

THE STATE
versus
CLEOPAS NYAMANDE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 31 December 2014

Review Judgment

MUREMBA J: The accused who was aged 54 years pleaded guilty to contravening s 70 (1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. He was duly convicted and I hereby confirm the conviction.

What causes disquiet is the sentence that was imposed on him. He was sentenced to 24 months imprisonment of which 10 months imprisonment was suspended on condition of future good behaviour. The remainder of 14 months imprisonment was suspended on condition of performance of community service.

What is mitigatory about this case is that the accused was aged 54 years old and was a first offender. He has a family of 2 wives and 6 children and he admitted to the charge.

What is aggravatory about this case is that the complainant was 14 years old and was doing form one. There is an age difference of 40 years between the accused and the complainant. It is obvious that the accused took advantage of the complainant. The two had sexual intercourse on diverse occasions stretching from the month of May 2014 to the month of November 2014 when it was discovered that the complainant was pregnant.

In explaining why he committed the offence the accused stated that at his church they are allowed to marry as many wives as they want. He said that he wanted the complainant to be his third wife. He said that he had been shown by the Spirit that the complainant was going to be his third wife.

In sentencing the accused the trial magistrate stated that incarcerating the accused would add to the woes of the complainant who was now pregnant in that she would end up looking after the child alone.

Considering the gravity of the offence which was committed by the accused I find the reasoning for sparing the accused a prison term by the trial magistrate without merit. The

offence is so bad that it warranted the imposition of a stiffer prison term and an effective custodial sentence.

It is pertinent to note that in Zimbabwe there are churches especially apostolic sects which have religious practices that encourage members to marry young girls. They continue to do so regardless of laws which outlaw child sexual abuse such as s 70 of the Criminal Law Code which is the section the accused was charged with. The section even attracts a maximum penalty of 10 years imprisonment. Despite the heavy penalty that is prescribed by statute these churches continue with their practice. It seems that they listen to the Spirit which leads them more than they listen to the law of the land. There also seems to be a conflict between what the Spirit tells them and what the law says.

Child sexual abuse has effects such as pregnancy, girls dropping out of school and the risk of contracting HIV/AIDS and other sexually transmitted diseases. Early marriages deny girls educational opportunities, lead to poverty and economic insecurity. Because of lack of education the capacity of these girls to make decisions is negatively affected. Other forms of gender-based violence and problems such as physical and sexual abuse are reinforced against them. Adults who engage in child sexual abuse and marry young girls show a complete disregard of the rights of children yet our Constitution which is our supreme law protects these rights. Section 81 thereof is relevant.

Section 81 (1) says, “Every child, that is to say every boy and girl under the age of eighteen years, has the right –

- a) ----
- b) ---
- c) ---
- d) ---
- e) To be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;
- f) To education

Zimbabwe has also ratified some regional and international conventions which prohibit child sexual exploitation and abuse and child marriages: Articles 34 and 35 of the Convention on the Rights of the Child (CRC); Articles 16(2) of the Convention on elimination of all forms of Discrimination Against Women (CEDAW). Article 21 of the African Charter on the Rights and Welfare of the Child.

In *casu* the complainant who was aged 14 years fell pregnant and obviously dropped out of school. What made her vulnerable was her young age and her church practice which brain-washed her. Adults who take advantage of such children ought to be seriously punished. They must be sentenced to imprisonment, not only to punish them but also in an endeavour to deter others who might have similar inclinations. Heavy custodial sentences are essential if the courts are to play their role in protecting children or young people from sexual abuse by adults.

Section 81 (3) of the Constitution states that children are entitled to adequate protection by the courts. Courts should show their commitment in tackling early marriages and child sexual abuse by imposing stiffer penalties. If this is done the rights of the children will be safe guarded.

In *casu* if the accused had been sentenced to effective imprisonment that would have sent a clear message to his church mates that child sexual abuse and child marriages are not tolerated by the courts and as such other would be offenders would have been deterred from committing such crimes in future. I hold the view that in the circumstances the sentence that was imposed by the trial magistrate is not deterrent enough. It also sends a message to these churches that they can proceed with child sexual abuse and child marriages and get away with very light sentences. A sentence in the region of 4-5 years imprisonment with a portion suspended on condition of good behaviour would have met the justice of the case.

The sentence is not in accordance with real and substantial justice and as such I withhold my certificate.