

**IN THE HIGH COURT FOR ZAMBIA**  
**HPS/24/2014**  
**AT THE PRINCIPAL REGISTRY**  
**AT LUSAKA**  
(Criminal Jurisdiction)

Between:

**THE PEOPLE**

**V**

**CLIFFORD DIMBA KANENE**

Before Hon. Mr. Justice C.F.R. Mchenga SC

For the People: C.M. Hambayi, Senior State Advocate, National Prosecution Authority

For the Convict: N. Chanda, Nicholas Chanda and Associates with T. Chali, H H Ndhlovu

& Company

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## **JUDGMENT**

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Case referred to:

**1. Macheka Phiri v The People [1973] ZR 145**

Legislation referred to:

1. **The Criminal Procedure Code, Chapter 88 of the laws of Zambia**

2. **The Penal Code, Chapter 87 of the Laws of Zambia**

J2

This case was pursuant to the provisions of **Section 217 of the Criminal Procedure Code**, committed to the High Court for sentencing. However, before imposing the sentence, I have decided to review the case by virtue of the powers vested in me by **Section 337 of the Criminal Procedure Code**. My decision to review the conviction follows a number of applications made by Clifford Dimba Kanene, the convict, raising issue with the correctness of the conviction in the face of what he considers to be inadequate evidence of the age of the prosecutrix.

The convict appeared before the Subordinate Court sitting at Lusaka 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 a date unknown but between the 31<sup>st</sup> of January, 2012 and the 1<sup>st</sup> of February, 2012 at Lusaka in the Lusaka District of the of the Lusaka Province of the Republic of Zambia he had unlawful carnal knowledge of Jammie Mukuwa a girl under the age of 16 years. He denied the charge and a full trial

was conducted. At the end of the trial, he was found guilty as charged and convicted.

### **J3**

The relevant evidence can be summarised as follows: on 31<sup>st</sup> January 2012, the prosecutrix, who said she was born on 25<sup>th</sup> March 1998 in Namwala, knocked off from school at about 12 hours. While in the company of her sister Shelly Mukuwa, Pw2, and two other boys she met the convict along the rail line within Misisi Compound. The convict who was with a friend took the prosecutrix to a lodge within the compound and had carnal knowledge of her. He also spent a night with her at the same lodge and only took her back to her father's house the following afternoon at about 15 hours.

Bruce Mukuwa, Pw4, the prosecutrix's father told the court that on 31<sup>st</sup> January 2012, he called the convicts father when Pw1 failed to return home from school. He said Pw1 was his daughter and she was born in Monze on 25<sup>th</sup> March 1998. He also said her Under-5 Card was destroyed in a fire and he did not obtain a

birth certificate for her. Pw4 said when he contacted the convicts father, he was given the convicts number and he called him. The convict told him that he was going to bring his daughter home but he did not. The following day, around 1800hrs, as he was reporting the matter at Lusaka Central Police Station, he was informed that the convict had taken the prosecutrix

#### **J4**

home while in the company of his father, mother, sister and brothers. He also said the prosecutrix was taken to the hospital.

Dr Lalieke Onesimus Chaponda Banda, Pw3, a doctor at the UTH confirmed having attended to the prosecutrix. He told the court that on 2<sup>nd</sup> February 2012, he examined the prosecutrix and found that she had sexual intercourse within 72 hours of the examination. He produced the medical report. He also said they do not use MRI but X-ray to determine age at his hospital. Evidence in support of her age was also given by Christopher Chabala Kafwanka, Pw5, of Polydrive Sunset School. He told the court that in 2007, as Pw4 was registering the prosecutrix at their school, he indicated on the enrolment form that she was born on 25<sup>th</sup> March 1998. He produced the enrolment form.

In his defence, the convict told the court that he had known the prosecutrix for over a year prior to the incident. He had met her in the bars where she used to drink from. He also said when she approached him, she told him that she was 18 years old and wanted to be one of his dancing queens. Further, he said the State did not conduct and/or bring evidence of a Magnetic Resonance Imaging (MRI) test to prove the prosecutrix age. In addition, it was his evidence

**J5**

that even though the prosecutrix volunteered to have sex with him to prove her age, he did not have sex with her.

In his judgment, the learned trial magistrate accepted the prosecution evidence and found that the convict had carnal knowledge of the prosecutrix. He also found that the evidence of Pw2, Pw3 and Pw4 corroborated the prosecutrix evidence on the sexual act and identity of the convict. He accepted the prosecution evidence and found that the prosecutrix was born on 25<sup>th</sup> March 1998. He found that Pw4's evidence that his daughter was born on that day was corroborated by that of Pw5.

As regards the failure to conduct and bring evidence of an MRI test, the learned trial magistrate found that even if the test was conducted, the results on the prosecutrix age would not have been different. He also found that in any case, had the convict thought that such test would have ended with a different result or evidence favourable to him, he was at liberty to apply for the prosecutrix to be subjected to the test during his defence but he did not. Finally, he found that the defence in the proviso in **Section 138 of the Penal**

**J6**

**Code** was not available to the convict because he denied having sex with the prosecutrix.

I have looked at the evidence on record and I am satisfied that the learned trial magistrate cannot be faulted for having come to the conclusion that the fact that the convict had carnal knowledge of the prosecutrix was proved beyond all reasonable doubt. What appears to be contentious is the age of the prosecutrix. It has been suggested that the prosecution failed to prove the age of the prosecutrix to the required standard; beyond all reasonable doubt.

The prosecution evidence in support of her age was that given by the prosecutrix, Pw4 and Pw5. According to the prosecutrix and Pw4 she was born on 25<sup>th</sup> March 1998. Pw4 also told the court that he could not produce the Under-5 card because it was destroyed in a fire; neither could he produce a birth certificate because none was obtained. The only document that was produced to support Pw4's evidence on the prosecutrix's age was an enrolment form he filled in 2007 when he was enrolling her to school. On that form, he gave her date of birth as 25<sup>th</sup> March 1998.

## J7

In the case of **Macheka Phiri v The People (1)**, Baron, Acting Chief Justice, at page 146, observed as follows:

*"As the learned judge observed in that case, there is no difficulty in proving the age of a prosecutrix, and it is not acceptable simply for a prosecutrix to come to court and state her age. This can be no more than a statement as to her belief as to her age. The prosecution should have called one of her parents or whatever other best evidence that was available for the purposes of such proof."*

It follows that the *viva voce* evidence from a parent which has not been discredited in cross examination can be used to conclusively prove the age of the prosecutrix in a defilement case. Birth certificates or Under-5 cards which are secondary

ways of proving age, can be used in cases where the parents are illiterate and do not know when their child was born; the parents are not available or to support the evidence of a parent who has testified. It must be noted that they are not necessarily the most credible or reliable ways of proving age. Anyone who is familiar with how a birth certificate is obtained in this country knows that it is based on information that is given to registration officials by the parent or person obtaining it on behalf of the child.

It follows, that like any other evidence their accuracy or truthfulness can be challenged by cross-examination of prosecution

**J8**

witnesses or through calling of defence evidence that discredits them. The learned trial magistrate was therefore right when he held that it was up to the convict to lead MRI test evidence if it was his view that it was going to help his case. Further, though MRI testing is one of the ways through which age can be proved, it cannot be said to be the most credible or the only one that the courts should accept. Like any other evidence given by an expert, it is only an opinion of the expert who presents

it and like any other evidence, it is for the trial magistrate to decide what weight to attach to it. The trial magistrate may either accept or reject the expert's opinion.

In this case, it cannot, on the evidence on record, be said that Pw4's evidence of when his daughter was born was discredited. There is nothing to suggest that he did not know or he was mistaken of when his daughter was born. Neither was his testimony not shaken in cross examination. His evidence on the issue was actually given credence by the testimony of Pw5. The evidence of Pw5 established that as early as 2007, way before the incident that gave rise to this case occurred, Pw4 had indicated, when he was registering his daughter, that she was born on 25<sup>th</sup> March 1998. While it can be argued that he lied when he gave his daughter's age to the police and court to ensure that the

**J9**

convict is prosecuted, the same cannot be said about it when he was enrolling his daughter. There is no evidence that there could have been any reason for him to lie then.

This being the case, I am satisfied that the trial magistrate was on firm ground when he found that that the prosecutrix was below the age of 16 years when the convict had carnal knowledge of her. Consequently, I find no reason to review the Subordinate Courts judgment on account of the prosecutrix age not having been proved beyond all reasonable doubt, the conviction is confirmed.

**Delivered in open court at Lusaka this 25<sup>th</sup> day of April, 2014**

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**C. F. R MCHENGA SC  
JUDGE**