# IN THE HIGH COURT OF SWAZILAND

**HELD AT MBABANE**

**CRIMINALCASE NO. 191/2009**

**In the matter between:**

**REX**

**VS**

**FRIDAY MAGAGULA**

**CORAM: OTA, J**

**FOR THE CROWN: MS. L. HLOPHE**

**ACCUSED: IN PERSON**

## JUDGMENT

**OTA, J**

[1] The Accused person was arraigned before the Magistrates Court charged with the crime of Rape. The crown alleged that upon or about the month 2009 and at or near Mavula area in the Hhohho region, the said Accused person, an adult male did intentionally have unlawful sexual intercourse with one **A M** a female who was at that time 6

years and incapable in law of consenting to sexual intercourse and did thereby commit the said crime of rape.

[2] The crown further alleged that the Rape was accompanied by aggravating circumstances as envisaged by Section 185 *bis* of the Criminal Procedure and Evidence Act 67/1938 as amended (CP & E) in that

1) At the commission of the offence the said Accused did not use a condom thereby putting the Complainant at risk of contracting sexually transmitted diseases and infections.

2) The Accused has broken the relationship of trust in that he is the complainant's parental uncle.

[3] The Accused pleaded not guilty to the charge. Thereafter a trial was conducted in which the crown paraded a total of 5 witnesses in proof of its case. At the close of the crown's case the Accused testified on oath and called no witnesses. In it's judgment the Court a quo found the Accused guilty of rape with aggravating factors, and convicted him

accordingly, thereafter the Court remitted this case to the High Court for sentencing in terms of Section 292 (1) of the CP & E.

[4] Let me straight away state here, that I find an irregularity in the charge sheet in that the crown failed to stipulate therein the day or month in the year 2009 in which the offence was committed as is required by law. However, since it is clear from the evidence tendered a quo, a fact which is also accepted by the Accused in his defence, that this crime took place in April 2009, I will treat this irregularity as insufficient to vitiate the entire proceedings a quo.

[5] I however find a need to admonish that the charge sheet constitutes notice to the Accused person of the case he is called upon by the crown to answer. The purpose of the charge sheet is to identify and isolate the particulars of the offence allegedly committed by the Accused. The prosecution of the Accused for the alleged offence will be done strictly on the basis of the particulars of the offence as identified and isolated in the charge. Therefore the charge should be drawn up

with the greatest legal skill, accuracy, elegance and expertise which the crown can muster.

[6] The foregoing said and done, I deem it expedient to point out at this juncture before proceeding to sentence, that from the record I am convinced that the crown indeed proved its case beyond a reasonable doubt before the Court a quo. I say this because the identity of the Accused is not in issue. The Complainant positively identified the Accused who is her uncle and with whom she resided in the same homestead at the material time of this incidence as being her attacker. I notice that the Accused failed to deny this fact either in his cross examination of the Complainant or in his defence.

[7] Furthermore, the fact of sexual intercourse was also proved beyond a reasonable doubt. The Complainants evidence was that the Accused inserted his penis into her vagina and that he did not use a condom. This fact is corroborated by the evidence of PW5, **Dr Eddmore S. Mafeka** the medical doctor who examined the Complainant at the

Emkhuzweni Health Centre after the rape incidence, as well as ext A the medical report of said medical examination which demonstrates the following " *Evidence of recent penetration and sexually transmitted infection noted*". Ext A also shows that the Complainants **Vestibule and Fourchettee** were bruised and that her hymen was bruised and torn at 4 x 7 o'clock. To my mind ext A is proof beyond a reasonable doubt that the Accused indeed had sexual intercourse with the Complainant and without a condom on the day in question, thus the presence of the sexually transmitted infection. The lack of consent was also proved beyond a reasonable doubt before the Court a quo. It is not disputed that the Complainant was only 6 years old when the rape incidence occurred. She was thus in law incapable of consenting to sexual intercourse. I say this because it is the position of The Roman Dutch Common Law that a child below the age of 12 years is incapable of consenting to sexual intercourse and even if she consents, sexual intercourse with her is Rape.

[8] It is thus in my view beyond dispute that the Court a quo properly convicted the Accused of the offence as charged. I therefore confirm the conviction by that Court.

**[9] JUDGMENT ON SENTENCE**

> In mitigation before this Court on the 10th of August 2011, the Accused begged for leniency. He said he is the bread winner of his family.

[10] In Response the crown called for a punitive sentence on the grounds that the Complainant was a child of very tender age when the offence was committed and there is a need to curb the prevalence of this offence.

[11] In passing sentence on you I am enjoined by Law to consider your personal circumstances, the interest of the society, the seriousness of the offence and the peculiar circumstances of the case. I have thus considered the fact that you are a first offender and that you are

remorseful. Having considered your personal circumstances, I must however point out to you that the offence you committed is a very serious one. The seriousness of this offence is heightened by it's prevalence in the Kingdom. These factors engendered the Supreme Court to demonstrate its abhorrence for this foul offence by coming out with the appropriate range of sentence for same, as between 11 and 18 years, in the case of **Mgubane Magagula V Rex Appeal No. 32/2010.** It is therefore clear that the mood of the Courts is geared in the direction of Curbing the Prevalence of this offence.

[12] In casu, Friday Magagula, by your barbaric activity, you violated this innocent and defenceless 6 year old. You violated her privacy and bodily integrity thereby debasing her womanhood with impunity. You violated the trust the Complainant reposed in you as her uncle. You failed to use a condom in your illicit enterprise and thus infected the Complainant with a sexually transmitted disease. You did not do well at all, **Friday Magagula.** As an older male relative of the Complainant's your duty was to protect her and not to expose her to this sort of

victimization. Your cruel activity upon the complainant was thus shameful, unacceptable and an outrage to put it in very mild terms.

[13] In as much as I have considered that you are a first offender, I must however stress that the incidence of sexual assaults on the girl child is of such a prevalence in The Kingdom that the need to discourage it is of paramouncy. The heightened activities of pedophiles like you must be curbed in the interest of the future and stability of the nation. It is this need that engendered Ramodibedi JA (as he then was) to remark as follows in the case of **Sam Dupoint V Rex Criminal Appeal No. 4/08, paragraph 15.**

> *" 15 It remains for me to emphasis that the Courts have a fundamental duty to protect society against the scourge of sexual assaults perpetrated against young children in particular. As this Court pointed out in Makwakwa's case (supra) the Courts should mark their abhorrence of the prevalent sexual attacks on young children, as a deterrent. This, they can do by imposing appropriately stiff sentences. Indeed in* ***Moses Gija Dlamini V Rex (supra),*** *this Court had no difficulty in confirming a sentence of 20 years imprisonment for the rape of a nine (9) year old*

*girl. Sexual offenders against young children have, therefore, sufficiently been warned*".

[14] Similarly in **Mgubane Magagula V The King (supra)** the Supreme Court in paragraph 20 thereof, recommended that the rape of a child should be treated as a particularly serious aggravating factor, warranting a sentence at or even above the upper echelons of the range.

[15] In casu, even though the age of the Complainant was not alleged on the charge as an aggravating factor, I am still enjoined to take it into consideration in sentencing. I say this because it is a trite principle of law that a Court in sentencing must weigh in the balance all aggravating and mitigating factors, in the case.

[16] In conclusion, having carefully considered the triad, I am convinced that a sentence of 18 years is condign of the offence committed, to serve as a deterent to others. Sentence back dated to

the 7th of May 2009, date Accused was arrested. It is so ordered. Right of Appeal and review explained.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS**

**THE 12th DAY OF ...August. 2011**

**OTA J.**

**JUDGE OF THE HIGH COURT**