REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case No: CA 85/2008

In the matter between:

BEN KAMAZE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: Kamaze *v State* (CA 85/2008) [2013] NAHCMD 147 (*31 May 2013)*

Coram: **NDAUENDAPO J et SHIVUTE J**
Heard: 15 APRIL 2013
Delivered: 31 MAY 2013

Flynote: Criminal procedure—Appeal-against convictions and sentences on rape and incest—Sentence of 18 years and 3 years respectively—Grounds of appeal—Guilt of appellant not proven beyond reasonable doubt—Complaint single witness—Sentences unreasonable—State proved the guilt of the appellant beyond reasonable

doubt—Conviction on incest charge—Duplication—Appeal allowed-Appeal against rape dismissed.

Summary: The appellant was convicted of rape and incest of his own daughter. On the rape charge, he was sentenced to 18 years imprisonment and on the incest charge to 3 years imprisonment. The sentence on incest was ordered to run concurrently with sentence on the rape charge.

He appealed against both convictions and sentences. His grounds of appeal are, *inter alia*, that his guilt was not proved beyond reasonable doubt, that the complainant was a single witness, that his rights to legal representation were not explained and not assisted by the presiding officer during the trial and that the sentences imposed were unreasonable.

Held, that although the complainant was a single witness on the actual rape, her evidence was corroborated by witnesses and the J88 and that the guilt of the appellant was proved beyond reasonable doubt.

Held, further, that, on the charge of incest, there was a duplication of convictions because the appellant only had a single intent to rape the complainant who happened to be his daughter

Held, further, that his right to legal representation was explained and appellant was duly assisted by the presiding officer.

Held, further, that the sentence of 18 years on the rape charge was in order.

Held, further, that the appeal against conviction and sentence on the rape charge is dismissed.

Held, further, that the appeal against conviction and sentence on the incest charge is allowed.

ORDER

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1. The appeal against conviction and sentence on the rape charge, is dismissed.
2. The appeal against conviction and sentence on the incest charge, is allowed.

JUDGMENT

NDAUENDAPO J [1]

The appellant was convicted of contravening section 1, 2 (2), 2 (3), 3, 4, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000 and incest in the Regional Court, sitting at Windhoek.

The allegations on the rape charge are 'that during 17 January 2004 at or near Windhoek in the Regional Division of Namibia the accused did wrongfully and unlawfully and intentionally and under coercive circumstances namely by applying physical force to the complaint commit or continues to commit a sexual act with another person, namely Erna Komumungondo of which the sexual act consisted of inserting his penis into her vagina.' '*The allegation on the crime of incest are that' In that upon or about 17th January 2004 at or near Katutura in the Regional Division of Namibia the said accused being a male person, and the complaint being a female person, did unlawfully and intentionally have sexual intercourse with one another, the said accused being by blood relationship the father of the said Erna Kamumungondo whom he was consequently legally prohibited from having sexual intercourse.'* He was sentenced to 18 years imprisonment on the rape charge and 3 years imprisonment on the incest charge.

[2] He now appeals against both conviction and sentence. The grounds of appeal are as follows:

AD CONVICTION

‘I. The State did not prove the charges against him beyond a reasonable doubt.

ii. The learned magistrate erred by convicting the appellant on the word of the complaint. And that the complaint was a single witness whose evidence was not corroborated.

iii. The learned magistrate failed to assist the appellant who was unrepresented and was facing a serious charge.

iv. The learned magistrate failed to explain to the appellant his rights to legal representation.

v. The learned magistrate erred by admitting the medical report which is hearsay evidence.

vi. The learned magistrate erred by not drawing a negative inference from the failure of the State not to call the doctor who examined the complainant.

vii. The learned magistrate erred by not drawing a negative inference from the failure of the state to take the appellant for medical examination.

ix. The learned magistrate erred by rejecting the evidence of the appellant and his witnesses.

x. The learned magistrate erred by failing to approach the evidence of the state witnesses with great caution since they are family members of the complainant.

AD SENTENCE

[3] xi. The learned magistrate erred by taking into account the prevalence of the offence of rape when no statistics were presented to court to show the prevalence of the offence.

xii. The learned magistrate erred by failing to assist the appellant who was unrepresented during his mitigation of sentence.

xiii. The sentence imposed on the appellant is so unreasonable that no reasonable court could have imposed it.'

Ms Nyoni appeared for the state and Mr Karuaihe for the appellant.

[4] **Legal representation**

The appellant complained that his rights to legal representation were not explained, but the record shows that was done on 20 January 2004 when he appeared in court. He opted to appoint a private lawyer. On 12 March 2004 his right to legal representation was again explained and he opted for legal aid counsel. Mr Hengari was appointed to represent him. On the date of the trial Mr Hengari did not turn up at court and the trial proceeded without Mr Hengari. Counsel for the appellant submitted that the presiding officer should not have allowed the trial to proceed in the absence of the legal representative of the appellant. He contended that the conviction was tainted by an irregularity in that the appellant suffered prejudice due to lack of legal representation.

Counsel, in support of his submissions, relied heavily on the case of *S v Seheri an Andere* 1964 (1) SA 29 A (at 36) where it was held that an accused unrepresented at a trial through his attorney's fault, does not as a result forfeit his right to legal

representation, and that a refusal to grant a postponement to the accused to enable him to be represented later amounted to a failure of justice'.

That case is clearly distinguishable from the present one. In *casu,* there was no request for a postponement which was refused. The record clearly shows that the appellant was asked by the presiding officer what 'he wanted to do in the absence of his lawyer' and he informed the court that 'he will stand on his own', based on that the trial proceeded. The appellant's right to legal representation was explained to him and he was fully aware of his right to legal representation from the date that he appeared in court and that is why he applied to legal aid. When his lawyer failed to turn up at court, he chose to represent himself. The record also shows that during the trial the presiding officer duly assisted him and his rights to cross examination was also fully explained to him. That ground is, in my view, without merit.

STATE'S CASE

[5] **Elna Komumungondo**

She testified that she is the biological daughter of the appellant and was in grade 10 at Namcol. On 17 January 2004 she came from the reserve to Windhoek to visit the appellant (her father) and stepmother, at the room which he was renting. On that day she and the appellant were watching tv in the room. Her stepmother left and went to look for meat at her aunt's house. She remained with appellant in the room. The appellant stood up from the bed, went to close the door and peeped through the window and closed the curtains, he then came back and lay on the bed. She was seated on the bed. She testified that the appellant grabbed her on the throat and started to play with her breasts. He then asked her whether he was not going to give him a 'bit'. She asked him what he wanted to be given, but he did not say what he wanted. He started kissing her, trying to put his tongue in her mouth. He let her lay down on the bed and put her arms behind her back with his one hand, lay on top of her and with the other hand lifted her skirt, removed her panty and then took out his penis and inserted it in her vagina.

He then had sexual intercourse with her and ejaculated in her. During that ordeal she was wrestling and trying to get him off from her, but she could not as he was holding her. After he ejaculated he started dressing himself and gave her panty to her and she put it on. She went around the bed and went to sit on the head side of the bed. Her stepmother came in and sat on the bed. They ate the meat that she brought with. After that, she went to the bathroom and took a bath. She washed off the semen from her private parts. There after she went to Jacqueline, her sister and she was crying. She told her that she was raped by the appellant. Together with Jacqueline they went to her niece, Priscilla, still crying and told Priscilla that the complainant was raped by the appellant. From there they went to the Women and Child Protection Unit to lay a complaint. There after she was taken to the hospital. At the hospital a medical examination was carried out on her and a medical report was compiled. (J88).
During cross examination, the appellant never challenged the complainant's evidence about the rape. Nor did he put to her that it was her mother who instigated her to falsely implicate him as he claimed when he testified.

[6] **Jacqueline Komumungondo**

She testified that she is a sister of the complainant from the same mother. On 17 January 2004 the complainant came to her house. She was crying and she told her that appellant had raped her. They proceeded to their niece's place and she informed Priscilla that the complainant was raped by the appellant and from there they went to the women and child's protection unit to lay a charge of rape. She confirmed that the complainant was then taken to the hospital where she was examined.

[7] **Priscilla Komumungondo**

She testified that on 17 January 2004 between 16h00 and 17h00 the complainant and Jacqueline came to her house. Jacqueline told her that the complainant had been raped by the appellant. The complainant was crying and from there, they went to the women and child protection unit, where she laid a charge of rape against the appellant.

[8] **Appellant's case**

He testified that the complainant came to visit them and she stayed for 2 weeks. When she was ready to go back to school in Omaruru, she wanted N$2000. He told her that he could not give her the N$2000 and an argument ensued as a result. He explained that to his mother and sister who advised him to send the complainant back to Omaruru, the complainant refused. On 17 January 2004 he was at work during the day. Between 13h00 and 14h00 he and his colleague came home and found his wife and the complainant watching tv. The colleague remained seated in the vehicle. He sent his wife across the road to go and buy russian and chips. The wife returned and when she entered the room, the complainant went out. He gave some of the food to his colleague who was seated in the vehicle. The complainant returned to the room, took her shoes from underneath the bed and then told him that she was going to her sister's house. It was raining and he asked her whether he could go and drop her, but she said no. After he finished eating he went to the vehicle and they drove off to work. He worked until 16h50 and then returned home. His colleague dropped him and he left. His wife told him that the complainant has not returned since she left lunch time. Around 23h00 the police arrived and arrested him for rape. He was locked up, whilst in custody, the mother of the complainant went to his employer and asked him for N$2000 so that she could withdraw the case. The employer refused. He denied having raped the complainant.

[9] **Kaumamuka Hangero**

He testified that, on that day the appellant told him that the complainant was asking for money. They drove to the house of the appellant. He remained in the vehicle and the appellant went inside the house and returned with food. They then left for work. After work he came and dropped the appellant his place. The next day he heard that the appellant was arrested.

Erica Tjazirapi, the mother of the appellant, testified that she heard that the appellant had raped the complainant but she personally saw nothing. Her evidence did not add anything further to the evidence of the appellant.

That was the case for the appellant

AD CONVICTION

[10] In his notice of appeal the appellant in essence complained that the state did not prove his guilt beyond a reasonable doubt and that the complainant was a single witness who's evidence was not corroborated. Section 208 of Act 51 of 1977 provides: 'An accused may be convicted of any offence on the single evidence of any competent witness'.

In S v Sauls and Others 1981 (3) SA 172 (A) at 180 D-E the court held that*:*

> *There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpf JA in S v Webber* 1971 (3) SA 754 (A*)* at 758*). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but is does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham* 1955 (2) SA 566 (A) at 566). *It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'*

The complainant not only told the court a quo in detail how the rape happened, but she immediately reported the rape to her sister who proceeded to her niece and told her niece about the rape. She was crying and that was confirmed by the sister and niece. That same night she was examined by the doctor who completed a medical examination report that was handed in court with the consent of the appellant. There

was no need to call the doctor as the J88 was admitted into evidence by consent of the appellant. Her evidence about the rape is corroborated by the J88. According to the medical examination report (J88), the doctor who examined the complainant observed that ‘she was confused, crying. The examination was painful. The findings of the doctor were that: Hymen not intact, minimal bleeding from the introitus, she was penetrated very fresh by penis’. He also observed: ‘whitish vaginal discharge like sperms’

The allegations by the appellant that it was the mother of the complainant who instigated her to lay the charge of rape, was an afterthought. It was not disclosed during his plea explanation. It was also not put to the complainant during cross-examination. No evidence was presented to corroborate the allegations. The complainant had no motive to make a false charge of rape against the appellant whom she loved as a child. Although the complainant is a single witness to the actual rape, the fact that she immediately reported that to her sister and her niece corroborates her evidence. She was crying because she was disappointed by what the appellant did to her. The J88 also corroborates her testimony that she was raped.

Having regard to the totality of the evidence,I am satisfied that the guilt of the appellant was proved beyond a reasonable doubt.

[11] **Charge of incest**

The appellant was convicted of rape and incest based on the same evidence. Counsel for the state correctly, in my view, conceded that the conviction on the incest cannot stand as it was a duplication of convictions. In *S v Karengo* 2007 (1) NR 135 HC the court held that ‘the most commonly used tests are the single test and the same evidence test. Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. See *R v Sabuyi* 1905 TS 170 at 171. This is the single intent test. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are

to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act being brought into the matter, the two acts are separate see *S v Nakale and others* 2007 (2) NR 405 HC at 420'. In this case the appellant had a single intent to rape the complainant who happened to be his child. Therefore the appellant should not have been convicted of both rape and incest.

[12] **AD SENTENCE**

In *S v Tjiho* 1991 NR 361 HC at 366 A-B, Levy J stated that:

'The appeal court is entitled to interfere with a sentence if:

(i) the trial court misdirected itself on the facts or on the law;

(ii) an irregularity which was material occurred during the sentencing proceedings;

(iii) the trial court failed to take into account material facts or overemphasized the importance of other facts;

(iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by any court of appeal.'

See: *S v Tjiho* 1991 361 (HC) at 366 A-B

In *S v Pillay*, it was stated that:

'the essential inquiry in an appeal against sentence, however is not whether the sentence was wrong or right, but whether the court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.

Counsel for the appellant submitted that there was no evidence led that the complainant was under the age of eighteen years old and the learned magistrate therefore erred to have assumed that the complainant was eighteen years old and to have sentenced the appellant to 18 years in terms of section 3 (10 (cc) of Act 8 of 2000. He contended that

the appellant should have been sentenced to 10 years in terms of section 3 (1) (a) (ii) of Act 8 of 2000. Even if counsel is correct in his submission that there was no evidence that the complainant was under 18 years old, section 3(1) (a) (ii) of Act 8 of 2000 refer to imprisonment for a period of not less than ten years. The ten years is a minimum period and there is nothing preventing the presiding officer to impose a period more than 10 years. The sentence of 18 years imposed on the appellant was therefore in order and no reason exist to interfere with that sentence.

In the result, I make the following order:

1. The appeal against conviction and sentence on the rape charge, is dismissed.
2. The appeal against conviction and sentence on the incest charge, is allowed.

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GN Ndauendapo

JUDGE

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N N Shivute

JUDGE

APPEARANCES

FOR THE APPELLANT:	Mr Karuaihe Of Karuaihe Legal Practitioners
RESPONDENT:	Ms Nyoni Office of the Prosecutor-General