IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

APPEAL № 73/2018

BETWEEN:

**KENNETH MASHEKA** Appellant

vs

**THE PEOPLE** Respondent

CORAM: **Chashi, Lengalenga** and **Siavwapa, JJA**
on 25th and 27th September, 2018 and 20th November, 2018

For the Appellant: Mr. H. M. Mweemba – Principal Legal Aid Counsel
Mr. E. Mazyopa – Senior Legal Aid Counsel

For the Respondent: Mrs. C. Mwansa – Deputy Chief State Advocate

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**J U D G M E N T**

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**LENGALENGA, JA delivered the Judgment of the Court.**

Cases referred to:

1. **MWABA v THE PEOPLE (1974) ZR 264**
2. **NSOFU v THE PEOPLE (1973) ZR 381**
3. **GIFT MULONDA v THE PEOPLE (2004) ZR 135**

4. **HOME AFFAIRS & ATTORNEY GENERAL v LEE HABASONDA (2007) ZR 207**
5. **GIBRIAN MWEETWA v THE PEOPLE (CAZ APPEAL Nº 12 OF 2017)**
6. **MUYUNDA MUZIBA & ANOR v THE PEOPLE (2012) 3 ZR 539**
7. **MUVUMA KAMBANJI SITUNA v THE PEOPLE (1982) ZR 115**
8. **KENIOUS SIALUZI v THE PEOPLE (2006) ZR 87**
9. **EMMANUEL PHIRI v THE PEOPLE (1982) ZR 71**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia – section 138(1) as amended by Act Nº 15 of 2005 and Act Nº 2 of 2011**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

This is an appeal against the conviction and sentence of twenty (20) years imprisonment with hard labour effective from date of arrest imposed on the appellant for the offence of defilement contrary to section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia as amended by Act Nº 15 of 2005 and Act Nº 2 of 2011.

The particulars of the offence were that the appellant, on a date unknown but in the month of May, 2015 at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia had unlawful carnal knowledge of a girl under the age of sixteen (16) years.

The prosecution case was anchored on the evidence of PW1, PW2, PW3 and PW4.

PW1, was the prosecutrix who was aged sixteen (16) years at the time of trial, there was no need for a *voire dire* to be conducted. Her evidence was to the effect that, on an unknown date in May, 2015 around 20:00 hours she was at home when she received a phone call from the appellant. At that time she did not know the appellant's name. She only knew that he was her cousin's friend and their neighbour.

According to PW1's evidence, the appellant told her to go to Nakatindi market to collect items for her cousin. When she arrived at Nakatindi market, the appellant told her that he wanted to have sex with her and that he did not have anything to give her. He forced her to have sex with him. She did not tell the appellant her age and that she was fifteen years at that time in May, 2015. PW1 was born on 16th September, 1999.

It was PW1's further testimony that in the month of June she missed her monthly period. When another month passed without her having her monthly period, she realised that she was pregnant and she confronted the appellant who told her to have an abortion. Thereafter, PW1 asked her

grandmother to look for drugs for her to terminate the pregnancy. However, her grandmother took her to the clinic where it was confirmed that she was three months pregnant.

According to PW1, her grandmother informed her mother who was in Kasumbalesa at that time. She had left PW1 with her brother PW2. PW1 was advised to report the matter to the police which she did. She was accompanied by her grandfather to Dambwa Police Post where she was issued with a medical report form to undergo a scan which she did.

The medical examination report exhibited as **"P4"** confirmed that PW1 was sixteen (16) weeks pregnant and fifteen (15) years old at that time.

In cross-examination, PW1 stated that the appellant neither proposed to her nor asked her age. She said that he forced her to have sex with him. She further stated that she told the appellant that she was pregnant in August.

PW2 was James Siamutema whose evidence was that his mother left him with PW1 and during that time he got a contract for four months. PW1 used to remain at home and one day when he was off duty, PW1 revealed that she was pregnant. According to PW2's testimony, at that

time PW1 did not disclose who was responsible for her pregnancy. He informed the Court that his sister was fifteen (15) years at that time. He only learnt who was responsible after a family meeting that he was a neighbour.

It was PW2's further testimony that after discussions, the appellant admitted that he was the one who impregnated PW1.

PW3, Anne Mukamba's evidence was to the effect that she has three children and among them PW2 and PW1 who was born on 16th September, 1999. As proof of PW1's age, PW3 exhibited before the Court, PW1's school identity card and an affidavit.

It was PW3's further evidence that in April she went to Kasumbalesa and left PW1 and PW2 at home. Whilst she was there, in July she received a phone call that PW1 was pregnant. When she inquired who was responsible for PW1's pregnancy, she was told that it was the appellant who was the next door neighbour. PW3 did not know him by name.

Later on in October when PW3 returned from Kasumbalesa, she summoned the appellant and told him that he should be paying them K300.00 monthly. According to PW3 the appellant accepted that he was responsible for PW1's pregnancy but he was not supportive. At the end of

that month he fled from his home and PW3 reported the matter to the police. The appellant was later spotted by PW3 when she was on her way to the market and he was subsequently apprehended.

PW4, Sergeant Martha Mfala of Dambwa Central Police Station investigated the case. Her evidence was to the effect that when she interviewed the appellant he freely and voluntarily admitted the charge in the Lozi language. She later charged and arrested him for the offence of defilement as the prosecutrix was fifteen years old at the time the offence was committed.

It was also PW4's evidence that she was led to the crime scene by the appellant, where at that time a house was being constructed.

The appellant did not challenge PW4 in cross-examination on her testimony.

In his defence, the appellant testified that in April he called the prosecutrix who lived in the same neighbourhood as he did. He proposed to her and she accepted and in the middle of June, the prosecutrix told him that she was pregnant and he refused to accept responsibility but she insisted that he was the one who impregnated her.

However, in cross-examination, the appellant informed the Court that he had sex with the prosecutrix at Nakatindi and also at Mulobezi rail line.

That is the evidence upon which the appellant was convicted and sentenced to 20 years imprisonment with hard labour. Dissatisfied with the Court's judgment, he now appeals against the said conviction and sentence on the following grounds:

1. **The learned trial Magistrate erred in law and in fact when he failed to direct his mind to the proviso in arriving at a conviction.**

2. **The learned trial Magistrate misdirected himself in law when he delivered a judgment that fell short of the standard required under section 169 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

In support of the grounds of appeal, Mr. Humphrey Mweemba, Principal Legal Aid Counsel filed heads of argument on which he entirely relied.

With regard to ground one, he submitted that the record indicates that the appellant pleaded guilty to the offence on the basis that he was told by the prosecutrix that she was born in 1997 which meant that she was above fifteen years at the time of commission of the offence.

He further submitted that the learned trial Magistrate having earlier explained the proviso to section 138(1) of the Penal Code to the appellant,

entered a plea of not guilty in respect of the appellant. He stated that this section of the law has provided a statutory defence that the Court is mandated to consider, hence the requirement to explain the proviso to the accused.

To support this position, he placed reliance on the following cases, **MWABA v THE PEOPLE[1],** **NSOFU v THE PEOPLE[2]** and **GIFT MULONDA v THE PEOPLE[3].**

Mr. Mweemba submitted that the appellant's defence in the record of appeal discloses that he did not raise the issue of the reasonable belief that the age of the prosecutrix was above fifteen (15) years. It was contended that, however, it was still mandatory for the Court to have considered a successful defence to the appellant under the proviso. It was argued that the appellant having raised that in his plea, placed a duty on the Court to consider the statutory defence in analyzing the evidence and applying the law to the facts.

It was submitted that the judgment however, did not reflect such consideration and Mr. Mweemba submitted that the Court's failure to make such consideration was fatal to the proceedings and prejudicial to the appellant.

To fortify his argument, he drew the Court's attention to the fact that the prosecutrix in her evidence indicated that she was fifteen (15) years old at the time of the sexual encounter. He further submitted that this thereby made it a border line case that should have mandated the learned trial court to draw the appellant's attention to the proviso and to explain why it was not available to him as a statutory defence.

With respect to ground two, apart from section 169 of the Criminal Procedure Code, Mr. Mweemba also relied on some decided cases to support the appellant's contention that the trial court's judgment fell short of the required standard.

As a starting point in arguing this ground, he reproduced the said section 169(1) of the Criminal Procedure Code for ease of reference as follows:

> **"169(1) The judgment in every trial in any court shall except as otherwise expressly provided by this Code, be prepared by the presiding officer of the court and shall contain the point of or points for determination and decision thereon and the reasons for the decision and shall be dated and signed by presiding officer in open court at the time of pronouncing it."**

Thereafter, he referred the court to the case of **HOME AFFAIRS & ATTORNEY GENERAL v LEE HABASONDA**[4] in which the Supreme Court gave guidelines on judgment writing as follows:

> **"Every judgment must reveal a review of the arguments and submissions of the court on the facts and the application of the law and authorities, if any, to the facts."**

Mr. Mweemba further relied on this Court's case of **GIBRIAN MWEETWA v THE PEOPLE**[5] in which guidance on what should be contained in a judgment was also given.

He also called in aid the case of **MUYUNDA MUZIBA & ANOR v THE PEOPLE**[6], where the Supreme Court considered the importance of a judgment and stated thus:

> **"We must add, from the outset, that the judgment of the trial court must be an important part of any record of appeal. There are a number of previous decisions that this court has made which clearly show how important a judgment of a trial court is to the entire life of a criminal case."**

In that case, the Supreme Court further referred to its earlier decision in the case of **MUVUMA KAMBANJA SITUNA v THE PEOPLE**[7] in which it held as follows:

> **"Judgment of the trial court must show on its face that adequate consideration has been given to all relevant material that has been placed before it, otherwise an acquittal may result where it is not merited."**

In the present case, Mr. Mweemba submitted that it is their contention that the judgment on record is defective as it does not meet the criteria and required standard in terms of the provisions of the law and *stare decisis*. He further submitted that even though the judgment shows a summary of the evidence of the witnesses, findings of fact and statement of the law in relation to the facts, however, it lacks a proper analysis and thereby falls short of the required standard as it has not taken into consideration vital pieces of evidence.

He submitted that the omission of the analysis and consideration therefore renders the judgment to be defective as it falls short of the required standard in terms of section 169 of the Criminal Procedure Code.

Based on the arguments advanced, he humbly requested this court to allow the appeal, quash the conviction, set aside the sentence and to release the appellant forthwith.

Mrs. Monica C. Mwansa, Deputy Chief State Advocate relied on the filed respondent's heads of argument.

In response, she submitted that the State supports the conviction as the case was proved beyond reasonable doubt.

With regard to ground one relating to the proviso to section 138(1) of the Penal Code, she submitted that it was explained to him at the right time to enable him to prepare a defence. She relied on the case of **GIFT MULONDA v THE PEOPLE** that was cited by the appellant's Counsel and in which the Court held *inter alia* that:

> **"it is a rule of practice that the proviso to section 138 of the Penal Code should be explained to an accused person. Failure to explain the proviso is fatal."**

She submitted that the proviso was explained and that no prejudice was occasioned to the appellant. Mrs. Mwansa submitted that this is confirmed in the record of proceedings and by the trial court's entry of a plea of not guilty. She further submitted that the court by so doing accorded the appellant an opportunity to raise and fall on the statutory defence. To support that position, she relied on the case of **NSOFU v THE PEOPLE** in which the Court observed as follows:

> **"... even when an accused pleads not guilty, it is desirable that the proviso be explained before plea but certainly at some early stage in the proceedings so that the accused may**

**have the opportunity to direct his cross-examination of the prosecution witnesses to the question of the girl's age....."**

With regard to the present case, Mrs. Mwansa submitted that not only did the trial court explain the proviso to the appellant, but the appellant even attempted to direct his cross-examination of PW1, the prosecutrix pertaining to her age. She argued that therefore no irregularity arose with regard to the proviso, as the appellant perfectly understood his rights under the proviso.

In support of this argument, she referred this Court to the case of **MWABA v THE PEOPLE** referred to in **GIFT MULONDA v THE PEOPLE,** where the Court held that:

**"in borderline cases, in terms of age, failure to explain the statutory defence to an accused person is an irregularity if there has been no prejudice."**

Mrs. Mwansa acknowledged that this case is a proper borderline case in terms of age and she submitted that the trial court properly directed its mind to the law when it explained the proviso to the appellant. She further submitted that there was no irregularity which may be subjected to some cure if any prejudice arose.

It is her contention that the trial court could not have reasonably been expected to deal with a defence the appellant had not raised, unless some evidence had been presented to support the defence. She submitted that the trial court cannot be faulted for not analyzing a defence that had not been raised. (See **KENIOUS SIALUZI v THE PEOPLE**[8]).

She prayed that this Court dismisses this ground of appeal.

In response to ground two, Mrs. Mwansa submitted that the record indicates the points for determination and that one of them is that the prosecution must satisfy the court beyond reasonable doubt on every ingredient of the offence. She submitted that the court's indication of the points of determination is supported by the fact that the court later made a determination as the judgment indicates. She further submitted that the judgment discloses the reasons for the decision that was arrived at. She gave an example of the court's reliance on the appellant's confession that was not challenged.

She argued that the judgment satisfied the requirements under section 169(1) of the Criminal Procedure Code and cannot be said to be defective. She submitted that the appellant failed to identify specific pieces

of evidence that were not analyzed by the trial court to warrant the judgment being challenged.

It is her contention that failure to analyse a piece of evidence does not and cannot render a judgment defective so as to consider it to fall short of the requirements under section 169(1) of the Criminal Procedure Code. She submitted that such failure may not amount to a ground of appeal that can be advanced in an appellate court.

She prayed that ground two be equally dismissed for being devoid of merit.

In concluding her arguments, Mrs. Mwansa prayed that this Court dismisses the appeal and upholds the conviction and sentence meted out to the appellant.

We have considered the evidence on record, the judgment appealed against, the submissions by both Counsel, together with the authorities cited and the sentence passed by the court below.

With regard to ground one the contention by Mr. H. Mweemba, appellant's Counsel is that the learned trial Magistrate failed to direct his mind to the proviso. Upon perusal of the record of proceedings, we observed that the proviso was explained to the appellant at the time he

took plea. The fact that the appellant was fully aware of the proviso explained to him by the learned trial Magistrate is supported by the fact that he proceeded to tell the court that he was told by the complainant that she was born in 1997. Thereafter, the court entered a plea of not guilty in respect of the appellant as opposed to the plea of guilt that ought to have been entered in view of his earlier admission of guilt.

We, however, observed from the evidence on record that when the appellant was cross-examining PW1, the prosecutrix, he did not challenge her on the year of birth that he alleged was given by her. In fact, she challenged him on the issue of her age by stating that he did not ask her age.

We further considered Mr. Mweemba's argument that in view of the appellant's plea, the court had a duty to consider the statutory defence in analyzing the evidence and applying the law to the facts. From the evidence on record, we observed that even though the proviso was explained to the appellant at the plea stage, at the defence stage, he did not rely on the defence he had earlier raised that the prosecutrix told him that she was born in 1997. Apart from that, the appellant did not

challenge the confession statement at both the prosecution and defence stages.

We accept Mr. Mweemba's submission that it would have been desirable for the trial Magistrate to remind the appellant as he was unrepresented, to address the issue. However, we are of the considered view that since the proviso was earlier explained to the appellant, the learned trial Magistrate's failure to remind him at the defence stage was neither fatal to the prosecution case nor prejudicial to the appellant's case as contended by his Counsel. The failure to explain the proviso to section 138 envisaged and referred to in the cited cases of **NSOFU v THE PEOPLE, MWABA v THE PEOPLE** and **GIFT MULONDA v THE PEOPLE** is where it is not explained and it results in the appellant being denied the opportunity to make out a defence which that proviso creates.

In *casu,* it is evident that the appellant understood the proviso and even attempted to challenge the prosecutrix in cross-examination about the issue of her age but he did not do a very good job as she bluntantly answered that he neither proposed nor asked her age and that he forced her to have sex with him.

The evidence on record shows that the appellant admitted having sex with the prosecutrix. We found that the said evidence is overwhelming against the appellant as he impregnated the prosecutrix. Therefore, the commission of the offence is supported by medical evidence.

Furthermore, the identity of the offender is not disputed as the appellant did not challenge the confession statement. We, therefore, find that there was corroboration to the commission of the offence and the identity of the offender as required in sexual offences in accordance with the Supreme Court's decision in the case of **EMMANUEL PHIRI v THE PEOPLE[9].**

The appellant having admitted having had sex with the prosecutrix, the danger of false implication of the appellant was eliminated, as the unchallenged confession statement is admissible.

For the reasons aforestated, we find that the learned trial Magistrate properly directed his mind to the proviso to section 138(1) of the Penal Code in arriving at a conviction in this case. Ground one therefore fails as it is devoid of merit.

We turn to ground two which attacks the judgment of the trial court on the basis that it does not comply with the requirements or standard set

out in section 169(1) of the Criminal Procedure Code. This provision of the law requires the Presiding Officer of the Court, in this case the trial Magistrate, or a Judge to include in the judgment the point or points for determination, the decision and reasoning of the Court in arriving at the decision. It also requires the decision to be dated and signed at time of pronouncement.

We examined the judgment appealed against to determine whether or not it offends section 169(1) in terms of compliance. The said judgment is found at pages 17 to 24 of the record of proceedings. The points for determination are found at pages 18 to 19 of the record where the learned trial Magistrate took the trouble to state the offence, particulars of offence and the proviso to section 138(1) of the Penal Code as amended by Act Nº 15 of 2005 and Act Nº 2 of 2011. He cautioned himself of the prosecution's duty or onus placed on the prosecution to prove its case against the accused beyond reasonable doubt and the court's duty to resolve any doubt in the accused's favour. Among the points for determination that he set out are the prosecution's duty to establish the following:

> **"1. That the accused had carnal knowledge of a girl under the age of sixteen years.**

when it delivered the judgment in open court at Livingstone on 21st January, 2016. It also signed and date stamped the judgment.

Therefore, based on our observations which we have highlighted, we agree with Mrs. Monica Mwansa's submissions that the judgment met the requirements under section 169(1) of the Criminal Procedure Code. Inspite of the judgment's brevity, we found that the requirements were encompassed.

We, accordingly, find that ground two lacks merit and we equally dismiss it.

Both grounds being unsuccessful, the net result is that the appeal fails and it is dismissed. Both conviction and sentence are accordingly upheld.

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**J. Chashi**
**COURT OF APPEAL JUDGE**

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**F. M. Lengalenga**
**COURT OF APPEAL JUDGE**

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**M. J. Siavwapa**
**COURT OF APPEAL JUDGE**