IN THE SUPREME COURT OF ZAMBIA **Appeal No. 140/2015**
HOLDEN AT KABWE
(Criminal Jurisdiction)

B E T W E E N :

BRIGHT KAWEME **APPELLANT**

v.

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe and Malila, JJS**
on 3rd November, 2015 and 2nd March, 2016

For the Appellant: Mrs. S. C. Lukwesa, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. M. B. Nawa, Deputy Chief State Advocate, National Prosecutions Authority

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J U D G M E N T

Malila, JS delivered the judgment of the court.

Cases referred to:

1. *Dorothy Mutale v. The People (1997) SCJ No. 51*
2. *Musonda and Another v. The People (1976) ZR 218*
3. *Davies Mwape v. The People (1979) ZR 54*
4. *Chipendeka v. The People (1969) ZR 82*

Legislation referred to:

1. *Section 217 of the Criminal Procedure Code, chapter 88 of the Laws of Zambia.*
2. *Section 2 of the Juvenile Act, chapter 53 of the Laws of Zambia*

3. *Section 118(1) of the Juvenile Act, chapter 53 of the Laws of Zambia*
4. *Handbook on Juvenile Law in Zambia (Centre for Law and Justice, Cornell Law School's Avon Global Centre for Women and Justice and International Human Rights Clinic, August, 2014)*
5. *Section 138(1) of the Penal Code chapter 87 of the Laws of Zambia*
6. *The Penal Code Amendment Act No. 15 of 2005*
7. *Section 65 of the Juvenile Act*
8. *Section 218 of the Criminal Procedure Code.*
9. *Section 337 of the Criminal Procedure Code*
10. *Section 218(3) of the Criminal Procedure Code*

The appellant was tried and convicted by the Lusaka Magistrate's Court for the offence of defilement of a girl aged below sixteen years. On referral to the High Court, for sentencing in terms of section 217 of the **Criminal Procedure Code**, chapter 88 of the laws of Zambia, the learned High Court judge sentenced the convict to:

> **"Eighteen years imprisonment with effect from the 29th May, 2014, the date the convict was arrested and taken into custody."**

We shall revert to this sentence later in this judgment.

The full particulars of the offence emerge from the testimony of the four prosecution witnesses. A brief outline of the facts is as follows. The appellant, who was the young brother of the prosecutrix's father, shared a sleeping room, albeit on different beds, with the prosecutrix who was at that time below sixteen years

old, and her six-year old brother. The prosecutrix was aged fourteen at the time of the trial, a fact confirmed by her parents and the under-five record accepted by the trial court.

One fateful night, the appellant left his bed and got on to the prosecutrix's bed, removed her under garments and ravished her. Under threat of unspecified, but certainly unfavourable consequence to her, the appellant warned the prosecutrix never to disclose anything about the malefaction he perpetrated on her person. When, in due course, the prosecutrix realized that she had fallen pregnant from the sexual encounter she had with her uncle – the appellant, it was impossible to continue to respect the appellant's threat. The prosecutrix accordingly confirmed to both her father, PW1 and her mother, PW2, that she had fallen pregnant from the appellant's act of canal abuse of her. A report was subsequently made to the Police. The prosecutrix also underwent a medical examination which confirmed that her hymen was torn and that she was indeed pregnant.

Before the trial court, the appellant admitted having had sexual intercourse with the prosecutrix and that the pregnancy she was carrying was his, adding that he had agreed with the prosecutrix that they would marry. To this end, he had started buying 'little' items for the baby.

On these facts, the learned trial magistrate held that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted him accordingly. The learned magistrate then referred the matter to the High Court for sentencing in terms of the provisions of section 217 of the **Penal Code**.

Prior to passing the sentence, the learned High Court judge ordered, on the 31st March, 2015, that the appellant undergoes an age determination procedure at the University Teaching Hospital. On the date of sentencing, the age determination report was not yet before the court. The learned High Court judge, nonetheless, proceeded to sentence the convict in the manner we indicated at the outset of this judgment.

The appellant launched this appeal principally against the sentence on two grounds. First, that it was a misdirection on the part of the sentencing court to proceed and sentence the appellant as an adult without waiting for, and considering the medical report on age determination after it ordered age determination to be done. Second, that the court misdirected itself when it sentenced the appellant to imprisonment without considering any other punishment when the medical report on age determination actually showed that the appellant could have been eighteen years and, therefore, a juvenile and a young person.

Written heads of argument were filed in court and relied upon by Mrs. Lukwesa, learned Senior Legal Counsel for the appellant. The two grounds of appeal were argued together. The main point taken by Mrs. Lukwesa was that the sentencing judge, having made the order for the appellant's age determination, should not have proceeded to sentence the appellant without considering the age determination report, as the age of the appellant at the time of sentencing would have determined how the appellant was to be

treated – whether as an adult or as a juvenile, and this would have dictated the type of sentence the judge was legally directed to give.

According to Mrs. Lukwesa, as the age determination report showed that the appellant was eighteen years or above, two scenarios were possible; first that the appellant could be eighteen years old and therefore, a juvenile in terms of section 2 of the **Juvenile Act**, chapter 53 of the laws of Zambia. Second, that the appellant was above eighteen years old in which case he could properly be treated in the manner that he was treated by the court.

Given that two inferences are possible, it was Mrs. Lukwesa's submission that the court is obliged to adopt the inference more favourable to the accused (appellant). The case of **Dorothy Mutale v. The People**[1] was cited. In the present case, the inference more favourable to the appellant was that he was eighteen years of age at the time of the age determination. Mrs. Lukwesa submitted that whether or not the report was before the court at the time of the sentencing, the court should nonetheless have pronounced itself on the issue of age for which it had ordered age determination so that

the record was complete. We were urged to uphold the appeal on this basis.

In reaction to the submissions made on behalf of the learned counsel for the appellant, Mrs. Nawa, learned Deputy Chief State Advocate, laconically stated that although she was served with the appellant's submissions the previous day, the State was in agreement with those arguments and, therefore, did not desire to make any arguments in rebuttal. In other words, the respondent believed that the grievances raised by the appellant against the sentencing judge were legitimate.

We have considered the arguments raised by the learned counsel for the appellant and have noted the non-objection to the appeal by the State. To us, it matters not that the state does not support the decision of the lower court. We are obliged to consider the propriety or otherwise of the decision or decisions alleged to have been made in error or in disregard of the law and make an assessment whether the criticism against the judge or trial magistrate were, in the circumstances, justified.

The question for determination is whether, having ordered for the determination of the appellant's age, the High Court, as a sentencing court, was obliged to consider the report on the age of the appellant before passing sentence.

Clearly, there is no issue raised by the appellant with the judgment of the learned trial magistrate, nor is there any complaint about the conviction. The whole appeal impeaches only the decision of the learned High Court judge as the sentencing court.

We note with much interest that the trial proceeded on the premise that the appellant was nineteen years old. No issue as to his age was raised before or after the commencement of the trial in the Magistrate's Court.

Section 118(1) of the Juvenile Act, chapter 53 of the laws of Zambia, requires that whenever a person who appears to be a juvenile is brought before a court for any purpose other than to give evidence, the court has an affirmative duty to "make due inquiry as to the age of that person." Failure to do so may result in the trial being declared unprocedural and, therefore, a nullity. This position

has been repeatedly reaffirmed in numerous of our decisions. In **Musonda and Another v. The People**[2], we overturned the juvenile accused's sentence of fifteen years' imprisonment with hard labour because there was evidence that the accused persons were juveniles at the time of the alleged offences, but their case had not been brought before a juvenile court. We stated in that case that at:

> **"the first indication that...the appellants might be juveniles...the trial court should immediately have conducted an inquiry as to the appellant's ages, and having found that they were both juveniles...should have ordered that the matter be heard and disposed of in the juvenile court."**

In **Davies Mwape v. The People**[3] we emphasized the significance of inquiring into an accused person's age where it appears that he or she is a juvenile. We stated in that case that where the court is unsure whether the accused person was a juvenile or an adult, the safest course to take is to carry out a due inquiry in accordance with the **Juveniles Act**.

Where a juvenile is being tried, the trial court should constitute itself into a juvenile court for purposes of hearing any charges against the juvenile, or exercising any other jurisdiction conferred on juvenile courts by statutes. In this connection, section

65 of the **Juveniles Act** is instructive. *(See also the Handbook on Juvenile Law in Zambia).*

Where the court proceeds to try a juvenile without following the procedure prescribed for such trial, the proceedings may be a nullity. In **Chipendeka v. The People**[4] an order for retrial was made. Skinner CJ observed obiter that:

> **"on the charge sheet the age of the appellant is given as eighteen years. There is no record that the court made an inquiry as to the age of the appellant. Section 116 of the Juveniles Ordinance imposes a duty on a court to ascertain the age of a juvenile on his appearing before the court charged with an offence. It appears to one that the learned magistrate was put on notice by the age stated in the charge sheet and that he should have made such inquiry. This error gave rise to further errors ... The learned magistrate has made no record that he was sitting as a juvenile court, and did not follow the procedure which a person presiding a juvenile court is bound by statute to follow ... There is no need for me to deal with this ground of appeal any further as I have already allowed the appeal against conviction on another ground. I will say by way of obiter that if it was shown to an appeal court that the person was actually a juvenile, then it might well be that the court would hold that the whole proceedings had been a nullity."**

We have already stated that in the present case, the age of the appellant was at the time of trial recorded on the charge sheet as nineteen years and, therefore, he was not a juvenile in terms of the definition of 'juvenile' under section 2 of the Juveniles Act. The trial court proceeded on this basis. As we have observed, no issue of the age of the appellant being possibly below nineteen years was ever raised. When the appellant was put on his defence, the court once again recorded the age of the appellant as nineteen years. There appears to be nothing from the record that should have put the learned magistrate on guard as regards the appellant's age and, the learned trial magistrate, as we have stated already, proceeded to try the appellant as an adult, using the usual procedures applicable to adult offenders, and convicted him on that premise. To the extent that there was nothing to prompt the alertness of the learned magistrate to the possibility that the appellant was a juvenile when the offence was committed and when he was tried, the procedure followed by the trial magistrate was, in our view, correct.

At the time of sentencing, the learned High Court judge on her own volition, and not out of any concern whatsoever raised by the appellant or his learned counsel, asked the question whether the age of the appellant had been ascertained, and thereupon proceeded to order age determination.

We have considered the procedure on committal of a convict to the High Court for sentencing as provided for in sections 217 and 218 of the Criminal Procedure Code, chapter 88 of the laws of Zambia. Under section 217(1):

> **"where, on the trial by a subordinate court of an offence, a person who is not less than the apparent age of seventeen years is convicted of the offence, and the court is of the opinion that his character and antecedents are such that greater punishment should be inflicted for the offence than that court has power to inflict, or if it is appears to the court that the offence is one in respect whereof a mandatory minimum punishment is provided by the law which is greater than that court has power to inflict, it may, after recording its reason in writing on the record of the case, commit such person to the High Court for sentence, instead of dealing with him in any other manner in which it has power to deal with him."**

In the present case, the referral to the High Court for sentencing of the appellant was done on the basis that the Subordinate Court lacked jurisdiction to inflict the sentence

prescribed under section138(1) of the Penal Code chapter 87 of the laws of Zambia as read with the Penal Code Amendment Act No. 15 of 2005. It was not done on the basis that the appellant was of the apparent age of not less than seventeen. As we have also alluded to earlier, and it bears repeating, the trial proceeded instead on the basis that the appellant was nineteen years old and, therefore, not amenable to procedures applicable to juveniles.

Once a referral for sentencing is made to the High Court in the manner the present referral was made, the High Court Judge's powers to deal with such a referral as a sentencing judge is set out in section 218 of the **Criminal Procedure Code**, chapter 88 of the Laws of Zambia. That section reads:

> **"(1) In any case where a subordinate court commits a person for sentence under the provisions of section two hundred and seventeen, the subordinate court shall forthwith send a copy of the record of the case to the High Court.**
>
> **(2) Any person committed to the High Court for sentence shall be brought before the High Court at the first convenient opportunity.**
>
> **(3) When any person is brought before the High Court in accordance with the provisions of subsection (2), the High**

Court shall proceed as if he had been convicted on trial by the High Court."

Our understanding of section 218 of the Criminal Procedure Code is that the High Court, as a sentencing court, should proceed in terms of subsection (3) to sentence the convict as if the convict had been tried by the High Court itself. The High Court, of course, does have revisionary powers under section 337 of the Criminal Procedure Code under which it can call for, and examine the record of any criminal proceedings before any subordinate court, for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded; and as to the regularity of any proceedings of any such subordinate court. In the present case, however, the High Court was by the referral requested to exercise very specified powers of sentencing the convict. There was no intimation by the learned High Court judge that she was exercising her revisionary powers when the matter was referred to her for sentencing, nor was she sitting as an appellate court. She should, therefore, have confined herself to her role as a sentencing court, having, by virtue of section 218(3) placed herself in the position of the court that tried and convicted the appellant. An

unnecessary conflict position would arise were the sentencing court to assume the revisionary or appellate jurisdiction during a referral for sentence under section 217 of the **Criminal Procedure Code**.

In our view, it was not for the learned High Court judge, constituted as a sentencing court, to embark on anything resembling a review of the trial court's judgment on the procedure followed by the trial court through the calling for a determination of the appellant's age. We have already stated that the appellant's age was not raised as an issue throughout the trial.

We do not think that having already been tried as an adult, the age of the convict was any longer of any moment. To purport to reopen the trial by questioning the age of the appellant, and therefore, the procedure adopted in trying the appellant, was to exercise revisionary powers of the High Court outside the parameters of section 218 of the **Criminal Procedure Code**. This was unprocedural, and therefore, a misdirection on the part of the learned High Court judge. It follows that the fruits of that misdirection, namely the order for ascertainment of the appellant's age, as well as the resulting report, were equally tainted with

procedural impropriety and can, therefore, not help the appellant's position.

In our view, the learned judge was right in ignoring the report on the determination of the appellant's age and proceeding to sentence the appellant on the basis of the trial record and the apparent age of the appellant which was not objected to at any time before and during the trial.

In any case, the Age Determination Report from a Radiologist at the University Teaching Hospital states that:

> **"According to the Digital Atlas of Skeletal Maturity by Vicente Gilsanz and Osman Ratib, the bone age of this patient is 18 years old or above."**

The report, as the learned counsel for the appellant argued, is capable of two different interpretations; first that the appellant was eighteen years (and probably younger at the time of the trial) in which case he was entitle to be tried by a juvenile court and special procedures applicable to juveniles apply to him, or he was an adult and properly tried by the learned magistrate as an adult. We were urged to adopt an interpretation most favourable to the appellant,

namely that he was a juvenile or young person at the time of the trial and for purposes of sentencing.

We have already stated that there was no basis for the trial magistrate to have treated the appellant as being younger than his stated age and his proceeding on this basis was not objected to. We have also already recorded our view that the learned High Court judge, as a sentencing court, should have confined herself to sentencing the convict, and therefore, that the order for determination of the convict's age was totally unnecessary. To us, this appeal cannot succeed. The appellant appears intent to take the greatest advantage of the sentencing court's lapse on what it should have not done in the first place, namely to order age determination after the conviction of the appellant by the trial court.

We note that the sentence pronounced by the learned High Court judge did not specify whether the appellant was convicted to simple imprisonment or one with hard labour.

Having regard to the seriousness of the crime of defilement and the nature of the sentence prescribed, we wish to clarify and reaffirm that the appellant's imprisonment is for eighteen years imprisonment with hard labour. The warrant for execution of sentence should be amended accordingly.

Appeal dismissed.

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G. S. Phiri
SUPREME COURT JUDGE

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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M. Malila, SC
SUPREME COURT JUDGE