THE STATE
versus
EDWARD MUKOMBWE

HIGH COURT OF ZIMBABWE
TSANGA & PHIRI JJ
HARARE, 3 December 2015

Criminal Review

TSANGA J: The accused was convicted of rape as defined in s 65 (1) (a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. He received the following sentence:

> "10 years imprisonment of which 5 years imprisonment is suspended for five years on condition the accused person does not during this period commit any offence of any sexual nature for which upon conviction he will be sentenced to imprisonment without the option of a fine."

The complainant was a 9 year old girl said by her aunt to be slightly mentally unstable. This was accepted by the court albeit no medical record was availed on her mental condition. The medical report on rape confirmed that penetration was definite and the court found the complainant's evidence on rape to be consistent. The accused was the complainant's neighbour. The complainant had been called by the accused and asked to accompany him to a nearby bush where he had raped her. In his reasons for imposing the above sentence, the magistrate observed as follows:

> "..Jani the accused person is 56 years. He was breathing down a 9 year old child. I have already stated that he took advantage of the mental instability of the complainant and ravished her. Now this is an aggravating feature.
>
> **But the advanced state of the accused's age is also mitigatory. A heavy sentence will break the accused person. This is the reason why I will depart from the usual sentences that are passed on rapists."** (My emphasis)

Nothing turns on the conviction. The sentence however is too lenient and the reasoning for its imposition is problematic. Section 65 (2) (a) and (e) of the Criminal Code include the age of the person raped and the age of the person who committed the offence among the factors that are to be taken into account in determining the sentence to be imposed on the accused person.

Clearly, the rape of a child by an adult is a highly aggravating factor in sentencing. It is not the accused's potential suffering from a lengthy term in prison which should provide the yardstick for his sentence. Where a child is involved and an accused has been found guilty of sexual abuse, it is what is in child's best interests that should be of paramount consideration in informing the judicial officer in dealing with an offender. In sentencing him it is the constitutional requirement to protect children from sexual exploitation or any form of abuse that should provide guidance on the appropriate sentence to be imposed. (See s 81 (f) of the Constitution of Zimbabwe Amendment (No.20) Act 2013) The court was dealing with an accused who lived in a compound with children and who had sexually abused a child. Moreover, the rape involved a 9 year old who in terms of our law is incapable of consenting to sexual intercourse. Yet the sentence imposed does not treat the accused as a real risk at all despite the fact that his having had sex with a 9 year old, indicates his dangerous capacity to be aroused by a child and evidence of a clear inclination to take advantage of a child.

When a child has been abused and a perpetrator is seen to get off with a light sentence, it may not make it worthwhile for children or their families to seek justice. The message sent by the magistrate's reasoning in imposing a light sentencing is that men who are subjectively perceived by the court to be elderly can get away lightly with child sexual abuse. Perpetrators may also think that they have little to fear from the law on account of their age. Consequently, it is the children who remain at risk and no doubt severely traumatised not only from the rape itself but also from seeing the accused get away very lightly.

Ultimately, a serious crime was committed and it should have been treated as such. There is nothing old about a 56 year old accused in this case to justify the departure from the norm in terms of the sentences normally accorded rapists. In *S* v *Andrea Ngwenya* HB19/09 a 79 year old charged with two counts of rape was sentenced to a total of 20 years of which 4 years was suspended on the usual conditions. In *S* v *Fida Steven Mpande* HB 137/10 a 59 year old who had sexual intercourse with a mentally retarded girl received a 20 year sentence. In *Nzima Moyo* v *State* HB 58/10 a sentence of 18 years of which six years was suspended in

a case where a teacher had raped a 10 year old pupil was confirmed on appeal. In *S* v *Victor Nkala* HB/120/09 a 10 year sentence with three years suspended where an accused had raped a mentally challenged woman, was regarded by the court as unacceptably lenient. It was said that a sentence of not less than 15 years would have been more appropriate under the circumstances.

In light of the above examples, a sentence in the region of 15 years would have been more keeping with justice in cases of this nature. The sentence in this case is not confirmed as being in accordance with real and substantial justice and I therefore withhold my certificate.

TSANGA J ……

PHIRI J agrees …….