IN THE SUPREME COURT OF ZAMBIA APPEAL No. 33/2022

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

MABVUTO TEMBO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Kaoma and Chisanga, JJS
On 7th June, 2022 and 13th June, 2022

For the Appellant : Mrs. M. M. Banda, Legal Aid Counsel

For the State : Ms. P. Nyangu, Senior State Advocate

JUDGMENT

Hamaundu, JS delivered the Judgment of the Court.

Cases referred to:

1. **Ignatious Nyirenda v The People, Appeal No. 359 of 2013**
2. **Goba v The People (1966) Z.R. 113**
3. **Makhanganya v R (1963) R & N 698**
4. **Sakala v The People (1972) Z.R. 47**
5. **Chibwe v The People (1972) Z.R. 308**.

Legislation referred to:

The Juveniles Act, Chapter 53 of the **Laws of Zambia**, **S. 122**

1.0 Introduction

1.1 The appellant, a resident of Chanhompwa village in Katete District, was convicted of the offence of incest by the Subordinate Court at Katete. The High Court sentenced him to 35 years imprisonment with hard labour.

2.0 The Facts

2.1 It is not in dispute that the trial magistrate convicted the appellant entirely on the testimony of the appellant's daughter, aged 10, who testified that her father had had carnal knowledge of her on not less than two occasions, in 2015.

2.2 The magistrate received that testimony on oath after conducting a *voire dire* which comprised the following questions and answers:

"Court	**:**	**What is your name?**
Child	**:**	**My name is Vero Tembo**
Court	**:**	**How old are you?**
Child	**:**	**I am 10 years old**
Court	**:**	**Do you go to school?**
Child	**:**	**Yes I go to a community school called Yambani**
Court	**:**	**What grade are you?**
Child	**:**	**I am in nursery school**

Court	:	**What subjects do you learn at school?**
Child	:	**I learn Mathematics and Nyanja and English**
Court	:	**You have come here are you going to tell us the truth?**
Child	:	**Yes I am going to tell the truth**
Court	:	**Is it good to tell lies?**
Child	:	**No it is bad to tell lies**
Court	:	**Because it is not good to tell lies so you will tell us the truth?**
Child	:	**Yes I will tell the truth**
Court Order	:	**I am satisfied that the witness of tender years possesses sufficient intelligence and understands the duty to tell the truth."**

3.0 The Appeal

3.1 This appeal attacks the said *voice dire* for, allegedly, being defective.

3.2 The arguments

3.2.1 The appellant's arguments

3.2.1.1 On behalf of the appellant, the only argument advanced by counsel on this point is that the questions that were put forward by the magistrate to the child were not adequate to establish that the child

understood the duty of speaking the truth.

3.2.1.2 It is Mrs. Banda's argument that it was not enough for the child to merely say that it is bad to tell lies; the magistrate should have probed further and found out whether the child knew what would happen to her if she told lies. According to counsel, the court would then have ascertained that the child knew that there would be some sort of punishment that would result from the lie.

3.2.1.3 Mrs. Banda further argues that the questions did not probe whether the child had done a bad thing before which had resulted in some form of deterrent action. By this argument, counsel meant that it was only from such an answer that the court would have been satisfied that the child really understood the duty to speak the truth.

3.2.1.4 In addition, it is argued that, notwithstanding the numerous decided cases which hold that cases of defective *voire dire* must result in a re-trial, in this particular case the appellant must be set free because the child is now an adult; and the appellant has served seven years of his sentence. For this submission reliance is placed on the case of **Ignatious Nyirenda v The People**[1] and the case of **Goba v The People**[2].

3.2.2 The Prosecution Argument

3.2.2.1 The prosecution's counter-argument is simply that the law as it stands merely requires the court to be satisfied that the child possesses sufficient intelligence, and understands the duty to speak the truth.

3.2.2.2 Ms. Nyangu submits that, in fact, the trial court did put forward questions which established these two requirements.

4.0 Our Decision

4.1 Section 122 of the **Juveniles Act, Chapter 53** of the **Laws of Zambia**, which prescribes the law applicable to the evidence of children states:

> **"122. Where, in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child if, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth."**

4.2 According to this provision, the evidence of a child who is below the age of fourteen can only be received, on oath, if the trial court forms the opinion that two conditions have been satisfied, namely; (i) that the child is possessed of sufficient intelligence to justify the reception of its evidence on oath; and (ii) that the child understands the duty of speaking the truth.

4.3 How then does the trial court come to form that opinion? In **Makhanganya v R**[3], the Federal Supreme Court of Rhodesia and Nyasaland considered that question.

Forbes, F. J. in his judgment said this:

> **"In my view the duty of a court when faced with a child witness is (a) to inquire as to the age of the child and if necessary, asses its age; (b) to investigate, by questioning the child, whether the child understands the meaning of an oath; and (c) if the answer to (b) is negative, to investigate whether the child understands the difference between truth and falsehood, and the need to speak the truth. The record should show these inquires (which, depending on the circumstances, need not be lengthy) and the conclusion reached by the judge. Unless a *voire dire* is carried out as I have indicated, a trial court cannot be satisfied that a child is fit to be sworn, or even to give evidence unsworn; and unless the *voire dire* is recorded an appellate court cannot be satisfied that the trial court has appreciated and carried out its duty."**

4.4 Forbes, F. J. was discussing a provision of the statute which; (i) did not prescribe the age of a child of tender years; (ii) provided that for a child to give evidence on oath, it must understand the nature of an oath; and (iii) provided that if a child did not understand the nature of an oath but was possessed of sufficient intelligence, and understood the duty to speak the truth, its evidence could be received, although not on oath.

4.5 Until 2011, that is exactly how the provisions in our statute were couched. As a matter of fact, this court followed the dictum of Forbes, F. J. in the following cases; **Sakala v The People**[4] and **Chibwe v The People**[5].

4.6 In 2011, however, the statute was amended; and now reads as quoted above. Suffice to say that now the statute requires that the child's evidence should only be received on oath. There is no longer any provision for the court to receive unsworn testimony from the child. Nevertheless, the principle behind the need to conduct a *voire dire,* as stated by Forbes, F. J., still remains valid.

4.7 Clearly, then, *voire dire* is a process by which a trial court interviews a proposed child witness with a view to satisfy itself that the conditions precedent to receiving the child's evidence have been met.

4.8 There is no standard questionnaire that has been stipulated for trial courts to follow: Hence the *voire dire* conducted will vary from court to court, depending on the particular adjudicator's probing skills. What matters however, as Forbes F. J. said in **Makhanganya v R**[3] is

that the probing should show that it is directed at establishing the requisite conditions precedent.

4.9 Therefore, it is not necessarily a lengthy probe that guarantees satisfaction; for, it should be borne in mind that the trial court forms its opinion not only from the questions put across to the child but also from its ocular observation of the child's demeanour during the interview. Hence, a trial court may derive satisfaction from a seemingly short interview.

4.10 And so, from the appellate court's stand point, the focus should be mainly to establish whether the trial court posed its questions in such a way that the two areas on which satisfaction is required were covered.

4.11 In our view, the magistrate in this case did direct his questions to the two conditions precedent in the law, that is, that the child possessed sufficient intelligence and understood the duty to speak the truth.

4.12 The appellant's only argument is that, in order to satisfy itself that the child understood the duty to speak the truth,

the trial court should have gone further to ask the child what would happen to her if she told lies to the court.

4.13 We do not think that a child will only understand the duty to speak the truth where there is an overhanging threat of sanctions for telling lies: A child who, from their own conscience, appreciates that it is bad to tell lies surely should be taken to understand the duty to tell the truth. Hence, we do not find the *voire dire* to have been inadequate.

4.14 There being no other point on which the appeal has been brought, we find no merit in the appeal. The same is hereby dismissed.

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E. M. Hamaundu

SUPREME COURT JUDGE

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R. M. C. Kaoma

SUPREME COURT JUDGE

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F. M. Chisanga

SUPREME COURT JUDGE