

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE NO.: HC-MD-CRI-APP-CAL-2019/00106

In the matter between:

**MWILIMA SANDY MUYONGO**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral Citation:** *Muyongo v S* (HC-MD-CRI-APP-CAL-2019/00106 [2020] NAHCMD 294 (17 July 2020))

**Coram:** USIKU J et UNENGU, AJ

**Heard:** 18 May 2020

**Delivered:** 17 July 2020

**Flynote:** Criminal Procedure – Evidence of a single – Corroboration by other evidence – Forensic evidence lacking – Such does not invalidate or nullify equally convincing evidence – Evidence be considered in totality – Appellant's guilt having been proven beyond reasonable doubt.

**Summary:** The appellant was convicted on the charge of Rape in the Regional Court sitting at Katima Mulilo where after he was sentenced to 12 years imprisonment.

Appellant appealed against conviction only after withdrawing his appeal against sentence.

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### **ORDER**

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The appeal is dismissed.

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### **APPEAL JUDGMENT**

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USIKU, J (UNENGU, AJ concurring):

[1] The appellant appeared in the Regional Court held at Katima Mulilo on a charge of rape. He pleaded not guilty to the charge but after the trial, he was convicted as charged on the 16 October 2018 and was subsequently sentenced to 12 years imprisonment.

[2] Discontented with the conviction and the resultant sentence imposed on him the appellant filed an appeal against both conviction and sentenced within the regulated period of time. It is of importance to note that at the time of the hearing of the appeal the appellant through his private instructed counsel indicated that the appeal against sentence was being withdrawn.

[3] The appellant raised the following grounds of appeal against his conviction:

- (i) That the Court erred by concluding that the complainant did not shower, urinate or have sexual intercourse with another person after the alleged sexual act;

- (ii) That the *court a quo* erred by rejecting and or concluding that the forensic report did not corroborate the appellant's version;
- (iii) That the magistrate erred in concluding that the appellant inserted his penis into the vagina of the complainant;

The respondent opposed the appeal.

[4] Ms Mainga appeared on behalf of the appellant on private instructions while Mr Kumalo appeared for the respondent.

[5] It must be pointed out on the outset that during the proceedings in the *court a quo* there was no issue raised by the appellant that the complainant might have had sexual intercourse with another person. This issue having only been raised on appeal. It is trite law that the Court of appeal must concern itself with the issues already raised in the *court a quo*. Thus it must be stressed that in an appeal the appellant is confined to the four corners of the record.

[6] Furthermore, it is important for the defense to put its case to the prosecution witnesses. It is not reason for not doing so that the answer would almost certainly be a denial. Therefore the court is entitled to see and hear the reaction of a witness to every important allegation.

[7] There is no dispute that the appellant and the complainant met at the former's house on the date in question. Furthermore, that the appellant and the complainant ended up in the appellants' bedroom, where she claimed to have been raped by the appellant. To this end the court evaluated the evidence of the state witnesses.

[8] From the evidence of the complainant it is clear that she immediately made a report of having been raped at an earliest opportunity that presented itself to one of her friend after she returned from the appellants' house crying. At the same time she requested her to accompany her to the bathroom. She was still crying as she removed

her shorts and showed it to her friend. Her friend observed fluids on the short and asked her what it was to which she responded that Sandy did it. “Sandy is the appellant.” It was after these revelations that she advised the complainant to go to the clinic which was not far away from the school. This witness’s version was accepted by the *court a quo* upon which the appellant was convicted on a charge of rape.

[9] Further evidence led was that semen was detected around the vagina, vulva and vestibule.

[10] The complainant’s evidence is to the effect that the appellant inserted his penis into her vagina. She did not consent to the sexual act. In terms of the *Combating of Rape Act 8 of 2000* a sexual act is defined as;

(a) ‘The insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person’.

[11] As borne out by the record of the proceedings the appellant himself admitted to having been pushed out of the complainants’ body, which implies that at the time he was being pushed out he had in fact inserted his penis into the complainants’ vagina which would mean that penetration had occurred.

[12] Indeed the *court a quo* considered the totality of the evidence presented and was cautious about the danger of convicting on such evidence and came to the conclusion that the truth was told. That principle was applied in *S v Sauls and Others*<sup>1</sup> where the Court held that such evidence need to be satisfactory in every respect provided that the Court at the end is satisfied that the truth had been told.

[13] Even though no forensic evidence was presented which would usually assist with the identification of the suspect, the absence of scientific evidence of DNA, or other forensic evidence, does not invalidate or nullify equally convincing evidence presented.

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<sup>1</sup> *S v Sauls and Others* 1981 (3) SA 172 (A).

[14] The Court in *casu* relied on the totality of the evidence and convicted the appellant as charged. In my view the complainant was a credible witness. Furthermore, when regard is had to the other corroborating evidence regarding the first report, the sexual act between the complainant and the appellant could not have been consensual under the circumstances.

[15] Having regard to the aforementioned reasons I make the following order.

The appeal is dismissed.

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D USIKU

JUDGE

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E P UNENGU

ACTING JUDGE

APPEARANCES:

For the Appellant:

I Mainga

Inonge Mainga Attorneys

Windhoek

For the Respondent:

P Kumalo

Of the Prosecutor-General's Office

Windhoek