



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO.

(3) REVISED.

17/03/14

DATE

[Signature]

SIGNATURE

**CASE NO:A716 /2012**

**In the matter between**

**VUSIMUZI MTSWENI**

**Appellant**

**AND**

**THE STATE**

**Respondent**

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**JUDGMENT**

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## **KGANYAGO AJ**

[1] The appellant was convicted by the Regional Magistrate on a charge of raping a 13 year old child. Although the learned Magistrate appreciated that minimum sentence was applicable, the appellant was sentenced to 20 years imprisonment.

[2] Leave to appeal was granted on petition against sentence only on the 19<sup>th</sup> of August 2013.

[3] It is trite that the question of sentence is best left in the discretion of the trial court and that it should only be interfered with if there is a material misdirection or if the sentence is shocking or disturbingly inappropriate.

[4] The minimum sentencing regime arises from the provisions of ss51 of the Criminal Law Amendment Act 105 of 1997 which provides:-

*“51 Minimum sentence for certain serious offences.*

*(1) Notwithstanding any law but subject to ss(3) and (6) a High Court shall, if it has convicted a person of an offence referred to in Part 1 of schedule 2, sentence the person to imprisonment for life.*

*3(a) If any court referred to in ss(1) and (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence prescribed in those subsections, it shall enter those circumstances in the record of the proceedings and may thereupon impose such a lesser sentence.”*

[5] Rape of a girl under the age of 16 years is one of the crimes identified in Part 1 of the schedule which carries the sentence of life imprisonment.

[6] The offence which the appellant has been convicted of, is the one for which minimum sentence applies. The court cannot for flimsy reasons deviate from that. In SV Matyityi [2010] ZASCA 127 at paragraph 23 the court said the following: -

*"Despite certain limited success, there has been no real letup in the crime pandemic that engulfs our country. The situation continues to be alarming. It follow that, to borrow from Malgas, it is no longer business as usual, and yet one notices all too frequently willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest reasons-reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about efficacy aversion to it, to implement sentences."*

[7] In his judgment on sentence, the learned Magistrate dealt extensively with all the relevant aggravating and extenuating circumstances. He considered the mitigating factors and evaluated them properly before he came to the conclusion that substantial and compelling circumstances exists which justify the departure from imposing the minimum sentence.

[8] The appellant was in a position of trust and should have been the one who should here protected the complainant. The complainant was an innocent, vulnerable and defenseless person who was looking upon for protection from the appellant, yet the appellant has betrayed her. When offences of this nature are committed against the vulnerable and defenseless, society looks upon to the courts for protection.

[9] Under the circumstances in my view, the learned Magistrate did not misdirect himself in sentencing the appellant to 20 years imprisonment. The

sentence of 20 years imprisonment is not shocking or disturbingly inappropriate under the circumstances.

[10] In the result I make the following order:-

- (1) The appeal is dismissed and the sentence is hereby confirmed.

  
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**MR KGANYAGO**  
**ACTING JUDGE OF THE HIGH COURT**

**I agree**

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**PRELLER**  
**JUDGE OF THE HIGH COURT**