

REPORTABLE (20)

Judgment No. SC 23/06

Criminal Application No. 135/06

GODFREY NZIRA v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 6 & 29, 2006

Before: CHEDA JA, In Chambers, in terms of r 20(5) of the Supreme Court Rules

This is an application for leave to note an appeal out of time.

The applicant was convicted of seven counts of rape and one of indecent assault at the magistrate's court. He was sentenced to a total of forty-two years' imprisonment with labour, of which ten years were suspended on certain conditions.

The applicant appealed to the High Court. The High Court upheld the conviction but reduced the sentence to one of thirty years, of which ten years were suspended on the same conditions. He now wishes to appeal against the judgment of the High Court against both conviction and sentence.

The applicant's legal practitioners have filed affidavits to explain why the appeal was not filed within the required time limits. Having perused their explanations, I accept their reasons for the delay.

However, the other important factor to be taken into consideration by the court or Judge in such an application is whether there are any prospects of success.

The applicant is forty-two years old. He is the head of a religious organisation and was also head of a shrine, to which people went to worship and consult him for healing. The two complainants were admitted at his shrine for that purpose. They lived there with many other people under his command and control. One was raped four times and the other was raped three times.

Evidence led at the trial, which was accepted by both the magistrate's court and the High Court on appeal, portrays the applicant as a strong leader of his church, who was feared by all the inmates of the shrine. He was also found to be a

cruel man, whose guards would be instructed to assault anyone who went against his wishes or instructions.

The Judge who dealt with the appeal analysed all the evidence of the witnesses carefully from the record and found that, although certain criticisms had been made concerning their failure to report timeously, there were reasons of fear on the part of the complainants. Examples were given to the complainants of what could happen to them if they told anyone about the rapes. The applicant gave the names of people who had died after telling others about being raped by the applicant. The evidence of the witnesses was so detailed that any possibility of fabrication was ruled out.

The applicant's own evidence was found to be mere denials and his evidence and that of his witnesses was not worthy of belief. The court also found that the applicant had contradicted himself on a number of points. It therefore rejected his story.

I must point out here that an appeal court is very unlikely to go against factual findings of the trial court which had the opportunity to listen to and actually see the witnesses and observe their demeanour when giving evidence, unless it is shown that there is a clear misdirection on the part of the trial court.

In *S v Ngara* 1987 (1) ZLR 91 (SC) at 98, it was made clear that where the trial court makes a firm finding of credibility and is impressed with the demeanour of witnesses the appeal court will not readily be persuaded that the trial court erred in its assessment of the evidence if it has the same impression gained from a reading of the record.

The findings of both the magistrate's court and the High Court cannot be faulted. There was no misdirection.

I see no prospects of success on appeal against conviction.

On sentence, the High Court reduced it from an effective thirty-two years to an effective twenty years.

In his notice of appeal against sentence, the applicant only suggested that the sentence induces a sense of shock and should be set aside. He submitted that the court took into account only aggravating features and says that that was a misdirection.

It has not even been suggested what mitigating features need to be taken into account to reduce the sentence further after it was reduced by the High Court.

I therefore find that there are no prospects of success either on conviction or sentence.

The application for leave to note an appeal out of time is dismissed.

Musunga & Associates, applicant's legal practitioners