

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: SS67/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. ✓
23/05/2024	
DATE	SIGNATURE

In the matter between:

THE STATE

and

KGWEDI NGOAKO

LEGAL SUMMARY

Constitutional Law: Right to fair trial- counsel for the accused and state counsel, as officers of the Court, has a duty to assist the Court, where necessary, to conduct trial fairly- Accused pleaded guilty to two counts of murder, one count of attempted murder, three counts of kidnapping, two counts of defeating the ends of justice. The accused assisted by his counsel, entered into a plea and sentence agreement with the state, in

in terms of section 105 A of the Criminal Procedure Act, 51 of 1977. After the Court had perused the statement, it emerged that the accused was not involved in the commission of the offences of murder, attempted murder and kidnapping. Both counsel agreeing with the Court that the accused was not involved. State did not intend to call witnesses to testify if the Court intended to enter a plea of not guilty, in terms of section 113 of the Criminal Procedure Act. Accordingly, Court did not convict the accused on the said counts.

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS67/2023

DATE: 2024-05-14

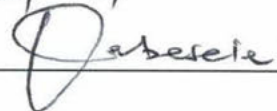
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In the matter between

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KGWEDI NGWAKO

Accused

S E N T E N C E

MABESELE, J: The accused pleaded guilty to two counts of murder, one count of attempted murder, three counts of kidnapping and two counts of defeating the ends of justice. The counts of murder are each read with the provisions of section 51(1) of the Criminal Law Amendment Act¹. This section

¹ 105 of 1997

makes provision for a sentence to imprisonment for life upon conviction.

The accused is legally represented. He sought legal assistance from Legal Aid, in Johannesburg. After the accused had pleaded to the charges and his counsel confirming that the plea of guilty on all the counts was in accordance with his instruction, counsel provided the Court with a statement which was prepared in terms of section 105(A) of the Criminal Procedure Act². This statement is referred to as 'plea and sentence agreement statement'.

After I had read the statement, I was of the view that, except the two counts of defeating the ends of justice, the accused was clearly not involved in the commission of the remaining counts. I subsequently raised concerns with both counsel on two issues that emanated from the statement, namely;

- (i) Proposed effective sentence of 8 years' imprisonment in respect of all the counts;
- (ii) A plea of guilty on the counts of murder, attempted murder and kidnapping, which was

² 51 of 1977

offered by the accused whereas the accused, according to the statement, seems not to have been involved in the commission of these offences.

After both counsel and I had read the statement, counsel admitted that indeed the accused was only involved in the counts relating to defeating the ends of justice.

The state does not intend to call witnesses to testify against the accused in respect of the counts of murder, attempted murder and kidnapping should a plea of not guilty be entered, in terms of section 113 of the Criminal Procedure Act. Therefore, the accused cannot be convicted on the said counts.

The facts which relate to the offences which were queried are as follows: The accused was employed by Mazibuko as a shepherd. He earned R350 per month. He stayed with Mazibuko on his property and had occupied one of the shacks on the property. On the morning of January 2023, the accused took Mazibuko's livestock for grazing.

As he left Mazibuko's property he saw complainant in count three and the deceased in

count 4, on Mazibuko's property. They were being assaulted by Mazibuko and his friends. They were accused of housebreaking. The accused returned from grazing and found the complainant and deceased on the property. They were inside the shack and being assaulted by Mazibuko and his friends.

Mazibuko instructed the accused and his friends to look after the complainant and deceased. During the course of the night the accused fell asleep. Mazibuko woke the accused up in the early hours of the morning and informed him that the deceased had died.

Mazibuko asked him to assist his friends (Mazibuko's friends) to take the deceased to the other side of Germiston. The deceased was put in a trolley dustbin, wrapped in a blanket. Mazibuko gave them money to buy petrol and burn the body of the deceased. They loaded the trolley bin in a Quantum vehicle and drove off.

Some days later Mazibuko sent the deceased in count five to fetch food for his livestock. He gave the deceased a trolley. The deceased lost the trolley and disappeared.

Subsequent to the disappearance of the deceased, Mazibuko promised to offer a reward to anyone who would bring the deceased to him.

The deceased was ultimately found and brought to Mazibuko at his property. Accused was present on the property when deceased was brought to Mazibuko. Mazibuko and his friends locked the deceased in a shack and assaulted him for three days. The deceased eventually died.

After the deceased's death, Mazibuko instructed the accused to bury the body of the deceased in a hole and cover it with furniture. The accused complied. A few days later the accused went to the police station and reported the incident to the police.

Passive participation of the accused on the counts of murder, attempted murder and kidnapping is evident in paragraph 15.11 of the statement. The paragraph reads:

“Although the accused was not actively involved in the kidnapping and assault of either deceased, he furthered the commission of the offences committed by Mazibuko and

his friends in that he assisted them after the commission thereof.

He did not have a legal duty to act and prevent and/or stop the commission of the offences.

His liability therefore, is based on his participation after the commission of the offences and is accessory in nature.

He intentionally and wilfully defeated the ends of justice by his actions of disposing both deceased's bodies."

Counsel for the accused has read the statement into the record of the proceedings. Subsequently, I have put questions to the accused to ascertain whether the accused admits all the elements of the offences in relation to defeating the ends of justice.

The response of the accused to the questions put to him persuades me to accept that the accused admits all the elements of the said offences and should be convicted and sentenced according to the plea and sentence agreement. It is worth mentioning that the accused had agreed in the statement to testify in a criminal trial against

SW Mazibuko. The accused is bound by the agreement.

I now wish to deal with the issue of fairness of the trial. This issue is triggered by the counts of murder, attempted murder and kidnapping. It is known now that the accused pleaded guilty to these offences which were not committed by him.

The Constitution³, makes provision for the right to legal representation and fair trial. Section 35(3)(g) provides that:

“Every accused person has the right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result and to be informed of this right promptly.”

The accused is relatively young. He comes from a poor family background. He lives in an informal settlement. He acquired little education, hence employed as a shepherd and earned as little as R350 per month. Regardless of this unimpressive background, the accused deserves a fair trial.

³ 108 of 1996

Although it is the duty of the Court to ensure that the accused receives a fair trial, legal representatives and state counsel should always be mindful of the fact that they are officers of the Court and should assist the Court, where necessary, in conducting the trial of the accused fairly. In view of the above, the following order is made:

The accused is guilty on two counts of defeating the ends of justice. He is sentenced to 10 years imprisonment on both counts. Each count carries a sentence of 5 years imprisonment. 3 years of the 10 years imprisonment on both counts is suspended for a period of 5 years on condition that the accused is not convicted of the offence of defeating the ends of justice, committed during the period of suspension. Accordingly, accused is sentenced to an effective term of 7 years imprisonment.

MABESELE, J
JUDGE OF THE HIGH COURT

DATE: _____

Date of Hearing : 24 May 2024

Date of Judgment : 24 May 2024

Appearances

On behalf of the State : Adv. R. Barnard

Instructed by : Director of Public Prosecutions

On behalf of the Respondent : Adv. L. Mosoaneng

Instructed by : Legal Aid Board South Africa