



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 407/2013

In the matter between:

THE KING

And

YUDO MALO

Neutral citation: *The King v Yudo Malo* [407/2013] SZHC 92 [2017] (23 May 2017)

Coram : **T. L. Dlamini J**

Date heard : **15 August 2016, 5 & 17 October 2016, 13 – 14 March 2017**

Date of delivery : **23 May 2017**

Summary: *Criminal law and procedure – Accused charged with rape – Offence accompanied by aggravating circumstances – Complainant aged 4 years.*

Held: *The Crown’s evidence proved beyond reasonable doubt that accused person committed the rape offence – Accused convicted and found guilty as charged – Sentence of 18 years without the option of a fine imposed.*

JUDGMENT

[1] The accused person, Yudo Malo, aged 40 years at the time the offence was committed, stands before me charged with the offence of rape accompanied by aggravating factors. The Indictment reads as follows:

*In that upon or about the 5th October 2013 and at or near Ngwane Park area in the Manzini Region, the said accused did intentionally have unlawful sexual intercourse with **NAKIWE REBBECA MALO**, a female minor aged four (4) 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:-

1. *The complainant was a minor of a tender age;*
2. *The accused stood in loco parentis as he is the uncle of the complainant;*
3. *The accused exposed the complainant to the risk of contracting sexually transmitted infections and HIV/AIDS as he did not use a condom.*

[2] When the Accused appeared before this court on the 28th June 2016, his right to legal representation was duly explained to him. He informed the court that he wishes to instruct an attorney and requested to be given about a week to do so. He however failed to secure the services of an attorney and on the 15th August 2016 he informed the court that he will conduct his defence.

[3] The charge was therefore put to the Accused. It was also explained to him in the language of his choice, Siswati. He was asked if he understands the charge and he answered in the affirmative. He entered a plea of not guilty.

[4] In proving its case, the Crown led the evidence of five (5) witnesses. I will chronicle their evidence herein below.

Chronicle of Crown's evidence

- [5] PW1 was Augustino Malo who is the biological father of the raped minor (the complainant). PW1 testified that the Accused is his elder brother. He further testified that on the 5th October 2013, he was residing at Ngwane Park with the mother of the complainant Ntombifuthi Mbingo and their two children. PW1 testified that he received a call from home in Maputo on this date. The call notified him about the death of his brother. He therefore called the Accused who is a brother and informed him about the sad news.
- [6] PW1 also testified that his brother (the Accused) resided at KaKhoza in Manzini. He requested him to come to Ngwane Park so that they can make arrangements to go to Maputo following the demise of their brother. The Accused came to Ngwane Park on that same day around 2:00 pm. The two brothers talked about the death of their brother and the need to go home but the Accused informed PW1 that he won't go to Maputo because he doesn't have money. He maintained that he won't go to Maputo even after PW1 had offered to pay for him.
- [7] PW1 further testified that he then informed the Accused that he will proceed and go home the following day. They then bought alcoholic drinks and drank until it was too late for the Accused to get public transport and return to KaKhoza where he resided. He then spent the night with them in their one room flat where PW1 and Ntombifuthi Mbingo resided with their two children.

[8] Describing the normal sleeping arrangement in their one room flat, PW1 testified that there is a mattress which they place on the floor where their two children sleep while he sleeps on a bed with their mother. He also testified that on this fateful day, he slept on the bed with the mother of their children together with their young child. The Accused slept on the mattress with the elder child (the complainant).

[9] PW1 further testified that he was awoken from his sleep by the mother of his children Ntombifuthi Mbingo who informed him that the Accused is raping Nakiwe. He also testified that the electricity lights were off but Ntombifuthi turned them on. He further testified that when the lights had been switched on he saw the Accused zipping up his trouser. The complainant had woken up as well. When leading this witness in-chief, the following interchange occurred between PW1 and Counsel for the Crown as recorded in my notes:-

Crown: When you saw Yudo zipping up his pants, where was Nakiwe?

PW1; She had woken up.

Crown: In what condition was she in?

PW1: I could not notice as she had just woken up.

Crown: What did Ntombifuthi say to the Accused?

PW1: She said she was going to call the police and she called them.

Crown: Did the police come?

PW1: Yes they did.

Crown: Where did the police find you?

PW1: I was inside the one room flat.

Crown: Who was with you?

PW1: It was all of us. It was me, the Accused and the children. Ntombifuthi had locked us inside the one room until the police arrived.

Crown: Proceed.

PW1: When the police arrived, they asked who raped the child. I told them that it is my brother. They then took him away together with the complainant and the mother of the complainant.

...

Crown: What grade is Nakiwe doing?

PW1: She is now doing grade 2 but was at kindergarten at that time.

Crown: Is the Accused person your younger brother or elder brother?

PW1: He is older than me. I was born after him.

Crown: That would be all my Lord.

- [10] The Accused was afforded an opportunity to cross-examine PW1. He, however, informed the court that he has no questions to direct to this witness save to mention that when he was seen zipping up his trouser, it is because he had taken it off when he went to sleep.
- [11] It is my observation that the Accused does not challenge PW1's evidence concerning the rape of the complainant being attributed to him.
- [12] PW2 was officer 4407 Constable Bongani Simelane. He testified that on the 5th October 2013 he was based at the Manzini Police Station under General Duty. On this aforesaid date at around 2200hrs (10 pm) he received a call from the police emergency number 999. The reporter was Ntombifuthi Mbingo. She reported that a child has been raped at Ngwane Park. Acting on this report, PW2 proceeded to Ngwane Park using a police van with officer 3672 Constable Magongo. At Ngwane Park they met the reporter who narrated that her daughter has been raped by her (daughter) elder uncle.
- [13] PW2 also testified that they found the reporter outside the room where the rape was committed. They then proceeded to it. The room was locked and Ntombifuthi (reporter) unlocked the door and they entered. Inside they found the Accused, Yudo Malo who was with his brother Augustino Malo. He further testified that after being shown who the perpetrator is, he then asked the accused person about the offence and his response was that he is sorry although he was a bit drunk.

[14] PW2 further testified that he then cautioned the Accused according to the Judges' Rules. He thereafter took the Accused, the mother of the complainant, and the complainant to the police station where he formally charged the Accused. The complainant and her mother were conveyed to the Raleigh Fitkin Memorial (R.F.M.) Hospital where the complainant was examined by a doctor.

[15] PW2 pointed at the Accused as the Yudo Malo that he arrested for the offence.

[16] While cross-examining PW2, the Accused denied that he told PW2 that he was sorry. He informed the court that the police did not ask him any question concerning the alleged rape. He further stated that the police only spoke to the mother of the complainant who pointed at him as the offender. He stated that the police simply locked him inside the police van. When he asked them about where he was being taken to, he said the police informed him that he was being taken to the police station as he was under arrest.

[17] PW2 maintained and reiterated, however, that he questioned the Accused about the rape and his answer was that he is sorry. He explained that he first talked to the mother of the complainant and that after having been taken to the one room flat he questioned the Accused about the offence. He then

reminded the court that he mentioned in his evidence in-chief that the Accused looked drunk on that night.

[18] PW3 was Nakiwe Malo who is the complainant. On account of her age, this witness testified through an intermediary as contemplated in terms of section 223 bis of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended (the Act). This section provides as follows:

“Evidence through intermediaries.

223 bis (1) In this section, whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if such person testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give the evidence through that intermediary.

(2) ...

(3) ...

(4) In this section –

(a) the Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries: and

(b) ...”

- [19] Following an application by the Crown, I appointed Olivia Ndlangamandla to be the intermediary. She possesses a Diploma in Social Work. She was officially trained as an intermediary in 2015. She however, was gazetted as an intermediary in 2010 after successfully completing an orientation programme. This information was provided by the intermediary, Olivia Ndlangamandla, under oath.
- [20] PW3 gave her evidence inside a child's friendly court from which she did not see the perpetrator of the crime.
- [21] I first admonished PW3, in view of her tender age, to tell the truth. I was satisfied that she appreciated the difference between the truth and a lie.
- [22] PW3 informed the court that she is Nakiwe Malo and is doing Grade 2 at Manzini Central School. When asked about going to church, she informed the court that she goes to Africa Revival Church. She stated that it is not good but is a bad thing to tell lies. She further stated that when you tell a lie you get punished for lying. I was therefore satisfied that PW3 appreciates the difference between the truth and a lie.
- [23] PW3 testified that her mother is Ntombifuthi Mbingo whilst her father is Augustino Malo. She was asked the name of her elder uncle who in Siswati is referred to as '*babe lomkhulu*'. She responded by stating that he is Yudo Malo. She was also asked about where she resided with her mother and father and she stated that they resided at Ngwane Park although her father is no longer staying with her mother now.

- [24] PW3 was further asked if her elder uncle visited them whilst they resided at Ngwane Park with her father and she answered in the affirmative. She was then asked to relate to the court about what happened at Ngwane Park when she was sleeping on the floor on the day they were visited by her elder uncle. PW3 testified that she was sleeping and “*babe lomkhulu*” woke up and “*wangikhumula*”, which means that he undressed her. She testified that he took off her skirt and panty and “*wase uyangisoma*”. The intermediary explained to the court that minor children refer to having sex as “*kusoma*”. Her evidence therefore is that the Accused thereafter had sexual intercourse with her.
- [25] PW3 was asked to demonstrate how the act of “*kumusoma*” happened. She was given two dolls for the demonstration. She laid down the female doll facing upwards. She then undressed it by pulling upward the skirt that the doll was dressed with. She thereafter undressed the male doll by pulling its trouser to below the knees and then laid it on top of the female doll. She was then asked about the whereabouts of her father and mother during that time. Her response was that they were sleeping on their bed.
- [26] PW3 was also asked if anyone saw when her elder uncle did this to her. Her response was that her mother saw it and then woke up her father. She was also asked if she was taken to hospital on that night. She responded in the affirmative. At the hospital she was attended to by a doctor although she mentioned that she has forgotten the name of the hospital to which she was taken.

[27] During cross-examination PW3 was asked by the Accused if she remembers all the events of that day when he visited them. Her response was that she does not remember some of the things. The Accused also asked PW3 about things that he (Accused) brought for the children, the complainant included. Her response was that she does not recall. The Accused further asked her about what is it that the Accused and her father did before they all went to sleep. PW3 did not answer this question but became silent.

[28] The Accused further asked if PW3 was hurt since she accuses him of having had sex with her. She answered in the affirmative. His last question was to ask her if she has exhibits to produce before court to prove that he indeed committed the offence he is charged with. I however interjected and reminded the Accused about the age of PW3. I explained to him that even if exhibits were present, PW3 could not be a custodian of the exhibits on account of her age. The question should have been directed to PW2 (police officer) or to the parents of PW3. The Accused thereafter informed the court that he has no more questions to ask from PW3.

[29] PW4 was Ntombifuthi Mbingo. She is the biological mother of the complainant (PW3). She gave a detailed account of the events of the fateful day. She testified that on the 5th October 2013 they were visited by the Accused at their place of residence at Ngwane Park. She also testified that the Accused and PW3's father are brothers, hence the Accused is PW3's elder uncle.

[30] PW4 testified that the Accused and his brother sat outside their one room flat and drank alcoholic drinks. She also testified that just before sunset, she

asked the complainant's father if the Accused was not returning to his place of residence. She even asked him about how they would sleep if he would spend the night with them. PW3's father responded by saying that he would sleep in their room. When asked how since it is a one room the father simply said he would sleep.

[31] PW4 further testified that later on Nakiwe said that she wants to sleep. She then prepared for her by placing a mattress on the floor. The Malo brothers were still seated outside drinking. Thereafter they entered the one room, played a DVD and danced.

[32] PW4 testified that she then asked Nakiwe's father to sleep on the mattress with his brother or else sleep on the bed with him while she sleeps on the mattress with the children. Nakiwe's father refused and informed her that Nakiwe will sleep on the mattress with her elder uncle. PW4 further testified that she even suggested that a certain Mr Ngwenya who was their neighbour be requested to accommodate the Accused on that night but Nakiwe's father told her that he is the one who pays rent for the one room and cannot therefore take orders from PW4. Eventually they all retired to bed with Nakiwe sharing the mattress with the Accused whilst she slept on the bed with Nakiwe's father and the younger child. The TV was left on and playing.

[33] PW4 further testified that just before they slept, she gave Nakiwe's elder uncle a duvet cover to share with Nakiwe. Thereafter they all retired to bed at around 9:00 pm. She testified that at around 10:00 pm she heard a strange sound that she first thought was coming from outside. It sounded "aahh,

aahh, aahh, aahh". When she opened her eyes she realized that the sound came from inside their one room. The TV had been turned off at that time.

[34] PW4 testified that she used her cellular phone as a source of light and directed the light to the head and face part of Nakiwe. She noticed that the part where Nakiwe slept was enlarged. She then rushed to turn on the light and pulled off the duvet cover, whereupon she found the Accused on top of Nakiwe. She then woke up PW1 who also witnessed what she was seeing.

[35] PW4 was asked by counsel for the Crown about how the two, the Accused and complainant, were dressed. She testified that Nakiwe's skirt was lifted upwards and her panty was pulled down to the knee level. The Accused had his trouser lowered to the knee level. She further testified that the Accused was asked by his brother PW1 about what he was doing but the Accused did not respond.

[36] PW4 testified that she then called the police using her cellular phone. On realizing that PW4 called the police, the Accused said "*hha kani sekuta emaphoyisa*", meaning that "eish the police are now coming". These words were said by the Accused, according to PW4.

[37] PW4 further testified that she was then pushed by the Accused in an attempt to go out of the one room but she overpowered him and pushed him back and thereafter closed the door and locked it from outside. She also testified that whilst she locked them inside the room, Nakiwe's father asked her to open but she refused. She only opened after the police had arrived.

[38] PW4 testified that when the police arrived, the one seated on the passenger seat alighted from the motor vehicle and the driver remained inside. She led the officer to the one room and the Accused was found laying on the mattress but fully dressed up with his boots put on. She further testified that the police officer was shown the perpetrator of the crime whereupon PW4, the complainant and the Accused were taken away by the police. The Accused was detained at the police station whilst the complainant and PW4 were taken to RFM Hospital.

[39] PW4 further testified that the complainant was examined by a doctor at the hospital. She also identified in court the Accused as the aforesaid elder uncle who she found on top of the complainant.

[40] In cross-examination, the Accused asked PW4 about how sure she is that he raped PW3. Her response was that she found him on top of her, and that she also saw blood on his penis. The Accused also asked her what are the symptoms that she saw from the complainant to show that he raped her. PW4 responded by stating that the police took them to the RFM Hospital where the doctor who examined PW3 confirmed that she had been raped. She further stated that the doctor informed her that a medical report of his findings will be prepared and given to the police.

[41] PW5 was Dr Daniel Addisu of the Raleigh Fitkin Memorial Hospital. He testified that on the night of 5th October 2013 a child by the name of Rebbeca Malo was brought by her mother for examination following an alleged rape incident. The child was seen by him at 1:45 am. Her physical condition and mental state appeared normal.

[42] PW5 testified that upon examination, he observed that PW3 had an old scar on the hymen as well as a 1 cm fresh laceration on the fourchette. His opinion and evidence was that the fresh laceration was consistent with a forced entry into the vagina. He further testified that there was forceful penetration of the vagina and the child was treated to prevent sexually transmitted diseases. He handed in a report of his findings as part of his evidence and it was marked as "Exhibit A".

[43] I asked the Accused if he has seen a copy of the exhibit and he stated that a copy was given to him.

[44] In cross-examination, PW5 was asked by the Accused if there was any bleeding which he observed from PW3's private parts. His answer was that there is none. PW5 was also asked by the Accused about what it was that forced its entry into PW3's vagina and hence caused the 1 cm fresh laceration. PW5 answered by stating that he can't say what it is but the laceration was consistent with a forced penetration of the vagina. No further questions were posed to this witness. The Crown's case was then closed.

[45] I informed the Accused about his right to elect to remain silent and not to give evidence, and that if he gives evidence he has the right to do so under oath or not, and the right to call his witnesses if he has any. He elected to give his evidence and to do so under oath.

The defence case

[46] The Accused testified that on the fateful day he was called by PW1 who invited him to his place of residence. He honoured the invitation whereupon he found PW1 sitting with another gentlemen. They sat together until PW1 informed him that he was accompanying the gentleman as he was then going. The two left but PW1 delayed coming back.

[47] The Accused also testified that he then decided to go back to his place of residence as it was already late. He then sent his goodbye to PW4. On his way he came across PW1 who then told him to sleep at their place as it was already late. They then returned together with PW1. He further testified that he shared with them their one room flat and slept there. Thereafter police came and arrested him during that night.

[48] Elaborating on the arrest, the Accused testified that the police told him that he was under arrest for rape. He then submitted that it supprises him that PW4 testified that she saw blood on him but the police did not take a sample of the blood as evidence. He also stated that PW5 (the doctor) testified that PW3 had an old scar on the hymen and that this evidence contradicts that of PW4. He therefore asked this court to evaluate this evidence and find that he did not commit the offence.

[49] That is how scanty the defence's evidence is.

[50] In cross-examination, it was put to the Accused that he did have sexual intercourse with PW3. In response, the Accused asked counsel for the Crown the whereabouts of the evidence that he indeed had sexual intercourse with PW3.

[51] It was also put to the Accused that there is no reason why the witnesses would make and fabricate a story against him. He responded by stating that there are things that happened between him and PW4. He however did not mention any of those things. The defence then closed its case.

Appraisal of the entire evidence

[52] In a case of rape the Crown bears the onus to prove beyond reasonable doubt three factors; viz the fact of sexual intercourse, the absence of consent and the identity of the accused as the offender.

See: **Nkosinathi Sibandze vs Rex (31/2014) [2014] SZSC 19 at para 4;**
Ndukuzempi Mlotsa vs Rex, Criminal Appeal No. 11/2014 (unreported)
at para 5; and **R v Ndwandwe Fannie 2000 – 2005 SLR 110 at 118.**

Fact of sexual intercourse

[53] In *casu*, there is no doubt, in my view, regarding the fact of sexual intercourse. The Accused was unable to dispute the evidence of the complainant (PW3) that while she was asleep the Accused woke up, took off the complainant's skirt and panty and had sexual intercourse with her. She further demonstrated the sexual intercourse with the use of anatomically detailed dolls.

[54] PW4 corroborated the evidence of PW3. She testified that when she rushed to turn on the lights and removed the duvet cover which the Accused and PW3 shared, she found the Accused on top of PW3.

[55] The Doctor (PW5) who examined PW3 testified that he observed a 1 cm fresh laceration on the complainant's fourchette. He testified that this fresh laceration was consistent with forced entry into the vagina and concluded that it was evidence of a forceful penetration of the vagina.

[56] In the case of **Nkosinathi Sibandze v Rex (supra) at para 11, MCB Maphalala** stated the following:

“...it is well settled in our law that the slightest penetration of the vagina suffices for purposes of the offence of rape. Legally, it suffices if the male organ is in the slightest degree within the woman's genitals”.

[57] For the above stated legal position, see also **Phumlani Masuku v The King, Criminal Appeal No. 33/2011 at para 13** (unreported).

Lack of consent

[58] The rape was committed against a minor child of four years. On account of her age, in our law she is not capable of consenting to sexual intercourse. A girl under the age of twelve years cannot give consent to sexual intercourse. Even when she consents, sexual intercourse with her according to our law constitute the offence of rape. See **Nkosinathi Sibandze v Rex (supra) at para 12** and the authorities listed therein.

Identity of the accused

[59] The identity of the Accused as the offender is not in dispute. He is very well known to three witnesses; namely, PW1, PW3 and PW4 as they are related. The Accused is a biological brother to PW1. He is also the elder uncle to PW3 and a brother in-law to PW4. The offence took place in the same room where all the three were sleeping and no other person joined them in that room. On the evidence, there is therefore no dispute about the identity of the Accused as the offender.

[60] In the circumstances, I came to the conclusion that all three elements of the offence of rape have been proved beyond reasonable doubt by the Crown.

[61] It is also not in dispute that the complainant was a minor of tender age at the time, and still is (almost four years later). It is also not in dispute that the Accused stood in *loco parentis* as he is the elder uncle of the complainant. It is further not in dispute that the Accused did not use a condom. He clearly exposed the complainant to sexually transmitted diseases including HIV/AIDS.

[62] I am therefore satisfied that the Crown discharged its onus of proof against the Accused beyond reasonable doubt. The Accused is therefore found guilty and convicted of the offence as charged. This verdict was handed down by this court on the 28th day of March 2017.

JUDGMENT ON SENTENCE

[63] In mitigation, the Accused pleaded that he lost his parents while he was very young. He has two children who are dependant on him for support. He submitted that since his arrest on the 5th October 2013 these children have

not been able to go to school because no one is there to pay for their school fees. The only survivors in his family are himself and his brother.

[64] He further pleaded that he has spent a long period of time in custody and that during this time he has been exposed to severe cold that has greatly affected his health. He therefore pleaded for a lenient sentence.

[65] The Crown submitted that the Accused has no previous criminal record. It however implored the court to impose a stiff sentence that would deter other would be offenders in light of the prevalence of the rape of the girl child in the Kingdom. The court was referred by the Crown to the cases of **Msombuluko Mphila v Rex (33/2012) [2012] SZSC 40** and **Mandlenkosi Daniel Ndwandwe v The King, Criminal Appeal No. 39/2011** (unreported).

[66] In the case of **Msombuluko Mphila v Rex (supra)**, Ramodibedi CJ, as he then was, stated the following:

“It remains for this court to express its profound horror at the alarming rate of crimes of rape committed against very young girls, particularly by close relatives. Appropriately stiff sentences must henceforth be the order of the day until this scourge is eradicated. Rapists have sufficiently been warned”. (para 10)

The Crown further submitted and implored this court to take into account sections 185 bis (1) and 313 (2) of the Act.

[67] Section 185 bis requires the court to impose a minimum sentence of nine years without the option of a fine to persons convicted of rape with aggravating factors, and that no part of the sentence is to be suspended. The section provides as follows:

“Sentence for rape

185 bis (1) A person convicted of rape shall, if the court finds aggravating circumstances to have been present, be liable to a minimum sentence of nine years without the option of a fine and no sentence or part thereof shall be suspended”.

[68] The effect of section 313 (2) is to preclude the court from suspending the sentence or any part thereof imposed upon a person who has been convicted of Murder, Rape, Robbery or any conspiracy, incitement or attempt to commit any of the three listed offences. This section therefore precludes the court from suspending a sentence or part thereof in respect of a person convicted of the offence of rape.

In deciding on the appropriate sentence to impose, I am required by law to consider and balance the personal circumstances of the Accused, the seriousness and prevalence of the offence and the interests of society. This is known as the triad.

[69] To this end, I have taken into consideration that the Accused has two minor children who depend on him for support. The Accused did not however, inform the court about the whereabouts of these children since his arrest in October 2013. He also did not inform the court if the children were residing

with him before the arrest. Furthermore, he did not inform the court about his source of income that enabled him to support the children. His plea for a lenient sentence on account of the above mentioned personal circumstances did not therefore convince me.

[70] I wish to mention that during the trial the Accused person did not show any sign of remorse. Instead he was asking the witnesses if they have any exhibits to produce as proof that he committed the offence.

[71] I have also taken into account that rape is a very serious offence that is prevalent in the Kingdom. **Ramodibedi CJ** pointed out in the case of **Sam Dupont v Rex, Criminal Appeal No. 4/08, para 15**, that “*the courts have a fundamental duty to protect society against the scourge of sexual assault perpetrated against young children in particular*”.

[72] It is common cause that the complainant was four years old when raped. It is also common cause that she is related to the Accused who is her elder uncle. It was undisputed that she was raped without the use of a condom. **MCB Maphalala JA**, as he then was, in the case of **Mandlenkosi Daniel Ndwandwe v The King (supra), para 15**, stated as follows:

“I am convinced that the prevalence of aggravated rape on both women and children calls for deterrent sentences beyond the range currently imposed by this court. This is particularly necessary in an era where society is faced with incurable sexually transmitted diseases including HIV/AIDS; however, this is by no means down-playing the effects of the trauma, shock, loss of dignity, torture,

inhuman and degrading treatment to which the victims of rape are subjected to.”

[73] **Ota J in Rex v Mandla Maxwell Gadlela (314/11) [2012] SZHC 154**

stated that rape “*is a rude debasing invasion of a person’s personality and bodily integrity. It has far reaching physical, emotional and psychological impact on the victims.*” (para 17)

[74] Society has expressed its interests through the promulgation of laws to deal with rape cases. Rape is listed as one of the serious offences in both the fourth and fifth schedules of the Act. Consequently, a high amount of bail to be paid in respect of these offences is fixed as the minimum amount to be required by the courts to be paid.

[75] In addition to the above, section 313 of the Act precludes the courts from suspending any sentence or part thereof in relation to a conviction for rape. To put emphasis on how serious society frowns upon rape offences, section 185 bis was added in the statute books. This section requires the courts to impose a minimum sentence of nine (9) years without the option of a fine in respect of rape convictions that are accompanied by aggravating circumstances.

[76] Our courts have endorsed that the range of sentences in respect of rape that is accompanied by aggravating circumstances is between 11 and 18 years. See **Mandlenkosi Daniel Ndwandwe v The King (supra), at para 14;** **Mgubane Magagula v Rex, Criminal Appeal No. 32/2011** (unreported) and **Nkosinathi Sibandze v Rex (31/2014) [2014] SZSC 19**

[77] Having considered the triad and the authorities referred to herein, I have come to the conclusion that in light of the tender age of the complainant, the relationship of the complainant with the Accused, the exposure to sexually transmitted diseases to which the complainant was subjected through the none use of a condom during the rape, and that the Accused never showed any sign of remorse, a sentence of 18 years without the option of a fine is appropriate.

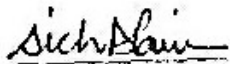
[78] The Accused became a predator in his brother's house, and a ravenous and dangerous wolf.

[79] In the result, and having found the Accused guilty as charged, I sentence him as follows:

(1) The Accused is sentenced to 18 years imprisonment without the option of a fine.

(2) The sentence is backdated to the 5th day of October 2013, being the date of arrest and detention for this offence.

[80] The right of appeal and review explained to the Accused.



T. L. DLAMINI
JUDGE OF THE HIGH COURT

For the Crown : Ms Lomvula Hlophe
For the Accused : In person