

**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**CASE NO:**  
**(ex ECG CC35/09)**

**In the matter between:**

**KWANELE MKHWENKWE**

**Appellant**

**and**

**THE STATE**

**Respondent**

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**FOUNDING AFFIDAVIT**

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I the undersigned,

**KWANELE MKHWENKWE**

do hereby make oath and state:

1. I am an adult male person, currently incarcerated in the Westbank Prison in East London. I am satisfied that the content of this affidavit is both true and correct to the best of my ability. Where I make legal submissions I do so on the advice of my legal representative.

2. This is an application for Leave to Appeal after the dismissal of my leave to appeal against my conviction by the Honourable Ms Justice Beshe in the East London High Court.
3. I was convicted by the Honourable Judge in the High Court sitting in East London on 7 October 2011 of two charges of rape of a minor under case number **CC35/11** and sentenced to 22 years imprisonment on each count. It was ordered that half of the sentence imposed on the second rape charge run concurrently with the sentence imposed on the first count. Please find the court order in respect of the outcome attached hereto as **ANNEXURE KM 1**. I also attach hereto as **ANNEXURE KM 2** the judgment on merits and **ANNEXURE KM 3** the judgment on sentence.
4. After sentence on 7 October 2011 my legal representative brought an application for leave to appeal against conviction and sentence. The Honourable Judge granted leave to appeal against my sentence only. I attach this order and judgment hereto as **ANNEXURE KM 4** and **ANNEXURE KM 5** respectively.
5. It was my instruction that Leave to Appeal must be sought against the convictions from this Honourable Court, but I was left in the dark on the further conduct of the matter. I heard nothing further until 10 December 2012, when I was informed that a new legal representative was instructed to argue the appeal against my sentence on 29 January 2013. I then established that the leave to appeal against my conviction was never proceeded with. I instructed my new legal representative to withdraw my

appeal against my sentence and proceed with an application to obtain leave to appeal against my conviction.

6. It was at all material times my understanding that an appeal would be done against my conviction. I am sorry for the delay in bringing this application, but I was unaware that my former legal representative had not proceeded therewith. I submit that I have an excellent chance of success on appeal against my conviction as I am innocent and as will be indicted below, the state has not succeeded in proving my guilt beyond a reasonable doubt.
7. The record of proceedings in my case was already typed, but there is some evidence missing from the appeal record. The evidence of Nurse Madigani and the Investigating Officer, W/O Baliso for the state as well as my own evidence was not transcribed. This evidence was rendered on 19 May 2011 in the East London High Court. This was brought to the attention of the Registrar, Grahamstown and a request was made to the transcription company to re-construct the record. On 16 January 2013 the Registrar, Grahamstown received confirmation from the transcription company that the said evidence was not recorded and that they cannot complete the record. The Registrar requested all parties to assist in reconstructing the record. This is going to take some time and in the meantime I am suffering prejudice as I am incarcerated and I am innocent. According to my legal representative it is difficult to fully motivate the reasons for this application without the reconstruction, but there are sufficient indications on the record as it stand that another Court could reasonably possibly reach another conclusion in respect of my guilt on appeal.

8. Therefore I pray for condonation for the delay in bringing this application for leave to appeal against my convictions, as before 10 December 2012 I was unaware that a petition was not done and after 10 December 2012 until the signing of this affidavit my legal representative waited for news on the re-construction of the record to finalise this application, thereafter I had to sign this Affidavit in East London. The application must still be served in Grahamstown and the originals docxexed to Bloemfontein for filing.
9. Since my arrest it has always been my defence that I was not the perpetrator of the deeds of which I am accused.
10. The Court neglected to determine whether the two minor complainants understood the meaning of the oath and whether they understood the difference between truth and a falsehood. In respect of the complainant in count 1 (Noqwase) the Court asked her whether she knows the difference between right and wrong to which she answered in the affirmative. The Court also asked her whether it was good or bad not to do homework. The Court then warned her to tell only the truth. In respect of the complainant in count 2 (Zwelibanzi) the Court also asked her whether it is good or bad to not do homework, then the Complainant answered that it was wrong. The Court commented that she sees that the Complainant knows the difference between right and wrong. The Court then warned the witness to speak the truth.
11. Therefore the evidence of the Complainants does not comply with the provisions of sections 164 to 166 of the Criminal Procedure Act. Similarly the state witness Sosheleni's evidence does not comply with this.

12. The evidence of the two child complainants is so vague and contradictory that no court can place any reliance on the identification of me as the perpetrator.

13. The evidence of the Complainant on the first count (Noqwase) is unreliable as:

13.1. She made no report about the incident until the Police came to her house to inform her mother of the incident;

13.2. No one was with her during the rape and she told no one of the rape, so it is unknown why the Police knew about the incident;

13.3. The information given to the doctor at the time of the incident is that someone dragged the complainant to the school's tuckshop. This is denied by the complainant. She went to the tuckshop by herself to buy items.

13.4. In her statement to the Police she said that I called her into the tuckshop, but she denied this in court.

13.5. The tuckshop is within the school premises and it within hearing distance from classrooms. The witness indicated that she screamed, but that I closed her mouth. It is highly unlikely that a rape of a scholar would take place at the tuckshop.

14. The evidence of the Complainant on the second charge (Zwelibanzi) is unreliable because:

14.1. Already in examination-in-chief, she gives three different versions of when I had supposedly entered the toilet, namely:

14.1.1. When she was finished urinating,

14.1.2. While she was still urinating and sitting on the toilet;

14.1.3. After she had already pulled up her panties and when she was about to go out of the toilet.

14.2. She mentioned that I raped her only after her mother threatened to beat her after she had denied that anyone interfered with her when her mother directed questions to her.

14.3. In her police statement and in cross-examination she indicates that two of her friends were with her whilst she was being raped, and I allowed all three of them to leave after the rape/s. But, she also indicated in examination-in-chief and in cross-examination that they were not with her. Neither of her friends confirmed their presence during the rape.

15. There was also a third child approached by the police to suggest that I raped her because of the allegation of the Second Complainant to the Police. She was taken to the doctor to be examined, but she showed no signs of having been interfered with sexually.

16. The discrepancies and contradictions in the evidence point toward the fact that both Complainants' evidence is too unreliable to convict me upon.

17. Coupled with the fact that it was not established that the complainants know the difference between truth and falsehood, another Court could reasonably possible

come to a different conclusion and the Honourable Judge President is requested to grant me Leave to Appeal against both convictions.

**DATED AT PORT ELIZABETH ON THIS \_\_\_\_ DAY OF \_\_\_\_\_ 2013.**

\_\_\_\_\_  
**KWANELE KHWENKWE**

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was sworn to before me at PORT ELIZABETH on the \_\_ day of \_\_\_\_\_ 2013, the Regulations contained in the Government Notice No. R1258 of 21 July 1972, as amended, having been complied with.

\_\_\_\_\_  
COMMISSIONER OF OATHS

**FULL NAMES IN BLOCK LETTERS:**

**BUSINESS ADDRESS:**

**OFFICE:**

**AREA:**