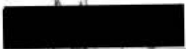




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A318/2023

1.	REPORTABLE: YES / NO
2.	OF INTEREST TO OTHER JUDGES: YES/NO
3.	REVISED: YES/NO
4 MAY 2026	
DATE	SIGNATURE

In the matter between:

KHEHLA KUBAYI
MAFUMISI KUBAYI

First Appellant
Second Applicant

and

THE STATE

Respondent

The matter was heard in open court. The judgment is handed down electronically by circulation to the parties' legal representatives via email and uploading to the electronic file of this matter on Caselines. The date of the judgment and order is deemed to be March 2026.

J U D G M E N T

MAZIBUKO J (REID J CONCURRING)

INTRODUCTION

- [1] The first appellant, Khehla Kubayi ('Khehla'), and the second appellant, Mafumisi Kubayi ('Mafumisi'), were arraigned before the Pretoria Magistrates Court, Gauteng Division ('the trial court') with one count of murder in that on 16 March 2019 they acted in furtherance of common purpose and killed one Lesedi Kekana ('the deceased') by first attempting to stab him with a knife, thereafter pushing him from the seventh floor of a block of flats and causing him to fall to his death.
- [2] They were duly informed of the implications of section 51 provisions of the Criminal Law Amendment Act 105 of 1997 in relation to the offence they were facing. They were legally represented during the trial.
- [3] They pleaded not guilty and exercised their right to remain silent.
- [4] They were convicted, and, a sentence of 8 years imprisonment, half of it suspended for a period of 5 years, was imposed.
- [5] The trial court granted leave to appeal against conviction.

THE DECISION OF THE TRIAL COURT

- [6] The issue before the trial court was, firstly, whether Khehla and Mafumisi acted in common cause to cause the deceased's death. Secondly, whether Mafumisi tried to stab the deceased, and lastly, whether the deceased was pushed by Khehla leading to his fall to death or he jumped over the railing.
- [7] The trial court was satisfied that Khehla and Mafumisi both participated and acted in common purpose in killing the deceased, when Mafumisi aimed at stabbing the deceased and the deceased dodged the knife, and, thereafter, Khehla pushed the deceased, who then fell and suffered injuries that caused his death.

GROUND OF APPEAL

- [8] In summation, the appellants contend that the trial court, among others, erred in:
- [8.1] Rejecting Khehla's alibi that he was not present during the chase of the deceased and his crew, and at the time the deceased was injured.
 - [8.2] Rejecting the appellants' reasonable, possibly true version in substance, without giving reasons and or based on inconsistencies or contradictions which were irrelevant and/or immaterial to the key dispute of whether the deceased jumped or was pushed.
 - [8.3] Placing the burden of proof on Khehla and Mafumisi, thereby calling upon them to be detailed and prove the truthfulness of their versions.
 - [8.4] Finding that the appellants acted in furtherance of common purpose without providing any reasons as to how there was prior planning between Khehla and Mafumisi. In the alternative, how the acts of one were imputable to the other.

ISSUE

- [9] The issue for determination in this appeal is whether the trial court correctly found that the appellants caused the death of the deceased whilst acting in common purpose.

STATE'S CASE

- [10] In order to prove the guilt of the appellants, the state relied on the evidence of Constable Edward Mahlangu ('Constable Mahlangu'), Constable Dumisani Abel Khoza ('Constable Khoza'), Malunga Mulaudzi ('Malunga') and Harvey Mogano ('Harvey').

Testimony of Constable Edward Mahlangu

- [11] The evidence of Constable Mahlangu was to the effect that he effected the arrest of the appellants when they came to him in the police station. He also took statements from other witnesses in the matter.

- [12] Under cross-examination, he testified that Khehla told him that the deceased jumped over the balcony wall.

Testimony of Constable Dumisani Abel Khoza

- [13] Constable Khoza testified that he was a photographer and a crime scene investigator. The photo album depicted the photographs and measurements of the scene of crime.

Testimony of Malunga Mulaudzi

- [14] Malunga testified that on the morning of 16 March 2018, between 2h00 and 4h00, he was with the deceased at The Wall Flats in his flat on the fifth floor. They then decided to visit their friend, Bridget Mothapo ('Bridget'), on the sixth floor. Whilst on the sixth floor, he acceded to the deceased's request for water. Whilst inside Bridget's flat to get water for the deceased, he heard the deceased arguing with another male. The argument was over the fact that the other male was talking to Bridget, whilst she was together with the deceased. While he was standing beside Bridget, he saw the deceased on the seventh floor being threatened by Khehla. Khehla was holding the deceased by his shirt. He went upstairs to pull the deceased from that situation.
- [15] He further stated that whilst on his way to the seventh floor, he met with Harvey, who was briskly walking back in panic from the situation. He passed Harvey, pulled the deceased by his hand and told him to walk away as he suspected the appellants were drunk. As they started walking, he looked back and saw Mafumisi holding a knife. Together with Khehla, Mafumisi chased them. He started running whilst holding the deceased's hand. Seeing that they were not running at the same pace, he let go of the deceased's hand.
- [16] Harvey also started running. At the stairs, he stopped and looked back and saw Harvey behind him, and the deceased was between 10 and 20 metres behind Harvey. Mafumisi caught up with the deceased, and Khehla was slightly behind

Mafumisi. Mafumisi tried to stab the deceased on his back but missed, as the deceased moved away from the knife, thereby having his back against the balcony wall. He estimated the height of which was just above his hip. Mafumisi was on the right-hand side of the deceased, whilst Khehla and the deceased were facing each other. Then Khehla pushed him over the balcony wall. The deceased landed in the parking lot and got injured. Khehla and Mafumisi looked over the balcony and saw the deceased falling.

- [17] Under cross-examination, he reiterated that Khehla pushed the deceased, denying that the deceased got hold of the railing before he jumped off. He stated that after calling an ambulance, the deceased was taken for medical attention. Later, he learnt that the deceased had passed away.

Testimony of Harvey Mkgwaneng Mogano

- [18] Harvey testified and confirmed his presence on the morning in question, as Mulunga stated. He stated that whilst in the flat, on the fifth floor, the deceased left with Malunga. After about 15 minutes, he went outside to find out why Bridget was telling the deceased not to go there. He saw the deceased on the sixth floor, arguing with people on the seventh floor. Seeing the deceased heading to the seventh floor, he followed. On his way, he met Malunga. He went to Khehla and Mafumisi, whose names he did not know then. Mafumisi had a large meat-cutting knife. He realised the argument could lead to a fight as there was a knife involved, so he told the deceased to walk away and not fight. Though he did not know what they were arguing about, he decided to apologise to Khehla and Mafumisi and left with the deceased.

- [19] Whilst, they walked away, Malunga was in front; he was in the middle; the deceased was behind him. When he looked back, he saw Khehla and Mafumisi running towards them, Mafumisi still holding the knife. They reached the deceased, and Mafumisi tried to stab the deceased, but the deceased managed to dodge the knife. The deceased was facing the appellants, with his back against the balcony. Khehla then pushed the deceased, who fell on the parking lot on his

face. He turned him over. The paramedics and the police arrived, and he was taken by the paramedics.

- [20] Under cross-examination, he reiterated that he was present and observed what happened to the deceased, leading to his death. He denied that the deceased and the twin brothers, Harry and Bokang, attacked Khehla. He also distanced himself from his statement, which did not state that Khehla pushed the deceased.
- [21] After a trial within a trial, the court ruled that his statement was not read back to him, thereby depriving it of any evidentiary value.

DEFENCE CASE

Testimony of Khehla Kubayi

- [22] In his defence, Khehla testified that on the day in question, whilst at his flat's balcony on the seventh floor, with Lyanda, he saw Bridget and started chatting to her. The deceased emerged and swore towards them, stating that he was still talking with Bridget. Listening to Lyanda's advice, he moved and sat against his flat's windowsill. The deceased came with Bokang and Harry. The deceased asked what was going on and punched him. The deceased, together with Harry, pinned him down against the windowsill whilst throttling him. Bokang also joined in the attack. His brother, Mafumisi, came to his rescue, and the deceased attacked Mafumisi. The other people, Ithu, Nico, Kamo, David, and Mahlatsi, also came to where he was. Kamo grabbed him by his jersey, thereby separating him from the deceased and his crew, and placing him in his flat, where he remained with Kamo and Mahlatsi. He saw Mafumisi chasing after the deceased and his crew. He heard from Mafumisi that the deceased jumped over the balcony wall and fell.
- [23] Under cross-examination, he reiterated that the deceased was not with Harvey and Malunga. He stated that after the incident, he and his brother called their parents, who advised them to leave the block of flats for safety reasons.

Testimony of Mafumisi Kubayi

[24] Mafumisi gave evidence to the effect that whilst inside a flat he shared with his brother, Khehla, Kamo and David, he heard some commotion as if people were fighting. On investigation, he found that the deceased, Harry and Bokang were surrounding and throttling Khehla. The deceased struck Khehla with a clenched fist. When he asked what was going on, the deceased attacked him by grabbing him by the t-shirt between the chest and the neck and warned that he would hurt him and Khehla. He removed the deceased's hand from his chest and went inside the kitchen. Khamo went outside and separated the deceased from Khehla. David reprimanded the deceased and prevented him from entering the flat.

[25] He then heard Bridget from the sixth floor telling the deceased to stop. Seeing that Khehla was still under attack, he grabbed the knife, went outside and wielded it, telling Khehla's two attackers to leave their place. Seeing the knife in his possession, the attackers let go of Khehla and retreated backwards. Khamo pulled Khehla inside the house. He chased after the attackers. One of them ran up until the emergency stairway, whilst the other turned the corner. He was about 4 to 5 metres behind them. He grabbed the railing and stopped. He heard lyanda saying, "Hey, wena, what are you doing?" and when he looked to his left, he saw the deceased jumping over the railing. He ran back to their flat whilst David went downstairs to where the deceased had fallen.

[26] Under cross-examination, he stated that the deceased never entered their flat; David blocked him. He did not know why Khehla did not testify about his torn t-shirt. He denied that among the people he chased were Malunga and Harvey, as none of them was fat, only tall. He said he was in possession of the knife to scare them away.

Testimony of lyanda Phika

- [27] Iyanda confirmed his presence on the day in question. His evidence was that the other two persons came out of Bridget's flat afterwards, not that they came to the seventh floor with the deceased.

Testimony of Bereng Kamogelo Panyane

- [28] On the day in question, he was with Khehla, Gusty, and others. They had a meal together. They left for their respective rooms. Whilst in his room, he heard noise, opened a curtain and saw two people pinning Khehla against the window. They were hitting each other with clenched fists. He went and separated them, then pushed Khehla into the flat. They met up with Mafumisi, who was leaving the flat with a knife in his hand. They remained there until Mafumisi came back, who then told them that the deceased had jumped over the rail and fallen. Under cross-examination, he testified that, although he had this information, he did not tell the police upon their arrival or thereafter.

DISCUSSION

- [29] It is trite that the court of appeal will only interfere with the trial court's factual findings where the trial court has materially misdirected itself on facts.
- [30] In order to succeed on appeal, the appellants must persuade this Court, on adequate grounds, that the trial court misdirected itself in accepting the State's evidence and rejecting their version as not being reasonably possible true. There are established principles governing the hearing of appeals against findings of fact and law. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct. They will be disregarded only if the recorded evidence clearly shows they are wrong.¹

¹ *S v Monyane and Others* 2008(1) SACR 543 (SCA) at para 15.

- [31] The state bears the onus to prove its case beyond reasonable doubt. The accused needs only to give a reasonable, possibly true version. The Court does not need to believe him.
- [32] It is not disputed that Khehla and the deceased's altercation regarding their interest in conversing with Bridget led to the deceased moving from the 6th floor to the 7th floor in a fighting mood. A fight ensued between the deceased and Khehla. The deceased's friends and those of Khehla, including Mafumisi, also got involved. Seeing the knife held by Mafumisi and, at the advice of Harvey to walk away and not fight, the deceased and his crew walked away. Mafumisi chased after them.
- [33] It was disputed that: a) The deceased was with Harvey and Malunga when he had a fight with Khehla and Mafumisi. b) Mafumisi was with Khehla when he chased after the deceased and his crew. c) The deceased was pushed over the railing, and d) Mafumisi and Khehla acted in common purpose in killing the deceased.
- [34] In order to answer these questions, it is noteworthy that the appellant's conviction arose from events that occurred in the early hours of the day in question, when the flat was lit. All witnesses, both for the State and for the defence, testified that nothing obstructed their observation of what was happening. However, they differ in terms of whether Harvey was the one who was with the deceased or whether it was the twin brothers, Harry and Bokang. Further, whether the deceased was pushed or he jumped over the railing out of his own accord.
- [35] *'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence must of course be evaluated against the onus on any particular issue or in respect of the case in its entirety. The*

*compartmentalised and fragmented approach of the magistrate is illogical and wrong.*²

[36] *Where a single witness has an interest or bias adverse to the accused, the evidence should be approached with particular caution.*³ *The court should seek to apply some kind of safeguard tailored to the particular reasons that make their testimony suspect to avoid, as far as possible, an incorrect finding based on their testimony.*⁴ *Courts should assess the witness's testimony for its reliability and credibility in light of the specific context of the case while being mindful of the concerns that necessitate caution.*⁵

[37] Harvey testified that, upon arriving on the 7th floor, he went to the altercation and fight scene, apologized on behalf of the deceased, though he did not know what he was apologizing for. He then pulled the deceased, and they walked away. The defence denies that Harvey was there and that he took the actions he testified to. Mafumisi stated that he chased after the tall guys; none of them was a big built person.

[38] During cross-examination at the trial within a trial, Constable Mahlangu testified that when he spoke to Harvey, among other things he commented about Harvey having gained weight. It needs to be indicated that this issue was not clarified at any stage during the trial, especially when Mafumisi testified that he chased after tall guys and none of them was big built. If Constable Khoza's evidence in this point is accepted, Harvey was not big built at the time of the incident, however at the time he testified he was.

[39] Harvey's evidence was more detailed than that of Malunga, whose presence at the scene was not disputed. He stated how he heard Bridget warning the deceased, who was on the sixth floor, arguing with someone on the seventh

² *S v Trainor* (468/01) [2002] ZASCA 125; [2003] 1 All SA 435 (SCA); 2003 (1) SACR 35 (SCA) (26 September 2002).

³ *R v Mokoena* 1956 (3) SA 81 (A) at 85H; *Sekoala v The State* (579/2022) [2024] ZASCA 18 (21 February 2024).

⁴ *Schwikkard and Van der Merwe Principles of Evidence* (3rd ed 2012) at p 546.

⁵ *Mohale v S* (A634/2017) [2019] ZACC 376 (27 June 2019) at para [36].

floor. How he followed the deceased to the seventh floor and explained the type of knife Mafumisi held in his possession. Mafumisi did not deny the type of knife, as Harvey explained.

- [40] The trial court considered the undisputed evidence that Harvey was the first to arrive where the deceased landed on the parking lot after falling from the seventh floor. It found that the fact that Harvey was the first to arrive at the parking lot where the deceased landed indicated that he saw the deceased falling from the seventh floor and immediately proceeded to where he landed. It was also not disputed that Harvey was the one who resuscitated him and spoke to him. In my view, considering all the factors around Harvey as discussed, the trial court was correct in finding that Harvey was present at least from the time he heard Bridget warning the deceased until he attended to the deceased after his fall.
- [41] I agree with the trial court that the evidence of Harvey was substantially satisfactory in relation to material aspects and to a certain extent corroborated by the evidence of the state and defence witnesses, and photo album on reconstruction, depicting the location in the flat where the deceased was before and after he fell to his death.
- [42] To answer the question whether Mafumisi was with Khehla when he chased after the deceased and his crew, and whether the deceased was pushed over the railing or he jumped the railing. One must look at the evidence as to what was happening just before the deceased and his crew started walking away. Mafumisi testified that when he walked out of their flat, he found the deceased together with his crew fighting Khehla. When he tried to find out, the deceased attacked him, by holding him by his t-shirt. He freed himself from the deceased's hold and went inside the flat. The deceased followed him but was stopped to enter the door though he had already passed the security gate. He came out with the knife. Seeing the knife Harvey advised the deceased not to fight but to walk away. He apologized, pulled the deceased by his hand, and they walked away. Whilst running he realized they were not at the same pace with the deceased, he let go of him and started running on his own. He looked back and realized, Mafumisi and Khehla had reached the deceased.

- [43] In *S v Chabalala* 2003(1) SACR 134 (SCA) at 139 par [15] Heher, AJA, with reference to *S v Van Aswegen* 2001(2) SACR 97 (SCA), said the following: *"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."*
- [44] If the defence version should be accepted as reasonably possibly true, it is important to assess what the case of Khehla and Mafumisi was. Mafumisi testified that the deceased held him by his t-shirt, whilst Khehla was still under attack by Harry and Bokang. After freeing himself from the deceased, he went inside the flat and came out with the knife. He beat his feet down and chased after the deceased and his crew whilst he wielded the knife, telling them to get out of their place. Mafumisi said he had the knife because Khehla was still under attack by the deceased and his crew. Khehla and Mafumisi as well as all the defence witnesses corroborated each other that Khehla did not chase after the deceased and his crew. It is not clear, though, why Mafumisi had to threaten them with the knife and chase after them when his brother, Khehla whom he was protecting, was already taken inside their flat.
- [45] Mafumisi did not deny running after the deceased and his crew, which evidence corroborates that of the deceased's crew that when they looked back, they saw him and Khehla running after them, and he (Mafumisi) was in front of Khehla and behind the deceased. In my respectful view, if Mafumisi was just threatening them, there was no longer a need to do so. They were already running away and, walking away from the fight. Further, there was no longer a need for him to run after them. He had already beaten his feet down and told them to get out of their place, and they had gotten the message and left Mafumisi and Khehla's place.
- [46] It was not clear what he intended to do with a knife on reaching them, as he was running after them carrying the knife, if the purpose was just to threaten them. The purpose of him carrying the knife is not explained, when the threat in the form of the deceased and his crew is already retreating and removed, and the

person threatened is already kept safe inside the flat. For the purpose of threatening them, it seems it could have been sufficient for him to just stand there with the knife, and or even shout at them.

[47] It is also not clear whether when the deceased dodged the knife, Mafumisi was still scaring him not intending to stab and harm him. Mafumisi's testimony is that he looked at the deceased and saw him jumping and falling after hearing lyanda shouting at the deceased. It was not established during the trial as to at what stage he lost sight of the deceased and his crew, as he was running after them.

[48] In my respectful view, Mafumisi and Khehla were not just running after them to scare them away but to fight them. The deceased and his crew did not just walk away from the fight but ran away from Mafumisi who had a knife. They were running from danger. They were chased after by Mafumisi who had a knife and wielded it towards them. Harvey and Malunga testified that on reaching the deceased, the knife was directed at the deceased, but he avoided it. He stood diagonally to both Khehla and Mafumisi, whilst his back was against the railing. Khehla pushed him, he then fell and died from the injuries he sustained when he was pushed over from the seventh floor.

[49] If the deceased's crew was chased after as far as the stairs and there was no swinging or wildering of a knife and pushing, what could have motivated the deceased to jump over? It might remain unknown; however, the undisputed evidence was that the deceased and his crew were already 10 to 15 metres away from Khehla and Mafumisi's flat. The deceased had already seen his friends in the stairs. In my view, respectfully, from the evidence, it is not far-fetched a thought that the deceased was accosted by the two brothers, Mafumisi and Khehla, was faced with danger or death by the knife. He dodged the knife. However, he stood diagonally to Khehla and Mafumisi, he could not move anywhere else. Khehla pushed him and due to the position of where they were and the height of the railing he then fell, got injured and later died.

[50] The court was alive to the fact that the state and defence witnesses, except for the police officers, were not independent witnesses towards the matter, as

Harvey and Malunga were friends of the deceased. The trial court noted that the evidence needs to be analyzed, corroborated and scrutinized, and be evaluated with a high degree of caution. I found no fault with the trial court's assessment of the facts and application of the law.

[51] The trial court was correct to accept Harvey and Malunga's testimony as it was clear, satisfactory, corroborated and consistent with independent verifiable evidence like the corridor, location of the wall and the railing, the stairs and the distance between Khehla and Mafumisi's room. Accordingly, the appeal against conviction ought not to succeed.

[52] As a result, I propose the following order.

Order:

(i) The appeal against conviction is dismissed.



NGM MAZIBUKO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered.



FMM REID
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing:

5 February 2026

Judgment delivered:

4 May 2026

Appearances:

For the appellants:

Mr MS Monene

Attorneys for the appellant:

Malumbete & Makhubele Attorneys

For the respondent:

Mr JJ Jacobs

National Director of Prosecutions