

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

APPEAL NO.35 /2022

BETWEEN:

CHRISTOPHER SIABOZO

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Muzenga, JJA

ON: 12th October 2022 and 24th February 2023

For the Appellant: E.I. Banda, Senior Legal Aid Counsel,
Legal Aid Board

For the Respondent: C. M. Hambayi, Deputy Chief State
Advocate, National Prosecutions
Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

- 1.Nzala v. The People [1976] Z.R. 221
- 2.Matthews Mumba v. The People CAZ Appeal No. 163 of 2017
- 3.Kabwita v. The People SCZ Appela No. 345 of 2013
- 4.David Zulu v. The People [1977] Z.R. 151
- 5.Modester Kalaba v. The People, CAZ Appeal No. 86 of 2017

6. Jutronich, Schutte and Lukin v. The People [1965]
Z.R. 9

7. Patrick Hara v. The People, SCZ Appeal No. 162 of
2011

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

1. Introduction

1.1. The appellant appeared before The Subordinate Court (Honourable S.M. Mukela), on a charge of defilement, contrary to **Section 138(1) of The Penal Code**.

1.2. He denied the charge, and the matter proceeded to trial.

1.3. At the end of the trial, he was convicted and pursuant to **Section 217(1) of the Criminal Procedure Code**, committed to the High Court for sentencing.

1.4. In the High Court (Mulife, J.), he was sentenced to 35 years imprisonment, with hard labour.

1.5. He has appealed against the conviction and in the alternative, against the sentence.

2. CASE BEFORE THE TRIAL MAGISTRATE

- 2.1. The evidence against the appellant was that in the evening of 7th July 2020, Fides Kalikwenda was with her daughter, the prosecutrix, at her shop at Ngweze Station, in Kazungula.
- 2.2. The prosecutrix was almost 5 years old at the time.
- 2.3. Fides Kalikwenda closed her shop around 20:00 hours. When she checked for the prosecutrix at a nearby shop, where she expected her to be, she did not find her.
- 2.4. A search for the prosecutrix was launched. It continued throughout the night.
- 2.5. The following morning, Sunday Kambimbi, the prosecutrix's grandfather, who was part of the search, found the appellant standing along the railway line, with the prosecutrix.
- 2.6. On being asked what he was doing with the prosecutrix, the appellant threatened Sunday Kambimbi, who retreated and went to seek help.
- 2.7. A search was mounted in that area and between 05:30 hours and 06:00 hours, the appellant, who was with

the prosecutrix, was pointed out to a police officer by Sunday Kambimbi.

2.8. The police officer apprehended the appellant as he was attempting to flee.

2.9. The prosecutrix told her rescuers that she had been defiled by the appellant. She was immediately taken to Livingstone General Hospital.

2.10. At the hospital, a doctor confirmed that it was the case, after observing that she had lacerations on the hymen and between the vagina and the anus.

2.11. In his defence, the appellant disputed being with the prosecutrix shortly before his apprehension. He said he was at his house sleeping that night and he did not know anything about the case.

2.12. He also informed the trial Magistrate that on 5th July 2020, he had an altercation with the prosecutrix's mother and that is why he was falsely implicated in this matter.

3. FINDINGS BY THE TRIAL MAGISTRATE

3.1. The trial Magistrate found that the prosecutrix was defiled and that she was a child who was below the age of 16 years at the time.

3.2. She found that the appellant was incriminated by the prosecutrix's evidence that he defiled her and Sunday Kambimbi's evidence that he found him with the prosecutrix, the morning after the prosecutrix had gone missing.

3.3. The trial Magistrate also found that Sunday Kambimbi's evidence that the appellant was found with the prosecutrix, was corroborated by the police officer who apprehended the appellant.

3.4. She rejected the appellant's defence after finding that the prosecution's version of events, was more credible.

4. PROCEEDINGS IN THE HIGH COURT

4.1. Before imposing the sentence, the sentencing Judge decided to invoke his revisionary powers under Section 338 of The Criminal Procedure Code.

4.2. He considered the propriety of the manner in which the *voir dire* on the prosecutrix, was conducted before she was allowed to testify.

4.3. The sentencing Judge concluded that, having not made a determination on whether the prosecutrix understood the duty to speak the truth, the prosecutrix should not have been allowed to testify.

4.4. Notwithstanding that error, he found that even if the prosecutrix's evidence was excluded, there was still cogent evidence warranting the appellant's conviction of the offence of defilement.

4.5. The sentencing Judge proceeded to impose a sentence of 35 years imprisonment. That was after noting that there were aggravating factors.

4.6. He itemised them as being, the age of the prosecutrix and the fact that the appellant kept the prosecutrix in the bush, away from the safety of her parents, the whole night.

5. GROUNDS OF APPEAL

5.1. Three grounds have been advanced in support of this appeal. They are couched as follows:

- (i) The trial Court erred in law and fact when it concluded that despite the *voire dire* being defective there was overwhelming evidence that the appellant committed the offence;
- (ii) The trial Court erred in law by convicting the appellant for the subject offence when the evidence on record discloses the offence of indecent assault; and
- (iii) In the alternative, the sentence of 35 years imposed by the Honourable Court was too excessive for a first offender.

5.2. Because the 1st and 2nd grounds of appeal are interrelated, we will deal with them at the same time.

6. ARGUMENTS IN SUPPORT OF THE 1st and 2nd GROUNDS OF APPEAL

6.1. In support of the 1st ground of appeal, Ms. Banda submitted that other than the prosecutrix's evidence, there was no other evidence that incriminated the appellant.

6.2. She then argued that the prosecutrix's evidence having been excluded, there no evidence that the prosecutrix's grandfather's evidence could have

corroborated to warrant the sentencing Judge's upholding of the appellant's conviction.

6.3. She also argued that the prosecutrix's grandfather was a suspect witness because he lied on the stand. His evidence could not be relied on.

6.4. In support of the 2nd ground of appeal, Ms. Banda argued that the evidence on record, at most, supports a charge of indecent assault and not defilement. She said this was on account of the doctor finding that a blunt item was applied on the prosecutrix.

6.5. It was her prayer that we uphold the two grounds of appeal and acquit the appellant.

7. ARGUMENTS IN RESPONSE TO THE 1st and 2nd GROUNDS OF APPEAL

7.1. In response to the 1st ground of appeal, Mrs. Hambayi submitted even with the exclusion of the evidence of the prosecutrix, there is evidence which connects the appellant to the commission of the offence.

7.2. She pointed out that the evidence of Sunday Kambimbi, which was corroborated by that of the

police officer, was that the appellant was found with the prosecutrix after she went missing.

7.3. She then referred to the cases of **Nzala v. The People**¹ and **Matthews Mumba v. The People**², and submitted that on the evidence that was before the trial Magistrate, the appellant had the opportunity to commit the offence.

7.4. In response to the 2nd ground of appeal, Mrs. Hambayi referred to the case of **Kabwita v. The People**³ and submitted that a charge of defilement can still be proved even if the penetration is partial.

7.5. She argued that the findings of lacerations on the hymen when the prosecutrix was examined by the doctor, established that the offence of defilement was committed.

8. COURT'S CONSIDERATION AND DECISION ON THE 1ST AND 2ND

GROUND OF APPEAL

8.1. The testimony of the prosecutrix having been discounted by the sentencing Judge, and rightly so in our view, the only evidence against the appellant was that he was found with the prosecutrix in the

morning, the child having gone missing the previous night.

8.2. Medical examination of the prosecutrix led to the discovery of fresh lacerations on the hymen. Fresh lacerations were also discovered between her vagina and the anus.

8.3. We will first deal with Ms. Banda's submission that Sunday Kambimbi's testimony should not have been relied on because he was not a credible witness.

8.4. The trial Magistrate considered the credibility of this witnesses, be it from a different angle.

8.5. The gist of Sunday Kambimbi's evidence was that he found the appellant with the prosecutrix that morning. The trial Magistrate found that this evidence was corroborated by the police officer who apprehended the appellant. He equally saw him with the prosecutrix.

8.6. In the circumstances, we agree with Mrs. Hambayi's submission that Sunday Kambimbi's testimony that the appellant was with the prosecutrix that morning, could be relied on because it was corroborated.

8.7. As regards Ms. Banda's argument that the medical report did not prove that the prosecutrix was carnally known, the medical report established that the prosecutrix suffered injuries on the hymen and between the vagina and the anus.

8.8. There is no direct evidence of what caused these injuries, given that the evidence of the prosecutrix has been discounted.

8.9. The case against the appellant, is therefore anchored on circumstantial evidence.

8.10. In the celebrated case of **David Zulu v. The People**⁴, the Supreme Court held that for a conviction to be anchored on circumstantial evidence:

"The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt"

8.11. The prosecutrix disappeared in unexplained circumstances on the 7th of July 2020, in the evening. The following morning, she was rescued from the appellant who attempted to flee when confronted. On being examined the prosecutrix was found to have

suffered injuries that included fresh lacerations on the hymen.

8.12. There is no evidence to suggest that the prosecutrix had those injuries before she went missing.

8.13. The appellant has simply denied being found with the prosecutrix. He attributed the evidence linking him to the prosecutrix to a difference he had with the prosecutrix's mother. A claim which was rejected by the trial Magistrate,

8.14. The questions that then follow are how did the prosecutrix suffer the injuries on her hymen and around the vagina, and who inflicted them?

8.15. In the circumstances of this case, we find Ms. Banda's claim that the injuries suffered by the prosecutrix, at most, point as indecent assault, to be farfetched.

8.16. It is our view, that the sentencing Judge, was on firm ground when he came to the conclusion that, the only inference that could be drawn on the evidence in this case, is that the prosecutrix was defiled, and that she was defiled by the appellant.

8.17. In the circumstances of this case, the lacerations suffered by the prosecutrix on the hymen and round the vagina cannot be attributed to anything else other than sexual intercourse.

8.18. Even though no one saw the appellant collect the prosecutrix that evening, the fact that he was found with her early in the morning the following day, only points at one conclusion. That it is the appellant who went away with the prosecutrix when she went missing and that he was with her the whole night.

8.19. Since he was with her the whole night and there is no evidence of anyone else being with them, the only conclusion that can be drawn is that it is the appellant who had sexual intercourse with the prosecutrix before her rescue.

8.20. We are satisfied that the test set out in the case of **David Zulu v. The People**⁴, for a conviction being premised on circumstantial evidence, was met.

8.21. Consequently, we dismiss both grounds of appeal against the conviction.

9. ARGUMENTS IN SUPPORT OF THE 3RD GROUND OF APPEAL

9.1. In support of the 3rd ground of appeal, Ms. Banda submitted that owing to the fact that the appellant is a first offender, the sentence of 35 years imprisonment imposed on him is excessive.

9.2. She also argued that the aggravating factors in this case, do not negate the fact that the sentence is excessive.

9.3. She prayed that we interfere with the sentence downwards.

10. ARGUMENTS IN RESPONSE TO THE 3RD GROUND OF APPEAL

10.1. In response, Mrs. Hambayi submitted that the 35 years sentence imposed by the sentencing Judge was appropriate because of the aggravating factors in this case.

10.2. She pointed out that the prosecutrix was aged 4 years and the appellant kept her overnight, for a number of hours. He subjected her to mental distress as evidenced by the record of proceedings before the trial Court.

10.3. She referred to the case of **Modester Kalaba v. The People⁵**, in support of her proposition that the

sentence should not come to us with a sense of shock as being excessive.

11. COURT'S CONSIDERATIONS AND DECISION On the 3rd

GROUND OF APPEAL

11.1. In the case of **Jutronich, Schutte and Lukin v. The People⁶**, the Court of Appeal, the forerunner of the current Supreme Court, gave guidance on the approach that an appellate court should take when dealing with an appeal against sentence. They guided as follows:

"In dealing with appeals against sentence the appellate court should ask itself these three questions:

- (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?"

11.2. In the case of **Patrick Hara v. The People⁷**, the Supreme Court considered age as an aggravating factor in a case of defilement. The court made the following observation:

"Young girls are no longer safe even in their homes. Therefore, each case depends on the circumstances surrounding the commission of the offence such as

the age of the victim, the manner of the attack, the relationship between the victim and the perpetrator of the offence.....this offence carries a maximum sentence of life imprisonment. The sentence of thirty (30) years is, therefore, not excessive, considering the age of the victim and all the prevailing circumstances of the case. Courts are slow to interfere with sentence unless it is shown that the discretion to mete out the sentence has been exercised wrongly or where it is shown that the sentence is so severe that it causes a sense of shock. In this case, the sentence of 30 years does not come to us with a sense of shock."

11.3. In this case, the prosecutrix was barely 5 years old when the appellant went away with her in the evening of 7th July 2020, without the consent or knowledge of her mother.

11.4. He was with her until the following morning around 06:00 hours, when she was rescued.


11.5. With these facts in mind, even if the appellant is a first offender, a sentence of 35 years imprisonment, does not come to us with a sense of shock as being excessive. It was warranted by the circumstances of the case.


11.6. This being the case, we find no reason for tampering with the sentence and dismiss the appeal against the sentence.

6 VERDICT

6.1 Having dismissed all the grounds of appeal, this appeal fails.

6.2 We uphold the appellant's conviction for the offence of defilement contrary to Section 138(1) of The Penal Code and the 35 years sentence imposed on him.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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F.M Chishimba
COURT OF APPEAL JUDGE


.....
K. Muzenga
COURT OF APPEAL JUDGE