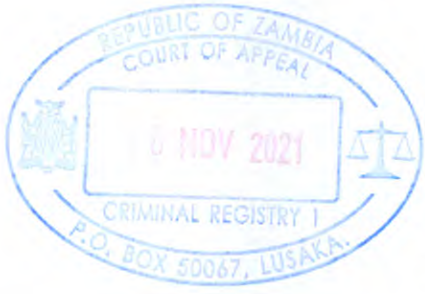
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No.207/2020**
HOLDEN AT LUSAKA AND NDOLA
(Criminal Jurisdiction)

B E T W E E N:



MWITU ZIYEZO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga, JJA

On 26th August 2021 and 18th November 2021

For the Appellant: L.Z. Musonda, Legal Aid Counsel, Legal Aid Board
For the Respondent: C.K. Sakala, State Advocate, National Prosecution Authority

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J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

CASES REFERRED TO:

1. Saluwema v The People [1965] Z.R. 4
2. Chabala v The People [1976] Z.R. 14
3. Phiri v The People [1970] Z.R. 178
4. Solomon Chilimba [1971] Z.R. 36
5. Sikaonga v The People [2009] Z.R. 192
6. Maseka v The People [1972] Z.R. 9
7. Stephen Mwaba v The People SCZ Appeal 184 of 2020
8. Katongo v The People [1960] Z.R. 30

9. Mathews Chitupila Chalwe v The People CAZ Appeal No. 58 of 2020

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Court of Appeal Act No. 7 of 2016

1. INTRODUCTION

1.1. The appellant, appeared before the Subordinate Court sitting at Mumbwa (Hon. M.N. Munsanje), on a charge of defilement of a child, contrary to **section 138(1) of The Penal Code.**

1.2. The allegation was that on a date unknown, but between February and July 2019, at Mumbwa, he had unlawful carnal knowledge of a girl, who was below the age of 16 years.

1.3. He denied the charge and the matter proceeded to trial.

1.4. At the end of the trial, he was convicted for the offence and committed to the High Court for sentencing.

1.5. The High Court (Limbani, J.), sentenced him to 35 years imprisonment, with hard labour.

1.6. He has now appealed against the conviction and the sentence.

2 EVIDENCE BEFORE THE TRIAL MAGISTRATE

2.1. The evidence before the trial magistrate, was that between, February and July 2019, the appellant, who lived in Mpunde Village, in Chief Mulendema's area, in Mumbwa, proposed love to the prosecutrix. The prosecutrix, who was 15 years at the time, lived in the same village.

2.2. The proposal was accepted and in the days that followed, the appellant had sexual intercourse with the prosecutrix, on several occasions, at a fee.

2.3. At some point, the prosecutrix discovered that she was five months pregnant and she informed the appellant of the development.

2.4. On 10th August 2019, the appellant approached the headman, for help. He told him that he had made the prosecutrix pregnant and that he intended to sell a cow

so that the proceeds could be shared between the headman and the prosecutrix's family.

2.5. During the same period, he approached, the prosecutrix's grandmother and told her that he had impregnated the prosecutrix. He also took clothing for the expecting prosecutrix.

2.6. In his defence, the appellant denied impregnating the prosecutrix. He told the trial magistrate that a known person was responsible for the pregnancy. He also denied admitting being responsible, to either the headman or the prosecutrix's grandmother.

2.7. He told the trial magistrate that the prosecutrix's grandmother, only requested him to engage her over her predicament. In the case of the headman, he falsely implicated him, because he owed him money.

2.8. The appellant also called Simasiku Kawaya as his witness.

2.9. According to that witness, the prosecutrix was in a relationship with his young brother. It ended when another man turned up, claiming responsibility for her

pregnancy. However, he admitted that the appellant would frequently be seen with the prosecutrix.

3 GROUNDS OF APPEAL

3.1. Two grounds have been advanced in support of this appeal.

3.2. The first, which relates to the conviction, is that what the appellant said in his defence, should have been accepted, because it could have reasonably been true.

3.3. In the second ground, which relates to the sentence, we have been urged to temper with the 35 years imprisonment because it is harsh.

4 ARGUMENTS IN SUPPORT OF THE GROUNDS OF APPEAL

4.1. In support of the first ground of appeal, Ms. Musonda referred to the cases of **Saluwema v The People**[1] and **Chabala v The People**[2], and submitted that the appellant's defence should not have been dismissed outrightly, merely because the trial magistrate thought that he told lies.

4.2. It should have been considered because all he was required to do is to give an explanation, that could reasonably have been true. His explanation, that someone else made the prosecutrix pregnant, should have been believed because it could reasonably have been true.

4.3. As regards the second ground of appeal, Ms. Musonda submitted that the 35 years sentence imposed on the appellant was harsh because this is an ordinary case of defilement. She referred to the cases of **Phiri v The People**[3], **Solomon Chilimba v The People**[4] and **Sikaonga v The People**[5] and submitted that given that there were no aggravating factors, the appropriate sentence is the mandatory minimum sentence of 15 years.

5 STATE'S RESPONSE

5.1. The State supports the conviction but not the sentence.

5.2. In response to the argument that the appellant gave an explanation that could reasonably have been true, Mr. Sakala submitted that the issue that was before the

trial court was not whether it was the appellant who made the prosecutrix pregnant. It was whether he had carnal knowledge of her.

5.3. He submitted that there was overwhelming knowledge that he had carnal knowledge of her and that she was only 15 years at the time.

5.4. Coming to the sentence, Mr. Sakala submitted that he did not support the sentence because the prosecutrix was 15 years and there was evidence that she had a chain of previous relationships. He also submitted that pregnancy is not an aggravating factor.

6 CONSIDERATION OF APPEAL AND COURT'S DECISION

6.1. In the case of **Maseka v The People**[5], Gardner JA, delivering the judgment of the Court of Appeal, the forerunner of the current Supreme Court, said the following on explanations that can reasonably be true.

> **'Hence, where an explanation has been given which as to part is rejected as false but as to part might reasonably be true, the accused is entitled, as the case may be, (depending on the nature of the part which might reasonably be true) to be acquitted or to be convicted**

of a different offence (for instance, receiving instead of burglary or theft)'

6.2. In this case, there was evidence from Misheck Mpande and Eunice Manongo, which the trial magistrate accepted, in preference to the appellant's version of events, that he approached them and took responsibility for the pregnancy.

6.3. The appellant's evidence, and that of his witness, that someone else was responsible for the pregnancy, even if it was to be believed, is of no consequence on the conviction. The appellant was not charged with making the prosecutrix pregnant but having sexual intercourse with her.

6.4. In the circumstances, we find no merit in the sole ground of appeal against the conviction and we dismiss it.

6.5. We will now deal with the ground of appeal against the sentence.

6.6. The following were the High Court judge's brief remarks before he sentenced the appellant:

> **'I am satisfied with the proceedings of the lower court and will accordingly sentence the convict.**
> **I will accordingly sentence you with hard labour to 35 years imprisonment. If you are not satisfied with my verdict, you have the right to appeal to the Court of Appeal'**

6.7. In the case of **Stephen Mwaba v The People**[6], Hamaundu, JS, delivering the judgment of the Supreme Court, said the following on the need for a sentencing court to give its reasons for the sentence:

> **'In this case, during the sentencing session, the appellant's counsel in mitigation did point out to the learned judge these two mitigating factor, among others. After that submission, the Learned judge simply said this**
>
> ***"I sentence you to 25 years imprisonment with hard labour with effect from the date of arrest"***
>
> **The judge said nothing about the two mitigating factors: his mind was not revealed on the record in arriving at the sentence. That was an error in principle"**

6.8. The sentencing judge, in this case, erred when he did not give his reasons for arriving at the sentence of 35 years. Ascribing reasons for the imposition of a particular sentence allows an appellate court to assess

whether the known principles of sentencing, were taken into account when the sentence was being imposed.

6.9. The jurisdiction of this court, in an appeal against sentence, is set out in **section 16(5) of The Court of Appeal Act.** It provides as follows:

> **The Court may, on an appeal, whether against conviction or sentence, increase or reduce the sentence, impose such other sentence or make such other order as the trial court could have imposed or made, except that—**
> **(a) in no case shall a sentence be increased by reason of or in consideration of evidence that was not given at the trial; and**
> **(b) the court shall not interfere with a sentence just because if it were a trial court it would have imposed a different sentence, unless the sentence is wrong in principle or comes to the Court with a sense of shock.**

6.10. The arguments that have been advanced in support of the proposition that the appropriate sentence was the 15 years mandatory minimum sentence include the fact that the prosecutrix was previously in relationship with men, that she was 15 years and that pregnancy was not an aggravating factor.

6.11. Much as the very tender age of the prosecutrix can be an aggravating factor, the fact that the prosecutrix in this case was 15 years old, cannot, on its own, be a basis for concluding that a sentence should be lowered. More so that the sentencing judge, did not seem to take it into account, when imposing the sentence.

6.12. Similarly, we do not find the fact the prosecutrix had previously relationships, mitigatory. Since she was below the age to consent when she had those relationship, if true, they were clearly just as abusive as the relationship she had with appellant who was 45 years at the time.

6.13. In the case of **Mathews Chitupila Chalwe v The People**[7], we said the following on when pregnancy can be an aggravating factor in a sexual offence:

> **'We equally agree with his argument that a pregnancy that is conceived in an incestuous relationship, cannot be an aggravating factor, for adult persons having a consensual sexual relationship, can be taken to be aware that, pregnancy is a probable consequence of such a liaison.**
>
> **However, the facts of this case point at something different from the ordinary. The appellant's daughter,**

according to the evidence accepted by the trial magistrate, did not consent to having sexual intercourse with the appellant. He forced himself on her, and thereafter threatened to kill her, if she brought the relationship to the attention of her mother. As it has turned out, it was not once but on multiple occasions.

That being the case, the pregnancy in this case was rightly classified as an aggravating factor, because it was not a product of a consensual liaison between the appellant and his daughter. Further, the use of threats of death, to procure sexual intercourse, further aggravated the circumstances in which the offence was committed in this case.'

6.14. We still stand by our position in the case of **Mathews Chitupila Chalwe v The People**[7], that pregnancy in a case of non-consensual sex, is an aggravating factor. Even if the evidence in this case indicates that the prosecutrix consented, given that she was a minor, it is our view that she had no capacity to give consent. In effect, there was no consent.

6.15. Further, it is a notorious fact, and we take judicial notice of the fact that all sorts of health problems, some of them life threatening or causing permanent

injury to health, can afflict a girl who conceives at a tender age, which includes the age of 15 years.

6.16. When considering the circumstances of this case, one cannot ignore the fact that when the pregnancy was revealed, the appellant attempted to 'pay-off' the headman, in order to stop or curtail the case from being investigated and dealt with to its logical conclusion.

6.17. Having regard to the factors that we have just outlined, the sentence of 35 years does not come to us with a sense of shock, as being excessive. It is our view that properly applying himself to the principles of sentencing, the judge in the court below, would still have arrived at the same sentence.

6.18. The appellant used his stronger financial position to have a paid for sexual relationship with a minor. When she fell pregnant, the attempted to use his financial position to suppress the investigation of the matter.

6.19. Consequently, we equally find no merit in the appeal against sentence and we dismiss it.

7 VERDICT

7.1. Both grounds of appeal having been unsuccessful, the appeal fails. We dismiss it and the sentence imposed by the High Court is upheld.

C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

B. M. Majula
COURT OF APPEAL JUDGE

K. Muzenga
COURT OF APPEAL JUDGE