

KAINOS BASERA MUTATU  
and  
THE STATE

HIGH COURT OF ZIMBABWE  
CHIKOWERO J  
HARARE, 13 September 2022

### **Chamber Application**

#### **CHIKOWERO J:**

1. This is an application for leave to appeal the conviction and sentence out of time and to prosecute such intended appeal in person.
2. On 19 October 2018 the Regional Court sitting at Chinhoyi convicted the then 60 year old applicant of three counts of rape as defined in s 65 of the Criminal Law Code.
3. Having treated the counts as one for sentence, the trial court imposed a penalty of 20 years imprisonment 2 years of which were suspended for 5 years on the usual conditions of good behaviour.
4. The Court found that the applicant had raped an 11 year old girl, whose maturity was put at between 5 and 6 years old at the Nyamhunga 1 Water Tanks, inside a flea market male public toilet and in a bush behind ZAOGA Church, all in Kariba.
5. The only issue at the trial was whether it was the applicant who had committed the offences.
6. The learned magistrate found that the three state witnesses were credible. The complainant gave a detailed account of the circumstances of the crimes and demonstrated how the offences were committed with the aid of the anatomically correct dolls. She knew the applicant because he occupied a vending table next to her aunt's at the market place. He employed food to lure his victim.
7. The aunt was believed in testifying that she did not influence the complainant to name the applicant as the abuser.

8. The social care worker was also believed. Her evidence was that the complainant freely and voluntarily fingered the applicant as the person who had raped her.
9. The Medical Report indicated that penetration was probable as the complainant's hymen had three healed notches, at 3, 7 and 12 o'clock. It was not in dispute that the complainant had been raped.
10. In light of the credibility findings and the content of the medical report I am satisfied there is no prospect of success in an appeal against the conviction. I am convinced too that the intended appeal against sentence is a predictable failure. The learned magistrate carefully balanced the mitigatory factors against the aggravatory factors and rightly concluded that a stiff sentence was called for.
11. He tempered the severity of the sentence by treating all three counts as one for the purposes of sentence and suspending a portion of the sentence on the usual conditions of good behaviour. The learned magistrate was mindful of the advanced age of the applicant, his poor health, family responsibilities and status as a first offender. At the same time, he found the 48 year age difference between the applicant and his victim, the gravity of the offence, the prevalence of sexual crimes against children and that the applicant exposed the complainant to the risk of contracting sexually transmitted diseases, since he used no protection, highly aggravatory.
12. The delay between the date of the conviction and sentence, 19 October 2018, and the date of the filing of the application, 17 August 2022, is inordinate.
13. The explanation for the delay is unreasonable. The applicant says he requested for a transcript of the record soon after he was sentenced. That was in 2018. He says he only managed to obtain the record on 8 January 2019. He does not explain why it thereafter took him more than three years for him to file this application.
14. Even if the delay had been minimal and the explanation reasonable I would still have dismissed the application on the basis that the intended appeal is devoid of prospect of success.

15. In the result, the application for leave to appeal the conviction and sentence under CRB CHNR 110/18 out of time and to prosecute such intended appeal in person be and is dismissed.

*The National Prosecuting Authority, respondent's legal practitioners*