

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 222/06

In the matter between:

REX

VS

MFANUFIKILE BABAZI MAN ANA

CORAM

FOR THE CROWN FOR

THE ACCUSED

MAMBAJ Q.

ZWANE IN

PERSON

JUDGEMENT

11th JULY 2007

[1] On Thursday 8th July, 2004, the complainant, Temhlanga Hlophe, affectionately referred to by her peers and grandmother (PW5) as Temree, left in the morning like many children of her age and went to her school at Lozitha Primary School. She was ten (10) years old then and was in grade 4. She was twelve (12) years old when she testified before me. In the afternoon on her way back home from school, she was in the company of some of her school mates, who however, separated from her and went to their respective destinations before she reached the gate to her home. One of the children who had walked with her from school was

Ayanda Hlophe (PW2) her brother who was a kindergarten pupil at the local creche. He lived with Temhlanga in the same homestead but had separated from her on the way from school and walked with other boys on a route different from that taken by Temhlanga.

[2] Just before she reached the gate to her homestead, the complainant met the accused who was from the complainant's homestead. According to the complainant, after saying a few words to her, the accused slapped her in the face, felled her, undressed her and raped her in the tall grass. When Ayanda came by, the Accused temporarily stopped raping her until Ayanda had left the scene. I pause here with the narrative to note that Temhlanga does not say whether Ayanda saw her with the Accused in the tall grass or said anything to them. During her rape the complainant said it did not occurred to her that she should shout for help. After the rape, the complainant left the scene and proceeded home, crying and reported the incident to Sandile her uncle. The matter was also reported to Ndumiso Dlamini, who testified as PW3 in this trial. Sandile was not called as a witness.

[3] The complainant told the court that she did not consent to what the Accused did to her. She testified further that the Accused had previously raped her in one of the houses at her home on another occasion and she had not reported the incident to anyone because she was afraid to do so. She said she was able to report about the incident under consideration because she, together with her school mates, had been given lessons and counseling about such incidents at her school, subsequent to her first rape encounter.

[4] PW3 advised the complainant to await the return home of the seniors in the family to whom the matter should be reported as it was too serious and the accused was a family relative. Later that evening the matter was

reported by the complainant to PW5 Jujwase Maseko, her grandmother who then summoned the family of the accused and her own family to a meeting at her home to deliberate on the issue.

[5] Amongst those present in the meeting were the following: Ford Dlodlu PW2), the mother of the accused, Rose Kate Mkhonta (DW3), the accused, PW5 and the complainant and her mother, who however, died before the start of the trial. The complainant told the meeting that the Accused had raped her outside the gate to her home that afternoon. In response **to** this, according to the complainant and PW5, the accused denied having raped the complainant but said that he had only inserted a finger into her vagina.

(6) On the next day the complainant was accompanied to the offices of the Swaziland Action Group Against Abuse who, after the case had been reported to them advised that it be reported to the police. Subsequent to that the complainant was referred to the Raleigh Fitkin Memorial Hospital for medical examination. The Accused was then charged with the rape of the complainant. The medical doctor who examined the complainant was not subpoenaed to give evidence as at the time of the trial she was resident in the Republic of South Africa and nothing had been done to procure her attendance. I ruled that, another Doctor, Doctor Bokiki. from the same hospital could not hand in the medical report as he was not the author thereof and the contents thereof were to him hearsay and thus inadmissible.

JT PW2, Ayanda HQ: pre was about 8 years old at-the time when he gave evidence. He testified under admotionment after the court ascertained that because of his age and want of religious knowledge or

understanding he was incapable of understanding the nature

significance, meaning and import of the customary religious oath administered in a court of law. ^

[8] Ayanda testified that on the relevant afternoon he had seen the Accused "sitting down and shaking" in the tall grass near the gate to his(Ayanda's) home. he did not see whether or not the Accused was alone there but he had been "surprised" by what the Accused was doing and had proceeded home and reported this at home. Later the complainant came home crying and reported to PW3 that she had just been raped by the Accused outside the gate.

[9] PW3 confirmed the rape report-to him by the complainant and added that he had gone to meet her within the homestead after it had been reported to him that she was crying. he confirmed further that the Accused had been to his homestead that afternoon visiting SANDILE. This fact is, of course common cause as the Accused admitted being there that day and for the said purpose. Accused also admitted having met the complainant near the gate to her home but said he had merely said "eita to her. which I am advised is a local corruption of "Hi there," meaning hello!

110] The 6th crown -witness. Constable Thembinkosi Fakudze confirmed that the complainant had reported to him on the 9th day of July 2004 that she had been raped the previous day by the Accused on her way home from school. After the close of the case for the prosecution I refused an application by the accused for his discharge and ruled that there was evidence implicating him in the commission of the offence. This evidence was the testimony of the complainant who knew him very well and the evidence of pw3" Ndumiso Dlamini who testified that indeed the Accused

had been at the complainant's home that day visiting SANDILE. There was also the evidence of Ayanda **wbj}** had seen the accused "sitting and shaking" in the tall grass near the gate under circumstances that "surprised" Ayanda. Added to this was the alleged admission made by the Accused during the deliberations that followed the reported rape, that he had merely inserted one of his fingers into the complainant's vagina.

[12] In his defence, the Accused gave evidence on oath and denied having raped the complainant. He also denied having admitted inserting a finger into the complainant's vagina. He admitted having visited Sandile at the complainant's home that afternoon and also having met the complainant at the gate. He said he had only greeted her by saying 'eita,' - How is it? And had proceeded on his way home. He said the rape charge was a conspiracy by complainant and her family and the people in his neighborhood to have him in jail because these people were jealous of his achievements in the area.

[13] The Accused also called his brother Ford Dlodlu and his mother Rose Kate Mkhonta to give evidence in support of his case. Both witnesses had been, in court, almost throughout the duration of the Crown case and the evidence in chief of the accused. I allowed them to give evidence and held that their evidence was admissible and because they had been in court following the proceedings as stated above it was just a matter of what weight the court had to attach to their evidence. See in this regard *the* case of **R v NHLABATSI, 1979-1981 SLR 338**.

both witnesses told the court that PW5 had reported to them that it was pW2 who had reported home that the Accused was raping the complainant near the gate. They both denied that the Accused had conceded having inserted a finger into the complainant's vagina.

[15] The 4th Defence witness, Thandazile Malindzisa gave evidence and stated that she had walked home together with the complainant from school on the day in question. The complainant had left her at her home and proceeded to her home. She further confirmed, what is, as stated above, common cause that she saw the Accused leave the complainant's home which was about one kilometre away from her home. This was after the complainant had passed through the home of this witness. She said the complainant and the accused travelled on the same route, but in opposite directions to their respective homes and must have met along the way.

J15] An evaluation of the case :cr the crown reveals that:

(aj On the 8th July 2004 the complainant met the Accused next to the gate to her homestead, (b) The Accused was well known to the complainant and Ayanda. (c» The complainant alleges that when she met the Accused he slapped her in the face and had sexual intercourse with her in the tall grass near the gate, (en She did not consent to the sexual intercourse. (en At the relevant time, Ayanda saw the Accused in. the tall grass, near the gate "sitting down and shaking". This that he decided to report this to Ndumiso.

If When she -aras being raped, the complainant saw Ayanda and was of the view that the Accused saw Ayanda as well.

(g) Immediately after Ay area's arrival home, the complainant came home crying and reported that she had been raped by the Accused in the tall grass outside the gate.the The accused denied havig raped the complainant but admitted having inserted his finger into her vagdna.

- (i) The complainant was not inspected or examined by any one in her genitals immediately after the rape and was only taken to be examined by a Medical Doctor on the next day. The doctor's report in this regard does not form part of the evidence in this case.

[17] In cross examining the complainant the Accused did not specifically deny having raped her. His questions were all centred on peripheral issues such as the exact cheek on which he had allegedly slapped her, the cloths he wore on that occasion and whether she had made her first report to Ndumiso or Sandile. The accused did not either in his own evidence or in cross examining Ayanda, deny that, he was on that relevant afternoon seated and shaking in the tall grass outside the gate to the complainant's home.

[18] Accused submitted in evidence and in argument that he is abundantly endowed with a penis/manhood that would in no way, when erect I presume, be able to penetrate a girl as young as the complainant. He testified further that on the 9th July just a day after the alleged rape, he had seen the complainant playing with a skipping rope and .showed no signs of having been recendy and forcefully raped. [i&] A total of four τ,witnesses, including the accused, place the accused, at the relevant time at the gate to the complainant's home. Two of thesewitnesses: the complainant and Ayanda place him in the tall grass. He has not denied having been in that tall grass in the position and circumstances described by Ayanda. The complainant was unable to say with any degree of certainty what the Accused was wearing during the race ordeal. This deficiency in her evidence, if it be characterized as such, is, **in** my view of very Little significance in the totality of the evidence in this case The cloths would have been in other

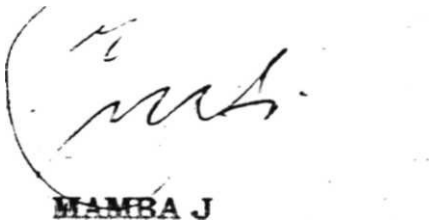
circumstances, a means of identifying the rapist, but in the present case the culprit was wellknown to the complainant. The accused himself admits having been with the complainant at the relevant place at the relevant time.

[20]The evidence of the complainant, Ayanda and PW5 is credible and straight forward. The Accused did not dispute it under cross examination and his evidence in defence was a bare and feeble denial. I find it as a fact that he also admitted having sexually assaulted the complainant by inserting a finger into her vagina. Whether or not this admission was factually true is not of the moment. In the circumstances of this case, I cannot attach any weight at all to the evidence of Ford Dlodlu and Kate Mkhonta. Ford is the Accused's brother and Kate is his mother. They were both seated in court almost throughout the trial until when the accused intimated in his evidence in chief that he shall call them to testify in support of his case.

[21] The complainant was only ten years old when she was allegedly raped. She was not sexually active. She testified that the accused undressed her and removed her panties before raping her. Because of her sexual inexperience and age and the absence of any other evidence suggesting penial penetration or any penetration at all by the accused, I am not satisfied beyond a reasonable doubt that the accused raped her. Her evidence is clear, however, that when the accused molested her, she felt pain in her vagina and cried. Whatever object the accused used to hurt her, his acts of removing her pair of panties and fiddling with her genitalia constituted an indecent assault of a serious nature on her and I accordingly found him guilty of such offence.

[22] In sentencing him to a term of 4 years of imprisonment, I took into account that:

1. The complainant was a young girl of just ten years old.
2. The accused was a neighbour and relative of the complainant and he was a common visitor at the home of the complainant and this factor established a certain bond and trust between him and the complainant. By indecently assaulting her he betrayed this trust.
3. The accused showed no remorse at all
4. The accused had spent about eight months in custody before being released on bail.
5. Sexual assault cases, especially on young and defenseless women, are terrifyingly too high in this country and society needs to be protected from sex



A handwritten signature in black ink is written over a circular stamp. The signature appears to be 'MAMBA J'. Below the signature, the text 'MAMBA J' is printed in a bold, sans-serif font.