

IN THE SUPREME COURT OF ZAMBIA      S.C.Z. APPEAL NO. 89/2007  
AT KABWE  
(Appellant Jurisdiction)

IN THE MATTER BETWEEN

BENARD TEMBO

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Sakala CJ, Chitengi, and Silomba JJS

On 6<sup>th</sup> November, 2007 and 8th November, 2007

For the Appellant:      Mr W.K. Cheelo , Legal Aid Counsel

For the Respondent:      Mr C.F.R. Muchenga, Director Public  
   Prosecutions

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**JUDGMENT**

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Chitengi, JS., delivered the judgement of Court

The Appellant, who was 82 years at the time of his arrest, over a year ago, pleaded guilty to a charge of defilement contrary to Section 138(1) of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of the offence alleged that Bernard Tembo, on a date unknown, but between 10<sup>th</sup> January, 2006 and 3<sup>rd</sup> February 2006 at Luanshya in the Luanshya District of the Copperbelt Province of the Republic of Zambia, had unlawful carnal knowledge of a girl under the age of 16 years namely, Elizabeth Mutale.



The facts in support of the charge are briefly that on the 3<sup>rd</sup> of February 2006 at about 16:00 hours, one Joseph Mkandawire the prosecutrix's grandfather, got a report from one Fredrick Ngosa Chilangwa, the prosecutrix's uncle, that the prosecutrix, who was 11 years at the time, had been invited to the Appellant's house. Thereupon, the prosecutrix grandfather went to check and found the Appellant with the prosecutrix in a disused house, and upon seeing the prosecutrix's grandfather, both the Appellant and the prosecutrix ran away. The prosecutrix ran home and when asked as to what she was doing with the Appellant, the prosecutrix said they wanted to have sexual intercourse but they were disturbed. However, the prosecutrix said that the Appellant had sexual intercourse with her on two occasions before and that the Appellant gave her money ranging from K300.00 to K400.00. The matter then was reported to the police and the Appellant was arrested for this offence which under warn and caution he voluntarily admitted.

The prosecutrix was given a medical report and sent to the hospital for medical examination and the doctor confirmed that the prosecutrix had been defiled.

After convicting the Appellant, the Learned trial Magistrate, pursuant to section 217(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, committed the Appellant to the High court for sentence because the learned trial Magistrate's sentencing powers are below the minimum mandatory sentence of 15 years imprisonment for the offence of defilement.

When sentencing the Appellant the learned sentencing Judge took into account the Appellant's plea in mitigation, the theme of which is that

he is a destitute kept by Catholic Church members and that he is a first offender who readily admitted the charge. Against this the learned sentencing Judge said that the Appellant who is an old man of 82 years preyed on a little girl and that what the Appellant engaged in is moral decadence which the courts should not allow to be passed on to future generations. Finally, the learned sentencing Judge observed that the law prescribing a mandatory minimum sentence of 15 years imprisonment is intended to protect the vulnerable girl child by punishing the offender and deterring the would be perpetrators.

Having made these comments the learned sentencing Judge imposed on the Appellant a sentence of 20 years imprisonment with hard labour to run from the date of arrest.

The Appellant now appeals to this court against the sentence of 20 years imprisonment imposed on him.

The ground of appeal is that the learned sentencing Judge erred and misdirected herself when she imposed a sentence of 20 years with hard labour on the Appellant who is a first offender and who readily pleaded guilty.

In arguing this ground of appeal, Mr Cheelo, the learned Legal Aid Counsel, submitted that the learned sentencing Judge should have given the Appellant credit for being a first offender and for pleading guilty and thereby saving the courts' time. It was Mr Cheelo's submission that the learned sentencing Judge should have imposed the minimum mandatory sentence of 15 years imprisonment. Mr Cheelo urged us to allow the appeal. The Director of Public Prosecutions did not reply.

We have carefully considered the facts of this case, the circumstances under which this offence was committed and the submission by Counsel for the Appellant. We agree with Mr Cheelo that the sentence imposed on the Appellant is on the higher side. Although the learned sentencing Judge said that she took into account the fact that the Appellant is a first offender who pleaded guilty, the sentence, the learned sentencing Judge imposed, does not reflect credit for being a first offender and showing remorse by pleading guilty. We see nothing peculiar that can take this case out of the realm of the 15 years minimum mandatory imprisonment prescribed by Parliament. As Mr Cheelo argued, we are of the view that this is a case where the learned sentencing Judge should have imposed the minimum mandatory sentence of 15 years imprisonment.

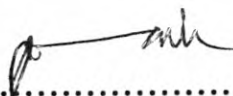
For these reasons, we allow the appeal, set aside the sentence of 20 years imprisonment imposed by the learned sentencing Judge and substitute it with one of 15 years imprisonment with hard labour to run from the date when the Appellant was arrested.



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E. L. Sakala  
**CHIEF JUSTICE**



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P. Chitengi  
**SUPREME COURT JUDGE**



.....  
S. S. Silomba  
**SUPREME COURT JUDGE**