IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE

APPEAL NO. 33/2007

KALUNGA BWALYA

and

THE PEOPLE

CORAM: LEWANIKA, DCJ, MUMBA, CHITENGI, JJS
On 10th April, 2007 and 7th June, 2007

For the Appellant: Dr. J. SOKO of JOSIAS & Partners
For the Respondent: P. MUTALE, Principal State Advocate

JUDGMENT

LEWANIKA, DCJ delivered the judgment of the court.

AUTHORITIES REFERRED TO:

1. ZULU VS THE PEOPLE, 1973 ZR 326
2. CHIBWE VS THE PEOPLE, 1972 ZR 101
3. NDALAMA VS THE PEOPLE, 1976 ZR 220
4. CHANDA VS THE PEOPLE 1969 ZR 58
5. NSOFU VS THE PEOPLE, 1973 ZR 287
6. SAKALA VS THE PEOPLE, 1972, ZR 35

The Appellant was convicted of the offence of defilement contrary to Section 138(1) of the Penal Code. The particulars of the offence being that the Appellant on the 25th day of October, 2004 at Ndola in the Ndola District

of the Copperbelt Province of the Republic of Zambia had carnal knowledge of a girl under the age of 16 years namely, **MULENGA SERINA**. The Appellant was sentenced to a term of 16 years imprisonment with hard labour and he has appealed against the said conviction.

The case for the prosecution in the court below was that on 25th October, 2004 the prosecutrix who was at the time 12 years old had set off with her young sister and a friend, they went to pick up old tins at a hill near Chipulukusu Compound in Ndola. The Appellant approached them and asked them to follow him so that he could buy them ice lollies to lick. They agreed to follow him and the Appellant bought ice lollies for the three of them which they consumed. The Appellant then asked the children to follow him to a place in town near the railway station where he was operating from. The Appellant told them to sit down and wait for him. When the Appellant returned he had bought some food which he ate with the children. The Appellant then grabbed the prosecutrix by the hand and the other child ran away but the prosecutrix's sister remained behind and the Appellant took the prosecutrix and her sister to a house in Nkwazi compound where she spent the night and the Appellant had carnal knowledge of her. The following day the Appellant took the prosecutrix to the railway station where they were supposed to board a train to Lusaka. The evidence of the prosecutrix was

that she had sustained some injuries to her private parts and was unable to walk properly and the Appellant carried her on his back. At the railway station, the Appellant was confronted by a security guard who apprehended the Appellant and handed him over to the police. The police took the prosecutrix to the hospital to be medically examined and the medical evidence on record confirmed that the prosecutrix had been defiled and the Appellant was charged with the subject offence.

The evidence of the Appellant was that on 24th October 2004 he was in town when he was approached by the prosecutrix and another child who begged him for food. He bought the children food and later they followed him to his house where the two children spent a night. On the following day in the evening he was with the prosecutrix and as he was crossing the railway line, he was apprehended by a security guard for trespassing. He denied having defiled the prosecutrix. He called his wife and mother as witnesses to support his evidence.

On the basis of this evidence the Appellant was convicted by the subordinate court and committed to the High Court for sentence.

Counsel for the Appellant has filed two grounds of appeal namely:-

1. That the trial court misdirected itself both in law and fact by relying on the evidence of a child of tender years without holding a voir dire;

2. That the trial court did not fully explain to the Appellant the proviso to Section 138 of the Penal Code.

In the view that we take of this appeal, we do not find it necessary to restate the submissions of Counsel for the Appellant and for the Respondent, which in any case are on record.

The evidence on record on page 11 shows that the trial court proceeded to swear in the prosecutrix a child of 12 years without conducting a voir dire. In the case of **SAKALA VS THE PEOPLE** (6) we held that it is essential with regard to a juvenile of tender years that the trial court not only conduct a voir dire but also record the questions and answers and the trial court's conclusion to enable the Appellate court to be satisfied that the trial court has carried out its duty. We have also restated in the recent past that before a witness of tender years is sworn the trial court should ascertain that the witness understands the nature of an oath. In this case the trial court did not even attempt to conduct a voir dire and there was a complete non compliance of Section 122 (1) of the Juvenile's Act and this conviction cannot be sustained. However the matter does not end there as we have to determine whether to acquit the Appellant outright or order a retrial. In the case of **ZULU VS THE PEOPLE** (1) we had occasion to consider Section 15(2) of the Supreme Court of Zambia Act, 1973 which provides as follows:-

15(2)

> *"The court shall, if it allows an appeal against conviction, either quash the conviction and direct a judgment and verdict acquittal to be entered, or if the interests of justice so require, order a new trial."*

In the Zulu case whose facts are nearly on all fours with the present case, we hold that Section 15(2) of the Supreme Court of Zambia Act gives the court power in a proper case to order a retrial where the appeal has been allowed only because of a defective voire dire. Although the Appellant has been in custody since 25th October 2004, this is a serious offence and we would therefore allow the appeal and order a retrial before a different Magistrate of competent jurisdiction.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

F.N.M. Mumba
SUPREME COURT JUDGE

P. Chitengi
SUPREME COURT JUDGE