

SOUTH AFRICA / JUDGMENT

Maluka v S (A15/2018) [2020] ZALMPPHC 6 (12 February 2020) [2020] ZALMPPHC 6

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago, Monene

CASE / FILE NUMBER

A15/2018

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT

OF SOUTH AFRICA

LIMPOPO DIVISION,

POLOKWANE

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

CASE

NUMBER: A15/2018

11/2/2020

In

the matter between: WILSON
 KABELO MALUKA
 APPELLANT
 AND
 STATE
 RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The appellant was arraigned in the Regional Court held at Nebo on one count of rape read with the provisions of section 51(1) of Act 105 of 1997 and one count of assault with intent to do grievous bodily harm. He pleaded guilty to the count of assault with intent to do grievous bodily harm and not guilty to the count of rape. He was convicted on both counts. On the count of rape, he was sentenced to life imprisonment, whilst on the count of assault with intent to do grievous bodily harm he was sentenced to twelve months imprisonment. The sentences were ordered to run concurrently.
- [2] Since the appellant was sentenced to life imprisonment in the Regional Court, he is having automatic right of appeal. The appellant has appealed against both conviction and sentence on the count of rape. However, in his heads of arguments and when the appeal was argued, his counsel conceded that the conviction was in order.
- [3] The background facts are that on the 8th May 2015 the complainant who was fourteen years old was called by the appellant to follow him to S[...]'s bedroom. The complainant and the appellant are cousins. On arrival in S[...]'s bedroom, the appellant told her to undress all her clothes and she refused. He threatened to assault her. He instructed her to lie on bed which she did. He undressed her pants and underwear and thereafter opened her legs. After opening her legs, he had sexual intercourse with her without her consent.
- [4] After he had finished, she went to sleep. Her mother and S[...] arrived. She reported to them that the appellant had raped her. They confronted the appellant and he denied raping her and later fled the scene. She was taken to hospital for check-up. The appellant denied raping the complainant.
- [5] Since the appellant is no longer challenging conviction, there is no need for me to deal with his grounds of appeal on that aspect. On sentence, the appellant's grounds of appeal are that the sentence of life imprisonment is too severe and that no reasonable court would have imposed it. That the trial court failed to take into consideration the appellant's personal circumstances which are that the appellant was 26 years of age at the time of the commission of the offence, he was a first time offender, he has been suffering from epilepsy

since 2005, he has spent thirteen months in custody as an awaiting trialist and, that the said rape cannot be described as falling into the worst rape cases.

- [6] In relation to conviction, I am satisfied that the trial court has taken the evidence before it in its totality and has analysed it properly. It can therefore not be faulted in convicting the appellant. Counsel for the appellant has correctly conceded that the conviction of the appellant on the count of rape was in order.
- [7] Turning to the sentence, it is trite that the sentencing is the prerogative of the trial court, and should not lightly be interfered with. An appeal in which the interference with the sentence will be justified is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether it exercised its discretion properly. (See *S v Romer* 2011 (2) SACR 153 (SCA) at para 22 to 23).
- [8] The sentence imposed by the trial court is prescribed by section 51(1) of Act 105 of 1997 in that the appellant has raped a child below the age of 16 years. The prescribed sentence to be imposed is life imprisonment unless the court finds that there are substantial and compelling circumstances justifying a deviation.
- [9] In *Director of Public Prosecution, Pretoria v Tsotetsi*[1] Copper AJA said: “As held in *Malgas* confirmed in *S v Dodo*, and explained in *S v Vilakazi*, even though ‘substantial and compelling’ factors need not be exceptional they must be truly convincing reasons, or ‘weighty justification’, for deviating from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed.”
- [10] The mitigating factors which the trial court took into consideration were that the appellant was 29 years old, he was unemployed, he used to receive disability grant for epilepsy which has been terminated, he is having three minor children who are residing with their mothers, he is a first offender, and that he has spent thirteen months in prison out of his own making as he was given bail but failed to attend court and was re-arrested.
- [11] In aggravation of the sentence, the trial court took into consideration that the appellant has planned the offence, has raped a fourteen years old victim, the complainant is still traumatized as she is still having nightmares, the appellant has caused division between the two families.
- [12] In *Tshabalala v The State; Ntuli v The State*[2] Mathopo AJ said the following:
- “The facts of this case demonstrate that for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women.”*

[13] The appellant and the complainant are related. The appellant was therefore supposed to protect her and not invade her privacy and

dignity, and in so doing, has humiliated and degraded her. The complainant had trust in the appellant, and the appellant had broken

it. Rape of women and children has become a scourge in this country as it is a daily occurrence. Without generalising, it seems men no longer have respect on women and children. They see the women and children as objects which they can use to satisfy their sexual desires at any given moment without any repercussions. This cannot be allowed to continue as if it is business as usual. It is the duty of the court to protect the vulnerable.

[14] The factors advanced by the appellant in mitigation of sentence in my view, are not truly convincing reasons or mighty justification for deviation from the prescribed minimum sentence. The trial court has considered the factors before it and correctly found that the aggravating factors far outweigh the mitigation factors. The appellant did not show any remorse at all. In my view, there are no substantial and compelling circumstances that were presented that justify a deviation from the prescribed minimum sentence.

[15] In the result I make the following order:

15.1 The appeal against both conviction and sentence is dismissed.

KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA,

I AGREE

MONENE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH

AFRICA LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR APPELLANT : MP LEGODI

INSTRUCTED BY

: LEGAL AID SOUTH AFRICA

COUNSEL FOR RESPONDENT : ADV MASHIANE

INSTRUCTED BY

: DPP LIMPOPO POLOKWANE

DATE OF HEARING

: 13 DECEMBER 2019

DATE OF JUDGEMENT

: 12 FEBRUARY 2020

[1]

[2017] ZASCA 83, 2017 (2) SACR 233 (SCA) (2 June 2017) at para 27

[2]

[2019] ZACC 48 (11 December 2019) at para 1

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALMPPHC/2020/6.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/maluka-v-s-unknown-topic-almpphc-2020>

Prepared on 11 October 2026 · Esheria