

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE
(Criminal Jurisdiction)

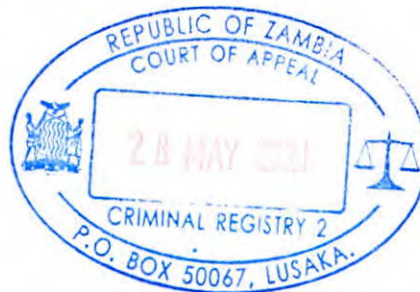
APPEAL 179/2020

BETWEEN:

MUBITA MOONGA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA

On 19th May 2021 and 28th May 2021

For the Appellant: K. Chileshe-Nshimbi, Legal aid Counsel, Legal
Aid Board

For the Respondent: M. Chipata-Mwansa- Deputy Chief Senior State
Advocate, National Prosecutions Authority

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. Kalaluka Musole v The People [1963-1964] N.R.L.R
and Z.R. 173
2. Whiteson Tembo v The People CAZ Appeal No. 36/2020
3. Chibozu and Chibozu v The People [1981] Z.R. 28
4. Dorothy Mutale v The People S.C.Z. Judgment No. 51
of 1997
5. Gift Mulonda v The People [2004] Z.R. 135

6. Manewe v The People (2005) BLR 276

7. Hakagolo v The People Appeal No. 607/2013

8. Mwaba v The People [1974] Z.R. 264

9. Nsofu v The People [1973] Z.R. 287,

Legislation referred to:

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

1. INTRODUCTION

1.1. This appeal emanates from the judgment of the High Court (Mweemba, J) delivered in Mongu on 13th June 2019.

1.2. The appellant, initially appeared before the Subordinate Court (Hon. L. Mwale), on a charge containing one count of the offence of defilement contrary to **section 138(1) of The Penal Code**. The allegation being that on 1st May 2017, in Mongu, he had unlawful carnal knowledge of the prosecutrix, a child who was below the age of 16 years.

1.3. He denied the charge, but at the end of the trial, he was convicted of the offence and committed to

the High Court for sentencing because the prescribed minimum sentence for the offence, was above the jurisdiction of the trial court.

1.4. The High Court sentenced him to 15 years imprisonment with hard labour.

1.5. He has now appealed against the conviction.

2. EVIDENCE BEFORE TRIAL COURT

2.1. The prosecutrix testified that the appellant was her tutor at Mulumbwa Primary School, in Mongu. One day, after lessons, as they walked away from the school, he told her that he wanted to spend some time with her. He also invited her to where he lived.

2.2. On 1st May 2017, she went to the appellant's house but did not find him. His brother, who was at home, at the time, phoned him and he came back.

2.3. They got into the house and the appellant closed the door and drew the curtains. He pulled her into the bedroom and put her on the bed. He then undressed her and had carnal knowledge of her. She

could not shout out because he put a cloth in her mouth. She went home after the incident.

- 2.4. According to her mother, on the 2nd of May 2017, she detected a foul odour emanating from the prosecutrix. The prosecutrix only told her what had happened, when she threatened to beat her if she did not tell her the truth.
- 2.5. The prosecutrix narrated to her that the appellant, who was her teacher, had carnal knowledge of her. She then reported the matter to the police.
- 2.6. They were issued with a medical report form and an examination at the hospital confirmed that she had been defiled. She also provided a birth record that confirmed that the prosecutrix was aged 13 years, at the time of the offence was committed.
- 2.7. Constable Annie Mwape Chibula, the arresting officer, confirmed receiving the complaint from the prosecutrix's mother. She also said although the prosecutrix looked 'old' because of her physical appearance and had attained puberty, she was still young.

2.8. The fact that the prosecutrix had 'big' breasts was confirmed by the scenes of crime police officer. However, he also said that she looked young

2.9. In his defence, the appellant did not deny having had sexual intercourse with the prosecutrix. He said it was consensual.

2.10. He testified that on 16th April 2017, he went to Limulunga Market to buy talk time and that is where he met the prosecutrix. He said from her physical features, such as her breasts, buttocks and hips, she looked like she was grownup. He got interested in her and struck a conversation. The prosecutrix told him that she was in grade 10 and was 16 years old.

2.11. The following day, he saw the prosecutrix in his class at Mulumbwa Primary School.

2.12. Further, on 23rd April 2017, the prosecutrix demanded that he spends some time with her, but he told her that he was going to a youth camp.

2.13. On 30th April 2017, he received a phone call from his cousin, informing him that the prosecutrix had come home. He went back home and they had sexual intercourse.

2.14. He maintained that the prosecutrix told him that she was 16 years old and was responding to him in a logical manner, like a grownup person. He added that the case could not have arisen if the prosecutrix had not lied to him.

3. TRIAL COURT'S FINDINGS OF FACT

3.1. It was not in dispute that the appellant had carnal knowledge of the prosecutrix, at his house, on 1st May 2017.

3.2. The trial magistrate found that the prosecutrix was one of the pupils the appellant was teaching at a school, during holiday tuitions. He also found that the prosecutrix was aged 13 years old at the material time and was therefore a child.

3.3. The trial magistrate took the view that the main issue for determination, was whether the appellant

had reasonable cause to believe and did in fact believe, that the prosecutrix was above the age of 16 years old.

3.4. In resolving this question, he took into consideration the evidence of the appellant that after he met the prosecutrix on 16th April 2017 and she told him that she was in grade 10 and was 16 years old. She subsequently she turned up in a class for grade 9 pupils.

3.5. It was his view that this development should have placed him on inquiry. He should have found out the actual age of the prosecutrix, before even thinking of having sexual intercourse with her.

3.6. He concluded that it was not reasonable for appellant, in the circumstances, to believe that she was above the age of 16 years and that the defence in the proviso to **section 138(1) of the Penal Code** was not available to him.

GROUND OF APPEAL

3.7. Though three grounds were advanced in support of this appeal, they all deal with one issue; it is contended that there was misdirection when the trial magistrate found that the defence in the proviso to **section 138(1) of The Penal Code**, was not available to the appellant.

4. ARGUMENTS IN SUPPORT OF THE APPEAL

4.1. Mrs. Chileshe-Nshimbi's position is that there was a misdirection when the trial magistrate found that the defence in the proviso, was not available to the appellant because he did not inquire into the age of the appellant before having carnal knowledge of her. She argued that the proviso did not place such an obligation on the appellant.

4.2. It was her view, that all that was required of the appellant, was to be satisfied with her 'outward' appearance that she was above the age of 16 years. She referred to the cases of **Kalaluka**

Musole v The People¹ and Whiteson Tembo v The People², in support of the proposition.

4.3. She also argued that the court should have pronounced itself on whether one could have believed that the prosecutrix was above 16 years, given that the trial magistrate had the opportunity of seeing her in court. The failure to do so was a misdirection.

4.4. Further, Mrs. Chileshe-Nshimbi pointed out that although the two police officers who were involved in the investigations contradicted each other on the appearance of the prosecutrix, the trial magistrate did not resolve the issue. The trial magistrate should have accepted the arresting officer's position, because it was favourable to the appellant.

4.5. Had he done so, he would have found that the defence in the proviso was available to the appellant because the prosecutrix looked like she was above the age of 16 years. He referred to the cases of **Chibozu and Chibozu v The People³** and

Dorothy Mutale v The People⁴, in support of the proposition.

4.6. In concluding, Mrs. Chileshe-Nshimbi urged us to allow the appeal. She also prayed that we quash the appellant's conviction and set him at liberty.

5. RESPONDENT'S ARGUEMENTS

5.1. In response, Mrs. Chipanta-Mwansa submitted that the trial magistrate correctly found that the proviso was not available to the appellant. She referred to the cases of **Manewe v The People**⁶, **Hakagolo v The People**⁷ and **Mwaba v The People**⁸, and submitted that it was not sufficient for the appellant to simply say that he believed that the prosecutrix was above the age of 16 years, because she had big breasts.

5.2. She submitted that being the prosecutrix's teacher, an ordinary person in his shoes would not have believed that the prosecutrix was 16 years old, only on her word and without further inquiry.

5.3. In addition, Mrs. Chipanta-Mwansa argued that the failure by the trial magistrate to state his ocular observation, was not an indicator that he did take into consideration all the evidence before him, before arriving at the conclusion that the defence under the proviso to **section 138(1) of the Penal Code**, was not available to the appellant.

5.4. Finally, she argued that there were no inconsistencies in the police officer's testimony that required resolution.

5.5. She implored this court to dismiss the appeal and uphold both the conviction and sentence.

6. CONSIDERATION AND DECISION OF THE COURT

6.1. We have considered the evidence on record, the judgment of the trial court, the grounds of appeal and the arguments made on behalf of both parties.

6.2. First of all, we agree with Mrs Chipanta-Mwansa that there were no inconsistencies in the evidence of the two police officers, which ought to have been resolved in the appellant's favour. They were

both agreed that although the prosecutrix had what appeared to be a 'developed body', she was still young.

6.3. We also agree with Mrs. Chileshe-Nshimbi's argument that it is important, in a case of defilement, for a trial magistrate to state his observation of the appearance of the prosecutrix. However, we do not agree with her view that whenever the trial magistrate fails to do so, the offender must be acquitted.

6.4. In the case of **Whiteson Tembo v The People**, when considering the desirability of a trial magistrate commenting on his ocular observations on a child, we said the following:

'we are of the firm view that, even though the magistrate said nothing of his ocular observation of RS, the critical consideration is that the appellant denied having carnal knowledge of her. The magistrate's failure to do so was not fatal to the prosecution's case, in the circumstances of this case'

6.5. In effect, what we said was that the failure to comment on the ocular observation of the prosecutrix, may, in appropriate cases, warrant an acquittal.

6.6. The question that then follows is, are the circumstances of this case, one such instance?

6.7. In the case of **Nsofu v The People**¹⁰, setting out the test for the successful deployment of the defence in the proviso, the Court of Appeal stated as follows:

'For a defence under the proviso to succeed an accused must satisfy the court that he had reasonable cause to believe that the girl was or of above the age of sixteen years, and must satisfy the court also that he did in fact believe this. The magistrate in his judgment specifically considered this question and said "having seen the girls myself, I am satisfied that no one can think that any one of them could be over sixteen years".'

6.8. From the foregoing, it is our understanding that the ocular observation of the prosecutrix, is not the sole consideration when determining whether an

appellant's belief that the prosecutrix was above the age of 16 years, was reasonable.

6.9. It is one of the many issues the court must consider before arriving at such a decision. There is no doubt that it is an important factor but it must be considered in the context of the circumstances of each case.

6.10. This being the case, it is our view that Mrs. Chileshe-Nshimbi was not correct when she said that all the appellant need to do to be availed of the defence, was to be satisfied of the outward appearance of the prosecutrix.

6.11. Whether it is reasonable to believe, from the outward appearance of the prosecutrix, that she is above the age of 16 years, is, in our view, dependent on where and how the encounter takes place. While it may be reasonable for a man who meets a girl, who looks 'big', in a night club, to believe that she is above 16 years, it may not be the case, if he met the same girl, in a primary school!

6.12. Going by the appellant's own explanation, he first met the prosecutrix at a market, where he noticed that she appeared old enough, which was confirmed by her claim that she was 16 years old. The next encounter was when she turned up in a grade 9 class, that he was teaching.

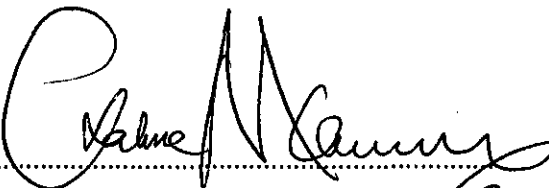
6.13. This 'new' meeting changed everything. We agree with the trial magistrate, that it should have placed any reasonable man in his situation, which in this case is a teacher, on enquiry. It did not. In our view, he acted recklessly when he went ahead and had sexual intercourse with the girl who turned out to be 13 years old.

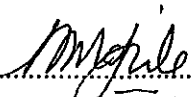
6.14. A man who acted recklessly, cannot he be said to have reasonably believed that the prosecutrix was above the age of 16 years. It is apparent that he was in a hurry to have a connection with the girl, conduct which cannot, by any standard, be said to be that of reasonable man, in the circumstances of this case.

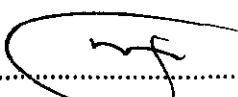
6.15. We are satisfied, that the trial magistrate rightly found that the defence in the proviso to **section 138(1) of the Penal Code**, was not available to the appellant.

7. VERDICT

7.1. We find no merit in the appeal and it is accordingly dismissed. The conviction and sentence imposed on the appellant are upheld.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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B.M. Majula
COURT OF APPEAL JUDGE


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K. Muzenga
COURT OF APPEAL JUDGE