

THE PEOPLE

v

FRANCIS MUSONDA AND
CHARLES BANDA

HIGH COURT

DR MATIBINTI, SC, J.

20th JUNE, 2011.

HPC/40/2011

[1] Criminal Procedure - Juveniles Act - Section 127 of the Juveniles Act Interpreted - Necessity of a parent(s) or guardian to attend all the stages of the proceedings.

This matter was referred from the Subordinate Court to the High Court for confirmation. In terms of section 94(1) of the Juveniles Act, no reformatory order made by a Juvenile Court shall be carried into effect without the record of the case, or a certified copy been transmitted to, and the order confirmed by the High Court.

Held:

1. The provisions in the Juveniles Act are designed for the protection of Juveniles, and they are to be complied with in order to avoid prejudice to a juvenile offender.
2. Section 127 of the Juveniles Act stresses the importance which the legislature attaches to attendance of a parent(s), or guardian at all stages of the proceedings. If the provisions of section 127 are not complied with, there is a risk that a juvenile may be prejudiced.

Cases referred to:

1. Tembo v The People (1974) Z.R. 286.
2. The People v Zimba (1976) Z.R. 86.
3. Chalimbana v The People (1977) Z.R. 282.
4. Musonda and Another v The People (1979) Z.R. 53.
5. Hachingabala v The People (1990 - 1992) Z.R. 7.

Legislation referred to:

1. Penal Code, cap 87, s. 272.
2. Juveniles Act, cap 53, s. 94(1) and 127(1).
3. Probation of Offenders Act cap 93, ss 7 and 8.
4. Criminal Procedure Code cap 88 s.138 (1)(a) (i) and (ii).

Mrs. M. P. Lungu, State Advocate in the Director of Public Prosecutions chambers for the People.

Mrs C. K. Kabende, Assistant Senior State Advocate, Legal Aid Board for the Juvenile offenders.

DR MATIBINI, SC, J.: This matter was referred to me from the Subordinate Court for confirmation. In terms of sections 94(1) of the Juveniles Act, chapter 53 of the laws of Zambia, no reformatory order made by a juvenile Court shall be carried into effect without the record of the case or a certified copy been transmitted, and the order confirmed by the High Court. The juvenile offender age 17 Years old, stood charged of the offence of theft contrary to section 272 of the Penal Code, chapter 87 of the laws of Zambia.

The particulars of the offence are that Francis Musonda and Charles Banda between 14th and 15th June, 2010, at Lusaka, in the Lusaka District of the Lusaka Province of the republic of Zambia jointly and whilst acting together with another person unknown did steal 4 big blankets, 3 baby blankets, and 3 curtains altogether valued at K1,590,000, the property of Doreen Phiri.

When the matter was called for plea on 24th June, 2010, the juvenile offenders admitted the charge, and the Court below proceeded to enter pleas of guilty. The Statement of Facts was read out to the juvenile offenders who confirmed that the statement was a true reflection of what transpired.

At the end of the hearing, a Social Welfare Report dated 14th July, 2010, was tendered in evidence. Under the heading "Remarks and Recommendations," the following observations were made:

"...the juvenile offender before the Court is a first offender.

...the juvenile is staying with the grandmother in Misisi Compound. The juvenile offender is a single orphan.

...the juvenile offender stopped school in grade five, and he is currently not in school.

...during the home visit it was discovered that the juvenile offender is not actually staying with the grandmother, because he has only been to her place for 3 weeks.

The juvenile offender gave me the mother's cell number and I talked to her on phone inquiring about the juvenile offenders behaviour, she is an irresponsible mother and she does not even communicate with the juvenile to know how he is staying.

...in conclusion the juvenile offender lacks parental guidance that is the reason why he is involved in theft activities.

...considering the factors mentioned above, I recommend that the juvenile offender be taken to Katombora Reformatory School so that he can acquire a life skill."

After the receipt of the Social Welfare Report, the Court below decided to accept the recommendation of the Probation Officer. The Court below went on to order as follows:

"Juvenile offender 1 to be taken to Katombora Reformatory School to acquire a life skill; and Juvenile offender 2, to be taken for division of Reformatory."

Mrs. Lungu in her submissions dated 23rd May, 2011, pointed out that section 127 of the Juveniles Act provides for the attendance of the juvenile's parent or guardian wherever possible, and whenever a juvenile is brought before any Court.

Thus Mrs. Lungu submitted that the Court below was on firm ground when on 25th June, 2010,

the Court below adjourned the matter due to the absence of the parents. However, when the matter was called the following day on 24th June, 2010, the juveniles informed the Court that their guardians were not aware that they were remanded in custody and had not in fact visited them.

In spite of the absence of the parents or guardians, the Court below went ahead to take pleas; enter pleas of guilty; receive the Statement of Facts; and issued reformatory orders consigning the juvenile offenders to Katombora Reformatory School. All these matters were transacted in the absence of the parent(s) or guardian(s).

Mrs Lungu submitted that it is clear from the record that the juveniles offender's parent(s) or guardian(s) were not present throughout the proceedings. Further, Mrs Lungu submitted, that it is not also clear from the record why the Court below dispensed with the attendance of the juvenile offender's parents or guardians.

Mrs Lungu drew my attention to the case of Chalimbana v The People (3). Mrs Lungu submitted that: In the Chalimbana case (supra), a juvenile was charged with entry and theft. He pleaded guilty. However, no arrangements were made by the authorities for a parent or guardian to be present before Court. Further, the record did not give reasons for dispensing with the attendance of a parent or guardian. In the course of the judgment it was observed that:

“The important consideration is that if these provisions are not complied with the juvenile may be prejudiced.”

Thus ultimately a finding of guilty and reformatory order were set aside in the Chalimbana case(supra),, and a re-trial was ordered. In view of the foregoing, Mrs. Lungu urged that the finding of guilty and the reformatory order should be set aside and re-trial ordered.

On 16th June, 2011, Mrs. Kabende filed submissions on behalf of the juvenile offenders. Mrs. Kabende submitted in the main as follows: that the order to send the juveniles to Katombora Reformatory School was severe. In making this submission, Mrs. Kabende drew my attention to the case of Musonda and Another v The People (4). In the Musonda case(supra) the Supreme Court held that an order to refer a juvenile to a reformatory is a severe form of punishment which should only be made when other methods of reform are inappropriate, or have proved to be in vain.

Further, Mrs. Kabende submitted that the juvenile offenders have been in custody for almost a year, and have therefore been exposed to the harsh reality that crime does not pay. Mrs. Kabende also argued that it is customary to give credit for time spent in custody, unless a good reason is advanced. In aid of this argument, Mrs. Kabende relied on the case of Hachingabala v The People (5).

I am indebted to counsel for the assistance rendered in this matter. I would like to briefly visit the cases of Tembo (supra) and Chalimbana(supra). First, in the case of Tembo v The People (1), the appellant, a juvenile appealed against a finding of guilt and reformatory order made against him by the

juvenile Court following a plea of guilty. The record disclosed that the resident magistrate made no inquiry concerning the whereabouts of the appellant's parents until after the plea had been taken and the finding of guilty recorded.

In delivering the judgment of the Supreme Court, Baron, D.C.J., observed that the case raised a matter of considerable importance. The record disclosed that when the appellant was brought before the juvenile Court, the resident magistrate made no inquiry concerning the whereabouts of the appellant's parents, until after the plea had been taken, and the finding of guilt recorded.

Baron, D.C.J. went on to observe that section 127 of the Juveniles Act stresses the importance which the legislature attaches to the attendance whenever possible during all stages of the proceedings, of the parent or guardian of a juvenile, and sets out in detail the procedure to be adopted, and the circumstances in which such attendance may be dispensed with. The attention of magistrates was drawn to paragraphs 92 and 94 of Magistrates Hand Book, 1968, Edition.

Baron D.C.J, went on to observe that the Court cannot over emphasise that provisions such as these which were designed for the protection of juveniles are there to be complied with and not ignored; in all cases the record should disclose that these provisions have in fact been complied with, and where the parent or guardian of the juvenile is not required to be present, the reasons why his attendance has been dispensed with should be stated.

Second, in the Chalimbana case (supra), the appellant, a juvenile was charged with entry and theft. At his trial he first pleaded not guilty. Then changed his plea to one of guilty. The appellant informed the Court that his parents lived at a place some 10 to 15 kilometres from the Court where he was tried. But no arrangements were made by the authorities for a parent or guardian to be present during the trial. The record indicated that the attendance of a parent or guardian was dispensed with. And no reasons were given.

In a judgment delivered by Gardner J.S., the Supreme Court observed that section 127 of the Juveniles Act provides that at any trial of a juvenile, a parent or guardian should be present during all stages of the proceedings, and this provision was not complied with in that case.

Gardner J.S., recalled that in the Tembo case(supra) referred to above the Supreme Court pointed out that the Juveniles Act stresses the importance which the legislature attaches to the attendance wherever possible during all stages of the proceedings of the parent, or guardian. And sets out in detail the procedure to be adopted and the circumstances in which attendance may be dispensed with.

Thus in the Chalimbana case(supra), the Supreme Court reiterated the observations it made in the Tembo case(supra), that the provisions in the Juveniles Act are designed for the protection of Juveniles, and the to be complied with in order to avoid prejudice to juvenile.

Ultimately, the Supreme Court, in the Chalimbana case supra set aside the finding of guilty; and the reformatory order, and ordered a re-trial. In so doing, the Supreme Court observed that it wondered whether the change of plea by the juvenile was the fairest course of action for him to take without the advantage of advice from a parent or guardian. The Supreme Court was of the opinion that because of the possibility of prejudice, it was proper to allow the appeal.

I agree with the submission by Mrs. Lungu that section 127 of the Juveniles Act stresses the importance which the legislature attaches to attendance of a parent(s) or guardian at all stages of the proceedings. Thus if the provisions of section 127 are not complied with, there is a risk that a juvenile may be prejudiced.

Apart from the failure by the Court below to ensure that the parent(s) or guardian(s) of the juveniles were present at all stages of the proceedings, the juveniles have been in custody for almost a year. I am therefore obliged to give the juvenile offenders credit for the time that they have spent in custody. In the circumstances, pursuant to section 338(1) (i) and (ii) of the Criminal Procedure Code, I am inclined to grant the juveniles a conditional discharge. The juvenile offenders are discharged subject to the condition that they do not commit any further offence between 20th June, 2011, to 20th June, 2012. In the event that this condition is violated, then the juvenile offenders shall be brought back, and consigned to Katombora Reformatory School.

I am fortified in making this order by the decision in *The People v Zimba* (2). In the *Zimba* case(supra) Cullinan, J. observed that in the case of a juvenile offender, an order for discharge can only be made after a finding of guilty.

Juvenile offenders discharged conditionally.