

**THE STATE**

**Versus**

**KENNETH NYONI**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 29 MAY 2008

Criminal Review

**NDOU J:** The accused was convicted by a Gwanda Senior Magistrate of indecent assault as defined in section 67 of the Criminal Law (Codification and Reform) Act [chapter 9:23]. He was sentenced to a fine of \$7 million or in default of payment 4 days imprisonment. In addition, he was sentenced to three (3) months imprisonment wholly suspended on conditions of good behaviour. The salient facts of the matter are the following.

The accused is aged 22 years old. The complainant is aged 20 years old. On 10 November 2007 the complainant went to Vumbachikwe Mine in the company of her husband. She had gone there to buy cooking oil. She left her husband at the mine and went ahead to prepare supper for the family. She met the accused at around 2030 hours on her way to her homestead. The accused asked her where she was coming from and she told him she was from buying cooking oil at the mine. The accused made some advances to her offering to give her cooking oil in exchange of sexual favours. She declined. The accused did not accept such a rejection, instead of persuading her further he decided to use violence. He held her hand and told her that he wanted to have sexual intercourse with her. The complainant persisted with her rejection. The accused applied more force, he held her by the collar of her attire. He forcibly tried to remove her skirt. The complainant fought back and in the process managed to grab the accused by his private parts whilst at the same time screaming for help. The grip on his private parts and the screaming prevented the accused from raping the complainant. Were it not for the complainant's impetuous conduct, the accused would have raped her. This is a clear case of attempted rape as defined in section 65 as read with section 189 of the Criminal Law (Codification and Reform) Act [chapter 9:23]. The facts admitted by accused clearly constitute attempted rape.

The accused must consider himself very lucky. This type of conduct calls for a custodial sentence in the region of five (5) to eight (8) years. A fine of whatever amount constituted a trivialisation of a very serious sexual offence. The accused used violence to try and have sexual intercourse with a married woman. The fact that he did not succeed to rape her has nothing to do with a change of heart on the part of the accused. Instead the complainant fought back and screamed for help. The

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accused was very, very close to raping the complainant. It is difficult to understand why it never occurred to the trial prosecutor and magistrate that the accused's conduct was a very serious form of sexual abuse, especially in these days of HIV infections and AIDS.

In the circumstances I cannot confirm these proceedings as being in accordance with true and substantial justice. I accordingly withhold my certificate.