

HAPPYMORE NYAKARUBVE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUZENDA & SIZIBA JJ
MUTARE, 11 September 2024 & 5 June 2025

Criminal Appeal

Appellant in person
Mrs *J. Matsikidze*, for the respondent

SIZIBA J:

1. The appellant's appeal in this case was against both conviction and sentence as imposed by the Regional Magistrate sitting at Rusape Magistrates Court on 25 April 2024. He was convicted of one count of rape in terms of s 65(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 15 years imprisonment. Although the appeal was said to be against both conviction and sentence, the Notice of Appeal contained no grounds of appeal against sentence and there was also no relief sought regarding the aspect of sentence. When we heard the parties on 11 September 2024, we condoned appellant's failure to seek prior leave of this court to prosecute the appeal in person and we granted the appellant the leave to proceed in person. We dismissed the appeal for lack of merit. We have found it necessary to give our reasons for dismissing the appeal after realizing that the appellant has approached this court under HCMTCR 799/25 in a composite application for condonation of late noting of leave to appeal to the Supreme Court as well as leave appeal to the Supreme Court.
2. The appellant's grounds of appeal before this court were as follows:
 - “1. *The court-aquo erred and misdirected itself at law and fact by convicting when there was no evidence linking the applicant to the commission and paid lip service to the defence case of the appellant.*
 2. *The court-aquo also erred by convicting the appellant basing on hearsay evidence.*

3. *The court further erred by failing to probe witnesses thereby making conclusions basing on untrue facts.*
4. *The learned magistrate further erred and misdirected herself when she convicted the appellant on the third count on the other hand agreeing with the appellant that first two counts were fabricated.*
5. *The learned magistrate further erred and misdirected herself by not assisting the appellant as there was no probing.”*

THE EVIDENCE ADDUCED BEFORE THE COURT A QUO

3. The allegations against the appellant were that he engaged in unprotected sexual intercourse with the complainant, a female juvenile aged 17 years who was his former wife’s young sister without her consent. The three counts related to the same complainant. The rape that was alleged on the first count was said to have occurred in May 2023. The allegations in relation to the second count related to the month of June 2023 while the events on the third count were alleged to have occurred on 15 August 2023. The appellant was acquitted and discharged on the first two counts and convicted and sentenced on the third count as indicated above.
4. The allegations on the third count were that on 15 August 2023, the complainant had gone to look for some firewood in the bush whereupon the appellant pounced upon her and tripped her to the ground and had unprotected sexual intercourse with her without her consent. After the incident, it is alleged that the complainant left the firewood there and proceeded to make a report to the village health worker by the name Grace Mungofa Dambudzo (hereinafter called the second witness). The second witness allegedly called the complainant’s parents who came to her place from the funeral. The complainant was examined by a General Nurse at Rusape General Hospital on 16 August 2023 and she noted that the complainant had no hymen, no injuries and that penetration was definite.
5. On her testimony, the complainant told the court that the appellant was her sister’s former husband. They had separated in June 2023. On 15 August 2023, her parents had gone to a funeral and she went out to look for some firewood. She said that the appellant had already noticed her while she had not yet seen him. The appellant accosted him and grabbed her hand and twisted her arm until she fell to the ground. He

lifted her skirt upwards and pulled down his trousers and shorts and had sexual intercourse with her. She picked a log and assaulted the appellant on the shoulder but he grabbed her hand and he then went away. The appellant also threatened her with a knife and said that he would cut her off with it. She arose and went straight to report the incident to the second witness without wiping off herself of the sperms that were in her thighs. The second witness informed her parents and also examined her and she was then taken to the hospital for medical examination.

6. The second witness testified that upon examining the complainant, she noted some sperms and some grass particles on her genitals. She corroborated the complainant's version that the incident occurred towards sunset as that is when the complainant came to her home. The complainant said that the incident occurred around 1600 hours. The second witness refuted the allegations that she had any bad blood with the appellant. She also alleged to have seen the appellant passing through her home and she dismissed his version that he could have been at the funeral during the alleged time.
7. The appellant's version was a denial of all the allegations. He said that he had separated with his wife in July 2023. He alleged that there was bad blood between him and his in laws and that the allegations were a fabrication. His version was that the complainant had three boyfriends who were sleeping with her. He alleged that there was an issue between him and the second witness involving goats and hence they were not in good books. He, however, did not say that he had any bad blood with the complainant. His first witness was Primrose Nemaunga his very former wife who came to tell the court that her young sister had lied against the appellant as she had not been raped. She did not fully elaborate why the complainant would have lied against the appellant in coming up with such serious allegations. Michael Gombeza was appellant's second witness who testified that the appellant had been in Macheke during the month of June when the second count is alleged to have occurred. Luxson Nyakarugwe also testified that on 15 August 2023, he had spent the day with the appellant at his home until he went to the funeral at 1700 hours. The accused prayed for his acquittal as his version was that all the allegations were a fabrication.

FINDINGS MADE BY THE COURT A QUO

8. The court *a quo* assessed the evidenced that was presented before it in light of the legal requirements of accepting a sexual complaint as articulated in *S v Nyirenda HB 86/03* which are to the effect that the complainant must give evidence, the complaint must have been made voluntary without any suggestive or intimidatory questions whatsoever and that the complaint must be made timeously at the earliest possible time and to the earliest possible person in the circumstances of the case. The court *a quo* discredited the allegations on the first and second counts on the basis of the fact that the complaint was not timeously made and that complainant who was by then a form three student would have been taught at primary level how to report or deal with a sexual abuse. The allegations on the second count were also not accepted by the trial court on the basis that the state had failed to disprove the appellant's *alibi* that he was at Macheke during June 2023.

9. On the third count, the court *a quo* found that the complaint was made timeously to the second witness soon after the sexual assault by the appellant. She was found with particles of grass and sperms at that early period although her panty was not brought as an exhibit to the court. The court also noted that the appellant did not dispute that he was at the village or in that area on that particular day. The court also found that the report by the complainant was voluntary and spontaneous and that there was no chance of the complainant having been influenced by her relatives to frame up the allegations against the appellant. The trial court accordingly found the appellant guilty and convicted him on the third count.

THE APPLICABLE LEGAL POSITION

10. The main issue for determination in this appeal was whether the court *a quo* can be faulted in having found the appellant guilty of having raped the complainant. The basis of an appellate court's interference with a lower court's findings of fact is limited to those instances where the lower court would have been irrational or grossly unreasonable in its findings of fact or assessment of evidence in a manner that can be shown to vitiate its decision. See *Mupande and Others v The State SC 58-22* at p 6 to 7

of the cyclostyled. On the same vein, findings of credibility of witnesses are chiefly in the province of a trial court and an appellate court does not have to interfere in the absence of any misdirection. See *Khumalo v The State* HB 28-24. Put differently, an appellate court will not interfere with a lower court's decision in the absence of a misdirection on the law or on the facts.

11. *In casu*, we did not find any error in the court *a quo*'s reasoning either on the law or on the assessment of the facts or evidence as presented before it. We were not persuaded to uphold any of the appellant's grounds of appeal against conviction and we also found no basis to interfere with the sentence imposed by the trial court and hence we dismissed the appeal in its entirety for lack of merit on 11 September 2024.

MUZENDA J concurring

Appellant in person
National Prosecuting Authority, respondent's legal practitioners