

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

MOSES NGENDA

AND

THE PEOPLE

RESPONDENT

Coram: Makungu, Sichinga and Muzenga JJJA

On 16th February, 2022 and 25th March, 2022.

For the Appellant: Mrs. L. Tembo Tindi of Legal Aid Board

For the Respondent: Miss S. Zulu State Advocate of National Prosecution Authority

JUDGMENT

Makungu J.A delivered the judgment of the Court.

Cases Referred to:

1. *Darius Sinyinza v. The People* SCZ Judgment No. 2 of 2009
2. *Dorothy Mutale and Another v. The People* (1997) SJ 51(S.C)
3. *Dickson Sembauke Changwe and Another v. The People* (1988 – 1989) ZR 144
4. *Mandula v. The People* 1993/94) ZR 91



APPELLANT

5. *Dennis Nkoma v. The People* CAZ Appeal No. 52 of 2011
6. *John Mbao v. The People* SCZ Appeal No. 115 of 2011
7. *Ilunga Kabala and John Masefu v. The People* (1981) ZR 102
8. *Ringson Mpalaula and Two Others v. The people* SCZ Appeal No. 80 of 2009

Legislation referred to:

1. *The Penal Code Chapter 87 of the Laws of Zambia*
2. *The Criminal Procedure Code Chapter 88 of the Laws of Zambia*
3. *Juveniles (Amendment) Act NO. 3 of 2011*

1.0 INTRODUCTION

1.1 The Subordinate Court of the first class tried and convicted the appellant of defilement of S. N. a child below the age of 16 years, contrary to Section 138 (1) of the Penal Code Chapter 87 of the Laws of Zambia as read with Acts No. 15 of 2005 and No. 2 of 2011.

1.2 The High Court sentenced him to 44 years imprisonment with hard labour with effect from the date of his arrest. This is an appeal against both conviction and sentence.

2.0 EVIDENCE BY THE PROSECUTION

- 2.1 The prosecutrix was aged 10 years old at the material time as she was born in 2009. The appellant is her step father.
- 2.2 The prosecutrix (PW1) in her evidence in-chief testified that, on 28th November, 2019 at night, while her mother was asleep in her bedroom, the appellant went to the bedroom where she was sleeping with her siblings, and had sexual intercourse with her. That he had been sleeping with her for a long time and she lied to her mother that he was fond of touching her legs because he had threatened to beat her.
- 2.3 The following morning, her mother and aunt checked her vagina and took her to the police station and later to Liteta Hospital where she was examined by a doctor.
- 2.4 Under cross examination, the prosecutrix stated that on 28th November, 2019, the appellant was in night shift. He did not have sexual intercourse with her. He only got some tobacco from her bedroom and left. In cross examination, she stated that nobody had sexual intercourse with her that night.

2.5 The prosecutrix's mother (PW2) testified that the incident complained of occurred, on 25th November, 2019 at home at Stable Farm. That night, there was a power outage and she went to sleep in her bedroom around 20:00 hours, while her husband (the appellant) slept in the sitting room as he was waiting for power to be restored. At 01:00 hours, she woke up and found that the power had been restored. She did not find the appellant in the sitting room but in the children's room where he stood over the prosecutrix, near the mosquito net, fully dressed in a T-shirt and shorts. He was holding the shorts. Upon seeing her, the appellant left the room and requested her not to tell her relatives or his, about what he wanted to do. He then requested her to check the prosecutrix to see if he had done anything to her. She was unable to do so because she was struck with shock and therefore powerless.

2.6 In the morning, she asked the prosecutrix what the appellant had done to her the previous night. Her response was that, he had touched her legs, which she said he usually did whenever he was drunk.

