

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

APPEAL/96/2023

BETWEEN:

ZIFA CHIRWA
AND
THE PEOPLE



APPELLANT

RESPONDENT

CORAM: NGULUBE, MUZENGA AND CHEMBE JJA

On 13th August 2024 and 20th August 2024.

For the Appellant : Ms. M. Nzala – Senior Legal Aid Counsel,
Legal Aid Board
For the Respondent : Ms. L. Zunduna – Senior State Advocate,
National Prosecution Authority

JUDGMENT

CHEMBE, JA delivered the judgment of the Court

Cases referred to: -

1. *Siakonga v The People* (2009) ZR 192
2. *Kaambo v The People* (1976) ZR 122
3. *Phiri v The People* (1970) SJZ 178
4. *Mathew Chitupila Chalwe v the People* CAZ Appeal No. 58 of 2020
5. *Jutronich, Schutts and Lukin v The People* (1965) ZR 9
6. *Mwitu Ziyezo vs The People* Appeal No. 207/2020

Legislation referred to:

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

1.0. INTRODUCTION

- 1.1 The Appellant, appeared before the Subordinate Court sitting at Lundazi on a charge of defilement of a child, contrary to section 138 (1) of the Penal Code. The particulars of the offence state that on the date unknown but between the 1st August, 2021 and 28th February, 2022 at Lundazi, the appellant had unlawful carnal knowledge of a girl who was below the age of 16 years.
- 1.2 He denied the charge and the matter proceeded to trial. At the end of the trial, the appellant was convicted for the offence and committed to the High Court for sentencing.
- 1.3 The High Court (Makubalo, M.K. J) sentenced him to 35 years imprisonment with hard labour. Disgruntled with the sentence, the appellant has now appealed to this Court.

2.0. BACKGROUND

- 2.1 Sometime in May 2022, the prosecutrix' stepmother suspected that she was pregnant. A pregnancy test confirmed that she was indeed pregnant. Her father, PW2, was informed. When questioned, the prosecutrix revealed that she had been having sexual relationship with the appellant. As the prosecutrix was only 15 years old at the time, the matter was reported to the police.

2.2 The prosecutrix was taken to Lundazi General Hospital where it was revealed that she was five months pregnant. The Appellant was apprehended and detained. He was subsequently charged with the offence of defilement. He denied the charge.

3.0. EVIDENCE BEFORE THE TRIAL COURT

3.1 The evidence before the trial Magistrate was that sometime in August, 2022 the appellant engaged in a sexual relationship with the prosecutrix, who at the time was only 15 years old. During the course of that relationship, the appellant had sex with the prosecutrix more than twice and after every sexual encounter he told her not to disclose the incident to anyone and gave her a K50.00. In his continued quest to have sexual intercourse with prosecutrix, the appellant told her to start taking birth control pills which the prosecutrix refused to do and the appellant then cut off all communication with her.

3.2. The prosecutrix then discovered she was pregnant and informed her mother who took her to a drug store where the pregnancy was confirmed. The matter was then reported to Lundazi Police Station at the Victims Support Unit where the prosecutrix disclosed that the appellant was responsible for her pregnancy.

3.3. Sometime during the course of May, 2022 the prosecutrix's father (Benard Ngulube) PW2, was approached by the appellant and his

relatives to render an apology and offer money as compensation for having made the prosecutrix pregnant.

- 3.4. In his defence, the appellant denied being in a relationship with the prosecutrix. He testified that PW2 demanded for K20,000.00 which he failed to pay because it was beyond his means. The appellant denied making the prosecutrix pregnant and maintained that there was another man who was responsible and not himself.
- 3.5. After analyzing all the evidence, the trial magistrate found that there was over whelming evidence that the appellant committed the offence. The trial magistrate further considered the fact that the appellant was seen together with the prosecutrix at Dunda compound, which placed an irresistible inference that the appellant committed the offence.
- 3.6. The trial magistrate further dismissed the appellant's defence that the prosecutrix only pointed at him as being responsible for her pregnancy after she was beaten by PW2. The trial magistrate found the appellant guilty as charged and committed him to the High Court for sentencing.
- 3.7. At the High Court, the appellant was sentenced to 35 years imprisonment with hard labour.

4.0. GROUND OF APPEAL

4.1 Disconsolate with the sentence, the Appellant appealed to this court advancing one ground of appeal as follows:

The Learned Judge erred in both law and fact when she sentenced the Appellant to 35 years imprisonment despite him being a first offender.

5.0 ARGUMENTS IN SUPPORT OF APPEAL

5.1 In the arguments in support of the appeal, the Appellant submitted that the sentence imposed by the Judge did not reflect leniency in view of the fact that he was a first offender. We were referred to the case of **Siakonga v The People**¹ where it was held that the Court had discretion to impose any sentence between 15 years to life imprisonment depending on the circumstances of each case.

5.2 Relying on the case of **Kaambo v The People**², it was submitted that the 35 year sentence imposed was too severe as it was more than twice the minimum sentence for the offence. To buttress this argument we were referred to the case of **Phiri v The People**³ where the Supreme Court guided that a first offender should always be accorded leniency. It was argued further that the mandatory minimum sentence was already a stiff sentence as it was meant to a deterrent sentence.

6.0 RESPONDENT'S ARGUMENTS

6.1 The Respondent filed heads of argument in which it supported the sentence imposed. It was submitted that there aggravating factors including the fact that the appellant defiled the prosecutrix about 20 times and she became pregnant. It was contended that this court has held in the case of **Mathew Chitupila Chalwe v the People**⁴ that pregnancy resulting from non- consensual sex is an aggravating factor.

6.2 The Respondent also referred to the case of **Jutronich, Schutts and Lukin v The People**⁵ in arguing that the sentence of 35 years imprisonment was not excessive or wrong in principle. We were urged to dismiss the appeal.

7.0 HEARING

7.1 At the hearing, both sides relied on their respective heads of argument. Counsel for the appellant submitted that the mandatory minimum sentence of 15 years imprisonment would have been more appropriate in the circumstances.

8.0. CONSIDERATION AND DECISION

8.1. We have carefully considered the evidence on record and the impugned judgment. The issue for determination is whether sentence of 35 years was appropriate in the circumstances.

8.2. It is trite law that when dealing with an appeal against sentence, the guiding principle is that which was enunciated in the case of **Jutronich v The People**⁵ where it was held that:

“In dealing with appeals against sentence 3 questions should be asked; (1) Is the sentence wrong in principle? (2) Is the sentence so manifestly excessive as to induce state of shock? (3) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?”

If any of the above questions is answered in the affirmative, the appellate court has to interfere with the sentence.

8.3 We note from the record that the learned trial Judge considered the fact that the prosecutrix fell pregnant to be an aggravating factor. We refer to our case of **Mathews Chitupila vs The People**⁴ in which we held that pregnancy was an aggravating factor following non-consensual sex. Although the prosecutrix consented to the sexual relationship, she was a minor and had no capacity to give consent.

8.4. Further, although the prosecutrix was 15 years old, it cannot be classified as an ‘ordinary borderline case’. The sexual relationship in our view amounted to an abusive relationship because the appellant was 32 years old.

8.5. We further refer to the case of **Mwitu Ziyezo vs The People**⁶ where we said that pregnancy was correctly classified as an

aggravating factor because it was not a product of a consensual liaison between the appellant and his daughter. In that case, we considered the fact that motherhood requires a level of physical, mental and financial preparedness that most children do not possess. Thus encouraging or accepting child mothers would be irresponsible.

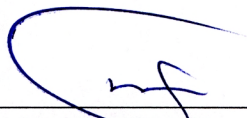
- 8.6. We stand by our decision in the **Ziyezo case** where we took judicial notice of the fact that it is widely recognized that girls who become pregnant at a young age may suffer health issues which may be life threatening or lead to lasting physical and emotional harm. In that case we upheld the sentence of 35 years imprisonment.
- 8.7. Given the aggravating factors in the present case and considering that the offence carries a maximum of life imprisonment, the sentence of 35 years is not excessive and does not come to us with a sense of shock. We do not agree with the appellant's submission that he was not accorded any leniency as a first offender. He was not sentenced to the maximum sentence.

9.0. CONCLUSION

9.1. The sentence meted out by the learned trial Judge was not wrong in principle and we will not interfere with it. We find no merit in the appeal and we dismiss it.



P.C.M. NGULUBE
COURT OF APPEAL JUDGE



K. MUZENGA
COURT OF APPEAL JUDGE



Y. CHEMBE
COURT OF APPEAL JUDGE