

**SINDISO TAPIWA MAKALIMA**

**APPELLANT**

**AND**

**THE STATE**

**RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA AND MATHONSI JJ  
BULAWAYO 22 OCTOBER 2010 AND 25 OCTOBER 2010

*Mr James* for appellant

*Mr Mabhaudi* for respondent

Criminal Appeal

**MATHONSI J:** This is a criminal appeal against both the conviction and sentence of the Appellant by the Regional Magistrates Court, sitting at Bulawayo on 18 July 2006. The Appellant was convicted of one count of rape and sentenced to 8 years imprisonment of which 3 years imprisonment was suspended for 5 years on the usual conditions.

Aggrieved by that conviction and sentence, the Appellant noted an appeal against both arguing that there was absolutely no evidence led on behalf of the State upon which a conviction could be founded. He further attacked the sentence on the basis that there was no discernable reason why the court a quo sentenced him as it did, when, at the time of the alleged offence, he was a juvenile of 17 years and as such, in his view, the sentence induced a sense of shock.

The state has conceded that both the conviction and sentence cannot be sustained. *Mr Mabhaudi* for the State submitted, in making the concession, that:

“The State called three witnesses, viz, Wilson John Makalima, Onmie Makalima and Nozipho Baloyi. The first two witnesses were recalcitrant witnesses. Nothing emerged from their testimony that implicated the appellant in the commission of the offence. The victim who was aged 5 years at the time of her testimony did not say anything that incriminated the accused. The Respondent concedes that at the time close of the state case no prima facie case had been established.”

Having gone through the record of proceedings and the submissions made by counsel for both parties we are of the view that the concession has been properly made. There was no basis whatsoever for the conviction of the Appellant and no justification for the departure by the learned Regional Magistrate from the usual sentencing options in respect of juveniles.

Accordingly, the appeal succeeds and the conviction and sentence of the Appellant are set aside and in their place is substituted the order that the Appellant be and is hereby found not guilty and acquitted.

Mathonsi J.....

Kamocha J agrees.....

*James, Moyo-Majwabu and Nyoni* appellant’s legal practitioners  
*Criminal Division, Attorney General’s Officer*, respondent’s legal practitioners