IN THE SUPREME COURT FOR ZAMBIA APPEAL NO. 61/2009

HOLDEN AT LUSAKA/NDOLA/KABWE

(*Civil Jurisdiction*)

BETWEEN:

BENTO SIKAZWE APPELLANT

AND

THE PEOPLE RESPONDENT

Coram: Chirwa, Chibesakunda and Chibomba JJS.
1st September, 2009 and on 21st March 2012

For the Appellant : Mr. M. J. Simwanza, Assistant Senior Legal Aid Counsel

For the People : Mrs. N. Matele, Assistant Senior State Advocate

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JUDGMENT

Chibesakunda, JS., delivered the Judgment of the Court.

Legislature referred to

(1) Sections 81, 137,138,139,141 159 and 164 of the Penal Code

(2) Sections 79(6) and 186 of the CPC Cap 88

The Appellant was charged with one count of incest contrary to Section 159(1) of the Penal Code as read with Act No. 15 of 2005[1]. The particulars of the offence allege that Bento Sikazwe on the

21st November, 2006 at Mpulungu, in Mpulungu District, of the Northern Province of the Republic of Zambia did have carnal knowledge of Edah Nakazwe, his daughter.

This matter, after seeking a fiat from the Director of Public Prosecution, proceeded before Magistrate Sinyangwe on a charge of rape. The trial was almost concluded when for no apparent reason on the record; the Principal Resident Magistrate transferred the matter under Section 79(6) of the CPC Cap 88[2] to another Magistrate now before Magistrate Muyambango Class II. He conducted trial *de novo.* He convicted the Appellant on a lesser charge of indecent assault contrary to section 137 (1)[1] as amended by Act 15 of 2005[1].

The evidence for the prosecution was that the prosecutrix, PW1, a biological daughter of the Appellant and his last child, had stayed with the Appellant from the time she was four years old. She testified that the Appellant married her biological mother after his younger brother died. She was the youngest of the children between Appellant and her mother. After the other children

became adults, they left PW1 and the Appellant staying the two of them together up to the time she was thirteen years. As she was thirteen years on the 21st November, 2006, she was asleep when the Appellant came into her bedroom, around 20:00 hours, with a knife, and threatened to kill her if she was to disclose to anyone what he was about to do to her. He held her throat as he had sexual intercourse with her. She cried as this act was being done. The following day, he did not allow her to go outside the house. But she managed to escape and ran to her brother, PW2, Moses Sikazwe.

She found her brother at his plot working. He noticed that she looked miserable. When he asked her why she was miserable, PW1 promised to tell him why she was miserable after reaching his house. When they got to his house, she and PW2 had a conversation in which she told him that the Appellant had sexual intercourse with her. As she was narrating what happened during the night before, the Appellant arrived and noticed that PW1 and PW2 were having a conversation in the house. He asked PW2 what PW1 was talking to him about. He, the Appellant, then

told PW1 and PW2 that PW2 should not keep PW1 as she was his wife referring to PW1. As this was going on, the sister Ireen Nakazwe arrived at the scene and listened to this conversation.

PW2's testimony was more less the same as PW1's testimony. He confirmed that PW1 was a biological daughter of the Appellant, she was his last child. He went on to testify that on 22nd November, 2006 as he was working at his plot, PW1 approached him. That she was looking gloomy. When asked why she was gloomy, she was reluctant to tell him immediately. That she however, promised to do so later when they get to his house. PW2 testified that as PW1 was narrating to him about the incident with their father, their other sister, Ireen Nakazwe arrived. As PW1 was telling PW2 and Ireen Nakazwe about how the Appellant forced her to have sexual relationship with her, the Appellant appeared at the scene and immediately started shouting saying to PW2 ***" why are you keeping my wife"*** referring to his daughter, PW1, as his wife. Continuing his testimony, PW2 further testified that the Appellant threatened to kill him and PW1 for her narrating her ordeal to him with PW3, Ireen Nakazwe. He even

demanded that she be brought back to him. Out of fear, PW2 took back PW1 to the Appellant. He later reported the matter to the Police. PW4 was the arresting Officer. He arrested the Appellant on the charge of incest which he denied. A medical report was produced before the court which was consistent with the allegation that PW1 had sexual intercourse with the Appellant.

When the Appellant was put on his defense, he elected to give unsworn statement. He indicated in his unsworn statement that yes he succeeded his younger brother in marrying PW1's mother when she became a widow, after his young brother died. According to the Appellant, PW1's mother had already five children and the youngest was the prosecutrix. The widow he married also died after he divorced her. He remained looking after the children of the family. PW1 was only four years when he took over and started looking after the children. He further testified that on the day he could not remember, he was not at home when PW1 disappeared. He started looking for her, in the course of looking for her, he came across this story about him having sexual intercourse with her. The Appellant told the court

that this story was a fabrication. The Appellant called no witness although he had indicated that he was going to call a witness.

With this evidence before him, the second Magistrate found that sexual intercourse between PW1 and the Appellant had not been established because the medical evidence, which was produced before him left a lot to be desired. Therefore, in accordance with Section 81 of the CPC[1], he convicted the Appellant of a lesser offence of indecent assault contrary to Section 137 (1) as amended by Act No. 15 of 2005, Cap 87[1].

The matter was sent to the High Court for sentencing. The sentencing Judge substituted the charge to incest. He sentenced the Appellant to twenty years imprisonment with hard labour with effect from 25th November, 2006.

The Appellant has now appealed against this conviction and sentence raising one ground of appeal namely that:

“The learned Magistrate erred in law and fact when he tried and convicted the appellant on a charge of incest without the Director of Public Prosecutions’ consent”.

Before this Court, Counsel for the Appellant mostly relied on his written heads of argument which he augmented with brief oral submissions.

His sole contention is that the proceedings before the last Magistrate were nullity. Counsel pointed out that according to the record, the instructions from the Director of Public Prosecution were to try the Appellant for rape not incest. So in the absence of express consent by the Director of Public Prosecutions, as required by Section 164 of the Penal Code, Cap 87[1], the trial court had no jurisdiction to hear the matter and to proceed to convict the Appellant on indecent assault and later to be sentenced for incest to a term of 20 years. Counsel contended that this Court has held in the case of **Liyongile Muzwanolo Vs. the People** that the absence of the consent by Director of Public

Prosecutions, takes away the jurisdiction of the court. In the case of **Mwanza (AB) vs. the People**, also this court had a similar holding. So Counsel argued that the appeal should be allowed on that ground.

Counsel for the Respondent made no submission except to say that she was going to be guided by the Court's views.

We have read the original record and the record of appeal. We have also considered issues raised in this appeal. The main issue raised is whether there was permission from the Director of Public Prosecutions to prosecute and convict the Appellant on the charge of incest.

Firstly, we want to register our great disapproval with the way this matter was conducted. The first Magistrate, Sinyangwe Esq conducted the trial and even reached the stage of writing a judgment on a charge of rape as per instructions from Director of Public Prosecutions. So far, no reason has been given on record as to why at page 13 of the record the Principal Resident

Magistrate transferred the matter at that stage to another Magistrate to start ***de novo.*** This step unwarrantly prolonged the administration of justice and with possible deaths of witnesses, this would have brought about a miscarriage of justice. Such approach by the lower court has to be deprecated.

Secondly, now coming to the main issue of whether or not the Director of Public Prosecutions gave permission to prosecute the Appellant on a charge of incest a charge on which he was sentenced. The letter from the Director of Public Prosecution reads:

> **“ DPP/11/22/2**
>
> **20th November, 2006**
>
> **The Divisional Prosecutions Officer**
> **Northern Division Headquarters**
> **KASAMA**
>
> **RE: THE PEOPLE VS BENTOS SIKAZWE**
>
> **The above subject refers.**

Find attached consent to prosecute Bentos Sikazwe with the offence of incest. I have authorized his prosecution for incest in order to avoid any further delays in the case. The correct charge on the evidence on the docket is that of rape.

The charge of incest should only have been preferred against the accused if his daughter had consented to the sex. In this case, the girl did not consent, making a charge of incest inappropriate.

In addition to preventing further delay in this case, I have considered the provisions of Section 186 of the Criminal Procedure Code. It reads as follow:
186. (1) When a person is charge with rape and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under one of sections one hundred and thirty-seven, one hundred and thirty-eight, one hundred and forty-one and one hundred and fifty-nine of the Penal Code, he may be convicted of that offence although he was not charged with it.

(2) When a person is charged with an offence under section one hundred and fifty-nine of the Penal Code and the court is of opinion that his is not guilty of that offence but that he is guilty of an offence under one of the sections one hundred and thirty-eight and one hundred and thirty-nine of the Penal Code, he may be convicted of that offence although he was not charged with it.

(3) when a person is charged with the defilement of a girl under the age of sixteen years and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under subsection (1) or (3) of section one hundred and thirty-seven of the Penal

Code, he may be convicted of that offence although he was not charged with it.

This provision allows the court to convict a person charged with one sexual offence to be convicted with a different sexual offence. However since dockets take too long to reach me, it is important that only "real" or "true" cases of incest are referred to me.

A man should only be charged with incest when he has sex with a female relative who consents and is above the age of 16 years. a man who has sex with a consenting female relative below the age of 16 years can either be charged with incest or defilement. In view of the time it takes for a docket to reach me, it is better off to proceed on a charge of defilement.

Where a man has sex with a female relative who does not consent they should be charged with the offence of rape. This should be the case even where the prosecutrix is below the age of 16 years.

Since there is evidence in this case that the prosecutrix was below the age of 16 when the offence was committee, the public prosecutor can bring the above quoted provision to the attention of the court should the correctness of the charge be an issue.

C F R Mchenga
DIRECTOR OF PUBLIC PROSECUTIONS"

Looking at this letter from the Director of Public Prosecutions, we hold the view that the Director of Public Prosecutions in the first paragraph gives impression that he had sanctioned prosecution to

go ahead with incest but later it is clear that he is only sanctioning the Appellant's prosecution on a charge of either rape or defilement. He went on to advise the prosecutions that even if they prosecuted the Appellant on a charge of rape or defilement, Section 186(1) of the CPC[2] allows the court to convict a person charged with either rape, defilement, incest of females, defilement of idiots or imbeciles, depending on the facts, to convict that particular person with a different offence as provided by the law. According to the law, under Section 186[2], if a person is charged with rape, under Section 132 and the court is of the opinion that he is guilty of the offence either under Section 137[1] which is indecent assault or the offence under section 138[1] which is defilement or section 141[1] which is procuring defilement or the offence under section 159[1] which is incest of females, that court can convict him/her of one of these offences under sub section 2 of Section 186 of the CPC[2] Director of Public Prosecutions explained that if a person is charged with an offence of incest of females under Section 159[1] of the penal code[1] and the court is of the opinion that he is guilty of the offence under section 138[1] which is defilement or section 137[1] which is indecent assault, that

person may be convicted of either of these two offences even though he was not charged of either of the two offences. The Director of Public Prosecutions further explained that when a person is charged with defilement contrary to section 138[1] of the penal code and at the end of the trial the court is convinced that he is only guilty of the offence under sub section 1 of section 137[1], that person may be convicted of indecent assault.

We hold the view that the learned Director of Public Prosecutions rightly guided the prosecution and the court below to invoke any of these provisions should that be necessary.

So Magistrate Muyambango rightly in our view concluded that, because **“the medical evidence left a lot to be desired,”** to use his own words, the Appellant was not guilty of the offence of rape but guilty of the offence of indecent assault contrary to Section 137[1] of the penal code. The learned sentencing Judge therefore misdirected himself when he sentenced the Appellant on a charge of incest. We hold therefore, that the cases of **Mwanza (AB) vs the People (1973) ZR 329**

(SC) and **Liyongile Muzwanolo vs the People (1986) ZR 46 (SC)** are not relevant. We therefore, quash the sentence by the learned sentencing Judge. We uphold the conviction by the Subordinate court on a charge of indecent assault. We sentence the Appellant to a term of 20 years with effect from the date he was arrested.

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C. K. CHIRWA
SUPREME COURT JUDGE

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L. P. CHIBESAKUNDA H. CHIBOMBA
SUPREME COURT JUDGE **SUPREME COURT JUDGE**