

SOUTH AFRICA / JUDGMENT

Kenosi v S (Appeal on sentence) (CA&R 12/2024) [2025] ZANCHC 49 (25 April 2025)

[2025] ZANCHC 49

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Tyuthuza

CASE / FILE NUMBER

CA&R 12/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: CA&R 12/2024

Reportable:

YES / NO

Circulate to Judges:

YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

JEFFREY KENOSI

Appellant

and

THE STATE

Respondent

Heard on: 10/03/2025

Delivered on: 25/04/2025

Summary: Appeal against sentence of life imprisonment on each rape count. Two issues for consideration. Whether the trial court erred in its finding that substantial and compelling circumstances do not exist and whether the trial court failed to take into account that the appellant was a primary caregiver when considering the appropriate

sentence.

Quorum: Mamosebo ADJP et Tyuthuza AJ

ORDER

In the result the following order is made:

1. The appeal against the sentences imposed is dismissed.
2. The office of the registrar is directed to make a copy of this judgment available to the Department of Social Development who are enjoined to visit the family of the appellant to investigate their needs, if any.

JUDGMENT ON APPEAL: SENTENCE

MAMOSEBO ADJP

- [1] This appeal is directed only against the sentences of life imprisonment on five counts of rape read with the provisions of s 51(1) of the Criminal Law Amendment Act, 105 of 1997 (CLAA).
- [2] The appellant pleaded guilty to five counts of rape and was convicted on 18 October 2023 in the regional court, Kuruman. On 28 November 2023, having found no substantial and compelling circumstances as envisaged in s 51(3)(a) of the CLAA, the trial court sentenced him to life imprisonment on each count. He enjoys an automatic right of appeal in terms of s 309(1)(a) of the Criminal Procedure Act, 51 of 1977[1] (CPA). The State opposed the application.
- [3] The grounds upon which the appellant relied for this appeal were that the trial court erred in its finding that substantial and compelling circumstances, justifying a deviation from imposition of the prescribed minimum sentences of life imprisonment, did not exist. Further, that the trial court failed to take into account that the appellant was a primary caregiver as well as to properly consider the interests of his minor children in imposing the life sentences.
- [4] The material facts surrounding the commission of the offences, extrapolated from his section 112(2) statement are to this effect. The rape in count 1 against the 21-year-old Ms AD, happened on 01 May

2021. He penetrated her more than once without her consent. The further rapes in counts 2, 3, 4 and 5 occurred on 28 January 2022 in respect of which he raped each victim, aged 16, 14, 14, and 15 years respectively, more than once. These rapes on the minors were perpetrated in the sanctity of their home. He found the victims asleep, woke them up by whipping them with a sjambok and instructed them to be still and to undress. He raped each one three times.

[5] Since the victims in counts 3, 4 and 5 were below the age of 16 the appellant bore the onus of showing that substantial and compelling circumstances existed which justified the imposition of a lesser sentence as contemplated in s 51(3)(a) of the CLAA.

[6] In *S v Vilakazi*[2] Nugent JA described rape as a repulsive crime, ...an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity. Almost 30 years ago, Mahomed CJ cautioned in *S v Chapman*[3]:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

(emphasis added)

[7] Mr Fourie, for the appellant, submitted that the cumulative effect of the personal and mitigating circumstances constitutes substantial and compelling circumstances. The following were placed before the court: that the appellant had pleaded guilty to the offences and thereby showed remorse for his conduct and that he is a suitable candidate

for rehabilitation. These are the appellant's personal circumstances upon being sentenced: He was 33 years of age, unmarried

with 3 minor children aged 10, 9 and 8 years. They all resided at his parents' home. The State abandoned proving the accused's

previous conviction of assault with intent to do grievous bodily harm which appears on the SAP69 because he denied it. He spent 22 months in custody awaiting trial. Of significance, in considering the personal circumstances of an accused, is that in cases of serious crime they recede into the background.[4]

[8] Ponnann JA made these abiding remarks pertaining to remorse and a plea of guilty in *S v Matyityi*[5]:

‘Remorse was said to be manifested in him pleading guilty.... It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor.[6] The evidence linking the respondent to the crimes was overwhelming. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.’

[9] In as far as the aspect of being a good candidate for rehabilitation is concerned, the following is material. Mr Bryson Kelokilwe, of the Department of Correctional Services, compiled a Suitability Report: Consideration of Correctional Supervision/Placement in terms of s 276A(1)(a) of the CPA. The probation officer recorded that the appellant admitted only one rape, that of the 21-year-old. He failed to disclose the other rape cases against him during the interview. The appellant does not appreciate the depth of the dehumanization caused to the minor children. The fact that he targeted minor girls demonstrates that he is a sexual predator. The submission that the

appellant was remorseful is misplaced.

[10] Navsa JA memorably said the following regarding rehabilitation in *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo and Others*:^[7]

‘Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter

sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation? Pre- and post-Malgas the essential question is whether the sentence imposed is in all the circumstances, just.’

[11] These victims were vulnerable and unsuspecting. The appellant preyed on them like a vulture. The Victim Impact Statements revealed their trauma and the fact that they have dropped out of school since the incident and their discomfort and mistrust of men in general. They now face a bleak and doomed future emanating from a fleeting gratification with lasting emotional trauma.[8] The society expects children to be raised and protected in an environment that allows them to optimise their potential without

fear.

Primary caregiver

[12] Section 28(2) of the Constitution[9] emphasises the paramountcy of the best interests of a child[10]. A child in this section means a person under the age of 18 years. Sight must not be lost of the fact that s 28 also applies to the rape victims in counts 2, 3, 4 and 5 as they were all below the age of 18 when they were raped. The appellant's contention was that the trial court has failed to consider that he is the primary caregiver when imposing life imprisonment. He urged us to remit the matter to the trial court to conduct an enquiry to ascertain the best interests of his minor children.

[13] Sachs J in *S v M* (Centre for Child Law as amicus Curiae)[11] considered the proper approach of a sentencing court where the convicted person is the primary caregiver of minor children and said:

'There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of

principle, consistency of treatment and individualisation of outcome.

- (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- (b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
- (c) If on the Zinn-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
- (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

- (e) Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.’
- [14] The trial court had postponed the case for the presentence report. Mr Kelokilwe records that the three children and the appellant lived at his parental home with his parents. His parents make a living through livestock farming, collecting and selling wood to the community as well as steel welding work. In considering the appropriateness of the custodial sentence the following is relevant: There will be no material impact on the minor children save for the appellant’s prolonged absence. The children will be in the same familiar environment and cared for by their grandparents. When the accused was interviewed by the correctional officer, he did not specifically state that he was the primary caregiver. He only stated that he and his children reside with his parents. This aspect is crucial because it distinguishes a primary caregiver from a breadwinner or a present but absent parent.
- [15] The grandparents ensured that the minor children were fed, prepared for school and carried on with their daily activities. The appellant was maintained from the same source that provides for the grandparents, namely, the family business. There is no doubt that the best interests of the minor children will be taken care of. Their mother is still alive and there is nothing that will stop the grandparents from co-parenting with her should that need arise.
- [16] Marais JA endorsed the salutary approach to sentencing in *S v Malgas*[12] when he said:
- ‘The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.’

- [17] The appellant is, in my view, a serial rapist who must be removed from society for life in terms of the dictates of the CLAA. I can conceive of no substantial and compelling circumstances existing to justify the departure from the ordained life imprisonment sentences.
- [18] I am not persuaded that the appellant's circumstances meet the threshold of a primary caregiver as it does not appear anywhere, even when he testified in mitigation of sentence, that he is. What has been clearly stated in the presentence report is that the source of their living is the family business wherefrom he and his children are cared for. The social workers in that community would be directed to visit the family to establish the further needs, if any, of the minor children and to guide the family regarding their best interests.
- [19] In the result, following order is made:
1. The appeal against the sentences imposed is dismissed.
 2. The office of the registrar is directed to make a copy of this judgment available to the Department of Social Development who are enjoined to visit the family of the appellant to investigate their needs, if any.

MC MAMOSEBO

ACTING DEPUTY JUDGE PRESIDENT

NORTHERN CAPE DIVISION

I concur

T TYUTHUZA

ACTING JUDGE OF THE HIGH COURT

For the Appellant Mr PJ Fourie Instructed by: Legal Aid South Africa For the Respondent: Adv T Engelbrecht Instructed by: The Director Public Prosecutions

- [1] 309 Appeal from lower court by person convicted (1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).
- [1] 309 Appeal from lower court by person convicted

(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).

[2] 2009

(1) SACR 552 (SCA) para 1

[3]

[1997] ZASCA 45; 1997

(3) SA 341 (SCA) paras 3 – 4

[4] S v Vilakazi 2009 (1) SACR 552 (SCA) para 58

[5] S v Matyityi 2011 (1) SACR 40 (SCA)

[6] S v Barnard 2004 (1) SACR 191 (SCA) at 197G

[7] 2009

(2) SACR 361 (SCA) para 22

[8] Director of Public Prosecutions Eastern Cape v Coko 2024 (2) SACR 113 (SCA)

[9] The Constitution of the Republic of South Africa, 108 of 1996

[10]

[11]

[2007] ZACC 18; 2007

(2) SACR 539 (CC) para 36

[12] 2001

(1) SACR 469 (SCA) para 12

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