TASIYANA MUKUNA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 15 May 2014 and 22 May 2014

Criminal Appeal

P. Hamunakwadi, for the appellant
E. Mavuto, for the respondent

BERE J: On 25 January 2012 the appellant was charged with the crime of rape at Harare Magistrates Court. The evidence having failed to support the charge of rape, the learned magistrate returned a verdict of guilty to aggravated indecent assault as defined in s 66(1) (a) (i) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. Following upon his conviction the appellant was sentenced to 6 years imprisonment of which 4 years imprisonment was suspended for 5 years on the usual grounds of future good behaviour.

It is against this conviction and sentence that this appeal has been lodged.

The basis of the appellant's appeal is that the evidence tabled before the court *a quo* supported neither a conviction on rape nor aggravated assault as found by the court *a quo*. The appellant argued that a proper reading of the evidence screamed for his acquittal.

Mr *E. Mavuto* appearing for the respondent has indicated through his papers filed of record that the respondent does not support the conviction.

In coming to the conclusion of the guilt of the appellant the learned magistrate sought to rely on the evidence of the complainant, her mother, the appellant's wife and the medical report of the complainant. The learned magistrate reasoned that his findings were consistent with the various pieces of evidence put together.

It will be noted that contrary to the findings of the court *a quo*, the complainant's evidence had several inconsistencies. She struggled to confirm that the appellant penetrated her and by implication caused the bruises on her private parts. In one breadth she said the

bruises on her thighs were not caused by the appellant but by her wearing of tight pants a position which was flatly denied by her mother who wanted to paint the picture that she always cared for the welfare of the complainant by buying her the correct pant sizes.

Of major concern to the court was that the medical report which was compiled by an expert did not show any interference with the complainant's vagina as claimed by the complainant's mother. Even more damning was the specific findings by the doctor in the medical report that the complainant was still a virgin at the time of her examination.

The standard insertions in almost every medical report that "sexual intercourse cannot be ruled out" must be looked at with heightened caution and must be aligned with the evidence led and justifiably accepted by the court.

If indeed there had been any interference with the complainant's virgina the medical report would not have failed to pick it up especially on the column that deals exclusively with the external genitalia examination.

The inevitable conclusion which this court arrives at is that if the evidence of the mother is inconsistent with the findings of the medical report, then the former must be rejected.

It occurs to me that the allegations against the appellant started gathering momentum and putting pressure on the complainant when word started spreading around in the neighbourhood that she had slept with some menas per the mistaken conclusion arrived at by the accused's wife after employing some rudimentary examination of the complainant's private parts.

It was that pressure on the part of the complainant which in my view led to the complainant, after persistent probing that she had been raped by the appellant.

The other yarning gap in the evidence led in the court *quo* sterns from the failure by the presiding magistrate to call Mrs Gutsi (the sister in charge at Irvines Clinic) to whom the complainant was alleged to have first disclosed that she had been raped by the appellant.

It was crucial for this witness to have presented herself in court in order to fully explain the circumstances under which the complainant made a disclosure of rape to her and her failure to be given a platform to testify adds another dimension to the hopelessness of the state case.

It is imperative in my view that where offences of a sexual nature are involved courts remain cognisant of the fact that these offences generally occur in the heart of privacy and that once raised they become difficult to disprove.

Secondly, and as several precedents have noted, there are many reasons why a complainant in a rape case may decide to frame the accused. The reason are many and varried and no matter how hard we try as courts we will never be able to exhaust such reasons.

If the complainant's evidence could not support a charge of rape, it is equally true that her evidence could not have supported a charge of indecent assault as correctly argued by Mr *Mavuto* in his written submissions. The concession was well made by the respondent.

In conclusion the conviction in this matter is unsafe. The conviction and sentence are both set aside and the appellant is found not guilty and acquitted.

Messrs Chara and Associates, Appellant's Legal Practitioners
The Criminal Division of the Attorney General's Office, Respondent's Legal Practitioners

BERE J:……..

HUNGWE J agrees:……