

GEORGE NDEBELE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

NDOU AND KAMOCHA JJ

BULAWAYO 25 JUNE 2012

L. Mcijo for appellant

Ms A. Munyeriwa for respondent

Criminal Appeal

KAMOCHA J: The appellant who was aged 61 years appeared before the Regional Court for the Western Division facing a charge of rape in contravention of section 65 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 2 November 2008 and at house number 6264 Nkulumane, Bulawayo he unlawfully had sexual intercourse with Sindiso Ndebele his own daughter aged 6 years. He pleaded not guilty but was convicted at the end of the trial. He was then sentenced to 18 years imprisonment of which 6 years imprisonment was suspended for 5 years on the customary conditions of future good behaviour.

Aggrieved by the trial court's decision he noted an appeal against both conviction and sentence.

The notice of appeal was, however, out of time. The appellant had filed an application for condonation which had not yet been finalised by the time the matter came for a hearing.

When it was pointed out to both legal practitioners that there was no appeal without condonation, they suggested that the court should exercise its review powers in terms of section 29 of the High Court Act [Chapter 7:06].

The court acceded to the request and proceeded to deal with the matter as a review matter. A reading of the complainant's evidence shows that she told conflicting stories to the court. Initially she told the court that she had been raped by her father – the appellant. The story changed when she was cross examined by the appellant. She told the court that she had been raped by one Andile. She said the appellant had not raped her. When asked by the court why she had said the appellant had raped her, her answer was that she had no reason for that. When asked if he had ever raped her, her reply was that he had not.

The State Counsel did not support the conviction and sentence in the circumstances. The concession was properly made. The proceedings were clearly not in accordance with real and substantial justice. The record of proceedings reveals that a substantial miscarriage of justice did occur.

Consequently, the conviction and sentence cannot be allowed to stand and are hereby set aside.

The accused is entitled to be immediately released and a warrant of liberation shall be issued.

Ndou J I agree

Lazarus & Sarif, appellant's legal practitioners

Criminal Division, Attorney General's Office, respondent's legal practitioners