



**IN THE HIGH COURT OF SWAZILAND**  
**JUDGMENT**

**Criminal Case No. 45/10**

**THE KING**

**V**

**SIFISO MABUZA**

**ACCUSED**

**Neutral citation:** *The King vs Sifiso Mabuza (45/10) 10 October 2013*  
[SZHC] 221

**Coram:** OTA J.

**Heard:** 4<sup>th</sup> October 2013

**Delivered:** 10<sup>th</sup> October 2013

**Summary:** **Aggravated rape of two minor females aged 2 years and 4 years respectively; accused opting to tender no evidence in his defence; uncontroverted evidence of Crown witnesses accepted. Accused convicted.**

**OTA J.**

[1] The Accused Sifiso Mabuza is charged as follows:-

**“COUNT 1**

**The Accused is guilty of the crime of Rape.**

**In that upon or about the 22<sup>nd</sup> November 2008 and at or near Mabiya area in the Lubombo Region, the said Accused did intentionally have unlawful sexual intercourse with Thandolwethu Simelane, a female minor four (4) years old, who in law is incapable of consenting to sexual intercourse, and did thereby commit the crime of Rape.**

**TAKE NOTICE FURTHER that the 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**

- (a) The complainant was a minor of tender age.**
- (b) Prior to the sexual abuse, the complainant was sexually inactive.**
- (c) The accused exposed the complainant to the risk of sexually transmitted infections and HIV / AIDS as he did not use a condom.**

**COUNT 2**

**The Accused is guilty of the crime of Rape**

**In that upon or about the 22<sup>nd</sup> November, 2008 and or near Mabiya area in the Lubombo Region, the said Accused did have unlawful sexual intercourse with Nongcebo Nxumalo, a female minor of 2 years who in law is incapable of consenting to sexual intercourse, and did thereby commit the crime of Rape.**

**TAKE NOTICE FURTHER that the 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:-**

- (a) The complainant was a minor of tender age.**
- (b) Prior to the sexual abuse, the complainant was sexually inactive.**
- (c) The accused exposed the complainant to the risk of sexually transmitted infections and HIV/AIDS as he did not use a condom.”**

[2] The Accused pleaded not guilty to the foregoing counts of offences. Whereupon the crown led the evidence of four (4) witnesses in proof of its case.

[3] PW1 was Edmond Simbarashi Maffrika, a medical practitioner. He told the Court that he presently practices as a medical practitioner at Mkhuzweni health Centre. He was stationed at this Health Centre on the 23<sup>rd</sup> of November 2008 when the complainants were brought to the health centre and he examined them. PW1 told the Court that in his examination of the genital of Nongcebo Nxumalo complainant in Count 2, who was then 2 years old, he noticed that her vestibule and fourchette were bruised and that her hymen was torn at positions 4 and 7 o'clock. PW1 came to the

conclusion after the examination which was painful, that vaginal penetration had been effected and that the penetration was recent judging by the bruises in the complainant's genital. PW1 told the Court that he prepared a medical report in respect of Nongcebo Nxumalo's medical examination, which medical report was admitted in evidence as exhibit A.

[4] PW1 further told the Court that on the same day he also examined Thandolwethu Simelane (PW2), complainant in Count 1, who was then 4 years old. He told the Court that upon examining PW2's genital he discovered that her labia, vestibule and fourchette were bruised and that her hymen was torn at 4,5 and 8 o'clock. The examination was painful. PW1 told the Court that he came to the conclusion that vaginal penetration had been effected and the penetration was a recent event judging by the bruises in PW2's genital. PW1 prepared a medical report with respect to PW2's medical examination, which medical report was admitted in evidence as exhibit B.

[5] PW2, Thandolwethu Simelane gave evidence with the assistance of an intermediary who is qualified as such. This procedure is in terms of section

223 *bis* of the CP&E and was in recognition of her very young age of 9 years when she testified.

[6] PW2 was duly admonished to tell the truth after the Court ascertained her level of comprehension as well as her understanding of the importance of telling the truth.

[7] PW2 told the Court that she was raped by the Accused in her grandmother's house at Mabiya. PW2 said she was playing with Nongcebo Nxumalo inside the house whilst her mother was drying out clothes by the drying lines and the Accused started by raping her and then he followed by raping Nongcebo. In describing what she meant by that they were raped, PW2 told the Court that Accused asked her and Nongcebo to take off their clothes. After that, Accused took his penis and put it into her vagina. When the Accused finished with her he repeated what he had done to her to Nongcebo.

[8] PW2 told the Court that after that her mother came and took them to their grandmother and reported to their grandmother that they had been raped.

The police were called and they were taken to the hospital where they were examined by a doctor.

[9] PW2 told the Court that she is in grade four and one of the subjects she is taught in school is health issues, consequently, she knows what a condom is. That the Accused did not put on a condom when he raped her and Nongcebo Nxumalo. PW2 positively identified the Accused as being the one who raped her by pointing at him in the dock.

[10] PW3 was Ntsetselelo Nxumalo PW2's mother. She told the Court that PW2 was born on the 31<sup>st</sup> of March 2004, and that she knows Nongcebo Nxumalo who is her brother's daughter. That Nongcebo was born on the 14<sup>th</sup> of June 2006.

[11] PW3 further told the Court that she knows the Accused. The Accused was working at her parental homestead at Mabiya as a herdboys and by the time of this incident on the 22<sup>nd</sup> of November 2008, the Accused had been

working at her parental homestead for almost one year. PW3 positively identified the Accused by pointing at him in the dock.

[12] PW3 told the Court that on the day of the incident she was on the verandah of the main house washing her clothes, whilst the complainants were in the randovel with the Accused. The two complainants were playing and taking turns to peep at PW3 through the window.

[13] After sometime PW3 decided to go and check on the complainants. When she got inside the randovel she found Accused lying face down and the two complainants standing there looking very scared. PW3 asked the complainants what happened and they told her nothing. She also asked the Accused what happened and he also told her nothing. PW3 then asked the complainants to go and play in the main house and she continued with her washing.

[14] It was further PW3's evidence that later in the evening whilst giving the children their bath, she noticed that PW2's underwear had fluids on it

which did not belong to a minor child. PW3 however said nothing and the children went to sleep.

[15] PW3 further told the Court that the following day, PW2 came and sat on her laps and then informed her that the Accused had sex with them the previous day. PW3 immediately took PW2 into the house and examined her genital where she found bruises. She reported the matter to her mother who also examined PW2's genital. PW3's brother with the community police mounted a search for the Accused. The Tshaneni Police Station was also called and the police came and took the complainants to the health centre where they were examined by a doctor.

[16] PW4 was 4237 Detective Constable George Dlamini of the Tshaneni Police Station. He was the investigating police officer. He told the Court that on the 23<sup>rd</sup> of November 2008 he received information that two children had been sexually molested at Mabiya. He received the two children aged 4 years and 2 years respectively from their mother and conveyed them to the Emkhuzweni Health Centre where they were examined by a doctor who thereafter, filled the RSP 88 form. PW4 told the Court that after the medical



examination he discovered that the children had indeed been sexually molested. From the clinic PW4 took the children back to the police station where he interviewed them and took their statements. They informed him that the person who sexually molested them is the person who was stationed with them at home herding cattle.

[17] PW4 told the Court that based on this information he left for Mabiya in the company of 1307 Detective Constable Nkambule. At Mabiya they found the suspect. They introduced themselves as police officers investigating a rape case where he is a suspect. Thereafter, they cautioned him in terms of the Judges rules. The Accused told them something which PW4 recorded in the RSP 218 form. Then they arrested the Accused and detained him in the police cells. PW4 positively identified the Accused as being the suspect be arrested in connection with this offence by pointing at the Accused in the dock.

[18] At the close of the Crown's case, the options open to the Accused were explained to him and the Accused opted to remain silent and rest his case on that of the Crown. The Accused also called no witnesses. Thereafter,

Learned Principal Crown Counsel Ms L. Hlophe addressed the Court urging for a conviction of the Accused on the Crown's case. The Accused again offered no reply to Ms Hlophe's submissions.

[19] Now, I find it imperative at this juncture to recount the overwhelming judicial consensus in establishing the offence of rape, which is that the Crown bears the onus to prove the following factors:-

- (a) The fact of sexual intercourse or indecent assault.
- (b) The lack of consent on the part of the complainant.
- (c) The identity of the Accused.

See **Rex v Mfanzile Mphicile Mndzebele Criminal Case No. 213/07.**

[20] Testing the totality of the evidence led by the Crown against the foregoing factors, I must say that indeed the Crown has established the essential elements of the offence of rape. The Accused failed to cross-examine any of the Crown witnesses in spite of the fact that his right to cross-examine all the witnesses and the essence of such cross-examination, was duly explained to him at each stage of the proceedings. The Accused person also chose not to

advance any evidence in his own defence and not to call any witnesses. I am thus inclined in the circumstances to accept the evidence of the Crown witnesses which I find consistent, credible, reliable and which has remained uncontroverted and unchallenged and is thus established.

[21] In accepting the evidence of all the Crown witnesses, I am mindful of the fact that PW2 who is the complainant in Count 1 was only 9 years old when she testified. The law requires that the evidence of such a witness should be treated with trepidation especially in view of the fact that she was the only eye witness to the alleged offence.

[22] Commenting on this issue in the case of **The King vs Bennet Tembe Criminal Trial 22/2011**, I said the following:-

**“I take cognizance of the pronouncement of Banda CJ in the case of Fana Msibi v Rex Criminal Appeal Case No. 7/2008, wherein his Lordship declared as follows:-**

**‘The complainant was a girl of 7 years when the trial began as well as when she gave evidence. The evidence of young children ought to be accepted with caution. It has been held, however, that Courts should not act upon any rigid rule that corroboration must always be present before a child’s evidence is accepted vide the case of Rex v**

**Manda (3) SA 158 and our local case of Roy Ndabazabantu Mabuza v Rex Criminal Appeal Case No. 35/2002”.**

[23] Consequently, I warned myself of PW2’s tender age as mandated by case law before I accepted her evidence based on the fact that she tendered her evidence with clarity, answering the questions posed in a forthright and unwavering manner. It was obvious to me that PW2 was not coached.

[24] Before recording her evidence, I first questioned PW2 to gauge her comprehension of why she was in Court and whether she understood the essence of telling the truth. PW2 told the Court that she goes to church and that her pastor told her that if she tells lies God will punish her. She also understood why she was in Court. She knew her age and also why she did not go to school on the day she came to testify.

[25] Furthermore, her evidence that the Accused had sexual intercourse with her found corroboration in the evidence of her mother PW3 who told the Court that upon being informed by PW2 that the Accused had sex with the two complainants, she examined PW2’s genital and found bruises there. PW3

also told the Court that when she bathed PW2 on the day the rape allegedly took place she found fluids on her underwear which did not belong to a minor.

[26] PW2's evidence of the fact that sexual intercourse did take place with regard to both complainants was further corroborated by the evidence of PW1, Dr Maffrika, who examined the two complainants on the 23<sup>rd</sup> of November 2008, a day after the offence. PW1 told the Court that he came to the conclusion after examining both complainants that vaginal penetration had recently occurred in both cases judging by the bruises he observed in the genitals of both complainants. This corroborates PW2's evidence that the Accused raped her by inserting his penis into her vagina and that after doing this to her, the Accused also did the same thing to Nongcebo Nxumalo. There is also uncontroverted evidence from PW2 that the Accused did not use a condom when he had sexual intercourse with both complainants. The fact of the sexual intercourse is further established by exhibits A and B which are the medical reports of Nongcebo and PW2 respectively, prepared by PW1 after the medical examination he conducted on them.

[27] Exhibit A the medical report of Nongcebo Nxumalo shows that her vestibule and fourchette were bruised and her hymen torn at 4 and 7 o'clock. The doctor's conclusion in exhibited A was **"Penetration effected"**

[28] Similarly, exhibit B which is PW2's medical report shows that her labia majora, vestibule and fourchette were bruised. Her hymen was torn at 4,5 and 8 o'clock. The doctor's conclusion was **"Penetration effected"**.

[29] In light of the totality of the foregoing, I come to the inexorable conclusion that the Crown indeed proved the fact of sexual intercourse in both counts beyond reasonable doubt see **South African Criminal Law and Procedure, volume 11 (2<sup>nd</sup> ed) page 440 by Hunt and Milton.**

[30] Furthermore, it is indisputable that both complainants did not consent to the sexual intercourse. I accept the testimony of PW3 that PW2 was born on the 31<sup>st</sup> of March 2004. Being the biological mother of PW2, PW3 is in law a credible witness to testified about PW2's age. Her evidence in this regard proves that PW2 was only 4 years old when this offence was committed.

This is substantiated by the fact that when PW2 testified before me on the 4<sup>th</sup> of October 2013, she told the Court that she was 9 years old, which in my view cannot be disputed in light of her very young appearance and frame which I personally observed in Court. This, to my mind confirms her age of 4 years at the time of the alleged offence which took place in 2008, precisely 5 years ago.

[31] Similarly, I am also inclined to accept the evidence of PW3 to the effect that the 2<sup>nd</sup> complainant Nongcebo Nxumalo was born on the 14<sup>th</sup> of June 2006. She was 2 years old when the offence was committed. Though PW3 is not Nongcebo's biological mother, she is however her Aunt being a sister to her father. She told the Court that Nongcebo was very young when she was brought by her mother to their parental homestead. I find PW3 a competent witness to testify about the age of Nongcebo in these circumstances. That is the position of the law as correctly elucidated in **The South African Law of Evidence by Hoffman and Zeffert (1990) (4<sup>th</sup> ed) page 149** as follows:-

**“Proof of age may be furnished by a birth certificate or by the evidence of the mother or someone also who was present at the birth”.**

See **Rex v Themba Magagula Criminal Trial No. 368/2009.**

[32] The evidence of PW3 is confirmed by the testimony of PW1 and exhibit A, Nongcebo's medical report which both tell the Court that she was 2 years old when she was taken for the medical examination after the offence was committed. This was also confirmed by PW4 the investigating police officer.

[33] In the face of above analogy , I am thus firmly convinced that PW2 was 4 years old and Nongcebo was 2 years old when the offence was committed. Being below the age of 12 years both complainants were in law incapable of consenting to sexual intercourse. That is the position of the Roman Dutch Common Law which holds sway in this jurisdiction, as captured in the case of **Rex v Mfanzile Mphicile Mndzebele (Supra)**, with reference to **R V Z 105 (1) SA, 739**, in the following terms:-

**“Accordingly to our practice a girl under the age of 12 years cannot give consent to sexual intercourse. Even if she consents, sexual intercourse with her accordingly to our law is rape”**

See **The King v Bennet Thembe (Supra)**.

[34] I therefore hold that both complainants being below the age of 12 years when the offence was committed did not consent to the sexual intercourse.



The Crown thus proved the lack of consent by both complainants beyond reasonable doubt in the circumstances.

[35] Finally, the Accused was very well known to PW2 who positively identified him by pointing him out in the dock. This is not surprising because at the time of the offence the Accused was the herdboyc at PW2's parental homestead where he had been living for about one year prior to the offence, according to PW3's evidence which was not disputed. PW2 and PW3 positively identified the Accused as the culprit. Their evidence was not disputed by the Accused. PW4 the investigating police officer also identified the Accused as the suspect he arrested in connection with this offence. His evidence was also not disputed. I find therefore that the Crown proved the identity of the Accused beyond reasonable doubt.

[36] In light of the totality of the foregoing, the Crown has proved its case beyond reasonable doubt. I find the Accused guilty of the offences as charged in counts 1 and 2 respectively, and convict him accordingly.

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

**THE .....DAY OF .....2013**

**OTA. J**

**JUDGE OF THE HIGH COURT**

**For the Crown:**

**Ms L. Hlophe**

**(Principal Crown Counsel)**

**The Accused in person**