

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

SS104/2008

5 **DATE:**

3 JUNE 2010

In the matter between:

NKOSINATHI YENGWA1st Applicant**MBULELO MWANDA**2nd Applicant

10 and

THE STATE

Respondent

J U D G M E N T**Application for Leave to Appeal**

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MOOSA, J:

This is an application by Mr Nkosinathi Yengwa and Mr
20 Mbulelo Mwanda for leave to appeal against their conviction.
Insofar as Mr Mwanda is concerned, he also applies for leave
to appeal in respect of his sentence. Counsel for both the
applicants set out quite comprehensively the grounds of appeal
in their notice of application for leave to appeal and the Court
25 is not going to repeat them.

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The Court now has to decide whether another court could come to a different conclusion to that to which this Court had come, both in respect of the convictions and insofar as Mr
5 Mwanda is concerned, in respect of his sentences. It is so
that in the case of Mr Mwanda, the Court found, in respect of sentence, that there was no substantial and compelling circumstances to depart from the prescribed minimum sentences in respect of the murder and robbery charges. In
10 respect of Mr Yengwa, the Court did come to the conclusion that there were substantial and compelling circumstances to depart from the prescribed minimum sentences in respect of the murder and robbery charges.

15 The Court heard argument both by counsel for Mr Yengwa and Mr Mwanda in respect of both the conviction and in respect of the sentences insofar as Mr Mwanda is concerned. It is so that the conviction is based firstly, on circumstantial evidence; secondly, on the question of identification; thirdly, on the
20 question of an alleged confession and the pointing out and lastly, on certain forensic evidence. Cumulatively, the Court came to the conclusion that the State had proved its case beyond reasonable doubt that the accused committed the offences in respect of which they were found guilty, and
25 accordingly convicted them on those charges.

In view of the evidence tendered by the State and in view of the nature of such evidence, and the fact that the Court convicted them on the basis of circumstantial evidence, this Court is satisfied that another court might come to a different conclusion than the one that this Court came to in convicted^{ING} the accused. Consequently, insofar as the convictions are concerned in respect of both the applicants, the Court is satisfied that there are reasonable prospects of success on appeal.

Insofar as the sentence of Mr Mwanda is concerned, the Court found that there were no substantial and compelling circumstances to depart from the prescribed minimum sentences in respect of the murder and robbery charges. This Court is also satisfied that another court might come to a different conclusion than the one this Court had come to in respect of whether there were substantial and compelling circumstances in respect of the murder and the robbery charges as far as Mr Mwanda is concerned. In the circumstances the Court also concludes that there are reasonable prospects of success insofar as the sentences^{are} concerned in respect of Mwanda. The Court accordingly grant him also leave to appeal in respect of the sentences.

25 In the circumstances, the Court then grants both Mr Yengwa
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and Mr Mwanda leave to appeal to the full bench of this court in respect of the convictions and insofar as Mr Mwanda is concerned, the Court also grants him leave to appeal in respect of the sentences to the full bench of this division. X

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MOOSA, J