



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 36/2010

In the matter between:

REX

VS

MSOMBULUKO MPILA

Neutral citation: *Rex vs Msombuluko Mpila 36/2010 [2012] SZ HC 4 (5 March 2012)*

Coram: **MAPHALALA PJ**

Heard: **28th SEPTEMBER 2010**

Delivered: **5th MARCH 2012**

Summary: **Accused charged with the rape of his six year old daughter – plea not guilty – accused found guilty as charged.**

[1] The accused Msombuluko Mpila of KaZulu area is charged with the rape of her six year old daughter Zwelakhe Mpila.

[2] The Crown alleges that upon or about the 26th November 2008 and at or near Lomshiyo area in the Hhohho region, the said accused did intentionally had unlawful sexual intercourse with Zwelakhe Mpila, a female minor aged 6 years who in law is incapable of consenting to sexual intercourse; and did thereby commit the crime of rape.

[3] The Crown further contends that the offence is accompanied by aggravating circumstances as envisaged in terms of the *Criminal Procedure and Evidence Act 67 of 1938* as amended in that:

1. Complainant was a virgin and a minor;
2. The accused stood *in loco parentis* as he is the complainant's natural father;
3. Complainant was traumatized by this experience.

The Plea

[4] The accused person pleaded not guilty to the indictment. The accused was conducting his own defence and the Crown was represented by Miss Hlophe. The Crown led the evidence of six witnesses including the evidence of the complainant Zwelakhe Mpila. The accused also gave evidence under oath and was vigorously cross-examined by the Crown.

- [5] I wish to apologise profusely to the accused for the tardiness of this judgment on account of other urgent matters which clamoured for my attention: Further, the Judge's notebook on this matter was misplaced so that I had to listen to the tapes of the matter which were not clear. It took me a considerable time to reconstruct the evidence given in court.
- [6] The complainant testified that on the 26th November 2008 she was with her younger sister Nonduduzo Mpila at Mgudvula, Mpila's homestead. She was called by her father, the accused to his house. The complainant went with her younger sister Nduduzo to accused's house.
- [7] She testified that when she entered the house the accused closed the door and proceeded to have sexual intercourse with her. She went to describe to the court that the accused forced her to remove her panties and he proceed to insert his penis on her vagina. She testified the court that it was a very painful experience. That accused made up and down movements and after a while he stopped. After the occurrence the accused told her that she must say that it was one Sgubhu Khumalo who was responsible for this.
- [8] On the same day she reported the occurrence to one Make Lindiwe Mpila (PW2) who inspected her private parts after she had noticed that the complainant was walking in an awkward manner. PW2 then reported this

matter to her grandmother Manyata Khumalo (PW3). Later on she related the event to Sarah Tfwala her mother.

[9] She was cross-examined searchingly by the accused where a contradiction in her evidence was exposed by the question directed by the accused. The exchange was as follows:

“Q: When you told Make Mpila that a bucket injured you were telling the truth?

A: Correct.”

[10] However in re-examination by the Crown she clarified the issue of the bucket and said it was her father (the accused) who told her that she was to say when asked that she was injured by a bucket.

[11] The other contradiction by this witness is when she was asked if there was anyone who told her to say these things and she said there was. However, in re-examination she stated that was not true. It remains to be seen what would be the effect of her evidence on the Crown’s case. I shall advert to this aspect of the matter later on in this judgment.

[12] The second witness for the Crown was PW2 Manyata Khumalo who is complainant’s grandmother. She testified that she received a report from one Lindiwe Mpila who was referred to in the Summary of Evidence as

PW2. She testified that Lindiwe Mpila came to her and asked her to come to the Mangongo homestead where the complainant was in order to inspect her.

[13] She stated that the complainant had blood on her private parts. She took the complainant to Pigg's Peak Government hospital and further reported the matter to the Pigg's Peak Royal Swaziland Police. She then reported the matter to complainant's mother who was in South Africa. This is about the extent of her evidence.

[14] PW2 was also cross-examined searchingly by the accused that it was not the accused who had sexual intercourse with the child. But she maintained her testimony and was not moved at all by the searching cross-examination of the accused person.

[15] The third witness for the Crown was PW3 Lindiwe Mpila. She testified that on the 20 November, 2008 she was at home when she noticed the complainant (PW1) who was not walking normally. She called the complainant after she suspected that there was something wrong with her private parts. She inspected the complainant's private parts. She asked the child why she was walking in such an awkward way and she suspected that the child had sores. She kept on asking the complainant until the complainant began to cry. She then took the complainant to her

grandmother's homestead. The grandmother is PW2. The complainant was then taken to hospital and later to the Police Station.

[16] PW3 was also cross-examined searchingly by the accused who put it to her that he did not molest the complainant because he was employed nearby where he was a tractor driver.

[17] The fourth witness by the Crown was one PW4 Benefit Dlamini. This witness was sent by PW3 to call the accused after she had noticed that something had happened to the complainant. He testified that he went to the accused who promised to come to them, but he never did. He testified that in the evening he went with PW4 to the accused. He testified that they found the accused at a homestead at KaMbukuza where liquor was sold. He found the accused drinking liquor and told him of what had happened to the complainant.

[18] PW4 was cross-examined briefly by the accused and nothing of significance was revealed.

[19] The Crown then called PW5 Sarah Twala who is the mother to the complainant and is married to the accused. She told the court that she was employed in Nelspruit, South Africa and was called to come home after the incident with her child, the complainant. I must mention that most of

her testimony is what she was told by the other witnesses who were at home when the incident took place.

[20] She was also cross-examined briefly by the accused where it was put to her the child said she was injured by a bucket. She testified that she does not recall that.

[21] The Crown then called PW6 3505 Detective Sergeant Raymond Nxumalo who was the investigating officer in this case. He testified how he investigated the case.

[22] This witness was cross-examined briefly by the accused on why he stated that accused had raped the complainant. The cross-examination of the accused did not take the case any further.

[23] The seventh and last witness for the Crown was PW7 Dr. Elias Phiri. He testified that he examined the complainant and compiled the medical report entered as “exhibit A”. He testified therein that he observed bruises on the *labia majora* and *labia minora*, damaged hymen and haemorrhage. PW7 stated that he reached the conclusion that vaginal penetration had occurred or penetrative sexual activity had occurred.

[24] PW7 further testified that it was unlikely that these injuries could have been caused by a bucket. The cross-examination of the accused did not take the matter any further.

[25] At the close of the Crown's evidence the accused's rights were duly explained to him and he elected to make a sworn statement. The accused denies that he raped his daughter putting forward a version that he had an *alibi* in that he was at his workplace where he was a tractor driver. He denied any involvement in this case and stated that he was informed that the complainant was injured by a bucket.

The arguments of the parties

[26] The court then heard arguments of the parties. Counsel for the Crown filed very useful Heads of Arguments for which I am grateful.

[27] The Crown contends that the accused was well known to the complainant (PW1). The complainant is the natural daughter of the accused. Moreover, this offence occurred during the day therefore, the complainant told the court that the accused is the one who inserted his penis into her vagina. That it is worth noting that at no stage did the complainant point at any other person besides the accused. The Crown contends that according to the evidence of PW3 (Lindiwe Mpila), she saw the complainant walking into the family yard coming from the homestead

where accused was residing. Complainant reported to her that her father had said that she had a flu when she enquired about the manner she was walking. That blood was on her pants. The complainant gave her a certain report that made her report to complainant's grandmother.

[28] The Crown further argued that when the complainant made a report to PW2 (Manyata Khumalo) according to the evidence of PW2 she told her that her father had said that she must say that she had been injured by a bucket.

[29] The Crown Counsel cited a plethora of legal authorities to support her arguments including *Milton JRL, South African Criminal Law and Procedure Vol.11 on Common Law Crimes* at page 461, the case of *Roy Ndabazabantu Mabuza and The King Appeal Case No.35/2002* (unreported at page 4, *Rex vs Sifiso Cornelius Ngcamphalala 34/2003*.

[30] In reply the accused also gave forceful submissions to the effect that the Crown case is fabricated against him as he was informed by the complainant that she was injured by a bucket. The accused contended that at the time of the commission of the offence he was out driving a tractor and he had nothing to do with this matter. The accused contended further that he was not in good terms with PW2. Further that PW5, Sarah Tfwala fabricated a case against him as he once found her in an uncompromising position.

[31] I have considered the evidence adduced before this court and the arguments advanced by the parties. It appears to me that on the weight of the evidence adduced by the Crown that it has proved its case beyond a reasonable doubt. It is without question that the complainant was raped on the day in question. The medical doctor who gave evidence stated that it is without any doubt that the child was sexually molested. The only question that looms large for determination by this court is who raped this 6 year old girl.

[32] The evidence adduced by the Crown all point to the accused person who is the father of the complainant. The Crown has led uncontroverted evidence of PW3 Lindiwe Mpila who stated that she saw the complainant walking into the family yard coming from the homestead where the accused was residing.

[33] The accused offered an alibi that he was not in his homestead on the day in question. However, this defence could not hold on the facts of the matter. The accused himself made contradictory statements on his whereabouts on the day in question. In his defence, he stated that he was at a Kunene homestead ploughing fields. This issue was never put to the Crown witness.

[34] Further, the accused told the court an untruth that PW2 told the court that she sent (PW4) Benefit Dlamini to call him where he was driving a tractor yet PW2 clearly stated that she was not aware if the accused was working anywhere.

[35] On the totality of the evidence it is abundantly clear that on day in question the accused had unlawful sexual intercourse with his daughter who was 6 years old at the time.

[36] The accused relied heavily on the contradictions in complainant's evidence as shown earlier in this judgment. In my assessment of the evidence adduced the complainant when she gave evidence was a young girl of 6 years giving evidence against her father in an imposing environment being this court revealing such embarrassing facts to total strangers. In my estimation such slips are bound to take place. In any event, in re-examination the damage was averted. See the case of *Roy Ndabazabantu Mabuza vs The King Appeal Case No.35/2002* (unreported) and the cases cited thereat.

[37] In the result, for the foregoing reasons I find the accused guilty as charged.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE

For the Crown : Miss L. Hlophe

For the accused : In person