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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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CASE NO: CC27/20

In the matter between:

THE STATE

And

T K

Accused

JUDGMENT (SENTENCE)

BRAUCKMANN AJ

1. "Violence against women is perhaps the most shameful human rights violation, and it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development and peace".¹
2. Mr K ("*the accused*") pleaded guilty to and was convicted of the crimes of murder and housebreaking by this Court. The Court now has the unpleasant and difficult task to impose the sentence on the accused.

¹ Kofi Annan Secretary General of the United Nations.

3. There are certain principles that serve as a guideline for the court to consider before the imposition of a sentence. Those guidelines are contained in various judgments of our courts. In S vs Rabie² it was held the accused's personal circumstances, the interest of the society and the crime together with the circumstances surrounding the commission of the crime must be taken into account. The court is obliged to keep a fine balance between these factors and should also not overemphasise one. The court is also called upon to show some mercy when imposing a sentence³.

4. It was stated in S v Vilakazi⁴ that before a court imposes a prescribed sentence it must assess, after considering all

² 1975(4) SA 855(A).

³ See Rabie *supra*.

⁴ 2009(1) SACR 552 (SCA).

circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the offence.

5. A sentencing court does not always have an untrammelled discretion to determine sentence – a clean slate on which to work. In certain cases prescribed sentences are provided for by the Criminal Law Amendment Act⁵ (the so called “Minimum Sentences Act”). Section 51 of Minimum Sentences Act provides:

“(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and

(6) A Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years.”⁶

⁵ Act 105 of 1997.

⁶ S v Matjeke unreported case by Ratshbvumo AJ, Case no. 049/2016, Gauteng Division, Johannesburg.

6. Murder is listed in Part I of Schedule 2 when (a) it is planned or premeditated. *In casu*, Mr K was arraigned with such charge and pleaded guilty thereto. The first count, Housebreaking was incorrectly put to Mr K, but he correctly pleaded guilty to housebreaking in terms of the common law. As no firearm was involved in the crime, the Minimum Sentence Act did not find application.
7. A court is required to weigh and balance a variety of factors to determine a measure of the moral, as opposed to legal, blameworthiness of an accused which is achieved by a consideration, and an appropriate balancing, of what the well-known case of S v Zinn⁷ described as a '*triad consisting of the crime, the offender and the interests of society*'.
8. Murder is listed in Part I of Schedule 2 when (a) it is planned or premeditated and *in casu*, I find premeditation on the part of the accused. That is found in the explanation by Mr K

⁷ 1969 (2) SA 537 (A), at 540G-H.

provided to the Court in terms of Section 112 (2) of the Criminal Procedure Act⁸ ("the CPA") and his evidence in mitigation of sentence.

9. I pause to quote from the section 112 (2) statement ("the statement"). Mr K stated that:

"I admit that on the date and place as mentioned in Count 1, I did unlawfully and intentionally kill T M."

Further that:

"I was provoked by the messages I had received from X and decided that I was to go to X's place of residence and speak to him about this issue. I took a machete to protect myself in case if X was to start a fight with me."

10. *On arrival and X's place, I knocked at the door, I heard deceased voice asking who was at the door. I tried to open the door but realised that the door was locked. I kicked the door and it opened. I went into the house and found the deceased in the living room area. I took out the machete and started to chop the deceased with it. I chopped her all over her body.*

⁸ Act 51 of 1977.

11. The deceased fell to the ground and started to bleed profusely, there were two minor children in that house who came out of the house and ran away after seeing me chop the deceased. I also fled the scene and threw away the machete on my way to my place of residence. Upon arrival at my place of residence, I prepared food for the children and we all went to sleep that night. In the morning, I prepared myself and went to work. The police came to my work place and arrested me on the charges that the state had preferred against me.
12. I admit that I knew by chopping the deceased with a machete, she will sustain serious injuries and she may even die. I also confirm that I did not reflect on my actions and I continued to chop her despite having realised that I had injured her. I confirm that through my actions, I had intended to cause the death of the deceased. I admit that the deceased died as a result of injuries that I had caused her and I further admit the cause of death as noted on the medico legal post-mortem report." [Own emphasis]
13. This statement was drafted by Mr K's legal representative, Mr Mthivhithivhi, discussed with him by his counsel prior to signing it, read into the record aloud by Mr Mthivhithivhi in

Court, and thereafter translated to him a sentence at a time by Mr Mathebula (the interpreter). The Court explained to Mr K to stop the proceedings immediately in the event that he differs from his counsel, or if his counsel makes statements that are not in accordance with his instructions.

14. Mr K testified in his own case in support of mitigation. He stated that he went to X's (the deceased's lover) home that night and was very angry. He stated that he wanted to fetch his "wife" (the deceased) and bring her to his home to look after the two minor children they had together, as taking care of them alone was an inconvenience.
15. He was aware of the fact that the deceased was at X's house and took a machete with to defend himself against X who instructed him to stay away from the deceased and in the event he would fail to heed the warning, X threatened to kill him. All the threats were made via messages on his cell phone. Not one message was produced by Mr K when

testifying and I find his version to be yet another attempt to adapt his version.

16. It became clear from the cross examination by Adv Poodhun, and questions by the Court, that Mr K's statement and his evidence was mutually destructive. He was afforded an opportunity to explain the difference, but simply blamed his counsel and the apparent "*misunderstanding*" between them for the adapted version under cross examination. There was no misunderstanding and the version placed before Court during the pleading stage was apparently adapted by Mr K to be favourable when it came to sentencing. The true version came out during cross examination.
17. Mr K conceded that he did not go to discuss the love relationship with X that night, but to fetch the deceased. The question then begs why did he go with his machete? It is clear that he went there with the intention to kill the deceased. X, and the two minor children can count

themselves lucky to have escaped his rage. From the medico-legal post mortem examination report it is apparent that the attack on the deceased was vicious and deadly. Dr Krynauw, the pathologist, states that his chief findings made were:

- a. Decapitation, cervical spine;
- b. Axe wound left shoulder.

18. The photo album submitted as evidence (Exhibit "E") also shows the extreme violent nature of the attack on the deceased. Mr K cannot explain his actions. On the one hand he states that he was in a dream whilst he killed the deceased, but on the other hand explains in the statement that he saw the deceased fall and start bleeding profusely. He never even summoned medical assistance for the deceased. What he elected to do was to go home, prepare food for the children, sleep and go to work the next day as if nothing happened.

19. The next day he was arrested at work and co-operated with the SAPS in the investigation. He had no choice but to co-operate as the police found his trousers with blood on it at his house. The DNA evidence against him was overwhelming.
20. The Court can only find that the heinous crime committed by the accused was not only planned, but also executed with the precision of a headsman.
21. Mr K's personal circumstances were placed before Court during his evidence. He is thirty years old, not married and have two minor children. The children was born from the relationship between the deceased and him. Two other children that was also born from the relationship both passed away already. Before his arrest he was employed as an operator with KDH and earned R 3 600.00 per month. The money was used to take care of the family unit. He has been incarcerated since 08 July 2019. Mr K stated that he never applied to be released on bail as the investigating

officer informed him that he was guilty of a very serious crime. He did phone the deceased's sister N M after he was arrested and apologised for killing her sibling. Mr K is a first offender and pleaded guilty, thereby not wasting valuable Court time. The last factor becomes very much a "neutral" factor in the face of the strength of the state's case against him.

22. Ms N M was called by the state. She testified that the minor children is with her at this stage and that apart from the social grant she is receiving in respect of the children, she works part time and takes care of the children's needs as well as that of her own two children. Mr K called her from jail and informed her that on the night that he killed her sister, he returned home to kill the two children as well. Fortunately for the children they were already asleep with Mr K's father, and he refused to let them go to him. I think Mr K's father saved the two children's lives from the murder spree that Mr K embarked on that night. I believe Ms M. Her evidence was

solid and not conflicting at all. The same can however not be said of Mr K's evidence.

23. Mr K never looked the Court in the eyes or even in the Court's direction. He looked down in front of him while he was testifying. His version kept on changing and varied between the versions as contained in the statement and as referred to above. His evidence was of an exceptional poor quality. Save for his personal circumstances set out in paragraph 18, *supra*, the version proffered by him cannot be believed. It became clear that he went to X's home to confront the deceased, and killed her in the most brutal way possible. The Court is no expert, but hopes that the deceased's decapitation caused instant death and that the deceased did not suffer. How Mr K could, on his version, return home, prepare food for the children and go to sleep is beyond comprehension and indicative of the fact that he had no remorse.

24. Mr K tendered some form of apology to the deceased's relatives in court. He testified that he was aware of the presence of their presence in Court but did not even look at them while he offered his "apology". What is aggravating is the fact that he failed to take the Court into his confidence when during the evidence tendered by him. He lied to the Court, and blamed his counsel when caught out.
25. According to Mr K's counsel the above factors is an indicator that Mr K can be rehabilitated and should be given an opportunity by deviating from the minimum sentence prescribed for murder. The Court disagrees with the submission and is firmly of the view that the factors listed above, taken together, is not of such a nature to convince the Court that they are compelling and substantial. It is accepted that he apologised, but that is no indication of remorsefulness at all. If Mr K was remorseful, he would have called for assistance after he realised that he "*made a mistake*", and not run away and conceal the machete.

26. I am of a firm view that pure jealousy and vengeance drove Mr K to this heinous deed. He decided that if he could not have the deceased nobody else will have her. His conduct is not that of a man, but of a coward. He went to the deceased's new residence to kill her.

27. The Malgas-judgment (and many other judgments) in regard to the correct approach to be adopted in the exercise of the discretion conferred on the sentencing Court in terms of section 51(3) of the Minimum Sentences Act, summarises it as follows :

- a. The prescribed sentence must ordinarily be imposed;
- b. It is only if a Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence that it may depart from the prescribed sentence.
- c. In deciding whether substantial and compelling circumstances exist the Court is required to look at all

the factors traditionally taken into account in determining the appropriate sentence, that is, mitigating and aggravating factors, and consider the cumulative effect thereof.

- d. If the Court concludes that the minimum prescribed sentence is so disproportionate to the sentence which would be appropriate to the extent that an injustice would be done by imposing that sentence; it would be entitled to impose a lesser sentence.
- e. The specified sentences are, however, not to be departed from lightly and for flimsy reasons.

28. Mr K did not provide the Court with any acceptable evidence indicating that he is a deserving case to be rehabilitated⁹. Even if I am wrong, exceptional gruesome nature of his attack on the deceased is of such a nature that it deserves the minimum prescribed sentence. The Court is of the view that cases like the one in *casu* were in

⁹ S v Nkomo 2007 (2) SACR 198 (SCA).

the Court's mind in Malgas when it stated that the specified sentences are not to be departed from lightly and for flimsy reasons. If the Court finds on the evidence before it that compelling and substantial reasons exists, it would amount to a travesty of justice.

29. The count of housebreaking gets a different dimension if looked at through the eyes of the deceased. She was in a safe place, doors locked. Mr K simply kicked the door open and started attacking the deceased without even talking to her. He was angry and decided to execute his plan. What the Court finds shocking is the fact that he perpetrated this crime in the presence of two minor children that were surely left traumatised in the extreme. Looking at the photographs of the crime scene is not only a bad experience, but also leaves the Court wondering how he could have executed the deceased in the children's presence. I am also of the view that they can

count themselves lucky that they escaped Mr K's wrath that night.

30. The society in South Africa is tired of Gender Based Violence. Most of the cases before me are femicide matters where husbands or boyfriends are of the opinion that the women in their lives are owned by them and may be treated worse than cattle. It is no longer acceptable to come to Court pretending to show remorse. Walking into the deceased's safe space armed with a panga whilst she was defenceless is not only indicative of Mr K's cowardice, but also that his own children and other women will not be safe with him around. He must be removed from society.
31. The only sentence that fits the crime and the criminal in casu is incarceration. There are no compelling or substantial circumstances. Mr K must join the other

murderers in jail. Unfortunately the deceased is lost forever and joins thousands. If not millions of women that were murdered by the persons supposed to love them. The accused's tend to rely on their human rights, but did not think of their victims' rights when perpetrating their heinous deeds.

32. In S v Swart¹⁰ the Supreme Court of Appeal stated the following:

"In our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment does not require to be accorded equal weight but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role."

¹⁰ 2004 (2) SACR 370 (SCA) at 378B-C.

33. Mr K testified that he was sober and not under the influence of alcohol or any other drug when he committed the murder. Even more self-discipline can be expected from a sober man.

34. I am therefore of the view that the following sentence is appropriate in the circumstances:

1. Count 1: 3 (three) years imprisonment.
2. Count 2: Life imprisonment.
3. The sentence in count 1 is to run concurrently with the sentence in count 2.

No order made in terms of section 103 Act 60 of 2000 (accused is automatically unfit to possess a firearm).

SIGNED AT MIDDELBURG ON THIS THE 12TH DAY OF NOVEMBER
2020.

H Brauckmann
ACTING JUDGE OF THE MPUMALANGA DIVISION,
MIDDELBURG (LOCAL SEAT)

Counsel for the STATE: Adv Poodhun (National Prosecuting
Authority)

Counsel for Defense: Mr Mtihvhithivhi (Legal Aid Board)