

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

CASE NO.: CC 12/2009

In the matter between:

**THE STATE**

**vs**

**GERSON KAVIYENE KAMERUAO**

**ACCUSED**

**Neutral citation:** *S v Kameruao* (CC12/2009)[2014]NAHCMD14(23 January 2014)

**Coram:** SIBOLEKA J

**Heard on:** 21 November 2013,

**Delivered on:** 23 January 2014

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SIBOLEKA J

[1] On 15 October 2013 this court convicted the accused on three counts of Rape in contravention of section 2(1) of the Combating of Rape Act, Act no. 8 of 2000; two counts of assault and one count of indecent assault.

[2] It is now my duty to consider an appropriate sentence, and in doing that I look into the accused's personal circumstances, the crime, and the interests of society. Sufficient weight is traditionally given to each factor. However it may in the end result in one factor being emphasized more than the other. This is normal in sentencing because each case has to be considered on its own merits.

[3] I am also alive to the objectives of punishment namely prevention, deterrence, reformation and retribution. (See *S v Banda* 1991 (2) SA 352 at 354.

[4] I will now start with the accused's personal circumstances.

[4.1] At the time of the commission of these offences he was 30 years old, and is now 36 years of age, he went up to Grade 9 at Okakarara Secondary School. He has three children the eldest aged 15 years; twins a boy and a girl are now 7 years old. The children are born from separate unemployed mothers and are currently residing with them in Okakarara. The eldest girl went to secondary school and the twins started school this year.

[4.2] The accused's parents are still alive and are pensioners. In December 2007 the accused worked for Ura Mine where he earned N\$2000 every second week. During the trial, he was on bail from 20 May 2011, and was unemployed, he did some casual work painting, welding, and fixing cars where he earned between N\$1000 to N\$2000.

[4.3] The accused supported all his three children including his parents, and all will now lose out with the incoming punishment. According to the accused's counsel the responsibility of taking care, supporting children and being employed are and should be regarded as mitigating factors.

[4.4] The accused spent three and a half years in custody while waiting for the

finalization of this matter, a quite substantial period of time, which counsel prays should also be taken into account. This counsel relied on the matter of *S v Vilakazi* 2000 (1) SACR 140 (W) at page 142 where the court held that the period spent in custody before the finalization of the trial should be taken into account during sentencing. I don't find problems with this reasoning. According to this counsel, this court per Van Niekerk J in *S v Abiud Kauzuu* described a failure to subtract the period accused already spent in custody awaiting finalization a misdirection.

[4.5] Mr Uirab submitted that when considering an accused's previous record, the age of the offender at the time of that conviction, how soon after the last conviction he committed another offence must be taken into account. He stated that on the last previous conviction assault with intent to do grievous bodily harm handed down on 21 February 2012 was relevant to the accused before court. The counsel acknowledged the seriousness of rape coupled with assault. He stated that for purposes of sentence the counts the accused has been convicted of, must be viewed as two offences only. The reason being that the cumulative effect could operate harshly if sentence on each count is considered separately. A co-current order of the running of the sentences would prevent the accused's life being broken up.

[4.6] Mr Uirab submitted that the accused is a first offender on the counts of rape and that no physical harm was suffered by the complainants. This counsel proposed ten (10) years' on both rape counts. A fine on the counts of assault would be appropriate and a wholly suspended sentence on the indecent assault.

[5] Counsel for the prosecution Ms Esterhuizen called Linda Kavendji, the complainant on the first count. She testified that she will not forget the incident. She said she feels ashamed about what had happened to her whenever she walks among the community. According to her, she has lost trust in men for fear that she may be raped again. During cross-examining of her mitigation evidence

she told the court that she did not contact Palmer the Social Worker because her older sister was counseling her. During re-examination she said it is difficult for the accused's counsel to understand how she felt when the accused raped her in front of her child.

[5.1] In regard to sentence Ms Esterhuizen submitted that the fact that the accused committed the second rape while out on bail must be taken into consideration during sentencing. This counsel asked the court to impose ten (10) years' on the rape count of Linda Kavendji. She proposed that the assault and indecent assault on Linda Kavendji be taken together for purposes of sentence because they were committed during the same rape incident. This counsel proposed twelve (12) years' for the two counts of rape on Veronica Garoes, stating that they should be considered as one action for purposes of sentence because it all happened at once. She requested six (6) months for the incident of assault of both Linda Kavendji and Veronica Garoes or that they should be made to run concurrently.

[6] On the crimes the accused has committed it need not be overemphasized that rape is a serious violation of the dignity of the victim. It creates a scar that cannot easily be healed for quite a long time. Women in particular are vulnerable members of our society who require protection. The court will fail in its duty if it does not impose a sentence that includes and carries a deterrent aspect to future would be offenders sending a clear message that rape will not be tolerated, and as such it will always be visited with harsh sentences at all times. Linda Kavendji was 18 years old when the accused sexually assaulted her in her own residence.

[6.1] Veronica Garoes had walked to a night club with her boyfriend on the day of the incident. She ignored his warning to stay away from the accused. In the end her belief that the accused was not going to harm her turned sour when she was sexually attacked while escorting him home to collect some money for more drinks. I agree with the accused's counsel submission that both victims did not

suffer physical harm, however, the seriousness of these offences remain firm and unshaken in the mindset of this court.

[6.2] It is an unavoidable consequence that custodial sentences have to be meted out in order to protect defenseless victims such as women. I am in agreement with the accused's counsel that the three and a half years that the accused spent in custody during the trial of the matter cannot be ignored.

[7] On the interests of society it is the duty of this court to protect those who are physically weak and not in a position to defend themselves. I am persuaded by the remarks of the court in *S v Karg* 1961 (1) SA 231 at 236B-C where the following was stated:

“It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.”

[8] In particular I have taken into account the following factors in the consideration of sentence: The accused is a first offender on the Rape offences; the victims did not suffer any physical harm during the assault; the accused spent three and a half years in custody awaiting the finalization of trial on this matter.

[9] In the result the accused is sentenced as follows:

Count 1: Rape: Eight (8) years' imprisonment;

Count 2: Assault: Three (3) months imprisonment;

Count 3: Indecent assault: Six (6) months imprisonment wholly suspended for five (5) years' on condition that the accused is not convicted of indecent assault, committed during the period of suspension.

Count 4 and 5 are taken together for purposes of sentence: Rape: Ten (10) years' imprisonment;

Count 6: Assault: Three (3) months imprisonment.

It is ordered that the sentence imposed in count 6 should run concurrently with the sentence in count 2.

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A M SIBOLEKA

Judge

#### APPEARANCES

STATE:

Ms. K Esterhuizen

Instructed by The Office of the Prosecutor-General

DEFENCE:

Mr. Uirab

Instructed by Directorate of Legal Aid