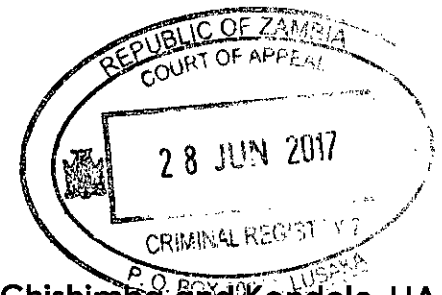
IN THE COURT OF APPEAL
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

CAZ/NO/40/2016

Between:

MICHAL CHAMPO **APPELLANT**

AND



THE PEOPLE **RESPONDENT**

Coram: Mchenga, DJP, Chishimba and Kondolo, JJA

On 7th February 2017, 8th February 2017, 8th February 2017, 10th March 2017 and 28th June 2017

For the Appellant: P. Chavula, Senior Legal Aid Counsel, Legal Aid Board
For the Respondent: R. Nkonde-Khuzwayo, Chief State Advocate, National Prosecution Authority

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JUDGMENT

Mchenga, DJP, delivered the Judgement of the court

Cases referred to:

1. **John Kasanga Wilmingstone Shayawa Kasempa v Ibrahim Mumba Goodwin Yaram Mumba Yousuf Ahmed Patel [2006] Z.R. 7**
2. **R v Bow Street Metropolitan Stipendiary Magistrate and Others Exparte Pinochet Ugarte [1993] 97 Cr. App. R. 188**
3. **Sebastian Saizi Zulu v The People S.J. No. 7 of 1991**
4. **Double Mwale v The People [1984] Z.R. 276**
5. **Priscillar Mwenya Kamanga v Attorney-General, Peter N'gandu Magande [2008] 2 Z.R. 7**

6. **Goba v The People [1966] Z.R. 113**
7. **Macheka Phiri v The People [1973] Z. R. 145**

Legislation referred to:

1. **The Constitution, Chapter 1 of the Laws of Zambia**
2. **The Penal Code, Chapter 87 of the Laws of Zambia.**
3. **The Judicial Code of Conduct Act Number 3 of 1999**
4. **The Evidence Act, Chapter 43 of the Laws of Zambia**

Michael Champo, the appellant, appeared before the Subordinate Court sitting at Samfya charged with one count of the offence of Defilement contrary to **section 138 (1) of the Penal Code.** The particulars of offence alleged that on 6th October 2012, at Samfya, in the Samfya District of the Luapula Province of the Republic of Zambia, he had unlawfully carnal knowledge of Cindy Chakaba, a girl below the age of 16 years. He denied the charge and the matter proceeded to trial.

The evidence and proceedings before the trial court can be summarised as follows; soon after the appellant took his plea, the trial magistrate informed him that although the wife to the prosecutrix's father, one Deria Mumba, was a court official and he knew him by sight, he did not believe that this would affect the way he was going to preside over the matter. He also told him that even if this was the case, he was ready to step down if the appellant had any objection

to him presiding over the case. The appellant said he did not and the matter proceeded to trial.

Cindy Chakaba, the prosecutrix, testified that on 6th October 2012, in the evening, the appellant was assigned to carry her and other persons from a traditional ceremony to where she was staying in a motor vehicle. After dropping the others, the appellant offered her some alcoholic beverages which she took. She then felt dizzy and he forcibly had sexual intercourse with her in the motor vehicle. She was 14 years old at the time having been born on 11th March 1998.

According to Mwansa Chisembe Trisha, when the prosecutrix was dropped by the appellant that evening, she looked distressed and immediately complained that she had been defiled by him. The same evening Bright Kaoma, a nurse at Lubwe Mission Hospital, took the prosecutrix to the hospital where she was examined by a doctor. Semen was observed and its presence confirmed by a laboratory examination.

There was also evidence from Hellen Chama, who told the court that she was the prosecutrix's mother and that she was born on 11th March 1998. She initially told the court that she did not have her under five card because it had gone missing in 2009. Another prosecution witness, Kennedy Nsamba, a teacher at Chibolya Primary School, referred to the enrolment register and testified that

when the prosecutrix was enrolled at their school on 10th January 2005, the school was informed that she was born on 11th March 1998.

Detective Sergeant Chibulila, the arresting officer, was the last prosecution witness. He gave evidence on the investigations he carried out and how the appellant was apprehended. When he was cross examined, it was suggested to him that Helen Chama was not the prosecutrix's mother but her aunt. It was also suggested to him that the prosecutrix's mother was in fact dead. In response, he said he was not aware of both claims.

After the close of the prosecution's case, the appellant was found with a case to answer. In his defence, he denied having carnal knowledge of the prosecutrix. He said he was aware that her under five card had deliberately been withheld because it was favourable to him. He also alleged that there was conflicting information on the prosecutrix's date of birth. While the information from her school indicated that she was born on 11th March 1998, there was information from the Examinations Council of Zambia that she was born on 11th March 1999.

The appellant called a witness, Mable Chilangwa, who told the court that she knew the prosecutrix's father, Royd Chakaba. She first met him in 1996 and at that time, the prosecutrix was eight months old. She also saw her under five card

which showed that she was born on 11th March 1996. In addition, she told the court that Hellen Chama was not the prosecutrix mother, her mother died.

The prosecutor then applied to recall Hellen Chama. He informed the court that in view of the controversy over the prosecutrix's paternity and date of birth, recalling her would be in the interests of justice as she had since found the missing under five card. The application was objected to on the ground that allowing the witness to testify again would enable the prosecution introduce new evidence on issues that were not raised in the appellant's defence.

The trial magistrate allowed the recall of the witness after finding that she was not going to introduce new evidence. She had talked about the under five card during her testimony and the prosecution could not have anticipated that the defence would allege that they had deliberately concealed it. The claim that the under five card had been deliberately concealed had therefore arisen ex *improviso* and it warranted the recall of the witness.

Hellen Chama then produced the under five card which showed that the prosecutrix was born on 11th March 1998. There was also evidence from a defence witness that records from the Examination Council showed that the prosecutrix was born on 11th March 1999. After this witness, the prosecutor applied to call Royd Chakaba, the prosecutrix's father, to clarify who her mother was. Despite defence counsel's objection, the trial magistrate ruled that

evidence in rebuttal could be called at any stage of the trial. In his testimony, Royd Chakaba maintained that the prosecutrix was born on 11th March 1998 and that Hellen Chama was her mother.

It must also be mentioned that during the course of the appellant's defence, the trial magistrate announced in court that he had received reports that the appellant had threatened members of staff at the court. He also indicated that he would not disclose who had provided that information but advised the appellant to desist from such conduct as there was a danger that his bail would be revoked.

Just before the close of the defence's case, counsel representing the appellant asked the trial magistrate to recuse himself because he was biased. He had reprimanded the appellant on the incident in a bar without hearing him and this was a sign that he was biased. Further, the prosecutrix's mother worked at the court and there was a danger that together with other court officials, they could inform him of what had happened outside court. The trial magistrate declined to do so indicating that he was not biased.

In his Judgment, the trial magistrate found that it was not in dispute that the prosecutrix was defiled. He found that Helen Chama was the prosecutrix's mother after accepting Royd Chakaba's evidence clarifying the issue. He also

accepted Helen Chama's evidence that the prosecutrix was born on 11th March 1998 because it was confirmed by the under five card.

Further, he found that the date of birth in the enrolment register was more credible than the one in the Examinations Council's document because it was based on information from the under five card. He found that the appellant's identity as the offender was corroborated by the witnesses who saw him dropping the prosecutrix. He also found that the prosecution evidence had proved beyond all reasonable doubt that appellant committed the offence.

The appellant was convicted and committed him to the High Court for sentencing. In that court, he was sentenced to 15 years imprisonment with hard labour and hence this appeal.

Four grounds of appeal have been advanced and they are as follows:

1. **The learned trial court erred and misdirected itself both in law and fact when it neglected/or refused to recuse itself from hearing this case when its impartiality was questionable and compromised.**
2. **The learned trial court erred and misdirected itself both in law and fact when it resolved the discrepancy concerning the age of the prosecutrix against the appellant**
3. **The learned trial court erred and misdirected itself both in law and fact when it allowed PW1 to be recalled and give evidence after the**

close of the prosecuntrix case when in fact there was no issue which arose *ex improviso* to warrant such recalling.

4. **The learned trial court erred and misdirected itself both in law and fact when admitting P1into evidence when the authorship and chain of custody had not been conclusively established.**

Because it is convenient, we will first deal with the first ground of appeal. Thereafter, we shall deal with the 4th, 3rd and 2nd grounds of appeal in that order.

In support of the 1st ground of appeal, Mr. Chavula referred to **Article 18 of the Constitution,** which guarantees the right to a fair trial and submitted that the appellant did not receive a fair trial. He was tried at a court where the prosecutrix's mother was the Clerk of Court and she is the one who prepared the record of proceedings. Since the prosecutrix's mother was the Clerk of Court, a fact that was known to the trial magistrate, he should have automatically recused himself. He submitted that **section 6 (2) (a) of the Judicial Code of Conduct Act** required the trial magistrate to recuse himself even if the appellant did not object to him hearing of the matter.

Mr. Chavula also referred to the case of **John Kasanga Wilmingstone Shayawa Kasempa v Ibrahim Mumba Goodwin Yaram Mumba Yousuf Ahmed Patel (1)** and submitted that it was within the rights of the appellant to raise the issue of

bias during his defence as it can be raised at any stage of the trial. He also referred to the case of **R v Bow Street Metropolitan Stipendiary Magistrate and Others *Exparte* Pinochet Ugarte (2)** and submitted it was not sufficient for the trial magistrate to state that he was not biased, immediately his partiality was challenged, he should have recused himself to protect the court from suspicion of being partial.

In response to the first ground of appeal, Mrs. Khuzwayo submitted that the appellant was accorded a fair trial. Other than certify the record of proceedings, Derina Mumba, who is actually not the prosecutrix biological mother, played no part in the trial. In any case, the appellant has not indicated how she influenced the proceedings.

As regards the trial magistrate's refusal to recuse himself, Mrs. Khuzwayo pointed out that Samfya being a small town, it is not unusual for people to know each other and the appellant has not shown that there was reasonable basis for the trial magistrate to recuse himself. She submitted that the mere fact that the trial magistrate cautioned the appellant without hearing him on the allegation that he had threatened court officials was not an indication that he was biased. This being the case, she submitted that it was not wrong for the magistrate to refuse to recuse himself.

In the case of **Sebastian Saizi Zulu v The People (3)**, Silungwe CJ, at page ..., delivering the judgment of the Supreme Court, observed as follows:

> **"In our view, the making of an application to a judge to recuse himself on the ground, as in this case, that he is biased, is in itself a contempt in the face of the court unless the application is substantiated by reliable evidence. In this respect, reliable evidence means evidence which can be tested in cross-examination and found to be cogent.**
>
> **Here, the appellant's application for the learned trial judge to recuse himself was based on the flimsy affidavit evidence of one man who, to the appellant's knowledge, was not even within the jurisdiction of the court. In our opinion, the appellant's conduct was reckless in the extreme and constituted contempt of court because, unlike Shamdasani (6) the appellant's conduct was not merely offensive, but it was outrageous and scandalous and was, therefore, punishable as contempt in the face of the court, on the authority of paragraph 6(7) of Halsbury's Laws of England already referred to."**

First of all, we find that it was inappropriate for Derina Mumba, the prosecutrix's step mother to be involved in the preparation of the record of appeal. Being a close relative of a party, there was a danger that it would be alleged, as is now the case, that her involvement prejudiced the appellant. But as has been correctly pointed out by Mrs. Khuzwayo, this inappropriate conduct, cannot on its own, be the basis for faulting the appellant's conviction. There is no evidence that she influenced or that there is a reasonable basis for suspecting that she influenced the outcome of the prosecution. Neither is there evidence or reason

for suspecting that the record of proceedings does accurately reflect was transpired during the course of this trial.

We also find that it was inappropriate for the trial magistrate to warn the appellant of the perils of interfering with court officials without hearing him on the allegation against him. In the face of such a serious allegation, the trial magistrate should have heard him on the issue before deciding to reprimand him. Notwithstanding, we find that the appellant did not suffer any prejudice because the trial magistrate did not revoke the bail or pursue the issue any further.

Reverting to the main argument in support of the 1st ground of appeal, **Sections 6 and 7 of the Judicial (Code of Conduct) Act,** provide as follows:

> **6. (1) Notwithstanding section seven a judicial officer shall not adjudicate on or take part in any consideration or discussion of any matter in which the officer's spouse has any personal, legal or pecuniary interest whether directly or indirectly.**
>
> **(2) A judicial officer shall not adjudicate or take part in any consideration or discussion of any proceedings in which the officer's impartiality might reasonably be questioned on the grounds that-**
>
> > **(a) the officer has a personal bias or prejudice concerning a party or a party's legal practitioner or personal knowledge of the facts concerning the proceedings;**
> >
> > **(b) the officer served as a legal practitioner in the matter;**
> >
> > **(c) a legal practitioner with whom the officer previously practiced law or served is handling the matter;**
> >
> > **(d) the officer has been a material witness concerning the matter or a party to the proceeding;**

(e) the officer individually or as a trustee, or the officer's spouse, parent or child or any other member of the officer's family has a pecuniary interest in the subject matter or has any other interest that could substantially affect the proceeding; or

(f) a person related to the officer or the spouse of the officer-

(i) is a party to the proceeding or an officer, director or a trustee of a party;

(ii) is acting as a legal practitioner in the proceedings;

(iii) has any interest that could interfere with fair trial or hearing; or

(iv) is to the officer's knowledge likely to be a material witness in the proceeding.

7. (1) A judicial officer disqualified under section six shall, at the commencement of the proceedings or consideration of the matter. Disclose the officer's disqualification and shall request the parties or the parties' legal representatives to consider, in the absence of the officer, whether or not to waive the disqualification.

(2) Where a judicial officer has disclosed an interest other than personal bias or prejudice concerning a party to the proceedings, the parties and the legal representatives may agree that the officer adjudicates on the matter.

(3) A disclosure or an agreement made under subsection (2) shall form part of the record of the proceedings in which it is made.

The provisions of **section 6 (1) of the Judicial Code of Conduct Act,** make it clear that it would have been mandatory for the trial magistrate to recuse himself had this case been concerned with his or his spouse's personal, legal or pecuniary interests. However, this matter was concerned with the step daughter of one of the employee's at the court and not him or his wife's interests.

We have also considered the scenarios set out in **section 6 (2) of the Judicial Code of Conduct Act,** that require an adjudicator to seek the parties consent

before hearing a matter. We find that they are not applicable to the circumstances of this case. Even if this was the case, we note that the trial magistrate invoked the provisions of **section 7 of the Judicial Code of Conduct Act** and sought the appellant's consent to continue hearing the matter. In our view, this is indicative that even if he was not personally connected to any of the parties, he was ready to step down if the parties were not comfortable with him hearing the case. That could not have been the conduct of a partial adjudicator.

While we agree with Mr. Chavula that an objection premised on **section 6 (2) of the Judicial Code of Conduct Act** can be raised at anytime, we note that in this case, the objection was founded on facts that were known to the appellant before the trial commenced. In fact, he did not object to magistrate sitting in a case that involved the step daughter of an employee at the court when it was initially raised. It was not until he was deep into his defence and after a couple of unfavourable rulings, that the issue was raised again. It would not be farfetched to state that the objection was on account of these unfavourable rulings. We have considered the circumstances in which the unfavourable rulings were made and other than pointing at misapprehension of the law, they are not indicative of bias. We find no merit in this ground of appeal and we dismiss it.

In support of the third ground of appeal, Mr Chavula submitted that the trial magistrate misdirected himself when he recalled Helen Chama, the prosecutrix's mother. He argued that scrutiny of the record of proceedings establishes that nothing arose *ex-improviso* to warrant her recall.

In response to the third ground of appeal, Mrs. Khuzwayo submitted that there was nothing irregular with recalling Hellen Chama because the prosecution did not have the under five card at the time she initially testified. She submitted that even if the evidence she gave after being recalled was expunged from the record, her initial evidence is still conclusive.

She also commented on the evidence of Royd Chakaba, the prosecutrix's father. Mrs. Khuzwayo conceded that the procedure for the reception of evidence in reply was not followed. She however submitted that the appellant did not suffer any injustice nor was there any miscarriage of justice by reason of the same irregularity. Further, the issue of Hellen Chama not being the prosecutrix's mother arose *ex improviso* and the prosecution was entitled to call evidence in reply.

The Judgment of the trial magistrate shows, the decision to recall Helen Chama was premised on the decision in the case of **Double Mwale v The People (4).** In that case, the Supreme Court held that:

(i) **When an issue which has arisen is essential to the just decision of the case, it is mandatory for the trial court to call or recall the appropriate witness under s. 149. C.P.C.**

(ii) **In exercising, its power to call witnesses a court must have regard to the traditional considerations for the exercise of a judicial discretion in criminal matters; and the section could not legitimately be used for purposes such as supplying evidence to remedy defects which have arisen in the prosecution case or where the result would merely be to discredit a witness.**

(iii) **Unless a vital point has arisen ex improviso which it is essential to clarify, the court should not normally exercise its discretion of its own motion when the result may be simply to make accused's position worse than it already is.**

The case of **Double Mwale v The People (4)**, was among other issues, concerned with the interpretation of **section 149 of the Criminal Procedure Code** as it appeared in the pre 1995 Edition of the Laws of Zambia. In that edition of the Criminal Procedure Code, the provision was concerned with the recall of witnesses. The provision is absent in the 1995 Edition of **the Criminal Procedure Code** (the edition currently in use) and in the case of **Priscillar Mwenya Kamanga v Attorney General, Peter N'gandu Magande (5)**, at page 17, the Supreme Court noted as follows:

> **"First and foremost, our High Court Act, Cap 27, has no provision for calling of witnesses by the court. The calling of witnesses in civil trials in the High Court is based on Common Law. Our Criminal Procedure Code, Cap. 88 of the Laws, has a specific provision for calling of witnesses by the court in criminal trials. This is section 149, of which however, was inadvertently omitted in our present edition of our laws. The provisions of the present section 149, are the same as those under section 158. In the arrangement of Sections, it is still shown that section 149 relates to the power of the court to summon witnesses and to examine any person present in court and to recall witnesses. It is clear to us that this section was**

> **misprinted and we wish to draw the attention of the Attorney General to this error or omission so that it can be rectified."**

It follows, that as the law currently stands, there is no provision for recalling of witnesses in a criminal trial. There was therefore no legal basis on which the trial magistrate could have recalled Hellen Chama.

As regards the calling of Royd Chakaba, **section 210 of the Criminal Procedure Code** provides as follows:

> **If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to contradict the said matter.**

While the provision does not explicitly state at what point after a "new issue" has been raised evidence in reply can be called, it is inconceivable that it was intended to allow the prosecutor to call evidence whenever the accused or his witness gave evidence raising a "new issue" in the course of the defence. Such an approach would be highly prejudicial as it would impede an accused person from systematically presenting his/her defence. The correct interpretation of the provision is that evidence in reply can only be called after all the defence evidence has been called and the accused person has closed his/her case.

Further, the right to call evidence in reply under section **210 of the Criminal Procedure Code,** can only be invoked if the witness is going to testify on an issue that arose ex *improviso*. In this case, Royd Chakaba was called to clarify the

defence evidence on the prosecutrix's date of birth and the claim that Helen Chama was not her mother.

When the arresting officer was being cross examined, it was suggested to him that the prosecutrix's mother had died and Hellen Chama was just her aunt. He denied the suggestion. The same claim was made when Mable Chilangwa gave evidence on behalf of the appellant. This being the case, it cannot be said that the issue arose *ex improviso* because it was raised before the close of the prosecution's case.

Similarly, he should not have been allowed to testify on the prosecutrix age because the issue did not arise *ex improviso*. Issue was raised with her age even before the close of the prosecution's case. Age is an essential element of a charge of defilement and the prosecutor should have presented the best evidence he had on the issue. It was improper to allow Royd Chakaba present "better" evidence on the prosecutrix's age as evidence in reply.

On this ground of appeal, we find that the evidence that Hellen Chama gave when she was recalled, including her production of the under five card was improperly admitted as the court had no power to recall her. We also find that Royd Chakaba's evidence was irregularly admitted. He should not have been called before the defence had closed their case. He should also not have been

allowed to testify on issues that had not arisen ex *improviso* in his evidence in reply. This ground of appeal succeeds.

Coming to the fourth ground of appeal, Mr. Chavula submitted that it was erroneous for the trial magistrate to allow the arresting officer to produce the enrolment register because he was not the author of the document. Since it was irregularly produced, he urged us exclude it when we assess the prosecution evidence.

The record of proceedings shows that before the enrolment register was produced by the arresting officer, it was identified by Kennedy Nsamba, the Acting School Manager. He was also the custodian of the register. **Section 4 of the Evidence Act** provides as follows:

> **(1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if-**
>
> **(a) the document is, or forms part of, a record relating to any trade or business or profession and compiled, in the course of that trade or business or profession, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and**
>
> **(b) the person who supplied the information recorded in the statement in question is dead, or outside of Zambia, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since**

> **he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.**
>
> **(2) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a fully registered medical practitioner.**

Though Kennedy Nsamba was not the "author" of the register, it was admissible because his evidence showed that it was prepared in the normal course of work at the school. Since the arresting officer took custody of the document during investigations, the trial magistrate cannot be faulted for allowing him to produce it. We find no merit in this ground of appeal and it fails.

Returning to the second ground of appeal, Mr. Chavula pointed out that there was a discrepancy between the school register and the under five card on the date of birth for the prosecutrix. The former showed that it was 11th March 1998 while the later indicated that it was 11th March 1999. He also submitted that the conflict between these two pieces of evidence was not resolved because the under five card was wrongly admitted into evidence. This is because Helen Chama was recalled to fill up gaps in the prosecution evidence and not to testify on an issue that had arisen *ex improviso*.

Mr. Chavula also submitted that the dispute on the age of the prosecutrix should have been resolved in favour of the appellant. Had this been done, the court

should have found that she was born on 11th March 1999 and was 13 years at the time she testified. A *voir dire* should have been conducted before she was allowed to testify and since it wasn't conducted, going by the decision in the case of **Goba v The People (6),** her evidence should be ignored for being irregularly admitted.

In response to the submissions in support of the second ground of appeal, Mrs. Khuzwayo submitted that Helen Chama and Royd Chakaba, the prosecutrix parents, both gave evidence on of her age. Going by the decision in the case of **Macheka Phiri v The People (7),** their evidence was rightly believed because it was the best evidence on the issue. She submitted that it would have been absurd if the court believed Mable Chilangwa, who was neither a parent nor relative, on the prosecutrix's age. Further, even if the print out form the Examinations Council was to be believed, it shows that the prosecutrix was below the age of 16 years at the time the offence was committed.

Mrs. Khuzwayo also submitted that there was no need to conduct a *voir dire* in this case because the prosecutrix was above the age of 14 years at the time of the trial.

The prosecution evidence in support of the age of the prosecutrix was the oral evidence given by Royd Chakaba her father and Helen Chama her mother. Her mother also produced the under five card. In addition, there was evidence from

the enrolment register. All this evidence pointed at the fact that she was born on 11th March 1998. But there was also evidence from the Examinations Council that she was born on 11th March 1999 and from Mable Chilangwa that she was born on 11th March 1996.

We agree with Mrs. Khuzwayo's submission that ordinarily, the evidence of Royd Chakaba and Helen Chama, her parents, should have been conclusive on the issue. However, we have already found that Royd Chakaba should not have been allowed to testify. We have also found that the under five card was irregularly admitted into evidence by the trial magistrate. When this evidence is excluded, the only evidence left is that of Helen Chama. Her evidence is disputed and it is not clear whether she truly the prosecutrix mother. Consequently, her evidence should have been treated with caution. The school register is not helpful because its credibility was anchored on the trial magistrate's finding that it reflected the contents of the under five card which should not have been admitted.

Age, like any other ingredient of a charge of defilement must be proved beyond reasonable doubt. The need to prove age conclusively is very important in borderline cases like this one in which there is evidence that the prosecutrix could have either been 13 years, 14 years or 16 years at the time the appellant is alleged to have carnally known her.

We are not persuaded by Mr. Chavula's submission that the dispute on the age of the prosecutrix should have been resolved in favour of the appellant and found that the prosecutrix was 13 years. Amidst the conflicting evidence on the date her birth, there is no basis for us to conclude that one birth date and not the other was the correct one. We find that the age of the prosecutrix was not proved beyond all reasonable doubt and to that extent this ground of appeal is allowed.

Having found that the prosecutrix age, an essential ingredient of a charge of defilement, was not proved beyond all reasonable doubt, we find it unsatisfactory to maintain the conviction in this case. We allow the appeal, the conviction is quashed and the sentence is set aside.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....
F.M. Chishimba
COURT OF APPEAL JUDGE

.....
M.M. Kondolo SC
COURT OF APPEAL JUDGE