

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

APP. No. 37/2022

BETWEEN:

NETO SIKABOLE

AND

THE PEOPLE



APPELLANT

RESPONDENT

**CORAM : Mchenga DJP, Chishimba and Muzenga JJAs
On 11th October, 2022 and 25th January, 2023**

For the Appellant : Mrs. S. C. Lukwesa, Acting Chief Legal Aid
Counsel – Legal Aid Board

For the Respondent : Mr. G. Mbao, Acting Senior State Advocate –
National prosecution Authority

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASE AUTHORITIES CITED:

1. Justus Simwinga v The People SCZ Appeal No. 120 of 2017
2. Jeffrey Godfrey Munalula v The People (1982) Z.R. 58
3. Phiri Macheke v The People (1973) ZR 145
4. Charles Chipandwe v The People SCZ Appeal No. 59 of 2019
5. Justin Simwinga v The People SCZ Appeal No. 120 of 2017
6. The People v Japau (1967) Z.R. 95
7. Zico Kashweka Lawrence Mungunda Chimbinde v The People (2007) ZR

LEGISLATION CITED:

1. The Penal Code Chapter 87 of the Laws of Zambia.
2. The Criminal Procedure Code Chapter 88 of the Laws of Zambia.

1.0 INTRODUCTION

- 1.1 The appellant was convicted of the offence of defilement of a child contrary to section 138(1) of the Penal Code Chapter 87 of the Laws of Zambia. The particulars were that Neto Sikabole, on 10th December, 2019, at Kalomo in the Kalomo District of the Southern Province of the Republic of Zambia, did have carnal knowledge of Miyanda Shome, a girl under the age of 16 years.

2.0 EVIDENCE IN THE COURT BELOW

- 2.1 PW1, Lina Sindowe, the mother to the prosecutrix, initially testified that (the prosecutrix) was born in 2001 and has no national registration card. After an adjournment, PW1 recanted her testimony by stating that the prosecutrix was born in 2005 and is in Grade Seven; PW1 could not state her daughter's age. Subsequently the prosecution then applied that she be declared a hostile witness which application was granted by the trial court.

- 2.2 PW2, Roy Sindowe, a brother to PW1 and uncle to the prosecutrix testified that the girl was born on 16th December, 2005 and was at the material time aged 14. He identified an affidavit and a letter from the school the prosecutrix attends marked P2 and the medical report, P1.
- 2.3 PW2 testified that on 10th December, 2019, the prosecutrix went missing from her mother's home. He began searching for her and travelled to Zimba where the matter was reported at the police. After a tip off, PW2 in the company of police officers, went to a place where the appellant and the girl were said to be staying. On hearing the police vehicle approaching, the appellant the prosecutrix and fled into the bush.
- 2.4 Later, the prosecutrix was found under a tree while the appellant went into hiding. When queried, the prosecutrix told PW2 that the appellant had been having sexual intercourse with her. At the hospital, she was found to be bleeding from the vagina.
- 2.5 We pose to note that the general affidavit was deposed by one 'Margie Miyanda Shombe' who identifies herself as the grandmother to the prosecutrix with the same names. The said

affidavit is also not signed. It would appear to us that the prosecutrix is in fact the deponent.

- 2.6 The prosecutrix, PW3, testified that she was 'stolen' by James and his wife who took her to Zimba where she was informed that she was now married to the appellant. She explained that the appellant and James had agreed to abduct her. She lived in various places with the appellant, James and his wife as married couples. During the said period, the appellant had sexual intercourse with her on several occasions. She stated that whenever they were moved to another place, the appellant would drag her along. At the said various places, PW3 and the appellant would sleep in one place, share beddings.
- 2.7 The appellant would tell her that they were married and he would have sexual intercourse with her. One day, while seated in the appellant's house, he came and told her that her grandmother, PW4 had come. He pulled and dragged her so that they run away into the bush. As they fled, the appellant abandoned her and the police apprehended her. The appellant was later apprehended by the police. She was taken to the hospital and examined.

- 2.8 PW4, Dina Mushabati Simaundu Muntanga is the grandmother to the prosecutrix. Her story was similar to that of PW2 save that she had requested the appellant to help look for James, his wife and the prosecutrix who were missing. The appellant did not return. PW4 denied marrying off the prosecutrix stating that she is young girl to be married off.
- 2.9 PW5, Rodwell Mukuba, is the father-in-law to the fugitive James. He received a call from PW2 informing him that James and the appellant had taken the prosecutrix and that they should bring her back. When he later confronted the appellant and James, they told him that they would return the girl. PW5 further told the court that he observed that the appellant was sleeping with the girl. When he asked the appellant, he told him that the girl was his wife.
- 2.10 The appellant gave an unsworn statement in which he denied being present when James and his wife and the girl left. He stated that PW4 sent him toimba to look for the trio and that he accordingly went there.

3.0 **DECISION OF THE LOWER COURT**

3.1 In her judgment, the learned magistrate found that the evidence of the prosecutrix had been well corroborated by the evidence of PW5 who saw her sleeping in the same beddings as the appellant. Further that the appellant had also told PW5 that the prosecutrix was his wife.

3.2 The appellant was convicted and the record committed to the High Court for sentencing. The High court sentenced the appellant to 30 years imprisonment with hard labour.

4.0 **GROUND OF APPEAL**

4.1 The appellant has advanced one ground of appeal couched as follows:

The trial court erred when it convicted the appellant in the absence of proof of the age of PW3 the prosecutrix beyond all reasonable doubt.

5.0 **ARGUMENTS BY THE APPELLANT**

5.1 The Acting Chief Legal Aid Counsel, Mrs. Lukwesa field heads of arguments dated 30th September, 2022 in support of the appeal. She submitted that in a charge for defilement, evidence

must be led to prove beyond all reasonable doubt that the victim subject of the offence, was a child under the age of sixteen.

5.2 The evidence before the trial court with respect to the age of the prosecutrix came from PW1, PW2 and PW6. PW1, the mother of the prosecutrix, PW3 testified that the girl was born in 2001. Following an adjournment at the instance of the prosecution without any reasons being given, PW1 was called at a later date where she now said that the girl was born on 16th December, 2005. PW1 was then declared a hostile witness when she stated she did not know the ages of her children apart from PW3.

5.3 Mrs. Lukwesa then cited the case of **Justus Simwinga v The People** ⁽¹⁾ where it was held that:

“In defilement cases, it is not acceptable simply for the prosecutrix to state her age. The age should be proved by one of the parents, or whatever other best evidence is available.”

The apex court went on to state as follows:

“We agree with learned counsel for the parties that the best evidence on the age of a child is from the parent or guardian. Indeed, we have pronounced ourselves on the issue of the age of the victim in defilement cases in a plethora of cases including the ones cited by counsel in this appeal that the age is an essential ingredient in a charge of defilement. By its very nature, the offence of defilement demands that the age be

established beyond reasonable doubt because it involves children under the age of 16 years.”

5.4 Counsel contended that from the guidance of the Supreme Court, the evidence of PW3 that she was born on 16th December, 2005 on its own is not sufficient to prove her age as there must be evidence from a parent or guardian or some other best evidence available.

5.5 As regards the evidence of the mother, PW1, it was submitted that she was declared a hostile witness and as a result, her evidence on the age of PW3 cannot be considered. She referred us to the case of **Jeffrey Godfrey Munalula v The People** ⁽²⁾ where it was held that:

- (i) *Where on an application to treat a witness as hostile, the court after sight of the inconsistent statement, decides to grant the application, it should then direct itself not to place any reliance on the contents of the statement and so record in the judgment.*
- (ii) *Before, with leave of the court, adducing evidence to prove a witness's inconsistency, the previous statement and its circumstances must be mentioned to the witness so that he may say whether or not he has made such a statement.*
- (iii) *It is in the court's discretion to determine a witness's hostility in that he does not, give his evidence fully and with desire to tell the truth; he is not hostile simply because his evidence contradicts his proof or is unfavourable to the party calling*

him. Much is dependent on the stature and extent of the contradiction; but, under common law file court may treat as hostile, even a witness who has not made a prior inconsistent statement, on the basis of his demeanour.

5.6 Mrs. Lukwesa submitted that the domino effect of PW1 being declared hostile is the removal of her evidence which means that there is no parent that attested to PW3's age. What then remains is the testimony of PW2, PW4 and PW6. As regards that of PW2, it was contended that he is not a guardian of the prosecutrix as he does not live or stay with her. In any case, PW2's knowledge of the girl's age was based on the affidavit and letter from the school. PW4 stated that she was the one living with the girl who at the material time had gone on holiday to her mother's (PW1) place.

5.7 With respect to the general affidavit and letter from the school relied upon by PW2 to confirm the age of the prosecutrix, Mrs. Lukwesa contended that the headteacher was never called as a witness to confirm the information contained in the letter or that he authored it. Further that the letter does not disclose the source of the information contained in the letter which letter is not a school register containing information obtained from

parents or guardians. Therefore, the letter cannot be relied on to prove the age of the prosecutrix.

5.8 As for PW6, it was contended that she is not the author of the letter which, in any case, was neither identified nor produced by the author. Counsel submitted that the letter ought to be expunged from the record. Should we as an appellate court decide otherwise, then the letter contains hearsay evidence which cannot be used to prove the age of the prosecutrix.

5.9 With respect to the general affidavit sworn by Margie Miyanda Shombe, Mrs. Lukwesa observed that on the reasons for swearing, the deponent is a grandmother of PW3, the victim herein. She contended that the affidavit lacks a foundation as from the author as the author was not called as a witness. Further, the person who testified as a grandmother to PW3 was Dina Mushabati Simaundu Muntanga, PW4 who neither referred to the affidavit nor the age of PW3. Therefore, the affidavit falls short of being the other best evidence required to prove the age of PW3.

5.10 Mrs. Lukwesa further submitted that in arriving at its finding that PW3 was aged 14 years, the trial court relied on the

evidence of PW1 which evidence should not have been considered as she was treated as a hostile witness. That even if the evidence of PW1 was considered, the said evidence shows a conflict in itself because PW1 initially testified that the prosecutrix was born in 2001, thereby making her over the age of 16 at the material time. However, PW1 later testified that the prosecutrix was born in 2005.

5.11 This was a material conflict which if resolved in favour of the appellant, would entail that PW3 was born in 2001 and was above 16 years of age at the material time. In this regard, it was contended that the age of PW3 was not proved beyond all reasonable doubt. Counsel prayed that the ground of appeal be allowed and the appellant acquitted.

6.0 **ARGUMENTS BY THE RESPONDENT**

6.1 Mr. Mbao, Acting Senior State Advocate filed heads of argument opposing the appeal. He submitted that the age of a prosecutrix in a charge of defilement must be strictly proved as was guided in the case of **Phiri Macheke v The People** ⁽³⁾ ***“by whatever other best evidence is available.”***

- 6.2 Mr. Mbao accepted that the letter from the headteacher was hearsay evidence as the author was not called to testify on its contents. He also conceded that the general affidavit was defective as it is not clear who the deponent was and that PW4, the grandmother did not refer to it in her evidence. He further conceded that PW2 was neither a guardian nor parent to the prosecutrix. The respondent however contended that PW2 is not just a relative but a close relative of the prosecutrix, her mother and grandmother. Further that he lives close to both the parent and grandmother of the prosecutrix. As such, PW2 was better placed to know the age of his niece having seen her growing.
- 6.3 In support of this view, Mr. Mbao relied on the case of **Charles Chipandwe v The People** ⁽⁴⁾ where the court stated as follows:

“In this case, evidence as to the age of the prosecutrix came from PW2, the elder sister aged 26 years, and we agreed with counsel for the State that she was qualified to give evidence on the age of the prosecutrix. The argument by counsel for the appellant on the proof of the age of the prosecutrix cannot be sustained. Ground one fails.”

In this regard, counsel submitted that PW2 was qualified to give evidence on the age of the prosecutrix.

- 6.4 The fact that PW2 said that he had an affidavit and letter from the head-teacher does not suggest that that, was the source of his knowledge but that he had supporting evidence to his evidence.
- 6.5 Counsel further submitted that the appellant was an employee of PW4, the guardian to the prosecutrix. That the appellant and the prosecutrix stayed at the same farm for three weeks prior to the incident. Therefore, the appellant was in a close relationship or somewhat associated with the family and/or the prosecutrix. Therefore, the appellant knew or ought to have known the age of the prosecutrix or that she was a child of tender years being a grade six pupil.
- 6.6 In support of this argument, counsel for the State placed reliance on the case of **Justin Simwinga v The People** ⁽⁵⁾ where the court guided as follows:

"We agree with learned Counsel for the parties that the best evidence on the age of the child is from the parent or guardian. Indeed, we have pronounced ourselves on the issue of the age of the victim in defilement cases in a plethora of cases including those cited by learned Counsel in this appeal that age is an essential ingredient in a charge of defilement. By its very nature, the offence of defilement demands that the age be established beyond reasonable doubt because it involves

children under the age of 16 years. We must be quick to point out, however, that in cases where the offender is a member of the family; is in a close relationship to the family or is somewhat associated with the family or the child, it cannot be argued successfully that he/she did not know the age of the prosecutrix or that the child was not a child of tender years."

6.7 Counsel on the basis of the above holding, prayed that the appeal be dismissed for lack of merit.

7.0 **ORAL ARGUMENTS**

7.1 At the hearing, we asked Mr. Mbao whether PW1's evidence was discounted after she was declared a hostile witness by the trial magistrate. Counsel responded that the procedure for declaring a witness hostile was not followed and that therefore, her evidence on the age of the prosecutrix stands.

7.2 As regards the trial court's reliance on the evidence of PW2 who relied on the affidavit and letter from head teacher, Mr. Mbao submitted that PW2 knew her age being a close relative. When referred to the affidavit relied upon by PW2, counsel for the State conceded that the same was deposed to by the prosecutrix and was never signed, and as such, is of no evidential value. However, the learned counsel maintained that even without the

affidavit and letter from the school, the remainder of the evidence of PW2 still supports the charge.

7.3 Mr. Mbao further responded that in the event that the age of the prosecutrix is not proved, then a conviction for rape would be appropriate considering that the evidence of the prosecutrix shows that the sexual intercourse was not consensual.

7.4 In response to the oral submissions by the respondent Mrs. Lukwesa, responded that PW2 lacked personal knowledge of the date of birth of the prosecutrix. That this is evident when the affidavit and letter from the school are taken away. We were urged to allow the appeal.

8.0 **DECISION OF THIS COURT**

8.1 We have considered the evidence on record the heads of arguments, oral submissions and authorities cited counsel. In our view, this appeal raises two issues for determination. The first being whether procedure was followed as regards PW1, the mother to the prosecutrix, being declared a hostile witness, and the second issue being whether the age of the prosecutrix was proved beyond reasonable doubt.

8.2 As regards the procedure where a witness is deemed hostile, the starting point is the High Court decision of **The People v Japau** ⁽⁶⁾ whose import is that when the material evidence of a prosecution witness at trial varies substantially from his testimony or earlier statement given to the police, leave may be granted to the prosecution to treat such witness as hostile.

8.3 In the case of **Jeffrey Godfrey Munalula v The People** ⁽²⁾, the Supreme Court guided on the procedure of treating a witness hostile. The court held that:

- (i) Where on an application to treat a witness as hostile, the court after sight of the inconsistent statement, decides to grant the application, it should then direct itself not to place any reliance on the contents of the statement and so record in the judgment.*
- (ii) Before, with leave of the court, adducing evidence to prove a witness's inconsistency, the previous statement and its circumstances must be mentioned to the witness so that he may say whether or not he has made such a statement.*
- (iii) It is in the court's discretion to determine a witness's hostility in that he does not, give his evidence fully and with desire to tell the truth; he is not hostile simply because his evidence contradicts his proof or is unfavourable to the party calling him. Much is dependent on the stature and extent of the contradiction; but, under common law the court may treat as hostile, even a witness who has not made a prior inconsistent statement, on the basis of his demeanour.*

- (iv) *The inconsistent statement of a hostile witness is completely inadmissible as evidence of the truth of the facts stated therein.*

8.4 From the above, it can be seen that leave may only be granted to treat a witness hostile after the court has had sight of the previous inconsistent statement. Once satisfied, the court may grant leave for the previous statement and its circumstances to be mentioned to the witness so that he may say whether or not he has made such a statement before.

8.5 The prosecution is then entitled to lead other evidence which contradicts the unfavourable evidence. The inconsistent statement of a hostile witness is completely inadmissible as evidence of the truth of the facts stated therein. Thus, in **Zico Kashweka Lawrence Mungunda Chimbinde v The People** ⁽⁷⁾, it was held that:

“Sworn evidence of a witness declared hostile at trial is not evidence per se and it cannot be considered by the court.”

8.6 Reverting to the case at hand, on 24th April, 2020, PW1 testified that the prosecutrix, who is her daughter, was born in 2001 and has no national registration card. Without any reason being advanced, the prosecution sought and was granted an

adjournment to 11th May, 2020 and then to 22nd May, 2020. On that date, PW1 testified before the court that the prosecutrix was born in 2005 and is in Grade Seven but she could not state her age. The prosecutor then applied that she be treated as a hostile witness. The said application was granted.

8.7 The court proceeded to hear other witnesses and nothing more was done about PW1 beyond the trial magistrate recording in her judgment that her evidence was not relied upon.

8.8 Clearly the procedure adopted by the learned trial magistrate was wrong and in effect, means that the evidence of PW1 with respect to the age of the prosecutrix, remains unchallenged.

8.9 The evidence of PW1 was to the effect that the prosecutrix was born in 2001, she later changed to 2005. This contradiction means that PW1 lacks credibility as a witness and her evidence on the age of the prosecutrix cannot be relied upon.

8.10 This brings us to the second issue for determination being whether the age of the prosecutrix was proved beyond reasonable doubt. Case law abounds to the effect that age is an essential ingredient in a charge of defilement and that it must be established beyond reasonable doubt because it involves

children under the age of 16 years. Further, that the age should be proved by one of the parents, or whatever other best evidence is available.

8.11 In this case, the trial court relied on the evidence of the prosecutrix herself who gave her age as 14, and that of the uncle, PW2 who relied on an unsworn affidavit and letter from the school.

8.12 With respect to the prosecutrix, the case of **Justus Simwinga v The People** ⁽¹⁾ guided that:

"In defilement cases, it is not acceptable simply for the prosecutrix to state her age. The age should be proved by one of the parents, or whatever other best evidence is available."

Therefore, the evidence of the prosecutrix as to her age falls away.

8.13 As regards PW2, an uncle, we find his evidence with respect to the age of the prosecutrix unsatisfactory. Firstly, we note that a parent to the prosecutrix PW1, is alive and testified as to the age. Secondly, PW2 relied on an affidavit allegedly 'deposed' by either the prosecutrix or someone sharing the same names as the prosecutrix and purporting to be her grandmother. The said

deponent, did not sign the affidavit and as such, it is defective in both form and substance.

8.14 The affidavit being defective, it follows that the learned magistrate misdirected herself in placing reliance on it. Consequently, the affidavit falls away.

8.15 Further, while PW2 is indeed an uncle to the prosecutrix being the brother to PW1, no evidence was adduced to show that he has personal knowledge of the date of birth or circumstances surrounding the birth of the prosecutrix.

8.16 We note that a letter was presented from the school authorities on the age of the prosecutrix. However, as rightly argued by Mrs. Lukwesa, the letter is hearsay in the absence of the author. It was necessary that the head teacher, being the author of the letter, give testimony in court to confirm the contents thereof.


8.17 In these circumstances, we find that the evidence of PW2, the defective affidavit and the letter from the school cannot amount to what is meant as “... *whatever other best evidence is available*” as held in the case of **Justus Simwinga v The People**⁽¹⁾ (supra).

8.18 Had the trial magistrate properly directed herself on the available evidence, she would not have arrived at a conviction for the offence of defilement. The prosecution failed to prove the necessary ingredient as to age of the prosecution being a child under 16 years old, beyond reasonable doubt.

8.19 We have considered whether the available evidence amounts to some other kindred offence and have found none in light of **section 186(3) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia.**

8.20 We find merit in the appeal and accordingly set aside the conviction and sentence by the court below. We accordingly acquit the appellant and set him at liberty forthwith.


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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT


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F. M. Chishimba
COURT OF APPEAL JUDGE


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K. Muzenga
COURT OF APPEAL JUDGE