

ESANI MAULUKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MANGOTA JJ
HARARE, 24 June 2014

Criminal appeal

E Chatambudza, for the appellant
E Mavuto, for the respondent

MANGOTA J: The appellant's appeal was set down for hearing on 24 June 2014. Prior to the day of the hearing and in response to the appellant's grounds of appeal as well as the latter's Heads of Argument, the respondent filed with the court a notice which he prepared in terms of s 35 of the High Court Act [*Cap* 7:06]. The court agreed with the respondent that his notice was properly before it and it accordingly allowed the appeal against conviction on that basis.

For purposes of clarifying matters, the court will deal in brief with:

- (a) the charge which the State preferred against the appellant,
- (b) the proceedings which the trial court conducted, particularly the evidence of the complainant - and
- (c) the reasoning which followed the conviction of the appellant

The appellant was charged with the crime of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Cap* 9:23]. The State allegations were that on 10 December 2011 and at CRG National Railways of Zimbabwe, Harare the appellant raped one Bertha Kavenga who was, at the material point in time, 16 years of age. It cited Bertha Kavenga as the complainant.

The appellant pleaded not guilty to the charge and denied having ever raped the complainant. He was, however, convicted after a lengthy trial in which the State called four

witnesses to come and testify against him. He, on his part, testified for himself and he called one witness.

The trial court sentenced the appellant to 12 years imprisonment, 3 years of which were suspended for 5 years on condition the appellant did not, within the stated period, commit any offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine.

The appellant was, accordingly, sentenced to an effective 9 years imprisonment.

The complainant was the first witness for the State. Her evidence, the court observed, was fraught with contradictions, inconsistencies and improbabilities. The court was surprised by the fact that the trial court was able to believe the version of events as narrated by the complainant in the face of what it observed. She was an incredible witness to say the least. She, for instance, stated that the appellant raped her. She said she reported the alleged rape to her aunt who is the appellant's wife and that the latter did not do anything about the report which she had made to her. Her aunt denied having ever received such a report from the complainant. It may be surmised for argument's sake, that the complainant's aunt was protecting the appellant when she stated as she did in court. However, a few days after the alleged rape, the complainant went to her rural area where she met her mother, her grandfather and her grandmother. She reported to none of these persons and her reasons for not doing so were never made clear to the trial court. She eventually went to stay with her boyfriend one Bright Chabvuta and she, once again, did not report to him that the appellant raped her on 10 December, 2011. Such conduct as the complainant displayed on this aspect of the case is not in any way consistent with the conduct of the person who had been sexually molested. The fact that the complainant only told her boyfriend of the alleged rape as a result of questioning, suggestions and supposed dreams which the latter was putting to her destroyed the complainant's version to a point of no return. Her story as told by her was that the appellant raped her on 10 December, 2011 and at CRG National Railways of Zimbabwe which is in the country's city centre. However, Bright Chabvuta who is her boyfriend stated that the complainant had told him that the alleged rape did not occur at CRG National Railways of Zimbabwe but in her own bedroom at the appellant's home.

It is difficult for the court to appreciate the reasons which persuaded the trial court to remain convinced of the fact that the complainant was a credible witness when matters which have been mentioned in the foregoing paragraphs are taken account of. The complainant's version fell on all fours both in-chief and when she was under cross-examination. Because

her story was unbelievable, improbable, inconsistent and, in many respects, contradictory, the trial court should, in its wisdom, not have continued with the case. The appellant should have been allowed to gain his freedom from the moment that the evidence of the complainant had been heard and done with. No amount or quality of further evidence was capable of resuscitating a case which, to all intents and purposes, was a dead one. The case died when the complainant testified in the manner which she did. The respondent was correct in making the concession which he made. The appellant is entitled to his freedom as his guilt was not proved at all.

The court has considered all the circumstances of this case. It is satisfied that the appellant was erroneously convicted and sentenced. It, accordingly, orders as follows:

- (a) that the appeal be and is hereby allowed
- (b) that the conviction and sentence be respectively quashed and set aside
- (c) that the appellant be and is hereby found not guilty and is acquitted of the charge.

Nyamushaya, Kasuso and Rubaya, appellant's legal practitioners
Attorney General's Office, respondent's legal practitioners

MANGOTA J _____

BERE J agrees _____