

IN THE HIGH COURT OF ZAMBIA
HOLDEN AT CHIPATA
(Criminal Jurisdiction)

HJS/68/2010

BETWEEN:

THE PEOPLE
AND
SHADRECK MWANZA

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 25th day of February, 2011.

*For the People: Ms. Soko, State Advocate, in the Director of Public Prosecutions
Chambers.*

For the Defence: Mr. K. Banda, Legal Aid Counsel, Legal Aid Board.

SENTENCE

Cases referred to:

- 1. Chipendeka v The People (1969) Z.R. 82.*
- 2. Siwale and another v The People (1973) Z.R. 182.*
- 3. Nachitumbi v The People (1975) Z.R. 285.*
- 4. Musonda and another (1976) Z.R. 218.*
- 5. Musonda another v The People (1979) Z.R. 53.*
- 6. Mwamba v The People (1979) Z.R. 193.*

Legislation referred to:

- 1. Penal Code, Cap 87, as amended by Act Number 15 of 2005, s. 155 (a).*
- 2. Juveniles Act, Cap 53, ss 2 (1), 63, 74 (1), and 118.*

Shadreck Mwanza stood charged of committing an unnatural offence, contrary to section 155 (a) of the Penal Code, as amended by section 7 (1) of Act Number 15 of 2005. The particulars of the offence are that Shadreck Mwanza on 1st June, 2010, at Petauke, in the Petauke District of the Republic of Zambia, had carnal knowledge of one Zacheas Zulu, a boy aged six years old against the order of nature. On 16th June, 2010, when the charge was read to Shadreck Mwanza, he understood the charge, and denied the charge. Thus, the matter proceeded to trial. At the end of the trial, the Court found that Shadreck Mwanza had committed the offence in question, and convicted him accordingly.

On 13th December, 2010, when the matter was called on for sentencing, justice A. M. Banda-Bobo issued an Order that the convict be referred to Chipata General Hospital for tests or examination, in order to ascertain his age at the time of commission of the offence. It was further ordered that the Department of Social Welfare in the Ministry of Community Development and Social Services, should also carry out investigations into his age and tender a report during the February, 2011, High Court Criminal and Civil Session. Accordingly, the matter was adjourned to the February, 2011, Session.

On 11th February, 2011, Chipata General Hospital returned a report signed by Dr. Phiri stating that he had examined Shareck Mwanza. And that the radiological films showed that age of Shadreck Mwanza is likely to be below the age of 18 years.

In the submissions dated 17th February, 2011, Ms. Soko after narrating the background to the case, submitted that according to the record from the lower Court, Shadreck Mwanza was aged 19 years at the time of the trial. Ms. Soko therefore submitted that it was surprising that Court below did not direct its mind to this pertinent issue.

In view of the foregoing, Ms. Soko submitted that justice A. M. Banda-Bobo was on firm ground when by an application by the defence counsel ordered that Shadreck Mwanza be referred to Chipata General Hospital in order to ascertain his age.

Ms. Soko also drew my attention to the case of *Musonda and another v The People (1976) Z.R. 218*. In the *Musonda case*, Ms. Soko submitted that it was held that when an appellate Court receives an indication that the appellant is a juvenile, it should immediately inquire into the appellant's age. It was further held that after the appellate Court is made aware that an appellant is a Juvenile, the appellate Court should direct that the matter be heard and disposed of in a Juveniles Court in accordance with the Juveniles Act. In light of the foregoing, and granted that Shadreck Mwanza is still a juvenile, Ms. Soko urged me to set aside the conviction and sentence. And refer the matter to the Subordinate Court for re-trial by a properly constituted Juvenile Court.

Furthermore, Ms, Soko argued that this is a proper matter for re-trial because of the tender age of the victim, and the sexually transmitted disease that was invariably passed from the juvenile to the victim; thereby constituting aggravating circumstances. Ms. Soko brought to my attention the fact that the juvenile is on bail pending trial.

Mr. Banda in his written submissions dated 18th February, 2011, observed that the matter had been called on for sentence. Mr. Banda contends that where a juvenile offender has suffered prejudice by being tried as a major instead of a juvenile Court, a Court ought to order that the juvenile offender should be sent to Katombora Reformatory School. Mr. Banda acknowledges that although the lower Court did not proceed as a Juvenile Court, I still have the discretion to make an order in keeping with the recommendation of the Social Welfare Department. In aid of this submission, Mr. Banda relied on the case of the *People v Mwaba (1979) Z.R 193*. In the *Mwaba case*, Cullinan J, observed as follows *obiter dicta*:

"I had considered sending the record back to the Court below so that the proper procedure in the matter could be followed. I observe however that there was not an iota of evidence before the Court to satisfy the proviso to s. 74 (1) of the juveniles Court, that is to indicate that the guardian had "conducted to the commission of the offence by neglecting to exercise due care of the juvenile."

For avoidance of doubt, I order that the order of the fine of K 50 or one month simple imprisonment in default of payment thereof be set aside. Under all the circumstances, I consider that it would be in the interests of justice to order that the juvenile offender be discharged and so I order."

Mr. Banda observed that in the instant case there are aggravating circumstances and therefore an order that Shadreck Mwanza be sent to Katombora Reformatory School would be appropriate, and a severe form of punishment to mete out in the premises. In buttressing the preceding submission, Mr. Banda relied on the case of *Musonda and another v The People (1979) Z.R. 53*, where it was observed as follows:

"A reformatory order is a very severe punishment and should only be made when other methods of reformation are in the circumstances entirely inappropriate or have proved to be in vain the in the past."

In the alternative, Mr. Banda submitted that I must order a re-trial, because the proceedings of the Court were a nullity as it neither made an inquiry into the age of the juvenile, nor did it proceed as a Juvenile Court. In support of this submission, Mr. Banda relied on the case of *Chipendeka v The People (1969) Z.R. 82*, where an order of re-trial was made under similar circumstances. In the *Chipendeka Case*, Skinner, C.J. observed as follows:

"There is another matter to which I should refer. On the charge sheet the age of the appellant is given as eighteen years. There is no record that the Court made an inquiry as to the age of the appellant. Section 116 of the Juveniles Ordinance imposes a duty on a Court to ascertain the age of a juvenile on his appearing before the Court charged with an offence. It appears to one that the learned magistrate was put on notice by the age stated in the charge sheet and that he should have made such inquiry. This error gave rise to further errors. A juvenile is defined by

section 2 (1) of the Juveniles Ordinance and means a person who has not attained the age of nineteen years. Section 63 of the same Ordinance provides that no charge against a juvenile shall be heard by Subordinate Court that is not a Juvenile Court. The learned magistrate has made no record that he was sitting as a Juvenile Court, and did not follow the procedure which a person presiding a Juvenile Court is bound by statute to follow. It appears to me 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 that if it was 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 the circumstance, Mr. Banda urged me to either send Shadreck Mwanza to Katombora Reformatory School, or in the alternative order a re-trial before a juvenile Court of competent jurisdiction.”

I am indebted to counsel for their submissions and arguments. I must state at once that whenever it appears to a trial Court that an accused person may be a juvenile section 118 of the Juvenile’s Act imposes a duty on a Court to ascertain the age of the person charged with the offence. Section 118 is expressed in the following terms:

“Where a person whether charged with an offence or not is brought before any Court otherwise than for the purpose of giving evidence and it appears to the Court that he is a juvenile, the Court shall make the inquiry as to the age of the person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, but an order of judgment of the Court shall not be invalidated by an subsequent proof that the age of that person has not been correctly stated to or estimated by the Court, and the age presumed, or declared by the Court person so brought before it shall for the purposes of this Act, be deemed to be the true age of that person so, and where it appears to the Court that the person so brought before it has attained the age of nineteen years that person shall, for the purposes of this Act be deemed not to be a juvenile.”

It is also important to note from the outset that a “juvenile” is in terms of section 2(1) of the Act defined as:

“a person who has not attained the age of nineteen years, and includes a child and a young person.” Again in terms of section 2(1) of the Juveniles Act, a child is defined as; *“a person who has not attained the age of sixteen years,”* and a young person is *“a person who has attained the age of sixteen years, but has not attained the age of nineteen years.”*

It is also important to note that in terms of section 63 of the Juveniles Act, no charge against a juvenile shall be heard by a Subordinate Court that has not constituted itself as a juvenile Court. When a Subordinate Court constitutes itself as a Juvenile Court, it is required to record that it is sitting as a Juvenile Court.

In the instant case it has been established that Shadreck Banda is a juvenile. However, the Court that found Shadreck Banda guilty of the offence of committing unnatural offence contrary to section 155 (a) of the Penal Code did not inquire into the age of Shadreck Banda. And above all, did not constitute itself as a Juvenile Court. Thus on the authority of the *Chipendaka case*, I hold that the proceeding before the Court below were nullity. Further, in the case of *Nachitumbi v The People (1975) Z.R. 285*, it was held that a criminal trial can be re-ordered if the first trial was flawed on a technical defect. Accordingly I order that this matter be re-tried by a properly constituted Juvenile Court.

Dr. P. Matibini, SC
HIGH COURT JUDGE