TREVOR KUNAKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 17 July 2018 & 14 November 2018

Criminal Appeal

Appellant, in person
E Makoto, for the Respondent

HUNGWE J: Appellant was convicted of one count of indecent assault as defined in s 67 of the Criminal Law Codification and Reform Act, [*Chapter 9:23*] and another of rape as defined in s 65 of the same Act. He was sentenced to one year in respect of the indecent assault charge and seventeen years in respect of the rape charge. Of the 17 years imprisonment 4 years was suspended for five years on the usual conditions of future good behavior. The one year in respect of the indecent assault charge was ordered to run concurrently with the sentence in respect of the rape conviction leaving an effective 3 years imprisonment.

The appellant was a self-actor and appeared in person at the hearing of the appeal. He raised several grounds of appeal which can be summarized as follows:

(a) The prosecution failed to lead evidence upon which his guilt could have been proven beyond a reasonable doubt
(b) There were no exhibits in the form of a birth certificate, for example, to prove that the complainant was below the age of consent. The blood-stained panty and the knife used to threaten the complainant were not produced to support the complainant's claims.
(c) The nurse who examined the complainant did not follow proper procedures in the compilation of the medical examination report.

(d) Because of the inconsistency in the complainant's evidence, the court erred in finding that she was a credible witness.

(e) The court erred in dismissing his defence of *alibi.*

(f) The court proceeded with a trial in spite of his demand to be represented by a legal practitioner of his own choice thereby denying him his right to a fair trial.

(g) Additionally the court infringed his procedural right to a fair hearing by introducing the rape charge at the trial.

The appellant amplified these grounds when he made submissions at the hearing of the appeal. The record does not bear out the submission that he was denied his right to legal representation. The record shows that he had legal practitioners who would come and go. Whether this was because he fired them or failed to meet their demands is not a matter for a court to inquire into unless specifically invited to do so at an appropriate stage. The record shows that at some point one of the legal practitioners indicated that he was double-booked. The court warned him that trial would proceed in his absence as there had been adequate warning of when trial would start. In these circumstances it cannot amount to a denial of the right to legal representation since that right was recognized and balanced against other rights such as the right to trial within a reasonable time. Appellant ought to have indicated then the difficulties which he encountered with securing legal services but the record shows that he did not protest his lawyers' absence when he failed to show up, mid-trial. One *Mr Venge* represented him at the commencement of the trial, another, *Mr Musarurwa* joined mid-stream but abandoned the appellant as the trial progressed. There is nothing to suggest on the record that the absence of the lawyers was a result of the refusal by the court *a quo* to a reasonable request for postponements or adjournments made by or on behalf of the appellant. Consequently, we find no basis for the contention that there was a denial of legal representation which led to an unfair trial.

It is not a fact that the rape charge was raised against the appellant at the commencement of the trial for the first time. Complainant reported rape to her mother and to Police. Clearly, this is what must have led to the request for the medical examination conducted by the nurse on 9 April 2014. His trial commenced exactly a month later on 8 May 2014. The rape had occurred on 4 April 2014, according to the State papers. In the circumstances, there is no basis for the suggestion that the rape charge was not fairly brought to his attention.

The learned trial magistrate meticulously analyzed the evidence led from both the State and defence witnesses. He carefully considered the demeanor of the complainant who was only ten years old when the crime was perpetrated on her and when she was testifying during appellant's trial. He found that the complainant gave her evidence well. Her recollection of the events was accepted by the court *a quo* as fair. She was under the tutelage of the appellant. She never doubted who the perpetrator of the rape was. The rape was confirmed by a medical examination a few days after the event. The findings of credibility by the court *a quo* in favour of the complainant cannot be faulted. Complainant reported to her mother soon enough. There is no suggestion on the record that she may have been mistake as to the identity of her assailant.

Appellant contends that his *alibi* defence ought to have been found credible. However the witness called on appellant's behalf gave evidence which literally destroyed the *alibi* defence. It will be recalled that appellant had said that on the days complainant claimed he had raped her or assaulted her, he was at Premier Tobacco Auction Sales Floor ("Premier Tobacco"). The witness from Premier Tobacco gave evidence that appellant had worked for the company in 2013 but had been dismissed on some misconduct allegations. He would not be eligible for re-engagement with this company for at least a year. He therefore was not in the employ of the company in 2014. The finding by the court *a quo* on this evidence cannot be seriously challenged and that evidence literally destroyed the appellant's *alibi* defence.

The appellant took issue with the absence of the evidence on the age of the complainant, specifically the birth certificate. Whilst the production of this document would have cleared any doubts regarding the complainant's age, it is clear that the appellant's defence was one of an *alibi*. As such, the age of the complainant was never put in issue throughout the trial. Assuming in appellant's favour, that he was unaware of the need to have raised it appropriately, the evidence on the record on the issue is so overwhelming that when the age of the complainant was mentioned, he never disputed it.

Complainant told the court she was in grade four. He was his tutor. The mother confirmed these facts. The nurse endorsed her date of birth as 12 September 2004. It is not clear where she got it. One assumes that complainant's mother, the second state witness, volunteered this information when she attended at the clinic at the behest of the Investigating Officer. That she was

in grade 4 is consistent with the age of 10. There was no need to prove that which was not in dispute.

Appellant hoped that the knife, as well as the complainant's pants, would have been produced at trial on the rape charge. The evidence for rape where a ten-year old or other minor child is involved does not solely lie in the physical exhibits referred to by a witness but, most importantly, on the findings on the credibility of the child. As was correctly found by the court *a quo* she was a good witness both in terms of her demeanor and in terms of reliability. She made the report to the person she was, in the circumstances, reasonably expected to have reported. The report was made when he was away from the residence which he shared with the complainant. In any event, his defence was not that the rape did not happen but that he was not the person who did it. The totality of the evidence, viewed in light of the appellant's defence pointed to the guilt of the appellant rather than to his innocence. He could not, for example, proffer a reason why a 10 year old child would have lied by suggesting that he kissed her as a reward for getting her school homework correct; that he forced her to caress his manhood and finally forcing himself onto her.

As for the appeal against sentence we did not agree with the contention that a sentence of 17 years for rape and one year for indecent assault was so harsh as to induce a sense of shock. The facts show that the appellant was trusted to coach the 10 year old child on her school work. To this end, he had access to the residence of the complainant's parents at any time. The parents entrusted him with the welfare of the complainant. He would be remunerated for his efforts. There was a relationship based on trust built between the complainant's family and the appellant. He abused his trust and ravaged a 10 year old child.

The Criminal Law (Codification and Reform) Act, *[Chapter 9:23]* provides for the possibility of life imprisonment for rape in appropriate cases. The trend however, in the case law, had been to impose a sentence in the region of 20 years per count, with a portion suspended on condition of future good behaviour.

In its assessment of sentence, the trial court took account of the fact that he was a church pastor, a man of the cloth, who worshiped together with complainant's parents. The court also took into account the age of the complainant, the trauma which accompanied the abuse, the threats which were offered to the complainant as well as the fact that after the rape he disappeared from the free accommodation that he enjoyed at this residence.

It was for the above reasons that we dismissed his appeal in its entirety on the turn at the hearing.

WAMAMBO J AGREES …….

Appellant appearing in person
National Prosecuting Authority, respondent's legal practitioners