IN THE COURT OF APPEAL OF ZAMBIA **APP NO.08/2021**

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:-

BLESS KAPEPA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Mchenga, Kondolo,SC and Banda-Bobo, JJA
On the 2nd November, 2021 and 25th March, 2022.

For the Appellant: Mr. Mweemba of Messrs Legal Aid Board

For the Respondent: Mr. Mwewa of Messrs National Prosecution Authority

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JUDGMENT

BANDA-BOBO, JA, delivered the Judgment of the Court

Cases referred to:

1. Musonda and Another v. The People (SCZ Judgment No. 9/179),
2. Davies Mwape v. The People (1979) ZR 54
3. Chipendeka v. The People (no citation)
4. Kaweme v. The People (SCZ App No. 140/2015)
5. The People v. Edward Mumba (HPC/42/2021)
6. Samuel Mwansa v. The People (no citation)
7. Chisala v. The People (1975)
8. Kapya Kandike v. The People (2010) ZR Vol 3, 292

Legislation referred to:

- *The Penal Code Chapter 87 of the Laws of Zambia*
- *Juveniles Act, Cap 53 of the Laws of Zambia*

1.0 Introduction

1.1 The Appellant was tried and convicted by the Subordinate Court of the offence of rape contrary to Section 132 of the Penal Code, Cap. 87 of the Laws of Zambia. The High Court at Kabwe, confirmed the conviction and sentenced him to thirty-five years (35) imprisonment with hard labour. He has now appealed against both conviction and sentence, and has proffered one ground of appeal, namely:-

The learned trial court erred both in law and in fact when it failed to constitute itself as a juvenile's court even when the record and evidence revealed that the Appellant was a Juvenile.

2.0 Brief Background

2.1 The brief background is that the Appellant was alleged to have committed the offence of rape, which allegation he denied and so the matter went to trial. At the time of plea, the guardian to the accused, Audrey Miyete told Court that the accused was a juvenile, having been born on 17th November, 2001. He was going to be nineteen (19) years old on 17th November, 2020. Plea was being taken on 10th

August, 2020. The crime was allegedly committed on 25th July, 2020.

2.2 In its Ruling, the Court said it had established that the accused was not a Juvenile offender, but a juvenile adult. The Court thus dispensed with the requirement of the guardian and proceeded to hear the matter in open court.

3.0 **Proceedings in the Lower Court**

3.1 During trial, six (06) witnesses testified for the prosecution. **PW1**, **Violet Kaseke**, the victim testified that while in her house around 20:00 hours on the material day, someone entered her house, threatened to kill her, covered her mouth and proceeded to rape her, both vaginally and anally. She said she had managed to bite the assailant on the neck. She said she did not know the accused as her sight was poor. That she never allowed him to rape her. It was her evidence that she told her children what happened, and the matter was reported to the police, who came and saw that she was bleeding and had faecal matter on herself due to the rape through the anus. She had a painful vagina, with blood

coming out. She was given a medical form and later taken to the hospital where she was attended to.

3.2 In cross-examination, she repeated that it had almost been dark as it was evening, but that she had bitten the accused on the neck.

3.3 **PW2** was **Naomi Kaseke**, the daughter to PW1. Her evidence was that on the material date, her granddaughter called her and told her she was failing to open the door to her great grandmother's house. The witness then went and tried to open the door but met some resistance as if someone was pushing the door from inside. Upon further pushing, the accused came out and she slapped him and told him she did not keep money in the house. Upon entering the house, she said she found her mother crying, covered in blood and faecal matter. She then raised alarm and that is how the accused was apprehended and brought back.

She said upon examining the accused, she saw that he had blood and faecal matter on the front of his trousers. He was thus taken to the police.

3.4 **PW3** was **Trisha Kapapi**, a great grandchild to PW1. She was the one who failed to open the door to the victim's house, and called PW2; who came to try and open the door. She witnessed the accused coming out of the house and being slapped by PW2, whereupon he took to his heels. She told Court that she recognized the accused as she used to see him at the market, and that she had had a torch in her hand; and it was on. She said when the accused ran, her uncle Timmy saw him and that is how he was chased, apprehended and brought back. This is how he was taken to the police.

3.5 Under cross examination, she said when the accused was apprehended, his trousers were stained with faeces similar to those found on her great grandmother.

3.6 **PW4** was **Timothy Kaseke**, who said as he went to his mother's house about 20:00 hours, he heard someone shout thief. He said he ran to the main road and found a person held by some people. He said the person was escorted back to PW1's house. That when a torch was flashed on the suspect, they saw the faeces on his trousers and that it was found that his grandmother (PW1) had also messed herself

with faeces. That, that is how the accused was taken to the police. He identified the accused.

3.7 **PW5** was **Silvia Katayi**, a Police Officer in the Victim Support Unit. She examined PW1 when she was brought into the Police Station. She found that PW1's dress had blood behind, that she had no underwear on and her vagina was still bleeding, and that she said it was painful. She issued PW1 with a medical report form and rushed her to the hospital. She identified the medical report form. She noted that the victim was nineteen (99) years old.

PW6 was another Police Officer, **Sulwenga Kelvin**. He received the report of rape of PW1 by the accused. Upon receipt of the Report, he went to the village where he found PW1, and took her to the police station where PW5 examined her. He too observed faecal matter on the front part of the accused's trousers and which matched those on the victim's dress. He said he interviewed PW1 who told him that the accused had raped her vaginally and later in the anus. He also interviewed the accused, whom he later arrested and charged for the offence of rape; a charge he denied.

3.8 After closure of the prosecution's case, the learned trial Magistrate found the accused with a case to answer and put him on his defence. He, in his defence, opted to remain silent and did not call any witness.

4.0 **Decision of the Lower Court**

4.1 The learned trial Magistrate analysed the evidence adduced by the prosecution. The learned trial Magistrate warned itself that it was dealing with a sexual offence, which needed corroboration. Sections 132 and 133 of the Penal Code were analysed. The Court set out what the prosecution needed to establish in order to prove a case of rape.

4.2 The Court found as a fact that indeed PW1 had been raped as evidenced by the medical report. As regards the perpetrator of the crime, it was found that the evidence of PW1 had been corroborated by PW2, PW3, PW4 and PW5; as they all spoke to the blood and faecal matter found not only on PW1 but also on the trousers that the accused was wearing when he was apprehended. He came to the conclusion that it was reasonable to conclude that the blood and faecal matter were as a result of the accused penetrating the complainant in the vagina as well as the anus. It was

concluded that he had an opportunity to commit the offence since the victim was alone in the house, from where the accused was discovered and the complainant had been raped. The Court concluded that the accused perpetrated the crime. That the complainant did not consent to the sexual intercourse perpetrated against her. The Court found the prosecution had proved the offence of rape and convicted the accused accordingly.

4.3 Upon the matter being remitted to the High Court for Sentence, the learned High Court Judge, Hon. Justice Limbani, agreed with the Magistrates Court's verdict, and sentenced the accused to thirty-five (35) years imprisonment with hard labour.

5.0 **The Appeal**

5.1 As already said, the Appellant herein was unhappy with the decision and now appeals against both conviction and sentence and has set forth one ground of Appeal as set out above.

6.0 **Heads of Argument in Support**

6.1 The Appellant filed Heads of Argument in Support on 20th October, 2021. The gist of the Appeal is that there is evidence that the Appellant was born on 17th November, 2001. That the offence occurred on 25th July, 2020; while trial started on 8th August, 2020. Based on the above, the argument was that the Appellant was a juvenile at the time, as he was eighteen (18) years old at the time of the commission of the crime. That, that being the case he should have been treated as a juvenile under Section 2 of the Juveniles' Act, Cap 53 of the Laws of Zambia.

6.2 We were referred to Section 118(1) of the Juveniles' Act, on the need for the Court to make an inquiry as to the age of a person who appears to be a juvenile. That failure to make such an inquiry will render a trial unprocedural and therefore a nullity. To affirm this position, we were referred to cases of **Musonda and Another v. The People[1]**, **Davies Mwape v. The People[2].**

It was submitted that in casu, despite making the inquiry, the Court still mislead itself by treating a juvenile as an adult, when the evidence on record showed that he was eighteen

(18) years at the time of the commission of the offence, and at trial. To buttress, we were referred to the case of **Chipendeka v. The People**[3] where a retrial was ordered, by Skinner, CJ who observed that the Court had not made an inquiry as to the age of the Appellant.

6.3 It was argued that whenever a juvenile is being tried in court, the court is obliged to constitute itself into a juvenile court. Section 65 of the Juvenile Act was referred to as well as the case of **Kaweme v. The People**[4] which case it was said, discussed the issue in detail. We were further referred to the case of **The People v. Edward Mumba**[5] which case discussed the provisions of Sections 63 and 65 of the Juveniles Act (case cited for persuasive value only). We were urged to find that the Appellant was a juvenile at the time of the commission of the offence and trial and that the lower Court should have complied with the provisions of Sections 63 and 65 of the Juveniles Act and constitute itself as a juvenile court. That we should allow the ground of appeal and set aside the conviction and sentence and treat the trial as a nullity.

6.4 In the alternative, as the sentence was wrong in principle according to the Appellant, this Court should sentence the

juvenile appropriately, should the Court hold that there is sufficient evidence to warrant a conviction.

Finally, it was submitted that this is an appropriate case for retrial.

7.0 **Hearing**

7.1 When the matter came up for hearing, counsel for the Appellant, Mr. Mweemba expressed a wish to rely on the Heads of Argument filed into Court. Mr. Mwewa, counsel for the Respondent responded viva voce and stated that page 1 of the Record of Appeal shows that the Court made an inquiry and the Appellant was found to be nineteen (19) years old, and that pursuant to Section 63(1) of the Juveniles Act, proceeded to trial. Mr. Mwewa disagreed with the assertion that the Appellant was a juvenile, stating that the trial was properly conducted.

7.2 Mr. Mwewa referred us to page 5 of the Heads of Arguments and referred us to the case of **Samuel Mwansa v. The People**[6] a Supreme Court judgment at pages 170 and 171 and said that the courts are allowed discretion to sentence a

juvenile, taking into account the circumstances of the case, and that a custodial sentence is not out of the question.

7.3 In reply, Mr. Mweemba maintained that despite the inquiry having been done, the fact was that the Appellant was eighteen (18) years old at the time. When asked whether for purposes of trial, the age considered was at the time of the commission of the offence or it is the age when the accused turns up in Court, Mr. Mweemba said the age looked at is at the time when the crime was committed, but he quickly retracted and said the age considered is when he turns up in court. Regarding the Appellant herein, Mr. Mweemba said that the Appellant was born on 17th November, 2001, hence the argument that he was a juvenile and if the court had taken time to consider these facts, it would have found that the Appellant was a juvenile. He reiterated that when a court makes an enquiry and erroneously comes to the conclusion that an offender is not a juvenile, the proceedings should be done away with.

8.0 Decision of this Court

8.1 We have considered the record and the arguments filed by the Appellant and the viva voce arguments proffered by the

Respondent. The contention by the Appellant is that, even though the Court made an inquiry as to the age of the Appellant, it misdirected itself by holding that the Appellant was nineteen (19) years old, contrary to the evidence on record, and failed to constitute itself as a juvenile court. That this constituted a fatal error. The Respondent on the other hand is categorical that having made an inquiry the Court was on firm ground when it proceeded to hear the matter in open court and not constitute itself into a juvenile court.

8.2 We have no difficult in accepting that Section 118 of the Juveniles' Act enjoins a court, before whom a suspect is appearing, to inquire as to the age of that person if it appears to the court that that person is a juvenile. In casu, there is evidence on the record of Appeal at page 2, that the trial Court made an inquiry as to the age of the Appellant. The Court after due process (inquiry) established that the accused was not a juvenile offender but a young adult. In the case of **Davies Mwape**[2], brought to out attention by counsel for the Appellant, the Court clearly guided on this issue when it held, inter alia, that:-

"(i) Under S118(1) of the Juveniles Act, it is sufficient for a court to rely solely on <u>ocular observation</u> and if it appears that an offender is a juvenile, an injury must be made to ascertain his exact age for the purpose of considering the powers of the court in relation to such offender. However, where by ocular observation the offender is obviously an adult, the court is not put on its inquiry;

(ii) when such inquiry has been made, the provision <u>that an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person was not correctly stated or estimated by the court comes into effect</u> and there cannot be any appeal on the question of age, provided that the inquiry made was infact a due inquiry and not defective in any way." (underline by Court for emphasis)

8.3 Reverting to the matter before us, to the extent that an inquiry was made, as appear at page 2 of the Record of Appeal, our view is that the trial Court complied with the provisions of Section 118(1) of the Juveniles' Act. At page 1 of the Record of Appeal, on the particulars of the Appellant, it showed that his age was nineteen (19) years. The Court, rather than rely on ocular observation alone, decided to make an inquiry before plea was taken. It thus put itself on inquiry.

It was after the inquiry that the Court concluded and confirmed that infact the person appearing before him was a young adult, whose trial could be held in open court. It is our view that the Court was aware, by so proceeding, of the law relating to juveniles, and found that the Appellant was nineteen years old. Having satisfied himself as to the age of the person appearing before him, he did not need to constitute himself as a juvenile court, to satisfy the provisions of Sections 63 and 65 of the Juveniles' Act. Further, it is clear from the record that the inquiry made was a due inquiry and not defective in anyway. Going by the decision in **Davies Mwape**[2]**,** even if the trial Magistrate erroneously arrived at the conclusion that the Appellant was not a juvenile, the fact that due enquiry was made into his age precludes us from finding that the proceedings were a nullity on account of the court not constituting itself as a juvenile court. We cannot fault the trial Court for proceeding in the way it did in this case. We find no merit in this limb of the Appeal.

8.4 In the second limb, the argument is that the sentence was wrong in principle and we should sentence the Appellant

appropriately in the event that we hold that there is sufficient evidence to warrant a conviction.

8.5 **Section 2(1) of Cap. 53 of the Laws of Zambia** defines a "juvenile adult" as a person who has attained the age of 19 years, but has not attained the age of twenty-one years. The lower Court during trial determined that the appellant was 19 years and therefore a juvenile adult.

8.6 The general rule is that a juvenile adult as found by the trial court should be sentenced based on the age he was at the time he committed the offence, which in this case was 19 years.

8.7 It is trite that **Section 72 of Cap 53** restricts the type of punishment that can be imposed on juveniles. **Section 72 (2)** is specific that no young person shall be sentenced to imprisonment, if he can be suitably dealt with in any other manner. Section 73 of the same Act specifies the way in which to deal with a juvenile offender; where it provides that:-

> **"73.(i)... the court shall take into consideration the manner in which, under the provisions of this or any other written law, the case should be dealt with, namely**
>
> **(i) Where the offender is a young person by sentencing him to imprisonment"**

Further Section 73(3) stipulates that:-

> **"73(3) Nothing in this section shall be construed as in any way restricting the power of the court to pass any sentence which it is empowered to pass under this or any other written law."**

The Supreme Court in the case of **Chisala v. The People**[7] held that:-

> **"(a) Once the court decides that a juvenile offender cannot be suitably dealt with otherwise than by sending him to prison, it is obligatory to impose the statutory minimum sentence for the offence in question**
>
> **(b) However, the decision whether or not the offender can be suitably dealt with otherwise than by sending him to prison, cannot be arrived at without having regard to the alternative; the court cannot close its mind to the fact that if it decided to send a juvenile to prison it is obliged to do so for the statutory minimum period prescribed for the offence.**
>
> **(c) ...**
>
> **(d) The question for the court is to choose the least unsuitable method of dealing with an offender. It is entitled to weigh the unsuitability of a reformatory order taking into account the circumstances of the offence, the antecedent of**

the juvenile and all other relevant factors, and to decide which is the less unsatisfactory of the two unsatisfactory courses."

8.8 In the later case of **Kapya Kandike v. The People**[8], the Supreme Court reiterated this position. In that matter, the appellant had been 18 at the time of the commission of the offence and was therefore a young person. The court held inter alia that:-

> **"5 ... where the offender is a young person, he can be sentenced to imprisonment if he cannot be dealt with in any other manner**
>
> **7. The High Court should have sentenced the Appellant as a juvenile at the age of 18 years when he committed the offence, and not at the age of 20 years when he was sentenced. However, the sentence of 15 years imprisonment stands because it is the statutory minimum sentence for defilement."**

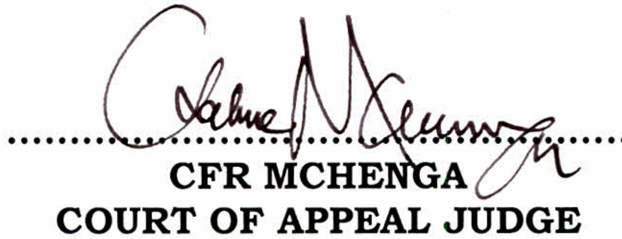
8.9 It is apparent from the cited authorities that a court can order the detention of a juvenile offender in a reformatory if the offence for which he was found culpable attracted a sentence of imprisonment, which, but for the fact that the offender is a juvenile would have been passed. It is also patent from the **Chisala**[7] and **Kandike**[8] cases that in the event that the court decides upon a sentence of imprisonment, it is obliged to impose the minimum sentence for the subject offence and

there is no discretion regarding the same. A decision to send a juvenile to prison cannot however be undertaken without considering any alternative and that the court is obliged to weigh between two unsuitable options and choose the lesser of the unsuitable choices.

8.10 In the matter before us, the young adult was found guilt of the offence of rape, whose minimum sentence is 15 years imprisonment. He raped a 99-year-old woman, not only through the vagina, but the anus as well. This was a defenseless old woman who could not even see clearly. It is therefore our view that a custodia sentence would be appropriate due to the aggravating circumstances of the case. We are of the view that a reformatory order would not be appropriate. We consider this a serious offence, and the manner of its commission is aggravating. We do not see any other way we can deal with him other than to imprison him. However, in view of the fact that the **Chisala[7] case** guides that it is obligatory to impose the statutory minimum sentence for the offence in question, we set aside the sentence of 35 years imprisonment because it is beyond the stipulated statutory minimum sentence of rape. We instead replace it

with 15 years imprisonment with hard labour, being the statutory minimum for the offence he was convicted of, which in our view is the appropriate sentence.

8.11 Our conclusion is that this appeal lacks merit and is dismissed accordingly.



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CFR MCHENGA
COURT OF APPEAL JUDGE

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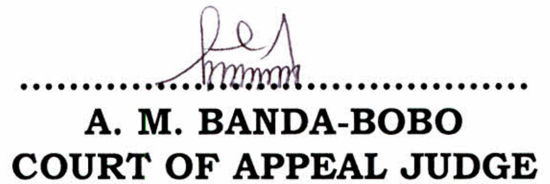
M. M. KONDOLO, SC
COURT OF APPEAL JUDGE



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