

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Criminal Trial No. 169/2003

In the matter between

REX

VS

TIKO NHLEKO

Coram: Annandale, ACJ

For the Crown: Mr. Fakudze

For the Defence: Accused in Person

## EX TEMPORE JUDGMENT ON SENTENCE 31 MAY 2005

Mr. Tiko Nhleko, the Court now faces the more difficult part of this hearing and that is to decide what sentence to impose. There are various factors that the Court will take into account but the main ones being your personal circumstances as you have placed it before the Court as well as the seriousness and the nature of the offence and the interest of society and balance those one against the other without over all under-emphasising any of them. In addition thereto, the Court shall also bear in mind that to show mercy is not a sign of weakness but an element that also comes into the equation as far as can be. You have told the Court and I accept it to be so that you are now a man in your mid 30s, you were about 33 at the time you

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were arrested on the 18 April 2003. I also take cognisance that at that time you were and you still are an unmarried man although you have a child with one woman girlfriend elsewhere. Further that you were employed as a kombi conductor earning around E350.00 per month and that from that you were able to provide some form of support for your tiny daughter around E150-00 per month. Also you say that your baby daughter stays with her mother at her mother's parental home and not with you. What is very disconcerting is that you show no sign of remorse whatsoever. You do say that you are sorry but that sorry is only because you were caught and convicted, not sorry for what you have done. The most heart-breaking aspect of this matter presently before Court is that the prey, as the prosecutor refers to the complainant was a small tiny innocent pretty young girl. At the time of the trial the Court had an opportunity to see what she looks like. She walked in and stood there where the Crown's counsel was and I distinctly recalled that she was tiny, frail beautiful little girl. What was done to her is as despicable as ever can be done. When he gave his evidence the medical doctor who treated her afterwards told the Court of the stitches that he had to insert in her genitals to try and repair the

damage. Various parts of her private parts were ruptured and torn open through the deed that was done. The girl, before her mother returned, was washed by you but when the mother returned she noticed blood on her private part. Her sister who returned earlier also saw it. Perhaps it was possible to wash away the blood, perhaps it was possible to try and stitch up what was torn but the mental anguish and the cruelty of what you did to her is something that will remain with her, it won't be washed away. Whatever kind of sentence the Court will impose, there is no way that that sentence can make undone what you did to the girl. Lungile was three years of age at the time and a young girl of three years is so small, so impressionable, so tiny, so fragile, to be exposed to such horrible things. The community of Swaziland desperately needs to be protected from such evil doings. The Court is not aware of your HIV status so therefore it does not come into play but it is well known that in Swaziland prevalence of HIV is the highest in the world and that close to half of the population is infected, which statistically makes it very dangerous for a young girl like the complainant to have intercourse with a grown up man. It will be a gross failure of justice if this Court were to overemphasise your own personal circumstances and impose a sentence that will enable you to return to society very soon where other vulnerable girls are also still available. There is no chance of the Court considering a fine or a fully or a partially suspended sentence. It is also not viable to consider to let you out under the supervision of the Department of Correctional Services to keep an eye over you while you return to society. There is also no prospect of the Court considering something like ordering you to return to society and perform some service for the benefit of the community. At the time the girl was left under your care by her mother she took a chance and you took your chance. The further aspect is that the girl was very badly injured, severely injured, and that she was abused by a person who was supposed to protect her from such evil. The Court will consider that you have been in custody since the time of the commission of the offence and will order that that part which you have already stayed in prison be taken into consideration by ordering that your sentence be backdated to that date. In our neighbouring country the minimum sentence that we would be looking at today is 15 years, or more, Swaziland is somewhat less. But the Court is not here to

merely impose minimum sentences and rubber stamp the process in that way. I have considered carefully the duration of your sentence, considering also at the same time your circumstances and other factors and also the interest of the community and especially what was done to the young Lungelo Gumbi.

It is my considered view that the correct sentence to impose today is one of 18 years imprisonment which I am ordering to be backdated in terms of Section 318 of the Criminal Procedure and Evidence Act, to be deemed to have commenced on the 18<sup>th</sup> day of April, 2003. You have already so indicated during your evidence in mitigation that you are in disagreement with the judgment of this Court and I explained to you that if you wish to note an appeal against either the judgment or the sentence, if you think that the Court made a mistake in its factual findings or that the sentence is shockingly high or something to that effect then you may within 21 days from today file a notice of appeal with the Registrar of the High Court and you may then have your appeal processed for the Court of Appeal to consider the merits of the appeal and when you do so, you again still have the right to appoint an attorney or an Advocate of the High Court to assist you in both preparing your appeal as well as arguing your appeal if that is the route you wish to follow.

JACOBUS P. ANNNDALE

ACTING CHIEF JUSTICE