

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

Appeal No. 53/2022

BETWEEN:

JAMES KAPEMBWA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Muzenga JJA
On 12th October, 2022 and 23rd February, 2023

For the Appellant: Mrs. L. Tembo-Tindi, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. Y. M. Banda, State Advocate, National Prosecutions Authority

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Martin Charo v. The Republic – Criminal Appeal No. 32 of 2015**
- 2. Justus Simwiinga v. The People – Appeal No. 120 of 2017**
- 3. Nsofu v. The People (1973) ZR 287**

Legislation referred to:

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

1.0 INTRODUCTION

- 1.1 The appellant was sentenced to 15 years imprisonment by Pengele J following a conviction of defilement by the Subordinate Court of the first class sitting at Chingola. He has appealed against the conviction and sentence on the basis that the prosecution did not prove their case beyond reasonable doubt.
- 1.2 The particulars of offence alleged that on 25th April, 2018 at Chingola in the Copperbelt Province of the Republic of Zambia the appellant had unlawful carnal knowledge of the prosecutrix, a child under the age of 16 years.

2.0 PROSECUTION EVIDENCE IN THE COURT BELOW

- 2.1 The evidence for the prosecution centred on seven witnesses. PW1, the auntie and guardian of the prosecutrix told the trial court that on 2nd May, 2018, the prosecutrix informed her that the appellant had sexual intercourse with her on 25th April, 2018 in her house. She quickly went to report the matter to Chiwempala Police Station where

she was issued with a medical report form to take to the clinic. She accordingly took the prosecutrix to Kabundi clinic and after the prosecutrix was examined, she was informed that the girl had been defiled. After that, she took the medical report to the police.

2.2 PW1 stated that the appellant was not a stranger to them, as they attended the same church and he was their garden boy for a year. In her continued testimony, she narrated that the appellant's uncle came to her house to ask for forgiveness as the appellant had accepted responsibility. She told the uncle to ask his nephew to put his apology in writing and later a written account of what happened on the material day was delivered to her. She told the trial court that the prosecutrix was her niece and that she was born on 28th March, 2003 at Luyoyelo Clinic in Mongu. She produced the prosecutrix's under-five card.

2.3 In cross-examination, she said that she started living with the prosecutrix in 2006 after her sister died and that the prosecutrix was 15 years at the time she was defiled.

2.4 The prosecutrix a grade nine pupil at Twatasha Combined School told the trial court that on 25th April, 2018, as she was walking home from school with her sister Peggy Kazhila, they met the appellant whom they

later walked with at home. It was her testimony that when they reached home, she went to sweep her bedroom while her sister remained in the kitchen. After sweeping, she went to throw litter outside and when she entered the house, she found the appellant in the sitting room. The appellant proceeded to hold her before pushing her against the wall in the passage. He moved her skirt upwards and she started shouting for help from her sister. The appellant told her that she was just making noise as he had sent her sister.

2.5 She narrated that thereafter, the appellant unzipped his pair of trousers and removed his penis, moved her pant one side and inserted his penis into her vagina. According to the prosecutrix she felt pain, then the appellant started shaking and after a short time he released whitish stuff that looked like mucus on her thighs. She told the trial court that the whitish stuff came from the appellant's penis. She stated that after that the appellant set her free and cautioned her not to tell anyone what had transpired.

2.6 It was her further testimony that thereafter she went to bath and carried on with her day. After the appellant left, the prosecutrix narrated her ordeal to her sister and a few days later she disclosed to

her auntie PW1 that the appellant had sexual intercourse with her. It was her testimony that PW1 reported the matter to Chiwempala Police Station and a medical report form was issued which she took to Kabundi Clinic where she was tested for HIV, defilement and pregnancy.

2.7 In her continued testimony she stated that the appellant was a person well known to her and her family and that on her 15th birthday, she informed the appellant that it was her birthday and that she had turned 15 years. According to PW2, the appellant told her that he could have bought a present for her if she had mentioned it earlier. She went on to state that she had a Facebook account where she had indicated that she was 18 years old although she was born on 28th March, 2003. She stated that the reason she indicated that she was 18 years on Facebook is because people tell lies on Facebook.

2.8 Under cross-examination, she informed the trial court that she gave her number to the accused in November, 2017 and that the appellant started proposing love to her in February, 2018 and they had sexual intercourse on 25th April, 2018.

2.9 PW3, Peggy Kazhila, was the prosecution's third witness. Her evidence on what transpired on the material day before she was sent by the appellant is similar to that of PW2. She told the trial court that the appellant gave her a K3.00 to go and buy eggs from the shop. She obliged and spent 25 to 30 minutes at the shop. When she got back, she noticed PW2 was not happy and her eyes were red. It was her testimony that the following day PW2 narrated to her that the appellant had sexual intercourse with her and that it was the reason she was sad the previous day.

2.10 It was her further testimony that on 28th March, 2018, on PW2's birthday, the appellant found them eating nshima and asked how old PW2 was and PW2 told him that she had turned 15 years.

2.11 Ira Watson Mungu was the prosecution's fourth witness. He told the trial court that on 2nd May, 2018, as he was busy working, he was informed by his wife PW1 that PW2 had informed her that the appellant had carnal knowledge of her. He narrated that since the appellant was outside their house, he called him inside the house in the presence of PW1 and asked him what happened on the material day. The appellant told him that nothing happened. PW4 told the trial court that he asked

PW1 to state what PW2 told her. He stated that PW1 narrated what PW2 had told her and that it was at that point that the appellant started apologising. He narrated that a week later, the appellant's brother, uncle and aunt came to his house to ask for forgiveness and paid 50 Kwacha. He asked them to ask the appellant to put his apology in writing and a few days later they received an apology letter from the appellant. PW4 identified the said letter in court.

2.12 In cross-examination, PW4 stated that the alleged sexual intercourse was brought to his attention on 2nd May, 2018 and the matter was reported to the police on 7th May, 2018 and that he did not demand any money from the appellant.

2.13 Sergeant Mwale Dickson, the arresting officer was the fifth prosecution witness. He told the trial court that on 8th May, 2018, he was allocated a docket of defilement to investigate in which PW1 complained on behalf of PW2 that the appellant had defiled her. He testified that he proceeded to interview the appellant who informed him that he honestly thought that the prosecutrix was 17 years at the time of the alleged offence. After reviewing the medical report and the prosecutrix's under-five card, he made up his mind to charge the

appellant with the subject offence and later arrested him. He produced the medical report and the under-five card which were admitted into evidence.

2.14 Under cross-examination, PW5 stated that he did not know whether the buttocks and hips of the prosecutrix were apparent and that according to exhibit D1, the breasts were visible.

2.15 Katika Alfred Mbala, a Medical Practitioner at Kabundi Clinic was the sixth witness of the prosecution. He told the trial court that he examined PW2 and his findings as contained in the medical report were that something pierced the hymen after penetrating the vagina and tore it and thus he concluded that PW2 had been defiled.

2.16 Under cross-examination, he stated that the age of PW2 was as indicated on the under-five card.

2.17 The last prosecution witness was Richard Kalebe, the head teacher for Chingola Central Combined School. He produced the 2017 provisional register into court which was admitted into evidence. According to the said register the prosecutrix was 15 years of age at the time the offence was committed.

2.18 This marked the end of the prosecution case. The appellant was found with a case to answer and accordingly, he was put in his defence.

3.0 THE DEFENCE

3.1 In his defence, the appellant opted to give sworn evidence and called no witnesses. He narrated that he knew PW2 in 2017 from Chikola SDA Church as they attended youth meetings together. It was his testimony that on one occasion PW2 told him that she loved him though he was not paying attention to her. He told the trial court that thereafter he proposed love to her and she accepted. According to the appellant, PW2 was 17 years at the material time as that is what she told him.

3.2 It was his further testimony that in terms of PW2's physical appearance, her body showed that she was mature. It was his testimony that the two had sexual intercourse for the first time on 5th April, 2018 at PW2's parent's house and that it was consensual. He told the trial court that the second time they had sex was on 25th April, 2018 at the same place. According to him, he was perplexed at PW2's skills in bed and wondered whether girls went to school to learn sex. He stated that after the encounter the prosecutrix asked him if they

could do it again, but he denied it and told her that they would do it later or the next day.

3.3 He went on to state that according to the prosecutrix's Facebook page, she was born on 28th March, 2000 thus she was 18 years old.

3.4 Under cross-examination, he told the trial court that he had a sexual encounter with PW2 on 25th April, 2018 and confirmed that he was PW1's general worker. He denied being present when PW2 turned 15 years and stated that he relied on her age and her physical appearance when he had sex with her.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 After careful consideration of the evidence before him, the learned trial court found that the prosecution had proved its case beyond reasonable doubt.

4.2 The trial court stated that all the ingredients of the offence of defilement had been satisfied and that the proviso to **Section 138(1) of the Penal Code** was not available to the appellant as he was aware of the prosecutrix's age.

4.3 Accordingly, the appellant was convicted of defilement and was later sentenced to 15 years imprisonment with hard labour.

5.0 GROUNDS OF APPEAL

5.1 Embittered with the conviction, the appellant filed four grounds of appeal couched as follows:

- (1) **The learned trial court misdirected itself in making a finding that the State had proved the matter beyond reasonable doubt when issues of the age of the prosecutrix was not fully resolved due to conflicting evidence.**
- (2) **The learned trial court misdirected itself in failing to make a finding of fact that the prosecutrix by her conduct made the now convict and any reasonable man reading her Facebook page and interacting with her believe that the prosecutrix was born on 28th March, 2000 and thus was 18 years at the time the alleged defilement was committed.**
- (3) **The learned trial court ought to have resolved the issue of the age of the prosecutrix in favour of the accused in light of the contradictions as to the prosecutrix's age.**
- (4) **The learned trial court misdirected itself in believing the story of the prosecutrix that she told the accused that she was 15 years of age on her birthday.**

6.0 APPELLANT'S ARGUMENTS

6.1 All the grounds of the appeal were argued together. It was contended that the key ingredient to the proviso to **Section 138(1) of the Penal Code** is that **"one had a reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen**

years.” It was submitted that the appellant did believe that the prosecutrix was above the age of sixteen years as she had advertised herself on Facebook to be 18 years.

- 6.2 It was contended that the issue of the appellant having been told by the prosecutrix on her 15th birthday that she was 15 years, in the background of the Facebook page that gave her age as 18 years, the contradiction should be resolved in favour of the appellant. It was submitted that the prosecutrix made the appellant believe that she was above the age of 16 by her conduct, especially when she told him that he does not notice her. We were referred to the Kenyan case of **Martin Charo v. The Republic¹** where the court held that:

“I do find that the appellant falls with the defence under section 8(5) of the Sexual Offences Act. It is PW1 who behaved like an adult and engaged in sexual intercourse. The appellant was not expected to inquire from several people about the age of the Complainant. The relationship continued for quite a long time to the extent the age became a non-issue. I do find that the appeal is merited and is hereby allowed.”

- 6.3 It was contended that it was not necessary for the appellant to ask for the under-five card, birth record or birth certificate or the prosecutrix

to tell him that she was 15 years on her birthday in the backdrop of the Facebook account which indicated that she was 18 years old.

- 6.4 According to counsel for the appellant, there are two versions of the prosecutrix's age. One is the under-five card while the second version is the one on her Facebook account. We were asked to resolve this inconsistency in favour of the appellant as he was led to believe that the prosecutrix was 18 years old. We were urged to set aside the conviction and sentence and set the appellant at liberty.

7.0 RESPONDENT'S ARGUMENTS

- 7.1 On behalf of the respondents, learned counsel supported the conviction and sentence. In her written submissions, she argued that the defence contained in the proviso to **Section 138(1) of the Penal Code** is not available to the appellant as the prosecutrix's age was established during the trial. According to the learned counsel, the prosecutrix offered a reasonable explanation as to why she lied when creating her Facebook account.
- 7.2 It was contended that the appellant knew the prosecutrix's family very well as they used to go to the same church, he was in the same youth group with the prosecutrix and was their garden boy. That he

associated with them frequently which made him have personal knowledge of the prosecutrix's age. We have referred to the case of **Justus Simwiinga v. The People**² where it was held that:

"In cases where the offender is a member of the family; is in a close relationship with the family or is somewhat associated with the family or the child, it cannot be argued successfully that he or she did not know the age of the prosecutrix."

- 7.3 It was submitted that the appellant knew the age of the prosecutrix as per evidence of PW1 and PW3 and the prosecutrix because, on her 15th birthday, the appellant was told that it was the prosecutrix's 15th birthday when he visited the family. We were referred to the case of **Nsofu v. The People**³ where it was held *inter-alia* that:

"For a defence under the proviso to succeed an accused must satisfy the court (a) that he had reasonable cause to believe that the girl was of or above the age of sixteen years and also (b) that he did, in fact, believe this."

- 7.4 It was submitted that the appellant herein did succeed on the first component of the proviso by showing that he had reasonable cause to believe that the prosecutrix was born on 28th March, 2000. The reason is the date put on her Facebook page. Every person looking at her

Facebook account, who did not know the real age of the prosecutrix would come to a reasonable conclusion that the prosecutrix was born on 28th March, 2000. Counsel went on further to contend that however, the appellant did not show the trial court that he did in fact believe that the prosecutrix was born on 28th March 2000.

7.5 In conclusion, it was contended that the trial court was on firm ground when it held that the failure by the appellant to challenge the evidence of his knowledge of the age of the prosecutrix in cross-examination made his defence under the proviso to fail. We were urged to dismiss all the grounds of appeal and uphold the conviction and sentence.

8.0 THE HEARING

8.1 At the hearing of this appeal on 11th October, 2022, learned counsel for the appellant Mrs. Tembo-Tindi and learned counsel for the respondent Mrs. Banda informed the Court that they will rely on the filed respective heads of argument.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the arguments by the parties and the judgment under attack. We are grateful for the arguments.

- 9.2 This appeal raises one pertinent question for determination, that is; whether the appellant satisfied requirements under the proviso to **Section 138(1) of the Penal Code**. The Section provides as follows:

"Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life; and provided that it shall be a defence for a person charged with an offence under this section to show that the person had reasonable cause to believe, and did, in fact, believe, that the child against whom the offence was committed was of, or above, the age of sixteen."

- 9.3 In the case of **Nsofu v. The People** *supra*, the Supreme Court guided that for a defence under the proviso to succeed an accused must satisfy the court that he had reasonable cause to believe that the girl was of or above the age of sixteen years and also that he did, in fact, believe this.

- 9.4 In this case, the appellant stated that the prosecutrix's Facebook account indicated that she was born on 28th March, 2000 and that she told him that he was not noticing her. From this, the appellant made up his mind to propose love to her and she accepted. He told the trial court that her body looked mature, her breasts and hips were big and

her height. Learned counsel for the respondent submitted that the appellant could not rely on the proviso because he knew that the prosecutrix was 15 years of age.

9.5 Learned counsel for the respondent referred us to the case of **Justus Simwinga** *supra*, supporting the argument that the appellant ought to have known that the prosecutrix was below the age of 16 since he was close to the family or the prosecutrix. The appellant only used to do piece work at PW1's house and had been doing that for about a year. According to the appellant, he had known the prosecutrix for about 7 months prior to the offence and the prosecutrix stated that she had known the appellant for approximately a year inclusive of the time trial was taking place.

9.6 These time periods clearly show that they had known each other for less than a year. In the circumstances of this case, it cannot be said that the appellant ought to have known the age of the prosecutrix. We therefore find the **Justus Simwinga** case inapplicable. We also hold the view that in the circumstances of this case, whether or not the prosecutrix mentioned to the appellant that she was celebrating her

15th birthday is inconsequential as the alleged age could or could not be true.

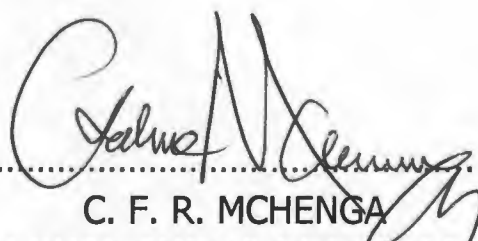
- 9.7 On the evidence on the record, we have no difficulties in finding that the prosecutrix held herself out as a person above the age of 16. Further, PW1, the guardian to the prosecutrix when shown the Facebook details and picture of the prosecutrix confirmed during cross-examination that any person who looked at those details could have believed that she was above the age of 16 years.
- 9.8 In the circumstances of this case, can it be said that a person in the position of the appellant could have had reasonable cause to believe that the prosecutrix was above the age of 16 years and did in fact believe that she was?
- 9.9 We hold the view that the trial court abdicated its duty when it failed to note its ocular observation of the prosecutrix's features and make a finding regarding her physical appearance in view of PW1's evidence and that of the appellant. This was a misdirection.
- 9.10 It is our view that had the trial court properly directed its mind on the issue, it would have found that the appearance of the prosecutrix

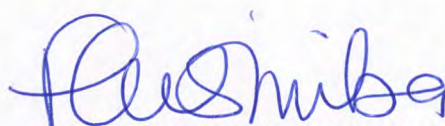
coupled with her Facebook posts would have made any reasonable person believe that she was above the age of 16.

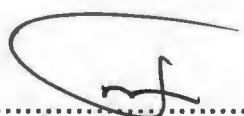
9.11 All in all, we are satisfied that the defence of mistake as envisaged by the proviso to **Section 138 of the Penal Code**, was available to the appellant.

10.0 CONCLUSION

10.1 We allow the appeal, quash the conviction, set aside the sentence, acquit the appellant and set him at liberty.


C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


F. M. CHISHIMBA
COURT OF APPEAL JUDGE


K. MUZENGA
COURT OF APPEAL JUDGE