

## **CHEWE v THE PEOPLE (1974) ZR 18 (SC)**

SUPREME COURT 5

BARON DCJ, GARDNER AND HUGHES JJ

21st AUGUST 1973 and 8th JANUARY 1974

(Appeal No. 94 of 1972)

### **Flynote**

**Criminal Procedure - Evidence - Child of tender years - Decision as to whether child is - Presumption that procedural matters correctly carried out.** 10

### **Headnote**

The appellant was convicted of defilement on the evidence of the complainant, a girl who gave her age as 13; no *voire dire* was conducted.

*Held:* 15

- (i) The first decision to be made is whether the proposing witness is a child of tender years; if he is not then s. 122 (1) of the Juveniles Act, Cap. 217, does not apply and the witness's evidence cannot be received save on oath.
- (ii) It 20 would be more satisfactory if the legislature were to lay down a specific age below which the provisions of s. 122 (1) were to be applied; in the absence of such legislation the decision must be made by the court in each case.
- (iii) The record being silent on the point and the witness having 25 been duly sworn, it must be assumed, on the basis of the standard presumption that procedural matters of this kind have been correctly carried out, that the child was not a child of tender years.

Cases cited:

- (1) *Sakala v The People* 1972 ZR 35. 30
- (2) *R v Campbell* (1956) 2 All ER 272.

Legislation referred to:

Juveniles Act, Cap. 217, s. 122 (1).

*C U Osakwe, Director of Legal Aid*, for the appellant. 35

*D M Zamchiya, State Advocate*, for the respondent.

### **Judgment**

**Baron DCJ:** delivered the judgment of the court. The appellant was convicted of defilement. The complainant was a girl who gave her age as thirteen and there is nothing on the record to suggest that a *voire dire* was conducted. The Director of Legal Aid submits that on the

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authority of *Sakala v The People* [1] the failure to conduct a *voire dire* was fatal.

Section 122 (1) of the Juveniles Act reads:

"Where, in any proceedings against any person for any offence or in any civil proceedings, any child of tender years called as 5 a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not on oath, if, . . ."

Thus the first decision to be made is whether the proposing witness is a child of tender years; if he is not then section 122 (1) does not apply 10 and the witness's evidence cannot be received save on oath.

There is no definition in the Juveniles Act nor, indeed, anywhere else of a "child of tender years". Lord Goddard, CJ in *R v Campbell* [2] said:

"Whether a child is of tender years is for the good sense of the 15 court . . ."

It would unquestionably be far more satisfactory if the legislature were to lay down a specific age below which the provisions of section 122 (1) were to be applied; in the absence of such legislation the decision must be made by the court in each case. In the present case the record is 20 completely silent on the point and we must assume, on the basis of the standard presumption that procedural matters of this kind have been correctly carried out, that the court was satisfied that this child was not a child of tender years. The child was duly sworn on the Bible in Nyanja.

This ground of appeal must therefore fail. 25

No other ground of appeal was advanced. The appeal is dismissed.

*Appeal dismissed*