IN THE SUPREME COURT FOR ZAMBIA **SCZ NO. 128/2021**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

MASAUTSO BANDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Mutuna and Chinyama, JJS.
On 7th September, 2021 and on April, 2024.

For the Appellant : Mr. B. Banda of Legal Aid Board
For the Respondent : Ms. C. Soko, of National Prosecution Authority.

J U D G M E N T

Chinyama, **JS**, delivered the Judgment of the Court.

Cases referred to:

1. Moses Mwiba v The People (1971) ZR 131.
2. Benua v The People (1976) ZR 13
3. Kaambo v The People (1976) ZR 122.
4. Patrick Hara v The People, SCZ Appeal No. 162 of 2011.

Statute

1. The Penal Code Cap. 87 of the Laws of Zambia.

1.0 **Introduction**

1.1 This is an appeal against both conviction and sentence meted out on the appellant for the offence of defilement contrary to **Section 138 (1) of the Penal Code, Chapter 87 of the Laws of Zambia, as read with Act No. 15 of 2005 and Act No. 2 of 2011**. He challenged the conviction alleging that he was entitled to the statutory defence under **Section 138(1) of the Penal Code** on the ground that the prosecutrix told him that she was 16 years old.

1.2 The appellant's dissatisfaction with the sentence is based on contention that he is a first offender, youthful and there were no aggravating circumstances.

2.0 Background

2.1 The facts of this case as they are relevant to the two grounds of appeal raised are that during the trial of the appellant in the Subordinate Court, he testified that the prosecutrix informed him that she was 16 years old at the material time. On the issue of the sentence, in mitigation, the appellant stated that he is a

first offender, repentant and is a young man who can be reformed.

2.2 The learned magistrate considered the testimony of the appellant regarding the age of the prosecutrix and discounted it. He stated, in this regard, that an ocular examination of the prosecutrix led him to believe that she was below the age of 16 years old. He accordingly convicted him and referred the matter to the High Court for sentencing.

2.3 The High Court Judge in delivering the sentence considered the mitigation by the appellant and concluded that he was not entitled to leniency because he did not repent. Further, he and his wife who was covering up for him, betrayed the prosecutrix trust and accordingly sentenced him to 40 years imprisonment with hard labour.

3.0 Appeal to this Court and arguments by Counsel

3.1 Counsel for the appellant, Mr. B. Banda advanced two grounds of appeal as follows:

3.1.1 The learned trial Court misdirected himself both at law and fact by not considering the appellant's statutory defence that the prosecutrix told the appellant that she was 16 years old.

3.1.2 *The learned trial Court erred in law by sentencing the appellant to 40 years imprisonment for a first offender who is youthful in age and where there are no aggravating circumstances.*

3.2 Arguing ground 1, Mr. Banda, contended that although the appellant raised the statutory defence regarding the age of the prosecutrix, the learned magistrate did not consider it. He argued further that the learned High Court Judge also ignored the evidence in support of the statutory defence.

3.3 In response, Ms. C. Soko argued that the trial Court did consider the appellant's defence and dismissed it after making an ocular observation of the prosecutrix which led him to conclude that she was under the age of 16 years.

3.4 As regards the second ground of appeal, Mr. Banda argued that since there were no aggravating circumstances, the sentence of 40 years was rather harsh and should come to us with a sense of shock. He argued that in the cases of **MOSES MWIBA V THE PEOPLE**[1] and **BENUA V THE PEOPLE**[2], we stated that a trial Court has discretion in matters of sentence and appellate Court can only interfere with such sentence if it is wrong in principle or law and comes with a sense of shock.

3.5 According to Counsel, the sentence meted out was not only wrong at law but also comes with a sense of shock because the appellant is a first offender and there were no aggravating circumstances.

3.6 In response, Ms, C. Soko argued that the sentence is not harsh. She went on to refer us to our decision in the case of **KAAMBO V THE PEOPLE**[3] where we said that the basis of sentence must always be the proper sentence merited by the offence itself after which the court considers whether the accused is entitled to leniency. She argued further that the offence which the accused was convicted of, calls for a sentence of 15 years to life and as such, the sentencing Court was entitled to mete out a 40 year sentence based on the surrounding facts of the case.

3.7 Counsel confirmed that there were aggravating circumstances which merited the 40 years sentence. Further, in the case of **PATRICK HARA V THE PEOPLE**[4], this Court did not interfere with a 30 year sentence for a first offender who pleaded guilty.

4.0 Consideration by this Court and decision

4.1 In our determination of this appeal, we have considered the record of appeal and arguments by Counsel. In ground 1, the appellant contends that, despite pleading the statutory defence under **Section 138(1) of the Penal Code as amended in 2011**, the trial Court did not consider it. We must immediately dismiss this contention because it is clear in the Judgment of the trial Court that he did in fact consider the defence and dismissed it.

4.2 In his Judgment, the learned Magistrate, as argued by Ms. Soko, did make an ocular determination of the age of the prosecutrix and concluded that she was under the age of 16 years. For completeness we are compelled to reproduce the relevant portion of the Judgment which is as follows:

> *"The Court saw the child and did not look like she was 16 years, although there was no documentary evidence to confirm the age of the child."*

4.3 This was a reaction to the appellant's defence that he was told by the prosecutrix that she was 16 years old.

4.4 The matter, however, does not end there. The provisions of **Section 138(1) as amended**, require that a person seeking to

invoke the defence had *"... reasonable cause to believe, and did in fact believe the child... was above the age of 16 years."*

4.5 In advocating his defence, the appellant did not testify that he had such belief and merely said he was told by the prosecutrix that she was 16 years old. We must conclude that ground 1 of the Appeal fails.

4.6 As for ground 2 of the appeal, we must agree with the arguments advanced by Ms. C. Soko that since the offence with which the appellant was charged commands a sentence of between 15 years to life, the Judge was at liberty to mete out a sentence within that period. The fact that the appellant is a first offender and youthful is immaterial because the section does not prescribe lenience for such offenders. We also agree with the submission by Ms. C. Soko that we have in the past upheld sentences in the region of 30 years for first offenders.

4.7 Mr. Banda urged us to apply the principles by the then Court of Appeal in the case of **MWIBA**[1] and this Court in the **BENUA**[2] case. In the former Doyle CJ stated that due allowance should be given to accused persons who plead guilty and show contrition. In the latter, we stated that a plea of guilty must be

taken into account in considering a sentence unless there are circumstances such as a man being caught red-handed when he has no alternative. These indeed are sound principles which should be applied in sentencing.

4.8 In the matter with which we are engaged, the appellant did not plead guilty and the sentencing Judge found as fact that there were aggravating factors, which findings have not been challenged. For this reason, the two cases are distinguished from the matter before us and do not aid the appellant's case. Ground 2 must also fail.

5.0 Conclusion

5.1 Arising from what we have stated in the preceding paragraphs, both grounds of appeal lack merit and we accordingly dismiss the appeal. In doing so, we uphold both the conviction and sentence of the lower Court.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE