

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)**

Case Number: A22/2024

1.	REPORTABLE: YES/ NO
2.	OF INTEREST TO OTHER JUDGES: YES/NO
3.	REVISED.
<i>19 September 2025</i>	
DATE	 [SIGNED] SIGNATURE

In the matter between:

VUSIMIUSI MIKE KHOZA

Appellant

and

THE STATE

Respondent

This judgment will be handed down by email to the parties and by publication on SAFLII. The date of the delivery of the judgment shall be deemed to be on 19 SEPTEMBER 2025 at 10:00.

JUDGMENT

Coram: Vukeya J et Roelofse AJ

Roelofse AJ:

[1] This is an appeal. The main issue in this appeal is the concurrency and cumulative effect of sentences.

THE TRAIL

[2] The appellant stood arraigned in the Regional Division of Mpumalanga held at Eerstehoek for murder read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. He pleaded guilty to the charge. On 26 April 2023, the appellant was sentenced to 15 years imprisonment by the Regional Court. His application for leave to appeal in the Regional Court was dismissed. For reasons that will appear below, I shall refer to this murder as “the second murder” and refer to the sentence as “the second sentence”.

[3] In his plea, the appellant said that the deceased confronted him because he had spoken to the deceased’s girlfriend. After this initial confrontation, the appellant thought that the issue was resolved but the deceased followed him when he left a tavern whereupon there was an altercation. The appellant knew that he was not up to a fist fight. The appellant said: “...because I am a coward I resorted to using a knife to stab him as I know that I am not fit to fist fight”.

[4] The State accepted the appellant's plea. The post-mortem report was tendered into evidence without the appellant objecting. The plea and the post-mortem were the evidence upon which the appellant was convicted.

[5] The appellant did not present evidence in the sentencing proceedings, neither did the State. The appellant's attorney presented argument in mitigation of sentence. The State presented argument in aggravation.

[6] In the appellant's argument, it was disclosed to the court that the appellant was convicted and sentenced on or about March 2020 to 15 years imprisonment for another murder that he committed on the same day as the second murder. I shall refer to this murder as "the first murder" and refer to the sentence as "the first sentence". The appellant had already served two years of the first sentence on the date that the second sentence was imposed.

[7] The appellant was 22 years old when the second sentence was imposed and 19 years old when the murders were committed. The appellant was living with his mother, a sister and a niece at the time of the first murder.

[8] It was argued on behalf of the appellant that his youthful age at the time the murders were committed must be taken into account and that the possibility of rehabilitation must be considered. The element of mercy was also mentioned in the context of the Regional Court ordering that the sentences run concurrently. It was also argued on behalf of the appellant that the circumstances under which the second murder was committed must be considered as reason to deviate from the minimum

sentence.

[9] It was argued on behalf of the State that the crime was serious and that the court should not deviate from the minimum prescribed sentence.

IN THIS COURT

[10] The appellant seeks to appeal his sentence. The appellant's Notice of Appeal was late. For this the appellant applies for condonation. The appellant's attorney of record deposed to the founding affidavit in the application for condonation. Not much is said in the founding affidavit save that the attorney who represented the appellant at the trial has taken a transfer to another province and therefore, no notice of appeal was filed. However sparse the grounds for the application are, the State did not oppose the application. Therefore, this court shall grant the appellant condonation for the late filing of this leave to appeal.

[11] Before I deal with the appellant's ground of appeal, I observe that "*Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by the courts below is circumscribed. It can only do so where there has been an irregularity that results in failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence it sets aside a conviction in relation to charge and convicts the accused of another*"¹

¹ Bogaards v S (CCT120/11 (2012) ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) (28 September 2012).

[12] In *S v Bailey* 2013 (2) SACR 533 (SCA), it was said that:

“[20] What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.”

[13] In assessing the appellant’s grounds of appeal against the material that was before the Regional Court and its reasoning, I shall apply the aforementioned principles.

[14] The appellant challenges his sentence on five grounds. The appellant says that the Regional Court: (a) imposed a sentence that was harsh and disproportionate to the offence committed having regard to the circumstances under which the offence was committed; (b) failed to take into account the time the appellant has already served for the first murder, as the first murder “...[was] committed on the same day emanating from the same incident.”; “...[m]isdirected itself by not excessing [sic] a measure of mercy before imposing sentence.”; (c) misdirected itself by not

ordering the sentence to run concurrently with the sentence the appellant was serving when the sentence was imposed; (d) misdirected itself when it found that there were no substantial and compelling circumstances to deviate from imposing the minimum prescribed sentence; (e) misdirected itself by overemphasizing the seriousness of the offence and the interests of society at the expense of the appellant's personal circumstances.

Ground (a)

[15] The appellant murdered the deceased with a knife because he says that he was a coward and not fit for a fist fight. This explanation is somewhat vague. According to the post-mortem report, the deceased was stabbed twice. One stab wound in the right chest and a stab wound between the second and third ribs through the aorta. In the appellant's plea, he admitted that his actions were intentional and was rightfully convicted.

[16] The appellant did not disclose or explain why he stabbed the deceased twice. Simply put, the appellant intended to kill the deceased and succeeded – this much was admitted in the appellant's plea and is supported by the post-mortem. These were the facts before the Regional Court. In this court's view, these circumstances, as they stand, do not show that the Regional Court misdirected itself in this regard when it imposed the sentence it did.

Grounds (b) and (c)

[17] In these grounds, the appellant's challenge is that the Regional Court did not take into account that the appellant was already serving a sentence for the first

murder, which murder was committed on the same day as the second murder. It is clear from the record that the Regional Court was aware of this fact yet, the record does not show that this was expressly considered when the Learned Magistrate imposed the sentence. This issue touches on the concurrency of sentences and the cumulative effect of the sentences that are imposed.

[18] In order to decide whether sentences should be ordered to run concurrently, there generally ought to be an inextricable link between the crimes for which the sentences must be imposed.² Save that the first murder was committed on the same day, there was no evidence before the Regional Court to find that there was an inextricable link between the first murder and the murder of the deceased in the sense that they form part of the same transaction or were committed as part of the overall criminal conduct. I therefore find that the Regional Court did not err not to order that the sentences of the first and second sentences to run concurrently.

[19] The Regional Court did not misdirect itself when it imposed the minimum prescribed sentence of 15 years for the murder. There were no substantial and compelling circumstances that would have warranted a deviation. In any event: *“Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have*

² See: *Dlamini v S* [2023] ZAGPPHC 468; A215/22 (13 June 2023)

*a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."*³

[20] Where this court has to part ways with the Regional Court is where the cumulative effect of the sentence for the first murder and the second murder is considered. The cumulative effect of the sentences is thirty years imprisonment. In this court's view, this is excessive. In this regard the Regional Court materially misdirected itself when it, notwithstanding being informed of the first sentence, did not consider that the sentences should run concurrently.

[21] This is more so when the age of the appellant at the time of the first and second sentence is considered. The appellant was 22 years old when he was sentenced for the second murder and 19 years old when he committed the murders. His youthful age and the prospects that he may still be rehabilitated having regard that the murders

³ S v Matyityi 2011 (1) SACR 40 (SCA) at para. 23.

were his only convictions, should have been given due weight. This was not done by the Regional Court, and this constitutes a misdirection which this court has no other option but to correct.

Grounds (d) and (e)

[22] This judgment already found above that the Regional Court did not misdirect itself regarding whether compelling and substantial circumstances existed and in considering the seriousness of the crime. There is no need to say more.

[23] In the premises, I propose the following order:

- (a) Condonation is granted.
- (b) The appeal is upheld.
- (c) The sentence of by the Regional Court held at Eerstehoek imposed on 13 April 2023 ("sentence date") is hereby ordered to run concurrently with the sentence the appellant was serving on the sentence date ("the first sentence") and is hereby antedated to the date of the first sentence.



Vukeya J
Judge of the High Court



Roelofse AJ
Acting Judge of the High Court

DATE OF HEARING:

6 June 2025

DATE OF JUDGMENT:

19 September 2025

APPEARANCES

There was no appearance because the appeal was dealt with in accordance with section 19(a) of the Superior Courts Act, 10 of 2013.

The Appellants were represented by Coert Jordaan Inc Attorneys.