IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 008/2018**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

TRY HAMENDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: ***CHISANGA, JP,* NGULUBE *AND MAJULA, JJA.***
On 21st May and 25th June, 2019.

For the Appellant: *Ms. M. Marebesa, Legal Aid Counsel, Legal Aid Board*

For the Respondent: *Mrs. S. C. Kachaka, Senior State Advocate, National Prosecution Authority*

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Phiri v The People (1970) SJZ 178*
2. *Kaambo v The People (1976) ZR 122*
3. *Jutronich, and Others v The People (1965) ZR 9*
4. *Joseph Mulenga and Albert Joseph Phiri v The People (2008) ZR 1 Vol 2*
5. *Patrick Hara v The People SCZ Judgment No. 162 of 2011*

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia.

On 28th November, 2017, the appellant was convicted of one count of defilement contrary to section 138(1) of the Penal Code, Cap 87 of the Laws of Zambia as amended by Act Number 15 of 2005 and Act Number 2 of 2011 of the Laws of Zambia. The particulars of the offence were that between 24th and 25th August, 2017, at Monze in the Monze District of the Southern Province of the Republic of Zambia, the appellant had carnal knowledge of a child. He was sentenced to thirty years imprisonment with hard labour with effect from 29th August, 2017.

The evidence against the appellant was that he had carnal knowledge of the prosecutrix, a girl aged 12 years, three times, on 24th August, 2017 after he picked her up from church on the pretext that he was going to collect a bicycle that her father was interested in buying. He took her to Chisekesi where, in the bush, he defiled her three times. He threatened to beat her when she tried to resist. This evidence came from PW2, the prosecutrix. She stated that she saw the appellant for the first time that fateful day.

PW3, the prosecutrix's elder sister, who was aged 14 years confirmed that the appellant picked up her sister from church on

the understanding that they were going to collect a bicycle that was for sale. When she did not return by 18:00hours, a search was conducted and the prosecutrix was only found at 10:00hours the following day.

The evidence of PW1, Doreen Cheelo was that on 25th August, 2017, she travelled to Muzoka to follow up the issue of the missing child, the prosecutrix, who was abducted the previous day, on 24th August, 2017. She found the child at Muzoka and upon interviewing her, she told PW1 that she was defiled by the appellant three times.

PW1 later learnt that the person who abducted the prosecutrix had been apprehended. She took her to Monze Mission Hospital for medical examination where it was revealed that she was indeed defiled. The evidence of PW4, Universe Hamakobo, the prosecutrix's father was that on 24th August, 2017, at about 18:00hours, he was informed by his wife that the prosecutrix had not returned home. He reported the matter to Chisekesi Police Station and a search was commenced. The child was subsequently found in Monze the

following day. He identified her under five card in court, which was marked ID2. He also identified the appellant who he knew well, as he was his nephew.

PW5, Kelvin Namweemba's testimony was that on 27th August, 2017, he assisted the prosecutrix's father by being involved in the search that was conducted after she was reported missing. He identified the appellant in Court as the person that he apprehended for abducting the prosecutrix.

The evidence of PW6, Detective Constable *Siantebele* was that he charged and arrested the appellant for the offence of defilement. In the course of investigations, he came across a green national registration card which showed that the appellant was born in 1997. He stated that the appellant told him that he took the prosecutrix because she was supposed to get married to him.

When the appellant was put on his Defence, he elected to remain silent and did not call any witnesses.

Upon analyzing the evidence, trial Court made the following findings of fact-

1. That the prosecutrix was defiled on the night of the 24th August, 2017.
2. That the appellant tricked the prosecutrix when he got her from church on the pretext that they were going to pick up a bicycle which her father wanted to buy but instead, he took her to a place in the bush in Chisekesi where he defiled her.
3. That she was found with the appellant near Ndondi the following day.
4. That there was no arrangement between the prosecutrix's father and the appellant for him take the child as his wife.
5. The court found that the appellant failed to exonerate himself and convicted the appellant of the offence as charged.

The matter was referred to the High Court where the appellant was sentenced to thirty years imprisonment with hard labour.

Dissatisfied with the sentence, the appellant seeks to assail the Judgment on one ground couched as follows-

That the Court erred in law and in fact when it sentenced the appellant to the collosal term of thirty years imprisonment with

hard labour when he was a first offender, and a youth, a sentence which does not reflect the leniency of the Court.

In arguing the sole ground of appeal, Ms. Marebesa, Legal Aid Counsel, submitted that the sentence of thirty years imprisonment with hard labour is manifestly excessive and was received by the appellant with a sense of shock as the court based its harsh sentence on the lower court's finding of fact that there was a ***"combination of defilement and torture."*** Counsel contended that although the prosecutrix told the court that during the ordeal her hands were tied and the she was dragged to the stream where the appellant whipped her, this piece of evidence was not corroborated by any independent evidence and is therefore unreliable. Counsel submitted that the medical report did not show any of the violence that the prosecutrix allegedly suffered at the hands of the appellant and that as such, the court erred in sentencing the appellant to the harsh sentence of thirty years imprisonment with hard labour.

We were referred to the case of **Phiri v The People**[1] where it was held that-

> ***"A first offender should not be denied leniency although circumstances may make the application of such leniency minimal. The reason for dealing with the first offender leniently is in the hope that a severe sentence is not necessary and a lenient sentence would be sufficient to teach a previously honest man a lesson."***

Counsel submitted that the appellant, being a first offender deserves the leniency of the court, especially that there were no aggravating circumstances in this case. It was further submitted that the appellant was acting under a Tonga tradition which is a notorious fact that one can abduct a woman and have sexual intercourse with her and later formalize the marriage.

Counsel contended that the sentencing court erred when it meted out a harsh sentence on the uncorroborated evidence of the prosecutrix which was to the effect that she was tortured when the trial court did not make any finding of fact on the said torture.

It was further argued that the sentence did not reflect the leniency of the Court as the appellant was only aged twenty years and was

youthful. Counsel further contended that the relationship between the appellant and the prosecutrix was not established for this to be considered as an aggravating factor.

We were further referred to the case of **Kaambo v The People**[2] where the Supreme Court held that-

> ***"The basis of sentence must always be the proper sentence merited by the offence itself, after which the Court considers whether the accused person is entitled to leniency. For an appellate Judge to substitute his own view as to an appropriate sentence for that of the trial Court is an error of principle."***

We were referred to the case of **Jutronich, Shulte and Likin v The People**[3], where the Court held that-

> ***"In dealing with an appeal, against sentence, the appellate Court should ask itself whether the sentence is wrong in principle, manifestly excessive as to induce a sense of shock or whether there are exceptional circumstances which would render it an injustice if the sentence was not reduced."***

Counsel submitted that since the appellant is a first offender and there being no aggravating circumstances, the court ought to have

sentenced the appellant to the mandatory minimum sentence of fifteen years imprisonment with hard labour. We were urged to quash the sentence of thirty years imprisonment with hard labour and in its place, impose a sentence of fifteen years imprisonment with hard labour.

The respondent filed heads of argument in response to the effect that the appellant used trickery to get the prosecutrix from church as he purported that they were going to collect a bicycle on the understanding that he was sent by the prosecutrix's father, when in fact not.

It was further submitted that the appellant ill-treated the prosecutrix as he defiled her, which was an aggravating factor. Counsel submitted that the appellant should have been charged with two counts, the first being that of the offence of abduction, contrary to Section 253 of the Penal Code as read with section 135 and that of defilement. It was contended that the particulars should have indicated that that appellant defiled the prosecutrix three times as he held her hostage overnight in the bush. Counsel

contended that the particulars should have shown the aggravating factors of the defilement. It was contended that the Court cannot justify a barbaric traditional practice that offends the law. This was in reference to the argument that the appellant was acting under a Tonga traditional practice that allows men to abduct women that they want to marry.

Counsel contended that in sexual offences, corroboration is required a matter of law on the identity of the offender and the commission of the offence and that not all aspects of the prosecutrix's evidence require corroboration. On the appellant whipping the prosecutrix, it was submitted that the facts are clear and undisputed as the appellant did not even deny whipping her.

We were referred to the case of **Joseph Mulenga, Albert Joseph Phiri v The People**[4], where the Supreme Court stated that-

> ***"When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts that are disputed. Leaving assertions which are incriminating to go unchallenged diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial."***

Counsel submitted that the prosecutrix was medically examined to prove the defilement and that the general assault on her person was not necessary.

It was further submitted that the evidence of Universe Hamakobo, the prosecutrix's father was that the appellant's mother was his cousin, making him his nephew. It was contended that the relationship between the appellant and the prosecutrix was also an aggravating circumstance. On the sentence of thirty years imprisonment with hard labour, it was submitted that the sentence was appropriate, considering the aggravating factors in this matter as this was not an ordinary case of defilement. We were urged to uphold the sentence as it was not excessive as to bring a sense of shock.

We were referred to the case of **Patrick Hara v The People**[5] where, even after pleading guilty and being a first offender, the Supreme Court sentenced the appellant to thirty years imprisonment with hard labour for defiling a twelve year old. Counsel urged the Court

to uphold the sentence, considering the age of the prosecutrix and the aggravating circumstances in the matter.

At the hearing of the appeal, Ms. Marebesa, Legal Aid Counsel submitted that she would rely on the sole ground of appeal as well as the heads of argument filed on 14th May, 2019.

Mrs Kachaka, Senior State Advocate, submitted that she would rely on the submissions filed on 21st May, 2019. She highlighted the aggravating factors such as the age of the prosecutrix who the appellant defiled three times in the bush on the fateful night after abducting her, slapping and whipping her violently.

In reply, Ms Marebesa submitted that the appellant abducted the prosecutrix for purposes of marriage. We were urged to allow the appeal and quash the lower Court's sentence, thus imposing the minimum mandatory sentence of fifteen years imprisonment with hard labour.

We have carefully considered the arguments of counsel on the sole ground of appeal. To recap, the appellant's grievance is simply that the trial Court erred in sentencing him to thirty years imprisonment

with hard labour as he was a first offender and that there were no aggravating circumstances.

We have also considered the learned Legal Aid Counsel's spirited arguments to fortify the sole ground of appeal, that the sentence of thirty years imprisonment with hard labour is excessive as the appellants is a first offender.

Firstly, it is trite law that a first offender deserves leniency when it comes to the imposition of a sentence. It is trite that while mitigating factors are considered, it is also essential that the sentencing Court takes into account the aggravating factors of the case.

In this matter, there were aggravating factors, these being the age of the prosecutrix and the fact that the appellant abducted her and defiled her three times in the bush while he slapped and whipped her when she resisted the defilement.

We also note that the evidence on record is that there was no agreement between the appellant and the prosecutrix's father that the appellant would abduct the prosecutrix for the purposes of

marriage. No doubt the defilement, coupled with the violent acts of slapping and whipping the prosecutrix traumatized her. It is therefore necessary to imposes a deterrent sentence due to the aggravating factors in this matter. We find that the sentence of thirty years imprisonment with hard labour does not come to us with a sense of shock.

In the premises, we confirm the conviction and the sentence imposed by the Court below. The sentence was correct in principle and we decline to interfere with it.

The net effect is that this appeal fails in its entirety and it is accordingly dismissed. The sentence is upheld.

F.M. CHISANGA
JUDGE PRESIDENT

P.C.M. NGULUBE
COURT OF APPEAL JUDGE

B.M. MAJULA
COURT OF APPEAL JUDGE