedings which are continued in terms of this subsection, the judicial officer is assisted by the remaining assessor, the finding or the decision of the judicial officer shall, in respect of any matter where there is a difference of opinion between the judicial officer and the assessor, be the finding or decision of the court.

(c)The judicial officer shall give reasons for any direction referred to in paragraph (a), and for any finding or decision referred to in paragraph (b)."

[10] The remedy available to the presiding magistrate in the situation in which the court a quo finds itself lies in section 93ter 11(a) of the Act as the assessor had withdrawn himself from the proceedings. By submitting a letter that he does no longer wish to act as an assessor, and was a clear indication that he was withdrawing himself from the proceedings. With the reasons which the assessor had given in his withdrawal letter, it is clear to the presiding magistrate that the assessor in question has rendered himself unable to act as an assessor anymore in this matter. From the memo of the presiding magistrate and the record of the proceedings, it is clear that the accused and the State were not afforded an opportunity to put forward arguments which the court a quo should consider in order to decide whether the proceedings may continue with one assessor, or that the proceedings start afresh.

Both accused are legally represented, the presiding magistrate can still find out from the State and the accused legal representatives

whether they consent to the trial proceeding before the remaining members of the court, and if the consent that will settle the matter, and there will be no need for arguments.

[11] It is clear that the presiding magistrate had not yet exhausted the remedies available to him as provided for in section 93ter (11). In my view, the remedies in that section are adequate to cater for the situation in which the court a quo find itself in, and this matter was not even supposed to have brought to this court at this stage. I agree with the DPP that this matter be referred back to the court a quo to afford the parties an opportunity to either consent to the matter proceeding before the remaining members of the court or present arguments for the court a quo to consider what will be in the interest of justice regarding the matter.

[12] In the result I make the following order:

12.1 The matter is referred back to the court a quo for the accused legal representatives and the State to either consent to the matter proceeding before the remaining members of the court or presenting arguments for the court a quo to consider as to what will be in the interest of justice regarding the matter.

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

SEMENYA DJP

DATE DELIVERED : 19th November 2021

[1] 105 of 1997

[2] 51 of 1977

[3] 32 of 1944

[4] 2016 (2) SACR 165 (SCA) at para 8

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Prepared on 14 October 2026 · Esheria