

THE STATE
versus
NAKAI TOMU

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 11 June 2019

Review judgment

KWENDA J: Accused was convicted on a charge of contravening s 4 as read with s 3 (1) (a) of the Domestic Violence Act [*Chapter 5:16*] “Physical Abuse”.

The charge is formulated in the following:

“... (accused) unlawfully committed an act of physical abuse upon Florence Guta her aunt by biting her with her teeth twice on the fore finger and on the right side of the mouth.”

The accused person and complainant are described in the State Outline as “aunts in the sense that their husbands are brothers.”

For purposes of a criminal offence under the Domestic Violence Act s 4 should be read with s 2 and subsection 3. The reason for that is the Act is concerned with violence committed against only those persons defined as complainants in s 2.

‘Complainant with respect to a respondent means:

- (a) a current, former or estranged spouse of a respondent, and
- (b) a child of the respondent, whether born in or out of wedlock, and includes an adopted child and a step child, or
- (c) any person who is or has been living with the respondent whether related to the respondent or not,
- (d) any person who cohabits with the respondent or is or has been in an intimate relationship with the respondent.

Section 3 defines domestic violence for the purposes of the Act as any unlawful act, omission or behaviour which results in death or direct infliction of physical, sexual or mental injury to any complainant by a respondent and includes:

- (a) physical abuse
- (b) etc

Section 4 criminalises domestic violence on a complainant by a respondent. What is meant is that not every act of physical abuse qualifies as domestic violence. The parties involved must have the relationship described in s 2. The victim must be a complainant *vis-a-vis* a respondent as defined. The relationship of the complainant and the accused in this matter does not fit into any category described in s 2.

Both the State and the court *a quo* overlooked that requirement. If the State had paid regard to that requirement it would have made the necessary averments in the charge specifying the specific paragraph and describing the relationship as envisaged in the Act.

The conviction cannot stand because an essential element of the offence is missing.

The accused has already served part of the sentence since he was convicted and sentenced on 7 February 2019. It is therefore not in the interests of justice for her to be subjected to another trial.

Accordingly I order as follows:

- (1) The conviction is quashed,
- (2) The accused shall be released forthwith.

CHIKOWERO J agrees.....