



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CC 46/2009

In the matter between:

**THE STATE**

and

**JOHNSON MATUNDU**

**1<sup>ST</sup> ACCUSED**

**UAZENGA TJAMUAHA**

**2<sup>ND</sup> ACCUSED**

**KAHIJAMBUA KAMUINGONA**

**3<sup>RD</sup> ACCUSED**

**UTJATAE MURETI**

**4<sup>TH</sup> ACCUSED**

**Neutral citation:** *State v Matundu* (CC46/2009) [2013] NAHCMD 241 (15 August 2013)

**CORAM:** NDAUENDAPO, J

**Heard on:** 27-28 May 2013

**Delivered on:** 15 August 2013

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## ORDER

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In the result,

Accused 1 is convicted of count 1, 4, 5, 10, 14, 18

Accused 2 is convicted of count 2, 3, 6, 11, 15, 17

Accused 3 is convicted of count 7, 12, 13, 19

Accused 4 is convicted of count 8, 9, 16, and 20

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## JUDGMENT

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### **NDAUENDAPO, J:**

[1] The accused are arraigned in this Court and charged with the following crimes.

#### **COUNT 1 In respect of accused 1 Johnson Matundu**

That the accused is guilty of contravening section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000  
– Rape.

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, **JOHNSON MATUNDU** hereinafter called the 1<sup>st</sup> perpetrator, did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by inserting his penis into the vagina of the complainant and the coercive circumstances are:

That he applied physical force to the complainant

That the presence of the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha was used to intimidate the complainant and the complainant was unlawfully detained.

**COUNT 2 In respect of accused 2 Uazenga Tjamuaha**

That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **UAZENGA TJAMUAHA** hereinafter called the 2<sup>nd</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 1<sup>st</sup> perpetrator Johnson Matundu to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances by holding the complainant while Johnson Matundu inserted his penis into the vagina of the complainant and the coercive circumstances are:

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 3 In respect of accused 2 Uazenga Tjamuaha**

**That the accused is guilty of contravening section 2 (1) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **UAZENGA TJAMUAHA** hereinafter called the 2<sup>nd</sup> perpetrator did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with **Mbajoroka Kauami**, hereinafter called the complainant, under coercive circumstances by inserting his penis into the vagina of the complainant and the coercive circumstances are:

He applied physical force to the complainant;

That presence of accused 1<sup>st</sup> Johnson Matundu was used to intimidate the complainant and the complainant was unlawfully detained.

**COUNT 4 in respect of accused 1 Johnson Matundu**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **JOHNSON MATUNDU** hereinafter called the 1<sup>st</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by holding the complainant while the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha inserted his penis into the vagina of the complainant and the coercive circumstances are:

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 5 in respect of accused 1 Johnson Matundu**

**That the accused is guilty of contravening section 2 (1) (a) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused JOHNSON MATUNDU hereinafter called the 1<sup>st</sup> perpetrator, did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant,

under coercive circumstances, by inserting his penis into the vagina of the complainant and the coercive circumstances are:

That presence of the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha, the 3<sup>rd</sup> perpetrator, Kahijambwa Kamuingona and the 4<sup>th</sup> perpetrator Utjatae Mureti was used to intimidate the complainant and the complainant was unlawfully detained.

**COUNT 6 in respect of accused 2 Uazenga Tjamuaha**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **UAZENGA TJAMUAHA** hereinafter called the 2<sup>nd</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 1<sup>st</sup> perpetrator Johnson Matundu to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by holding the complainant, while the 1<sup>st</sup> perpetrator Johnson Matundu inserted his penis into the vagina of the complainant and the coercive circumstances are:

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 7 in respect of accused 3 Kaijambua Kauingono**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **KAIJAMBUA KAMUINGONO**

hereinafter called the 3<sup>rd</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 1<sup>st</sup> perpetrator Johnson Matundu to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by holding the complainant while the 1<sup>st</sup> perpetrator Johnson Matundu inserted his penis into the vagina of the complainant and the coercive circumstances are:

That he applied physical force to the complainant; His presence was used to intimidate the complainant and; the complainant was unlawfully detained.

**COUNT 8 in respect of accused 4 Utjatae Mureti**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about the 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **UTJATAE MURETI** hereinafter called the 4<sup>th</sup> perpetrator did wrongfully, unlawfully and intentionally cause Johnson Matundu to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant while the 1<sup>st</sup> perpetrator Johnson Matundu inserted his penis into the vagina of the complainant under coercive circumstances by holding the complainant and the coercive circumstances are:

That he applied physical force to the complainant; His presence was used to intimidate the complainant and; the complainant was unlawfully detained.

**COUNT 9 in respect of accused 4 Utjatae Mureti**

**That the accused is guilty of contravening section 2 (1) (a) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **UTJATAE MURETI** hereinafter called the 4<sup>th</sup> perpetrator, did wrongfully, unlawfully and intentionally commit or continue to

commit a sexual with Mbojoroka Kauami, hereinafter called the complainant, under coercive circumstances, by inserting his penis into the vagina of the complainant and the coercive circumstances are:

That presence of 1<sup>st</sup> perpetrator Johnson Matundu, the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha and the 3<sup>rd</sup> perpetrator, Kahijambua Kamuingona was used to intimidate the complainant and the complainant was unlawfully detained.

**COUNT 10 in respect of accused 1 Johnson Matundu**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **JOHNSON MATUNDU** hereinafter called the 1<sup>st</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 4<sup>th</sup> perpetrator Utjatae Mureti to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by holding the complainant while the 4<sup>th</sup> perpetrator Utjatae Mureti inserted his penis into the vagina of the complainant and the coercive circumstances are;

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 11 in respect of accused 2 Uazenga Tjamuaha**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **UAZENGA TJAMUAHA** hereinafter called the 2<sup>nd</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 4<sup>th</sup>

perpetrator Utjatae Mureti to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by holding the complainant while the 4<sup>th</sup> perpetrator Utjatae Mureti inserted his penis into the vagina of the complainant and the coercive circumstances are;

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 12 in respect of accused 3 Kaijambua Kamuingono**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **KAIJAMBUA KAMUINGONO** hereinafter called the 3<sup>rd</sup> perpetrator did wrongfully , unlawfully and intentionally cause the 4<sup>th</sup> perpetrator Utjatae Mureti to commit or continue to commit a sexually act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by holding the complainant while the 4<sup>th</sup> perpetrator Utjatae Mureti inserted his penis into the vagina of the complainant and the coercive circumstances are:

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 13 in respect of accused 3 kaijambua kamuingona**

**That the accused is guilty of contravening section 2 (1) (a) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**



The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **KAIJAMBUA KAMUINGONO** hereinafter called the 3<sup>rd</sup> perpetrator did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by holding the complainant while the 4<sup>th</sup> perpetrator Utjatae Mureti inserted his penis into the vagina of the complainant and the coercive circumstances are:

That by words and or conduct he threatened to apply physical force to the complainant.

That presence of 1<sup>st</sup> perpetrator Johnson Matundu, the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha and the 3<sup>rd</sup> perpetrator, Utjatae Mureti was used to intimidate the complainant and the complainant was unlawfully detained,

**COUNT 14 in respect of accused 1 Johnson Matundu**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **JOHNSON MATUNDU** hereinafter called the 1<sup>st</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 3<sup>rd</sup> perpetrator Kaijambua Kamuingona to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances,, by holding the complainant while the 3<sup>rd</sup> perpetrator Kaijambua Kamuingona inserted his penis into the vagina of the complainant and the coercive circumstances are:

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 15 in respect of accused 2 Uazenga Tjamuaha**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused JOHNSON MATUNDU hereinafter called the 1<sup>st</sup> perpetrator Kaijambua Kamuingona to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by holding the complainant while the 3<sup>rd</sup> perpetrator Kaijambua Kamuingona inserted his penis into the vagina of the complainant and the coercive circumstances are:

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 16 in respect of accused 4 Utjatae Mureti**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused UTJATAE MURETI hereinafter called the 4<sup>th</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 3<sup>rd</sup> perpetrator Kaijambua Kamuingona to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by holding the complainant while the 3<sup>rd</sup> perpetrator Kaijambua Kamuingona inserted his penis into the vagina of the complainant and the coercive circumstances are:

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 17 in respect of accused 2 Uazenga Tjamuaha**

**That the accused is guilty of contravening section 2 (1) (a) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **UAZENGA TJAMUAHA** hereinafter called the 2<sup>nd</sup> perpetrator, did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by inserting his penis into the vagina of the complainant and the coercive circumstances are:

That the presence of the 1<sup>st</sup> perpetrator Johnson Matundu, the 3<sup>rd</sup> perpetrator Kaijambua Kamuingona and the 4<sup>th</sup> perpetrator Utjatae Mureti was used to intimidate the complainant and complainant was unlawfully detained.

**COUNT 18 in respect of accused 1 Johnson Matundu**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **JOHNSON MATUNDU** hereinafter called the 1<sup>st</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 2<sup>nd</sup> perpetrator Uazenga Mbajoroka Kauami, hereinafter called the complainant while the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha inserted his penis into the vagina of the complainant and the coercive circumstances are;

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 19 in respect of accused 3 Kaijambua Kamuingono**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **KAIJAMBUA KAMUINGONO** hereinafter called the 3<sup>rd</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant while the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha inserted his penis into the vagina of the complainant and the coercive circumstances are:

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

**COUNT 20 in respect of accused 4 Utjatae Mureti**

**That the accused is guilty of contravening section 2 (1) (b) read with section 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 – Rape.**

The state alleges that upon or about 23 May 2008 and at or near Okakarara Secondary School in the district of Okakarara, the accused **UTJATAE MURETI** hereinafter called the 4<sup>th</sup> perpetrator did wrongfully, unlawfully and intentionally cause the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha to commit or continue to commit a sexual act with Mbajoroka Kauami, hereinafter called the complainant, under coercive circumstances, by holding the complainant while the 2<sup>nd</sup> perpetrator Uazenga Tjamuaha inserted his penis into the vagina of the complainant and the coercive circumstances are .

That he applied physical force to the complainant;

His presence was used to intimidate the complainant and;

The complainant was unlawfully detained.

## [2] **SUMMARY OF SUBSTANTIAL FACTS**

The complainant was a learner at Okakarara Secondary School. All 4 accused persons were also learners at the same school.

On the 23 May 2008 the complainant and her friends failed to get lifts to take them to their homes where they were to spend the weekend off school. They returned to the hostel.

Later the complainant and her friends were on their way to get food when the complainant was stopped by the 1<sup>st</sup> and 2<sup>nd</sup> perpetrators who were her classmates. Her friends proceeded without her. The 1<sup>st</sup> and 2<sup>nd</sup> perpetrator grabbed hold of the complainant and dragged her to a toilet. The 2<sup>nd</sup> perpetrator closed the door to the toilet. The 1<sup>st</sup> perpetrator then had sexual intercourse with the complainant while the 2<sup>nd</sup> perpetrator held her down.

When the 1<sup>st</sup> perpetrator finished having sexual intercourse with the complainant the 2<sup>nd</sup> perpetrator had sexual intercourse with her while the 1<sup>st</sup> perpetrator held the complainant down.

When the 2 finished having sexual intercourse with the complainant, they left the complainant in the toilet. The complainant who was crying got out of the toilet and started walking towards the hostel. While she was walking the complainant was called by the 3<sup>rd</sup> perpetrator, Kaijambua Kamuingona.

The 3<sup>rd</sup> perpetrator threatened her with a knife and then pushed her to the boy's hostel. In the hostel the 3<sup>rd</sup> perpetrator was joined by the 1<sup>st</sup> perpetrator, Johnson Matundu and the 2<sup>nd</sup> perpetrator, Uazenga Tjamuaha and the 4<sup>th</sup> perpetrator Utjatae Mureti. All 4

perpetrators assisted each other and took turns to have sexual intercourse with the complainant.

[3] All the accused pleaded not guilty to all the charges preferred against them. Accused 1 was not present at the hostel when the alleged rape took place in the toilet and in the hostel. Accused 2 explained that he had consensual sex with the complainant in his room. He denied raping her in the toilet. Accused 3 was at the village when the alleged rape took place. Accused 4 explained that he had consensual sex with the complainant in the toilet. Mr Karuaihe is representing accused 1; Mr Mbaeva is acting for accused 2, Mr Uirab for accused 3 and Mr Coetzee for accused 4. Ms Esterhuizen is acting for the state.

The state called the following witness and the **summary** of their evidence is as follows:

[4] **ALEX MWENDERA**

He testified that he photographed certain points pointed out to him by the complainant. The photo plan handed in court is a true reflection of what he has photographed.

[5] **TUVATEE TJIVAU**

She is a teacher at Okakarara secondary school. She testified that she knows all accused persons and the complainant. The complainant and accused 1 and accused 2 were learners in her class in 2008. Accused 3 and 4 were learners at the same school. She was informed by Sexy that the complainant was raped.

She then approached the complainant who further told her during her register period at school on the 28<sup>th</sup> May 2008. According to her the complainant's, looked sad also crying and unstable.

She decided that she could not ask her in class and she called the complainant outside. Outside the complainant told her that she was raped over the weekend by the 4 accused persons. The complainant was continuously crying and she decided to take her

to the office of the principal. She also told the court that she did not ask the complainant in detail as to what had happened as she was crying continuously.

[6] **Doctor Sikota Mutanekelwa Zeko**

Dr. Zeko testified that during 2008 he was stationed at Otjiwarongo state hospital at the outpatient department.

He examined the complainant on the 28<sup>th</sup> May 2008. Five days after the alleged rape. His observations were as follows: 'fourchette tender, vestibule tender, hymen-annular, not present, fresh tear, vagina difficult to examine, even with one finger, marked tenderness examination was painful, bruising on posterior wall.' Conclusion 'injuries fit with the time and circumstances of alleged incident, findings suggestive of forceful entry'.

He further testified that because of the examination which showed that there was lot of tenderness, that indicated that there was forceful entry and also indicated that, there was some penetration and the fact that his examination was several days later, from the time of the incident, he would not expect so much pain.

*On a question by the Court on whether if there was consensual sex between the patient (complainant) who was a virgin for that matter, and a man would you be able to observe this kind of forceful entry that you referred to in your report? The doctor replied "no I will not because the pain was so much and usually when there is consent, there is lubrication, because the body respond positively when there is consent."*

Q: *you mean lubrication from within the body*

A: *yes, because there were glands there that lubricate the vagina*

The Court further asked from your examination can you say that this forceful entry happens once or twice or what was your observation about that? In other words how many times would you say the penis caused that injury. The doctor replied: 'your

Honour it would be more than once. “because the pain was not just on the outside, but also on the inside.”

Dr Zeko also examined each of the accused persons. In respect of ACCUSED 2, UAZENGA TJAMUAHA he found hyper pigmented patches on circumcised glans penis. Tender, no bruising or tenderness on shaft. He explained the colour was different from the actual glans penis because the colour is usually pink, but this one looked a bit reddish. He stated any force could have caused that, if it is used against any resistance. Dr Zeko found it to be tender, painful as the accused showed that there were some pain when he touched that area. He concluded that the ‘injuries fit with the time and circumstance of the alleged incident’.

In respect of ACCUSED 3, KANUINGONO KAHIJAMBUA he found circumcised hyper pigmented peri urethral area. It means that the pigmentation there was darker around the peri urethral area. Normal colour is, it looks pink. The pigmentation could be caused by any external force on the glans penis itself. Dr. Zeko however indicated he would not know when sexual intercourse had taken place.

In respect of ACCUSED 1, Johnson Matundu, he observed penis partial erection circumcised, injuries fit the time and circumstances of the alleged incident’. He testified that he cannot remember whether he had found any injuries.

Dr Zeko’s explanation with regard to the above he stated that this one was done right at the end, after he had finished everything. And by that time, the patients had already gone. He also explained that he wrote the conclusion at the end of the examinations.

In respect of ACCUSED 4, UTJATAE MURETI, Dr. Zeko indicated he also found hyper pigment peri urethral area. That was caused by external force, applied to the tip of the glands penis.

[7] **Mbajoroka Kauami**



She testified that in 2008 she was in grade 9 at Okakarara Secondary School. She was staying in the hostel. She was 17 years old. She knows accused 1 and 2 very well as they were in the same class. She knows accused 3 as he was a learner at the same school. Accused 4's father is the brother to her mother. She testified that the Friday 22 May 2008 was an out weekend. The hostel supervisor told them that they must leave the hostel premises to go to their homes and if they do not get transport to their homes, they can come back to the hostel. She went to look for transport to go home, but she could not pay the fare and she then returned to the hostel. The girl who was in charge at the hostel informed them that they had to provide for their own food as it was an out weekend. A friend of hers suggested that they go to the location to a friend to get food. At around 19h00 they decided to walk to the location. There was a still light and as they were approaching the boys' toilets they found accused 1 and 2 standing there. Accused 1 asked her to stand/stop as he wanted to ask her something. She stopped and asked her friends to wait for her at the gate. They told her that time was not on their site and she must find them on the way. When they left, accused 1 grabbed her on the right arm and forcefully pulled her towards him. She asked him to leave her so that she could go. Accused 2 came and held her on the left arm. She was resisting. They pulled her into the boy's toilet. Accused 2 closed the door of the toilet and her back was against the wall. She stood against the wall with the aim of trying to beat them off so that they could not touch her. They told her to be quiet. Accused 2 grabbed her legs and pulled her down. She hit her back on the floor and injured her back. She was wearing a long trouser, a top and a jersey. Whilst lying on the floor, accused 2 came and pulled her arms towards the back and pressed them down on the floor. Accused 1 was in the meantime undressing his trouser and pulled his trunkie up to his knees. Thereafter he undressed her trouser and panty up to under her knees. He got on top of her and inserted his penis into her vagina and raped her. After accused 1 finished he got off and told accused 2 that it was now his turn and he accused 1 would hold her arms so that accused 2 could get his turn. Accused 1 held her arms/pulled her arms upwards and then pressed them down onto the floor. Accused 2 then undressed his trouser and trunkie and then got on top of her. He inserted his penis into her vagina and raped her.

After they finished both dressed up and ran out of the toilet towards the boy's hostel. She then dressed up and decided to go back to the girl' hostel. She was in much pain between her legs and her back. As she approached the girls' block, accused 3 was standing there. He called her and she tried to wipe off her tears. The visibility was fine and she recognized his voice. Accused 3 told her to come to him as he wanted to ask her something. She went to him as she thought that he wanted to ask her about school work. He asked her why she was crying, but she was quite. She then told him that if 'there was nothing constructive he wanted to discuss she was going to sleep. She then turned her back towards him with the intention of going and he then grabbed her on the hair and forcefully pulled her back towards him. He then took out a small knife and pressed the knife against her neck and told her to listen to each and everything he was telling her. She thought that he will stab her or even kill her. He then said she must accompany him to the boys hostel. She did not want to go with, but he was pushing her until they reached the boys hostel. He told her that if she did not do what he was telling her, he can do anything to her therefore she must do what he was demanding from her. They walked pushing, pulling as she tried to resist. They entered the boys block and he then took her inside to the 3<sup>rd</sup> room from the entrance. She resisted entering, but he pushed her on the floor of the room on a mattress. He pushed her from behind and she fell on the floor on the mattress. She tried to jump up and ran away, but she suddenly saw the other accused coming into the room. That was accused 1, 2, and 4. The lights were on and it was clear and they were coming from the other rooms.

They grabbed her and pushed her onto the mattress. Accused 2 then took her arms pushed them backward and then pressed them down onto the mattress and sat on them. Accused 4 then got hold of her legs and opened them. Accused 3 came undressed her trouser and panty and placed them into a locker.

She testified that the room throughout was not all that dark, the light from the pole was reflecting into the room, because the room did not have curtains, so that light was coming into the room.

She testified that the visibility inside the room was such that she could recognize each and every one of them. Accused 4 opened her legs and pressed them down on the mattress. Accused 1 then undressed himself and got on top of her and inserted his penis into her vagina and raped her. Accused 1 was facing her as he was raping her so she could recognize that it was accused 1 who was raping her. She told him to get off her, but he refused. After he finished he got up and held her legs and told accused 4 that it was now his turn to get on top of her. Accused 4 undressed his trunkie up to his knees and got on top of her and inserted his penis into her vagina and raped her. She was crying and she did not know what to do as she was thinking that it was the end of her life. She recognized accused 4 as he was facing her whilst on top of her.

After accused 4 finished, he told accused 3 that it was now his turn he must come and lay on top of her. Accused 4 then held her one leg together with accused 1 holding the other leg. Accused 3 got on top of her undressed himself and inserted his penis into her vagina and raped her. Accused 3 was facing her and she could recognize his face. Whilst accused 3 was on top of her, she managed to pull her hands out under accused 2 and then she grabbed him on his ears and slapped him, he then slapped her back.

After accused 3 finished raping her, he told accused 2 that it was now his turn and that he should come and lay on top of her. Accused 2 got on top of her, inserted his penis into her vagina and raped her. Accused 2 face was facing her face and she could clearly see his face and she recognized him as accused 2.

After that accused 1, 2 and 4 left the room and they went to sat at the boys block and she remained in the room with accused 3. Accused 3 then got up took her clothes from the locker and threw them at her face and he then also left the room. After she came out of the room they were seated in front of the block and as she was passing they were laughing saying 'yah you can now go nice because you have saved us' Accused 3 also said that if she happened to go and tell anyone, they will come back and assault her or do something to her. They were all seated together when accused 3 said that to her. She went to the room where she slept for the weekend (not her usual room) took a bath

and went to bed. She pretended as if nothing had happened, she was ashamed of telling the girls in the room what had happened to her. When her friends returned from the location she did not tell them that she was raped. She told them that she did not follow them because it became dark and she decided to come and sleep. The next morning she did not go out as she was not feeling well and she was just in the hostel and did not tell anyone about the rape. Tuesday morning she woke up, washed herself, and went to class. In the class she was not concentrating and she was crying quietly. She did not tell anyone on Tuesday as she was ashamed, feeling bad and could not look people in the eyes as she was afraid that they would say that she initiated that to happen to her. Sexy came to her and asked her why she was crying and what had happened to her, she then related to sexy what had happened to her. Sexy went to tell the teacher and the teacher called her and she then related that to the teacher. She told teacher Tjivau that she was raped in the toilet and in the boys' hostel.

Teacher Tjivau then took her to the principal's office. She then told the principal what she told Tjivau. She was crying when she talked to the principal and it was difficult for her to relate each and every detail to him as she was afraid. The principal immediately phoned the police who arrived soon thereafter. She testified that she was also taken to the hospital where a doctor examined her. She was admitted in the hospital for the whole week as her body was painful and she could not walk properly. She never gave any consent to any of the accused to have sex with her.

[8] **Uaukua Kangononduezu (Sexy)**

She knows the complainant as a friend since 2007. They were classmate in 2008 at Okakarara Secondary School.

She testified that the weekend of 23 May 2008 was an out weekend and the boys who had to play soccer had to stay at the hostel. She left home and on Monday when she returned she saw that the complainant was not normal as she was limping and quiet. She asked her why she was quiet and limping and she informed her that she fell down and injured herself. On Tuesday during break time she and a friend went to the

complainant and asked her what was wrong with her. She told her that accused 1 and 2 raped her and that she was threatened with a knife to go to the boys block. She did not say anything further as she was crying. She mentioned the names of all 4 accused. After she informed her, she took her to teacher Tjivau.

[9] **Esnath Kauami**

She is the mother of the complainant. She went at the school after she was told that her daughter, the complainant was raped. When she met her they cried. She told her that she was raped by four boys in the toilet and in the boys hostel. She went to the police station and signed documents. After that she returned to her home at the village. At home she was told by her uncle that one of the accused is the child of her brother and that she must go and withdraw the case. This brother was supporting the complainant. She went to the police station to withdraw the case, but the police refused to withdraw it. She did that without the knowledge of the complainant.

[10] **Theofilus Ngozu**

He is the principal of Okakarara secondary school. He testified that on Wednesday 28 May 2008 Ms Tjivau reported to her office about a pupil who was raped. The complainant was brought to his office and he could not ask her in detail as she was not in a very good condition and, she was crying. She gave him the names of the four accused as the persons who raped her. The accused were learners at the school and they were also soccer players. The complainant informed him that she was raped in the toilet and again in the boy's hostel.

He called the four accused to his office and informed them about the allegations against them. Accused 1 told him that he was trying to have sex with the complainant whilst standing and he could not penetrate her and she fell down. The police were called and the parents of the accused were contacted.

He testified that the four accused were soccer players and they stayed behind that weekend as they were supposed to play in a soccer tournament that weekend. He knows that because he is the principal of the school and he had a keen interest in soccer.

[11] **Nicola Kazondendu**

She was in grade 9 at Okakarara secondary school in 2008. She knows the four accused as they were schooling together. She testified that on 23 May 2008 was an out weekend they stayed at the hostel as they could not find a lift to go to their homes. After eating, they went to sit in front of the girls' block. Whilst seated there accused 3 came there and called her to come to him, she refused. He then called the complainant and she went. When she asked the complainant where she was going she said she was going to watch DSTV. Whilst seated Yaunga arrived there. She and yaunga left to the location. At around 22h00 they came back to the hostel and found the complainant asleep. In the morning they went to take a bath. She observed that the complainant was not walking properly as she walked with open legs. On Tuesday they went to school. The complainant informed her that she was raped over the weekend by the four accused. They first raped her in the toilet and then took her to the boys' hostel where they again raped her.

[12] **Warrant officer Himarwa**

She is the investigating officer. She testified that she met the complainant on 28 May 2008 at Okakarara police station. The complainant was emotional and crying and she could therefore not take a statement from her. She took the statement the next day and the complainant told her in detail what had happened to her. She testified that she had investigated many rape cases before and from her experience, the complainant did not pretend to be emotional.

[13] **Applications in terms of s 174**

At the end of the state's case, the accused brought applications in terms of s 174 of Act 51 of 1977. I refused the applications and indicated that my reasons will be provided at the end of the trial. The complainant testified in detail how she was grabbed by accused 1 and 2 and pulled into the toilet. Accused 1 and 2 then took turns in raping her. When she left the toilet and on her way to the hostel, accused 3 called her and then grabbed her and threatened her with the knife. He then pulled her to the boys hostel. She was resisting but, he was too strong for her. At the hostel he pushed her into the room and pushed her down on the mattress. As she was lying on the mattress the other accused 1, 2 and 4 came into the room. They assisted each other and took turns in raping her. There was light in the room and she could see and recognize their faces as each one of them was on top of her. She was examined by the doctor who observed that there was force penetration more than once. The complainant also told her friend, teacher Tjivau and the principal that she was raped by the four accused persons. In my view a prima facie case was established by the state and the evidence adduced was such that a court, acting carefully, may convict the accused. On that basis the applications were refused.

## **DEFENCE'S CASE**

### **[14] Accused 1**

He was a learner at Okakarara secondary school in 2008. He denied having had sex with complainant on 23 May 2008. On that specific day he was at home in Okakarara. He went home at 15h00 in the afternoon. He denied having played soccer that weekend. He also did not meet with his co accused that specific day when he went home. He only met them the Monday at school.

He denied having admitted to the principal that he tried to have sexual intercourse with the complainant.

### **[14] Accused 2**

He testified that he knows the complainant as they were in the same class. He testified that on the 23 May 2008 was an out weekend. He was at school until 10h00 am and from there he went to look for a lift, but did not manage to get a lift and returned to the hostel around 19h00. At the hostel he sat a bit outside in front of the hall. Inside the hall there were learners watching DSTV. He stood up and went to room 3 to fetch a jacket. When he entered room 3 where he was sleeping, the lights were on and the door was open. The complainant was lying on his bed. He asked who was sleeping in his bed and she removed the blanket off from her face and he saw that it was the complainant. He asked her what she was looking for and she said 'mepondo' meaning I am struggling. He then moved close to the bed. He sat on the bed and she started touching him on his body and she took off her bra and showed him her breast. They started kissing, she then removed her clothes, and he also removed his clothes. She put it on top of the other bed. They then had sexual intercourse and after they finished, the complainant put on her clothes and she left, from there he went to room 5 picked up his jacket and then went to the location. He returned around 24h00 midnight. He went to sleep and the next morning he went to look for a lift and went to the village. He returned to school on Monday around 17h00.

On Wednesday around 9h00 am whilst in class he was called by teacher Tjivau and they went to the principals' office. He was arrested on Wednesday at 15h00 and taken to the doctor for examination.

[15] **Accused 3**

He testified that in 2008 he was a learner at Okakarara secondary school and in grade 10. He knows his co-accused. He knows the complainant.

Before leaving to the village he saw the complainant at the hostel around 18h00 in front of the girls block. She was with Nicola. They were seated in front of the hostel block. He was waiting for the vehicle to come and pick him up. He then called Nicola and she said she was not coming because she was tired, thereafter he called the complainant and then she stood up and came. When she came they started talking and they agreed



to go to the school hall to see what was on TV. They went there stayed for 5 minutes and came out and stood between the hostel block of the boys and the hall talking. Whilst standing there, accused 4 came there and called the complainant and she went to him and they walked to school. He stood there for long until the vehicle arrived and he then went to the village. He denied having a knife and having threatened and raped the complainant.

[16] **Accused 4**

He testified that in 2008 he was a learner at Okakarara secondary school and in grade 10. On Friday 23 May 2008 it was an out weekend. Around 13h00 he went to the location strolling around in the location and returned back to the hostel early in the evening. At the hostel, before reaching the front block, he met accused 3 with the complainant, they were having a conversation. He called the complainant to come to him, she came and they walked in the direction of the school and as they were walking he started proposing to her asking her to become his girlfriend. It was not the first time that he proposed to her, before that he tried 2 or 3 times. She showed interest then and they tried to kiss once. They walked freely and they kissed and they walked passed the classrooms and went to the toilet. They stood at the toilet and started kissing and whilst kissing the security guard passed by the toilet and to avoid being seen by the security guard they went inside the toilet. Inside the toilet they continued kissing and then the complainant undressed herself and he then undressed as well. They had sexual intercourse and when they finished they dressed up and then he left first. He went to the hall and watched TV. There were other learners in the TV hall. He stayed in the hall for 40-60 minutes from there he went to his room, took a bath and went to sleep. He was alone with the complainant in the toilet and he did not see accused 2 that day. He knows accused 1, 2 and 3 as they were schooling at the same school, but they were not friends.

On Wednesday he was called by teacher Tjivau to go to the principal's office. At the office the principal was with 2 police officers and he was taken to the police station.

He was later taken to the hospital with accused 1,2,3 and examined by a doctor and no injuries were found on his penis. He denied having raped the complainant or assisted his co-accused in any manner to rape the complainant. In 2008 he was playing soccer for the under 17 team.

[17] **Analysis of the evidence**

The complainant testified in detail how she was raped in the toilet by accused 1 and 2. She testified that as they were approaching the boys' toilets accused 1 and 2 were standing there. Accused 1 grabbed her on the right arm and forcefully pulled her towards him. She asked him to leave her but he did not do that. Accused 2 came and held her on the left arm and they pulled her in the boys' toilet where they took turns in raping her. Her evidence that she fell on her back in the toilet and injured her back was corroborated by the doctor who observed bruises on her back when he examined her. Accused 1 admitted to the principal that he was trying to have sex with the complainant when she fell on the floor. The complainant also testified that she knows accused 4 very well. Accused 1 and 2 were in the same class with her and accused 3 and 4 were also learners from the same school. She testified how accused 3 forcefully took her to the boys hostel, to room 3. She testified that in the room she was lying on the mattress when each of the accused got on top of her and raped her. There was enough illumination in the room and they faced her when they were on top of her, so she could clearly recognise their faces. The accused also testified that they know the complainant very well. Some were in the same class with her and they assisted each other with their homework. From the evidence adduced, there was no animosity between her and the accused. Her evidence was also corroborated by the doctor who examined her. His findings were that there was '*forced penetration*', and according to the doctor if there was consensual sex the glands around the vagina would excrete lubricants which makes it easier for penetration to take place. The doctor testified that he examined the complainant 5 days after the alleged rape and his observations were: '*fourchette tender, vestibule tender, fresh tear, vagina difficult to examine, even with one finger, examination was painful*'. On the question by the Court whether the 'forceful entry'

happens once or twice he replied 'more than once because the pain was not just on the outside, but also on the inside'.

The complainant was subjected to intense and lengthy cross examinations. Counsel for the accused pointed out contradictions in her testimony. Mr Karuaihe submitted that the version of teacher Tjivau contradicted that of the complainant. Tjivau testified that the complainant told her that she was pulled into the toilet by accused 1 only and that another person who assisted accused 1 was already in the toilet. Complainant testified that both accused 1 and 2 pulled her in the toilet. The complainant testified that her friends brought her some chips and bread when they returned that evening, Nicola denied that.

Mr Mbaeva submitted that accused 2 and the complainant knew each other and accused 2 could not have raped the complainant while knowing that she could point him out in case a report was made to the police. He also submitted that the complainant was a single witness as far as the element of penetration is concerned and therefore her evidence must be treated with caution. Mr Uirab took issues with the fact that the complainant did not scream whilst being raped, that she informed Tjivau that only accused 1 raped her in the toilet, the contradictions between her testimony about the meeting with accused 3 and the testimony of Nicola that accused 3 called the complainant whilst the two of them were seated in front of the girls block and the fact that she told Nicola that she was going to watch tv with accused 3 and that accused 3 threatened her with a knife whereas Nicola did not see that, also her failure to report the rape immediately at least to Nicola showed that she was never raped by any of the accused persons, according to Mr Uirab. Mr Coetzee also pointed out the contradictions in the evidence of Tjivau and that of the complainant, that when accused 3 took her to the room, the other 3 boys were already in the room whereas the complainant testified that the 3 boys only entered the room when she and accused 3 were already in the room, that the complainant told Tjivau that only accused 1 pulled her in the toilet, whereas she testified that both accused 1 and 2 pulled her in the toilet, the fact that she told an untruth about there being no cellphone reception at the village of

her mother, whereas there is indeed MTC reception. Nicola's evidence that the complainant was going to watch tv with accused 3 is improbable. The complainant decided to go to the location to look for food as she was hungry as there was no food to be served at the hostel that weekend, and for her to abandon the search for food in favour of going to watch tv, is improbable. Nicola was less than candid when she testified that.

The court is mindful of the contradictions and the discrepancies in the evidence of the complainant. However the fact that there were contradictions and discrepancies in her evidence, does not mean a court must reject her evidence about the rape as untruthful especially where there is corroboration from the doctor and other witnesses.

*In Albertus Hanekom v The state, Supreme Court, appeal case no SA 4 (A) /2010 delivered on 11 May 2001 at 16 stated the following: "Before evaluation of the evidence of the various witnesses mention must also be made of the fact that not every contradiction or discrepancy in the evidence of a witness reflects negatively on such witness. Whether such discrepancy or contradiction is serious depends mostly on the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence".*

Mr Ngozu, the principal of the school, testified that Tjivau made a report to him that the complainant was raped by four boys. The complainant gave him the names of the four students who raped her and that she was raped in the toilet and in the boys hostel, but she could not give further details as she was crying. He called the four boys to his office trying to find out what had happened.

According to him accused 1 told him that he was trying to have sex with the complainant, and then the girl fell down on the floor. When it was put to accused 1 why the principal would testify that, he replied 'my lord I have no comment why the principal have to testify such a thing that I do not have comment.' He further stated 'me and the principal were just normal since we were also communicating very well'. That admission by accused 1 corroborates the version of the complainant that she fell on the

floor in the toilet. Why would the principal lie about that and single out accused 1 out of the four accused who were summoned to his office. I have closely observed Mr Ngozu when he testified and he made a good impression on me. He came to tell the truth and the court is satisfied he told the truth.

Accused 2 testified that on Friday morning he went to school up to 10 am. At 10:30 he finished eating and from there he went to collect his luggage and went to the location to go and look for a lift. He was unsuccessful in getting a lift and he returned to the hostel, there was no security guard at the gate. He went to his room 3 where he found the complainant lying in his bed. He testified that the complainant was never before in his room, did not tell her that he was sleeping in room 3 and on that specific bed. There were 12 beds in that dormitory. That weekend was an out weekend and he did not meet with the complainant to tell her that he would be around. According to him there were more than 7 dormitories at the hostel for boys. The questions that arise immediately are the following: how did the complainant know that he would be around that weekend? that he was sleeping in room 3 and on that specific bed in which she was alleged found in sleeping?

The Court asked accused 2 those questions and he answered by saying he did not know. It is highly improbable that the complainant will simply go to the boys hostel, go to room 3 and sleep on accused 2 bed, keep the lights on and the door open wait for accused 2 to arrive and demand sex from accused 2.

Accused 4 testified that the reason why they went into the toilet was because he saw the security guard who was guarding the door and that is why they decided to go into the toilet. There was evidence from accused 2 that when he returned from the location to the hostel at 19h00 the security guard was not there at the gate. Nicola also testified that at the time when they exited the gate to go to the location around 19h00 there was no security guard at the gate. The complainant also testified that the security guard was not there. The principal also testified that the gate guards do not walk around in the

yard, they are only there to man the gate. The evidence by accused 4 that they, him and the complainant, saw the security guard that is why they went into the toilet is not true.

Accused 4 also testified that on 2 or 3 occasions before 23 May 2008 he proposed to the complainant, showing that he was interested in her. According to him he wanted her to be his girlfriend, yet when she agreed to be his girlfriend and after he had sex with her in the toilet, he left her in the toilet and never contacted her again. That is inconsistent with his alleged prior conduct of wanting her to be his girlfriend and still his girlfriend after the sex in the toilet. If his version is credible, why would the complainant after having sex with him in the toilet, proceed to the room of accused 2 and sleep in his bed demanding more sex from another boy who was not her boyfriend? That is highly improbable. The court is mindful that the complainant was a single witness on the actual rape and that her evidence must be treated with caution. But having regard to totality of the evidence, I am satisfied that her evidence on that aspect is credible.

I have carefully considered the totality of evidence, the inherent strengths, weaknesses and probabilities on both sides and I am satisfied that the prosecution proved the guilt of the accused beyond reasonable doubt.

In the result,

Accused 1 is convicted of count 1, 4, 5, 10, 14, 18

Accused 2 is convicted of count 2, 3, 6, 11, 15, 17

Accused 3 is convicted of count 7, 12, 13, 19

Accused 4 is convicted of count 8, 9, 16, and 20

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**G N NDAUENDAPO**

**JUDGE**

**APPEARANCES**

**THE STATE:** Ms Esterhuizen  
Of The Prosecutor General Office

**ACCUSED 1:** Mr Karuaihe  
Karuaihe Legal Practitioner

**ACCUSED 2:** Mr Mbaeva  
Mbaeva & Associates

**ACCUSED 3:** Mr Uirab  
Legal Aid Counsel

**ACCUSED 4:** Mr Coetzee  
Tjitemisa & Associates