

THE PEOPLE
v
EDWARD MUMBA

HIGH COURT
DR. MATIBINI, SC, J.
29th DECEMBER, 2011.
HPC/42/2011.

[1] Criminal procedure - Juveniles Act - Whether failure by the Subordinate Court to constitute itself as a Juvenile Court is fatal.

This matter was referred from the Subordinate Court to the High Court for confirmation, because 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 thereof been transmitted to, and the order confirmed by the High Court.

Held:

1. The failure by the Subordinate Court to constitute itself as a Juvenile Court was fatal.

Cases referred to:

1. The People v Zulu (1965) Z.R. 75.
2. Chipendeka v The People (1969) Z.R. 82.
3. Musonda and Another v The People (1979) Z.R. 53.
4. Chanda v The People (1970) Z.R. 18.

Legislation referred to:

1. Penal Code, cap 87, as read with Act Number 15 of 2005, s. 138(1).
2. Juveniles Act, cap. 53, ss. 63, 65, and 68.
3. Criminal Procedure Code, cap. 88, ss. 187 (2), and 338 (1) (a) (i) and (ii).

P. Mutale, Acting Deputy Chief State Advocate in the Director of Public Prosecutions Chambers for the People.

C.K. Kasonde, Assistant Senior Legal Aid Counsel, Legal Aid Board for the juvenile offender.

DR. MATIBINI, SC, J.: The juvenile offender, aged 18 years old, stood charged for the offence of defilement contrary to section 138 (1) of the Penal Code, chapter 87 of the laws of Zambia, as read together with Act Number 15 of 2005.

The particulars of the offence are that on 18th May, 2010, at Lusaka in the Lusaka District of the

Lusaka Province of the republic of Zambia did have unlawful carnal knowledge of Melinda Chitandika; a girl under the age of 16 years.

When the matter came up for plea on 11th June, 2010, the juvenile offender denied the charge, and the Court below properly entered a plea of not guilty.

In support of the finding of guilty, counsel for the prosecution; Mrs. Lungu filed submissions dated 17th May, 2011. Mrs. Lungu argued that there was cogent evidence in the Court below to justify returning the verdict of guilty. Mrs. Lungu submitted that the prosecutrix adduced very clear evidence in a forthright manner. Mrs. Lungu also argued that the evidence in this case was sufficiently corroborated both in terms of the commission of the offence, as well as the identity of the juvenile offender.

Conversely, Mrs. Kabende counsel for the defence submitted that in terms of sections 63 and 65 of the Juveniles Act, chapter 53, of the laws of Zambia, the Court below did not constitute itself as a Juvenile Court. The juvenile offender was treated as an adult. Section 63 of the Juvenile's Court Act enacts as follows:

“A Subordinate Court sitting for the purpose of _____
a) hearing any charge against a juvenile; or
b) exercising any other jurisdiction conferred on a Juvenile Court by or under this Act. is this in this Act referred to as a juvenile Court.”

Section 65 goes on to enact that:

“(1) subject as hereinafter provided, no charge against a juvenile, and no application or matter whereof the hearing is by this Act assigned to Juvenile Courts shall be heard by a Subordinate Court which is not a Juvenile Court:

Provided that____

(i) a charge made jointly against a juvenile and a person who has attained the age of nineteen years shall be heard by a Subordinate Court which is not a juvenile Court; and
(ii) where a Juvenile is charged with an offence, the charge may be heard by a Subordinate Court which is not a Juvenile Court if a person who has attained the age of nineteen years is charged at the time with aiding, abetting, causing, procuring, allowing, or permitting the offence; and
(iii) Where in the course of any proceedings before any Subordinate Court other than a juvenile Court, it appears that the person to whom the proceedings relate is a juvenile, nothing in this section shall be construed as preventing the Court if it thinks fit so to do from proceeding with hearing and determination of those proceedings.

(2) No direction whether contained in this or any other Act that a charge shall be brought before a Juvenile Court shall be construed as restricting the powers of any magistrate to entertain an application for bail or remand, and to hear such evidence as may be required for that purpose.

Mrs. Kabende submitted that there is a world of difference between proceedings in the Juvenile Court, and those in the ordinary criminal proceedings. The proceedings in the Juvenile Court, Mrs. Kabende argued are sensitive. Thus Mrs. Kabende submitted that sections 63 and 65 referred to above,

must be strictly adhered to. A failure to adhere to sections 63 and 65, Mrs. Kabende argued, should result in the entire proceedings being declared a nullity.

In aid of the preceding propositions, Mrs. Kabende relied on the case of *Chanda v The People* (supra). Mrs. Kabende submitted that in the *Chanda* case (supra) the magistrate did not similarly adhere to the mandatory statutory provisions. And as a result, the entire proceedings were declared void and the reformatory order made against the juvenile quashed. In light of the *Chanda* case (supra), I was urged to similarly quash the proceedings in the Court below.

I am indebted to counsel for the assistance rendered in this matter. I have had occasion to visit the *Chanda* case (supra). The issue in the *Chanda* case (supra) was that a Subordinate Court passed a reformatory order without recording any conviction against a juvenile offender who admitted the charge.

On appeal to the Court of Appeal, Pickett, Ag C.J. delivered the judgment of the Court. In the course of delivering the judgment, Pickett, Ag C.J. observed that it was evident from the record of the resident magistrate that there was no Statement of Facts of the case. More serious, however, Pickett Ag C.J. observed that the resident magistrate did not record any conviction as provided by section 187 (2) of the Criminal Procedure Code, which stated as follows:

“If the accused person admits the truth of the charge, his admission shall be recorded, as nearly as possible, in the words used by him, and the Court pass sentence upon or make an order against him unless there shall appear sufficient cause to the contrary.”

Picket Ag C. J. went on to observe that in the *Chanda* case (supra), the offender was a juvenile and subject to the provisions of the Juvenile's Ordinance. Section 66 (now section 68 of the Juvenile's Act), provides as follows:

“The words “conviction” and “sentence” shall cease to be used in relation to juveniles dealt with by a Subordinate Court and any reference in any enactment of this ordinance to a person convicted, a conviction or sentence shall in the case of juvenile be construed as including a reference to a person found guilty of an offence, a finding of guilty, or an order made upon such a finding as the case may be.”

Pickett Ag C.J held that the preceding provision is mandatory. And since it was not carried by the resident magistrate, the Court of Appeal had no alternative but to consider the proceedings to be a nullity, and quash the sentence of a reformatory order.

The Court of Appeal had considered the possibility of issuing an order for a re-trial. However, in view of the time which had elapsed since the juvenile was before the resident magistrate, and also granted that in any event the reformatory order was an excessive order, the Court of Appeal declined to order a re-trial. Accordingly, the reformatory order was quashed, and the appellant was set at liberty forthwith.

In this case, Mrs. Kabende argued that since the Subordinate Court was dealing with a juvenile,

it should have constituted itself as a Juvenile's Court in accordance with sections 63 and 65 of the Juveniles Act. However, Mrs. Kabende pointed out that from the time the juvenile offender was called upon to take plea, he was treated as an adult.

Further, when the trial commenced on 28th July, 2010, the Court below once again sat as though it was hearing a matter regarding an adult and not as a Juveniles Court. This position was maintained throughout, until the juvenile was found guilty. Mrs. Kabende pressed that this was a serious error. And she urged me to quash the two year reformatory order made against the juvenile considering that the juvenile has been in custody since September, 2010, to date.

A case directly in point is the case of Chipendeka v The People (2). The facts of the case were that the appellant was similarly convicted in the Subordinate Court of the offence of defilement of a girl under the age of 16 years. He was sentenced to two years imprisonment.

He appealed against both the conviction and the sentence. Skinner C.J. sitting in the High Court observed in the course of the judgment that:

"The learned magistrate has made no record that he was sitting as a Juvenile Court, and he did not follow the procedure which a person presiding over a Juvenile Court is bound by statute to follow. It appears to me that the magistrate did not appreciate that he was dealing with a charge against a juvenile, and this was an irregularity which arose from his failure to inquire as to the age of the appellant. There is no need for me to deal with this ground of appeal any further as I have already allowed the appeal against conviction on another ground. I will say by way of obiter dicta, that if it is shown to an appeal Court that the person was actually a juvenile, then it might well be that the Court would hold that the whole proceedings had been a nullity"

In light of the obiter dicta by Skinner, C. J. in the Chapendeka case, I agree with the submission by Mrs. Kabende that the failure by the Court below to constitute itself as a Juvenile Court is fatal. Accordingly by virtue of the revisionary powers vested in me by section 338 (1) (a) (i) and (ii) of the Criminal Procedure Coes, I hereby quash the order by the Court below to send the juvenile to Katombora Reformatory School, because the whole proceedings were a nullity.

Further, in view of the mistrial I order that the matter should be re-tried.

Re-trial ordered.