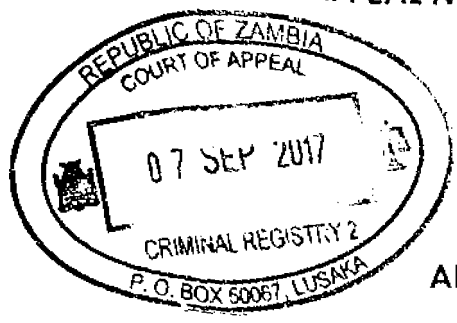
IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT NDOLA AND LUSAKA
(Criminal Jurisdiction)

APPEAL NO. 86/2017



BETWEEN:

MODESTER KALABA — APPELLANT

AND

THE PEOPLE — RESPONDENT

CORAM: Mchenga, DJP, Chashi and Mulongoti, JJA

On 2nd May 2017 and 7th September 2017

For the Appellant: K. Katazo, Legal Aid Counsel, Legal Aid Board
For the Respondent: C.L. Phiri, Deputy Chief State Advocate, National Prosecution Authority

JUDGMENT

Mchenga, DJP, delivered the Judgement of the Court

Cases referred to:

1. Sikaonga v The People [2009] Z.R. 192
2. Jutronich, Schutte and Lukin v The People [1965] Z.R.
3. Kaambo v The People [1976] Z.R. 122

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

Modester Kalaba, the appellant, appeared before the Subordinate Court sitting at Mufulira charged with one count of the offence of Defilement contrary to

section 138 (1) of the Penal Code. The particulars of the offence alleged that on unknown dates but during the month of October 2014, at Mufulira, in the Mufulira District of the Copperbelt Province of the Republic of Zambia, he had unlawful carnal knowledge of Mirriam Mambwe, a girl below the age of 16 years.

The evidence before the trial court was that on 13th October 2014, the prosecutrix, a 14 years old girl, was left at home in the care of the appellant by her mother who had travelled out of town. Two days later, at night, the appellant, who was 35 years old, followed the prosecutrix to her bedroom where he had carnal knowledge of her. There was also evidence that he had carnal knowledge of her on three subsequent occasions in between October and December 2014.

Following his conviction, the appellant was committed to the High Court for sentencing. Before imposing the sentence, the Judge in the court below, observed that the commission of the offence was aggravated by the fact that the appellant defiled the prosecutrix on four occasions and he left her pregnant. She then imposed a sentence of 45 years with hard labour.

One ground of appeal has been advanced by the appellant and it is against sentence only; it is that:

> **"The sentencing court erred in Law and in facts when it sentenced the Appellant to the colossal term of 45 years imprisonment with hard labour when he was a first offender and it does not reflect the leniency of the court."**

At the hearing of the appeal, Mr. Katazo relied on written submissions he had filed in earlier on. He referred to the case of **Sikaonga v The People (1)** and submitted that this being an "ordinary" case of defilement because there were no aggravating factors, it should have attracted the mandatory minimum sentence of 15 years. He also referred to the case of **Jutronich, Schutte and Lukin v The People (2)** and submitted that while a court is entitled to take into account the penalty available for comparable offences, there was misdirection when the Judge in the court below imposed a sentence of 45 years on the ground that the appellant had defiled the prosecutrix on more than one occasion.

Finally, Mr. Katazo referred to the case of **Kaambo v The People (3)** and submitted that the sentence imposed by the Judge in the court below failed to take into account the fact that the appellant was entitled to lenient treatment. He prayed that since the appellant was a first offender and there were no aggravating factors, the sentence be reduced to the mandatory minimum sentence of 15 years imprisonment.

In response Mrs. Phiri submitted that, an appellate court can only interfere with a sentence if it comes to it with a sense of shock on account of it being excessive or if it substantially departs from the principles of sentencing. She submitted that both scenarios do not arise in this case.

Mrs. Phiri pointed out that the Judge in the court below was entitled to impose a harsh sentence because there were aggravating factors. The prosecutrix was only 14 years at the time the offence was committed and she ended up pregnant.

In reply Mr. Katazo submitted that even if the prosecutrix was aged 14 years at the time the offence was committed the sentence should come to the court with a sense of shock because the appellant was a first offender.

Before dealing with the arguments concerning the sentence, we will comment on the manner in which the charge in this case was drawn up. The appellant faced one count of the offence of defilement and the particulars were that:

> **"Modesty Kalaba, on unknown dates but during the month of October, 2014 at Mufulira in the Mufulira District of the Copperbelt Province of the Republic of Zambia, had unlawful carnal knowledge of Mirriam Mambwe a girl below the age of 16 years"**

The use of the words ".... on unknown dates...." In the particulars of the offence is indicative of the fact that it was being alleged that the appellant had carnal knowledge of the prosecutrix on more than one occasion in the month of October 2014.

Where an offender has unlawful sexual intercourse with a victim on divers dates, the sexual intercourse on each of those days or occasions constitutes a separate offence. To that end **section 135 of the Criminal Procedure Code** provides that:

> **(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences**

charged are founded on the same facts or form, or are a part of, a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

(3) .....

To the extent that the charge in the sole count alleged that the appellant had carnal knowledge of the prosecutrix on more than one occasion, it was defective for being duplicitous. If it was the intention of the prosecutor to charge him with one offence, the particulars should have read "..... on a date unknown but between the 1st of October 2014 and the 31st of October 2014, he had carnal knowledge of .....".

However, if the prosecutor's intention was to charge him for committing the offence on the four occasions on which he is alleged to have had carnal knowledge of the prosecutrix, four counts should have been preferred for each incident. This should have been the case even if the precise date for each one of them was not known. Each of the counts should have read "..... on a date unknown but between the 1st of October 2014 and the 31st of October 2014, he had carnal knowledge of .....".

Reverting to the appeal, Mr. Katazo submitted that the Judge in the court below should have imposed the mandatory minimum sentence of 15 years because this was a case of an "ordinary defilement". But Mrs. Phiri's position is that there were

aggravating factors, she mentioned the age of the prosecutrix and the pregnancy that resulted from the commission of the offence.

It is now settled law that the tender age of the prosecutrix, in a sexual offence, can be an aggravating factor. It is also settled that the aggravation increases as the age of the prosecutrix reduces. In this case, the prosecutrix was 14 years old at the time the offence was committed. Since an offence is only committed when the prosecutrix is below 16 years, we find that the fact that the prosecutrix was 14 years old, at the material time cannot be an aggravating factor. The case can even be classified as a "borderline case". Consequently, we find that the age of the prosecutrix in this case was not an aggravating factor.

However, we agree with Mrs. Phiri that the fact that the appellant defiled a child he was left to take care of was an aggravating factor. This is because he breached the trust that was placed in him to look after her. The other aggravating factor is that the abuse left the prosecutrix pregnant; She was only 14 years at the time. This being the case, we find that this case cannot be classified as being an "ordinary" case of defilement because there are aggravating factors.

When considering the appropriate sentence to impose in any case, the court must certainly take into account the circumstances in which the offence was committed. However, the issue is not straight forward in cases where the evidence suggests that the offender committed more offences than he was convicted for. Even if the evidence suggest that an offender committed more than one offence,

he should not be sentenced as if he was convicted for more than one offence. This is more so when the prosecutor, in the face of evidence suggesting that more than one offence was committed, opts to prosecute him for one offence only.

We find that there was misdirection, when the Judge, in the court below, took into account the fact that the appellant had carnal knowledge of the prosecutrix on more than one occasion when imposing the sentence. Given that he was only charged with and convicted of one count of defilement, the several occasions he is alleged to have defiled the prosecutrix should not have been taken into account when deciding the appropriate sentence. They were separate offences for which he was never convicted.

The sentence of 45 years imprisonment is therefore set aside and in its place, we impose a sentence of 30 years imprisonment with hard labour. To this extent the appeal against sentence succeeds.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....
J. Chashi
COURT OF APPEAL JUDGE

.....
J.Z. Mulongoti
COURT OF APPEAL JUDGE