

THE STATE  
versus  
SHEPHERD MBURUMA

HIGH COURT OF ZIMBABWE  
KWENDA J  
HARARE, 5 December 2019

### **Condonation**

In Chambers

KWENDA J: The applicant was convicted by the regional court sitting at Harare, on the 7<sup>th</sup> November 2018 on two charges of rape as defined in section 65 (1) of the Criminal Law (Codification and Reform) Act (*Chapter 9:23*) (Criminal Law Code) and Attempted Rape as defined in s 189 as read with s 65 (1) of the Criminal Law Code. He failed to exercise his right to appeal within the stipulated period of ten working days.

This application was filed on the 28<sup>th</sup> October 2019, i.e about a year after conviction. In this application the applicant seeks condonation for his failure to file an appeal timeously, extension of time within which to appeal and leave to prosecute an appeal in time.

#### Reason for Delay

The applicant has submitted that he is aware that for him to succeed he must address the following:

1. explanation for the delay
2. Extent of the delay
3. prospects of success on appeal if condonation is granted

The applicant puts the blame emphatically on the legal practitioner who represented him at the trial. He says that the legal practitioner did not do anything despite assuring him that he would appeal against conviction and sentence. The legal practitioner relocated to South Africa without filing the appeal and communicating with the applicant. The applicant says he sent his relatives to the offices of the Registrar of the High Court and regional Court to enquire whether any appeal had been filed. They could not find a record of an appeal filed on his behalf.

While the applicant was waiting for his relatives to raise money to engage another legal practitioner, he got to know that there was leeway for him to apply for condonation, extension of time within which to note his appeal and leave to prosecute appeal in person.

He has submitted this application without legal representation.

Although the application does not provide specific dates and time frames, the applicant has given a detailed account of what he did in an effort to ensure that his appeal is lodged.

Prospects of success on the merits

The applicant has submitted that he has good prospects of success on appeal particularly against conviction. He submitted that the complainant was contradicted materially by other state witnesses. He submitted that these contradictions tended to put in doubt her assertion that the applicant raped her.

He submitted that the trial court should have found that the complainant may have “falsely accused” him.

The complainant in this matter was 13 years old at the time of the sexual intercourse which the court found to have been proved through complainant’s testimony and confirmed by medical evidence.

The applicant does not dispute the medical evidence. The applicant’s assertion that the complainant’s testimony puts lack of consent in doubt would not assist him since he could still be convicted of unlawfully having sexual intercourse with a minor in contravention of s 70 (1) (a) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*].

However, the appellant’s assertions about what delayed his appeal and prospects of success on the charges of rape and attempted rape on which he was convicted have not been controverted by the State.

The application is therefore unopposed.

In the circumstances I will accept the averments made in this application by the applicant.

The application therefore succeeds.

It is ordered as follows:

1. The application is granted.

2. The failure by the applicant to note an appeal against conviction and sentence in case number Harare Magistrates Court R 573/18 within the time set by the rules be and is hereby condoned.
3. The applicant is granted leave to prosecute the appeal in person
4. The applicant shall note his appeal within ten days of this order.
5. He is granted leave to prosecute appeal in person.

*National Prosecuting Authority*, respondent's legal practitioners