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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

Appeal No. 38/2007

(Criminal Jurisdiction)

BETWEEN:

VICTOR BWALYA
AND
THE PEOPLE

APPELLANT

RESPONDENT

Coram: **Chirwa, Silomba, JJS and Kabalata, AJS on the 10th April
2007 and 7th May 2007**

For the Appellant: Mr. E.M. Sikazwe, Acting Director of Legal Aid
For the Respondent: Mr. Patrick Mutale, Principal State Advocate.

JUDGMENT

Kabalata, AJS, delivered the judgment of the Court.

Cases referred to:

- (1) *Moses Mwiba vs. The People (1971) ZR 131*
- (2) *Noah Kambobe v. The People (2002) ZR 57*

The Appellant was committed to the High Court for sentence by the Subordinate court of the first class for the Kasama District pursuant to Section 217 of the Criminal Procedure Code, Cap. 88 of the Laws of Zambia.

The Appellant was convicted on his own admission on one count of Defilement contrary to Section 138(1) of the Penal Code, Cap. 87 of the Laws of Zambia. The particulars of the offence were that, he on 11th

August, 2005 at Kasama in the Kasama District of the Northern Province of the Republic of Zambia, did unlawfully and carnally know Mwansa Kapembwa, a girl under the aged of 16 years.

The statement of facts which were read to the appellant after his plea of guilty were that on 11th August, 2005 the victim in this case, Mwansa Kapembwa, aged 8 years was at her friend's home playing and that was around 1900 hours. Whilst playing at the said house the Appellant who is the uncle to Vai, called the victim outside and forced her to have sex with him. The victim shouted for help, but the Appellant threatened to kill her if she shouted or told anybody. After defiling her, the victim went home and informed her mother Mulusi Mulenga who checked her and found that the child had some injuries on her private parts. She then reported the matter at Nseluka Police Post where she was issued with a medical report form for her to go to the hospital for examination. Appellant was then apprehended interviewed, charged and arrested for the subject offence. Under warn and caution in Bemba the language he appeared to understand better, he gave a free and voluntary reply admitting the charge. According to the medical report form, the victim sustained injuries on her private parts.

When the Appellant appeared before the High Court for sentence, he was sentenced to 35 years imprisonment with hard labour. He now appeals against sentence only.

On behalf of the appellant, counsel has argued that the sentence was excessive and did not reflect the leniency which should be accorded to a first offender who pleads guilty.

But on behalf of the Respondent, Counsel submits that 35 years imprisonment with hard labour imposed on the appellant is not excessive in the light of the tender age of the prosecutrix and also the sad reality that the appellant at the time of committing the offence, was HIV positive. Counsel further submits that by doing what appellant did, he sentenced the young girl to death and therefore the Court should mete out sentences that reflect the gravity of the offence notwithstanding the fact that the appellant pleaded guilty and showed remorse. Counsel also observed that the sentence should send an appropriate message to the society at large that Courts will not condone animal behaviour.

In response, Counsel for the appellant urged us to use principles of sentencing in dealing with the appellant in this case.

We have carefully considered the circumstances surrounding this case as well as the submissions of Counsel and the authorities cited therein. In *Moses Mwiba vs. The People*¹, Doyle CJ, as he then was, said:

“While sentencing due allowance should be given to an accused person who pleads guilty and shows contrition.”

In yet another case of *Noah Kambobe vs. The people*² Ngulube CJ, as he then was, said:

“It was acknowledged by the court that the sentence was excessive and did not reflect the leniency which should be accorded to a first offender who pleaded guilty.”

Whilst we subscribe to the principle that an accused who pleads guilty to an offence and is a first offender, should be treated with leniency, the circumstances surrounding this case clearly show that an Accused such as the appellant herein does not deserve any leniency normally afforded to first offenders.

We say this in view of the tender age of the prosecutrix who was only eight years at the time the appellant committed the offence. Furthermore, the matter is aggravated by the fact that at the time the appellant committed this offence, he was HIV positive as revealed by the medical report form and consequently, by his actions, the Appellant literally sentenced the young girl to the grave.


We are of the view that the sentence imposed by the lower court upon the appellant does not come to us with a sense of shock because of the gravity of this case. Indeed Courts should not be seen to condone animal behaviour to the extent of treating the appellant with leniency when what he did to this unfortunate little girl is to sentence her to death.

Having said that, we find that there is absolutely no merit in this appeal and it is therefore dismissed.

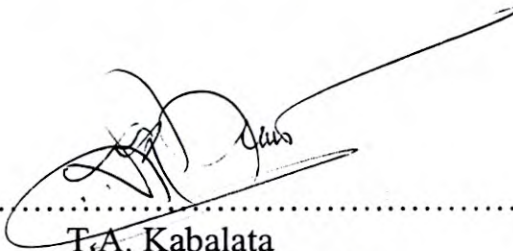
The sentence of 35 years imprisonment with hard labour imposed by the lower court upon the appellant therefore stands.



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D.K. Chirwa
Supreme Court Judge



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S.S. Silomba
Supreme Court Judge



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T.A. Kabalata
Acting Supreme Court Judge