

NTOMBIZODWATSHUMA

versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE AND MOYO JJ
BULAWAYO 14 JULY 2014 AND 17 JULY 2014

Mr *S. Chamunorwa* for the appellant
Mr *Hove* for the respondent

Criminal Appeal

MAKONESE J: The Appellant appeared before the Regional magistrates' court at Bulawayo on the 4th July 2013, with a co-accused, one Patrick Tshuma, facing one count of kidnapping as defined in section 93 (1) (b) of the Criminal Law Codification and Reform Act [Chapter 9:23]. Both accused persons pleaded not guilty to the charge and after a full trial accused two was acquitted, while Appellant was found guilty and sentenced to undergo 10 years imprisonment with 4 years suspended on the usual conditions.

The Appellant was not satisfied with both conviction and sentence and filed a lengthy notice of appeal in support of her appeal. The Appellant contends that the state failed to prove its case beyond reasonable doubt regard being had to the fact that the credibility of the complainant's story was put into doubt by the evidence of Patrick Tshuma which appeared to contradict the complainant's version in material respects.

The background to this matter is that the Appellant was a 59 old housewife at the time of the alleged offence. The complainant was aged 6 years and resided at Mafanisa Line, Ntabazinduna at the relevant time. The Appellant was a neighbour to the complainant. The complainant was residing with her aunt Sibongile Moyo. On or around the 9th February 2013 at around 1800 hours the complainant was in a bushy area looking for goats. It was alleged by the state that Appellant approached the complainant, closed her mouth with her hand, tied her hands and legs with a piece of cloth and then forcibly took her to her homestead against her consent. The complainant who testified in court informed the court that she was taken from a place near an

anthill by the Appellant who tied her up and took her to a grassy area at Patrick Tshuma's homestead. Complainant went further to indicate that she was released from Patrick Tshuma's homestead the following day. The state led evidence from Sibongile Moyo who testified that the complainant was her brother's child. She averred that the complainant went missing on the 9th February 2013. Her crucial evidence is captured in the transcript of proceedings at page 14 as follows:

"The child left to look for goats. She then disappeared. The goats came on their own. I went and called but no one answered. I then went to my neighbour whom I trusted at Nyathi's homestead and told her that I was not seeing the child. She advised me to go back home but the child was still not there...."

On how the complainant was found the evidence of the witness is contained at page 27 of the transcript of the proceedings in the following terms:

"I then met Patrick Tshuma accused two who asked me about the disappearance of the child. I told him that no one wants a child to disappear. I then started crying. He then got hold of my hand and he accompanied me. I told them to free her because it was difficult for me to sleep without seeing the child. I did not mention anyone's names. Patrick Tshuma took me to Ntombizodwa Tshuma who is accused one then started to insult me why I was crying with a loud voice. I then threatened to assault accused one and she then said I was assaulting the child. I then told her that the child belongs to me. She then told me to be quiet and she told me accused two had found the child in the toilet. I did not answer accused one."

It is common cause that eventually the complainant was brought to Appellant's homestead by Patrick Tshuma and that happened in the presence of several other villagers. The complainant was handed over to Sibongile Moyo.

The difficulty with the state case commences with the introduction of the evidence of Patrick Tshuma in his defence outline. He testified as follows:-

"Upon my arrival at Ndlovu's place I found that there were a lot of people. They greeted me and I responded. They then asked me if there were any people who were searching where I was coming from. I told them that I had not seen them where I was coming from."

I was then told that they were not seeing their child who left the previous day to look for some goats. I told them that I had not seen her. I was at Ndlovu's place for 10 minutes and I then told accused one that I was going back home to weed since the aunt of the child was not there and had gone to the police. I went back to my place of residence and got into the fields where I had left my hoe and began weeding."

I then left around 6:45pm and went via the toilet and I decided to go inside and see how the rains fell since it was raining. I then found complainant in the toilet. She was not tied, she was okay and I told her that she was being looked for at her place. She did not answer me. I then asked her if I was supposed to take her to her place of residence and she responded that she did not want by lifting her shoulders. I took her into one of my rooms. She had no clothes. I then told her to sit in that room. I got into one of the rooms and took a blanket and covered her with a blanket. I then advised her that I was going to her place to advise them that I had seen her.”

In his submissions on behalf of the Appellant, Mr *Chamunorwa*, forcefully argued that there was an unresolved conflict in the evidence of the complainant and that of Patrick Tshuma. He averred that the doubt that was created in the state case must be construed in favour of the Appellant. Mr *Chamunorwa* further pointed out that the trial court failed to enquire how the complainant gained access into Patrick Tshuma’s house. The evidence showed that at the time the complainant allegedly went missing, Patrick Tshuma was away at some farm doing menial work and that when other villagers were called to Patrick Tshuma’s homestead, when the complainant had been found it is Patrick Tshuma who unlocked the door.

I must point out that it is clear that no evidence was led to suggest or show that the Appellant had a spare key to Patrick Tshuma’s house or that the Appellant had placed the complainant in the toilet at Patrick Tshuma’s homestead. A further problematic piece of evidence which was not controverted is that when the complainant was seen by Patrick Tshuma she refused to be taken back to her house. It seems to me that the trial magistrate erred by failing to place any weight on the evidence that complainant used to run away from her home because of the abuse she suffered at the hands of Sibongile Moyo. In this respect, the fact that the complainant was refusing to go home gives rise to the inference that on this occasion she may probably have run away from home.

I tend to agree with counsel for the Appellant who submitted that the learned trial magistrate erred in failing to assist the Appellant who was unrepresented at trial to prosecute her defence to the extent that several issues requiring the comment of the witnesses were left unresolved. This was an irregularity which prejudiced the Appellant and consequently vitiated the proceedings. See the case of *State v Msindo* 1997 (1) ZLR 162 (S).

A further concern is that the learned magistrate appears to have failed to warn himself of the need to apply the cautionary rule when dealing with the evidence of the complainant. The

complainant was aged 6 years at the material time and at that age she could have easily been prone to exaggeration, fabrication and fanciful thinking. See the case of *State vs Sibanda* 1994 ZLR 394 (S).

In the above matter, the Supreme Court laid down six main issues to look out for when dealing with evidence of minor children, namely:

- a) children's memories are unreliable.
- b) children are egocentric
- c) children have difficulty distinguishing fact from fiction.
- d) children are highly suggestible
- f) children make false allegations
- g) children do not understand the duty to understand the truth.

Mr *Hove* appearing for the state argued that it was safe to rely on the evidence of the complainant and that her testimony was credible and worthy of belief. I am unable to agree that the evidence presented by the state as a whole is adequate to provide proof beyond reasonable doubt. There are gaps in the evidence of the state case which remained unexplained and unresolved. It is a trite principle of our law that where reasonable doubts exists, then in that event, the accused must be acquitted. The net effect of the evidence placed before the trial court was that there existed reasonable doubt as to whether or not the Appellant committed the offence and it behoved the trial court to find the Appellant not guilty.

I have observed that a perusal of the record indicates that the offence alleged against the Appellant is without a discernible motive and there is no indication from the evidence led why the Appellant would have committed the offence. It is an unusual case.

In the event, the appeal against both conviction and sentence succeeds. The appeal is allowed and the conviction and sentence is set aside.

Moyo JI agree

Calderwood, Bryce Hendrie and partners, appellant's legal practitioners
Criminal Division, Prosecution's General Office, respondent's legal practitioners