



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Criminal Case No: 165/11

In the matter between

REX

V

NDUKUZEMPI MANDLENKOSI MLOTSA

Neutral citation: *Rex v Ndukuzempi Mandlenkhosi Mlotsa (165/11)*  
[2012] SZHC 184 (4 September 2012)

**Coram:** OTA J.

**Heard:** 27<sup>th</sup> August 2012

**Delivered:** 4<sup>th</sup> September 2012

**Summary:** Aggravated rape - victim 11 years old-accused  
sentenced to 18 years

**OTA J,**

[1] The accused person **NDUKUZEMPI MANDLENKOSI MLOTSA** stands charged with one count of the crime of rape.

The indictment alleged the following:-

[2] *“In that upon or about the month of November, 2010 and at or near Mdumezulu area in the Lubombo Region, the said accused did intentionally have unlawful sexual intercourse with **PHUMAPHI DLAMINI**, a female minor aged six (6) years old who in law is incapable of consenting to sexual intercourse and did thereby commit the crime of Rape*

[3] **TAKE NOTICE FURTHER** that this offence is accompanied by aggravating factors as envisaged under section 185 (bis) of the Criminal Procedure and Evidence Act 67/1938, as amended in that:

(i) *The victim was a minor of tender age*

- (ii) *The accused did not use a condom thus exposing the victim to the risk of contracting sexually transmitted infections including HIV/AIDS*
- (iii) *The accused stood in loco-parentis relationship with the complainant*
- (iv) *The accused inflicted a lifelong trauma on the victim*
- (v) *The accused broke the victim's virginity"*

[4] When the accused person was arraigned before this court on the 27<sup>th</sup> of August 2012, his Constitutional right to be represented by a counsel of his choice was duly explained to him. The accused however elected to conduct his own defence. Thereafter, the charge was put and explained to the accused in siSwati. The accused verified that he understood the charge and that he was pleading guilty.

[5] Learned Crown Counsel **Ms. N Masuku** then informed the court that the crown was accepting the accused's plea of guilty

and would be dispensing with further evidence. That the parties had prepared and signed a statement of agreed facts which the crown wished to tender in court as exhibit, together with the medical report of the medical examination conducted on the complainant. Learned Crown counsel also informed the court that the crown wished to submit the birth certificate of the complainant as exhibit.

[6] Thereafter, the contents of the statement of agreed facts, medical certificate and complainant's birth certificate were read and explained to the accused in siSwati.

[7] The accused verified that he understood the content of the statement of agreed facts and that it was a true reflection of the facts of this case. The accused also verified that he understood the content of the medical certificate and complainant's birth certificate and that he had no objections to these documents being admitted in evidence. The statement of agreed facts, medical certificate and complainant's birth certificate were

thereafter admitted in evidence by consent and marked exhibits A,B and C respectively.

[8] It is opposite for me at this stage to detail the content of the statement of agreed facts.

It states as follows:

### **“STATEMENT OF AGREED FACTS**

#### **A**

*Ndukuzempi Mandlenkosi Mlotsa (hereinafter referred to as the accused) stands charged with the offence of RAPE. He has pleaded guilty to the charge, which plea the Crown accepts.*

*It is agreed between the Crown and the accused as follows-;*

#### **B**

*In the month of November, 2010 at or near Mdumezulu area in the Lubombo Region, the complainant (Phumaphi Dlamini) was sent by her brother, Petros to go to the homestead of the accused to ask for sugar. The complainant found the accused*

*at home. The accused grabbed the complainant to his room where he had sexual intercourse with her. After he had finished he gave her E 5.00 and he did not give her the sugar.*

**C**

*The accused had sexual intercourse with the complainant on another occasion, when the complainant was sent by her father to the accused to give him his jersey. The accused further had sexual intercourse with the complainant on the day the complainant was sent by her father to ask tobacco from the accused.*

**D**

*The complainant reported this matter to PW2, Nondumiso Mbonane.*

**E**

*On the 24th November 2010 the complainant was examined by PW4 (Dr.Asha Varghese) at Good Shepherd Hospital who reached the opinion that “hymen not intact- vagina 1 finger – sexually abused several times.”*

**F**

*The accused was arrested by the police on the 25th November, 2010 and has been in custody .The accused is remorseful of his actions.*

## **G**

*Accused more specifically admits that;*

- i. The complainant Phumaphi Dlamini was a minor aged 6 years*
- ii. He intentionally had unlawful sexual intercourse with the complainant who in law is incapable of consenting to sexual intercourse*
- iii. By not using a condom , the accused exposed the complainant to the risk of contracting sexually transmitted infections and HIV / AIDS*
- iv. He stood in loco-parentis relationship with the complainant*
- v. He inflicted lifelong trauma on the complainant*
- vi. He broke the victim's virginity*

## **H**

***The medical examination report ‘R.S.P 88’ and the complainant’s birth certificate will be produced as evidence. ”***

[9] Having carefully considered the statement of agreed facts, I am satisfied that it exhibits sufficient particulars of the offence committed for the court to dispense with the necessity of further evidence in terms of section 238 of the CP&E, I am firmly convinced that the statement of agreed facts and the medical certificate constitute proof beyond reasonable doubt that the accused committed the offence.

[10] I say this because not only did the accused plead guilty to the offence as charged, but in the statement of agreed facts, the accused expressly admitted that he had sexual intercourse on 3 different occasions with the complainant a minor. That he did not use a condom thus exposing the complainant to the risk of contracting sexually transmitted infections and HIV/AIDS. That he stood in *loco-parentis* relationship with the complainant.



That he broke the complainant's virginity and inflicted a lifelong trauma on her.

[11] Furthermore, the fact of sexual intercourse was established beyond reasonable doubt by exhibit B, the medical certificate which shows the opinion of **Dr. Asha Varghese** who conducted the medical examination on Complainant, as **“hymen not intact-vagina 1 finger-sexually abused several times”**. These findings together with the statement of agreed facts show proof beyond reasonable doubt that the accused did have sexual intercourse with the complainant.

[12] Also the fact that the complainant did not consent to the said sexual intercourse cannot be gainsaid. This is because exhibit C, complainant's birth certificate shows that the complainant was born on 11<sup>th</sup> November 1999.

[13] Therefore, as at the time the offence was committed in November 2010 the complainant was 11 years old. It is the

position of the Roman Dutch Common Law which applies in this jurisdiction, that a girl below the age of 12 years is incapable of consenting to sexual intercourse and even if she consents, sexual intercourse with her is rape. Therefore, the complainant who was only 11 years at the material time this offence was committed was incapable in law of consenting to sexual intercourse. Thus the sexual intercourse which the accused had with the complainant is rape.

**See R v Z 1959 (1) SA 239, R v Mfanzile Mphicile Mndzebele Criminal case no 213/2007, Rex v Bennet Tembe Criminal case no 22/2011, Rex v Mandla Maxwell Gadlela Criminal case no 324/2011.**

[14] In coming to the foregoing conclusions, I am mindful of the fact that the indictment states that the complainant was 6 years old when the offence was committed. This is obviously an error in the face of the documentary evidence exhibit C, the complainant's birth certificate, which shows that she was 11 years old at the time the offence was committed. This is

however not an irregularity capable of vitiating these proceedings. This is because, both a 6 year old girl and an 11 year old girl are incapable in law of consenting to sexual intercourse. The accused to my mind has thus suffered no prejudice by the age of 6 years indicated on the charge sheet.

[15] I however deem it expedient to stress here, that it is important that the crown employs the greatest skill, care, accuracy and elegance in drafting of charges, since the charge sheet constitutes notice to the accused of the offence he is called upon to answer.

[16] Finally, the identity of the accused is not in issue. He pleaded guilty to the charge.

[17] It is by reason of the totality of the foregoing, that I find that the crown has proved its case beyond reasonable doubt. The accused is found guilty and accordingly convicted of the offence of rape as charged.

## **JUDGMENT ON SENTENCE**

[18] In mitigation the accused asked for leniency. He said he does not know how the demon which has affected the whole country got into him. Accused prayed that God forgives him.

[19] **Ms Masuku** for her part called for a stiff sentence. She also told the court that the Accused is a first offender.

[20] **Now, Ndukuzempi Mandlenkhosi Mlotsa**, in passing sentence on you, the law mandates me to weigh the triad. That is, the seriousness of the offence, the interest of the society, your own personal interest and the peculiar facts and circumstances of the case. These factors are encapsulated in the words of **Moore JA**, when considering the sentence passed in the case of **Mfanasibili Gule v The King, Criminal Appeal case no 2/2011**, when he said:

*“(i) the circumstances of the offender*

- (ii) *The public interest*
- (iii) *The mitigating and aggravating factors applicable to the offence arising out of all materials before the court*
- (iv) *The law and practice relating to sentencing in Swaziland*
- (v) *The sentencing guidelines, norms and trends obtaining in Contemporary Swaziland as disclosed in the most recent decisions and pronouncement of the Supreme Court and where appropriate those of the High Court”*

[21] I have thus considered your personal situation which I have paraded above. I pay particular heed to the fact that you are remorseful. You pleaded guilty and you are a first offender. I must say that you have my sympathy.

[22] **Ndukuzempi Mandlenkosi Mlotsa**, your personal circumstances notwithstanding, I want you to know that the offence you committed is a heinous one.

[23] The seriousness of your offence is compounded by the prevalent activities of pedophiles like you in the kingdom, which is fast turning the lives of the girl child into a nightmare and ought to be seriously deprecated, and with grave urgency too.

[24] It was in the bid to discourage this sort of aggravated rape that the Supreme Court in the case of **Mgubane Magagula v The King, Criminal Appeal No32/2010**, evolved “The Appropriate Range” of sentence for this offence as 11 to 18 years, thus taking the lowest range of the sentence beyond the 9 years minimum mandatory sentence prescribed by parliament in terms of section 185(1) bis of the CP&E.

[25] The Supreme court also recommended in **Mgubane Magagula (supra) at paragraph 20** , 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. This demonstrates the strict and uncompromising mood of the courts and the society against child molestation.

[26] This mood is also embodied in the words of **Tebbutt JA** , in the case of **Sifiso Cornelius Ngcamphalala V The King , Appeal case no 34/ 2003** as follows:-

*“Rape is a crime of diabolical nature which offends the sensibilities of every normal decent human being more particularly where the victim is of such a tender age as the one in the present case. There has become a national crisis in this kingdom and instance of children of this age group being victims of rape, are on the rise. The courts have in such cases the responsibility to meet out stiff sentences which will send clear and unambiguous messages that society is disgusted by such behavior. The rape is a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. Women, more particularly small girls are entitled to protection of these rights”* see also the words of **Ramodibedi JA (as he then was) in Sam DuPont V Rex appeal no 4/ 08 at paragraph 15.**

[27] In casu, **Ndukuzempi Mandlenkosi Mlotsa**, your victim was an 11 year old innocent and defenceless child. A 63 year old man like you should know better. This child was young enough to be your granddaughter. By your ruthless activity you evaded her innocence, her virginity and I must point out, her most priced treasure. You gave her no choice, which every woman is entitled, to elect whom to surrender it to. Rather; you took it away with impunity. By so doing you debased her womanhood and self-worth.

[28] In your folly, you did not have the common sense to use a condom, thus exposing the complainant to the risk of sexually transmitted infections and HIV/AIDS. Your evil, barbaric and reprehensible activity has the dangerous potential of causing physical, emotional and psychological damage to the complainant for life.



[29] You also violated the trust which complainant reposed in you by reason of the fact that you stood in *loco parentis* relationship with her. You did not do well at all. Your privileged position in this respect demanded that you love, cherish and protect her and not to subject her to this sort of dehumanization.

[30] It remains for me to emphasise, that the girl child of this kingdom, is entitled to her life and freedom from inhuman and degrading treatment. She is entitled to her liberty and play, free from molestations. She is a human being whose fundamental rights are also guaranteed by the Constitution Act, 2005. She is not just an object that can be captured and harassed upon the whim and caprice of any male in the Kingdom. That is why indecent and villainous males who orchestrate this sort of barbarism upon the girl child must be discouraged as a matter of paramountcy, to sanitize the society.

[31] **Ndukuzempi Mandlenkosi Mlotsa**, having therefore carefully considered the triad, I come to the inexorable conclusion that a

sentence of 18 years is fitting of the offence you committed, to serve as a deterrent to others.

[32] This sentence is backdated to the 25th of November, 2010, date of the Accused's arrest and incarceration.

[33] It is so ordered. Right of Appeal and review explained

For the Crown: N. Masuku

The Accused in Person

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

**THE .....DAY OF.....2012**

**OTA J.**

**JUDGE OF THE HIGH COURT**