IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 193/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

EDSON CHISENGA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: *Chisanga, JP, Chishimba, Sichinga, JJA*
On the 27th March, 2018, 11th April, 2018, and 22nd May, 2018

For the Appellant: *Mr. H.M. Mweemba – Principal Legal Aid Counsel*
Mrs. G. Imbwae – Messrs Dove Chambers

For the Respondent: *Mrs. M. Bah-Matandala – Deputy Chief State Advocate*

JUDGMENT

Sichinga, JA, delivered the Judgment of the Court

Cases referred to:

1. *Gideon Hammond Millard v. ThePeople (1998) S.J. 34 (SC)*
2. *The People v. John Kapalu Kanguya (1979) ZR 288 (HC)*
3. *Ezara Moyo v. The People (1981) ZR 173 (SC)*
4. *Sikota Wina and Princess Nakatindi Wina v. The People (1996) S.J. (SC)*
5. *Kelvin Mwinga and another v. The People Appeal No. 10, 11 of 2017 (CA)*

Legislation referred to:

1. *The Penal Code Chapter 87 of the Laws of Zambia*
2. *Constitution of Zambia Chapter 1 of the Laws of Zambia*

Edson Chisenga, the appellant, appeared before the subordinate court of the first class sitting at Serenje charged with one count of the offence of Defilement contrary to **Section 138(1) of the Penal Code**[1]. The particulars of the offence alleged were that on the 15th day of January, 2016 at Serenje in the Serenje District of the Central Province of the Republic of Zambia, the appellant had unlawful carnal knowledge of a girl below the age of sixteen (16) years. He admitted the charge and was convicted. Thereafter he was committed to the High Court for sentencing. On the 27th September, 2017, the appellant was sentenced to 18 years imprisonment with hard labour by the High Court. He has appealed against conviction and sentence.

The statement of facts alleged that the prosecutrix was defiled by the appellant on unknown dates in March, 2015, December, 2015 and on 15th January, 2016. It was alleged that on the first occasion, the appellant invited the prosecutrix, his granddaughter, to accompany him to the bush. Whilst there he had carnal knowledge of her and promised to give her some money for her silence failure to which he would beat her. The prosecutrix did not

tell anyone but her grandmother suspected something had happened to her and confronted her with her suspicions. The girl admitted that the appellant had sex with her. The mother to the prosecutrix was informed and she confronted the appellant but did not report the matter to the police.

On the second occasion in December, 2015, the appellant allegedly had carnal knowledge of the prosecutrix in his house during the night. On 15th January, 2016, the appellant again had carnal knowledge of the prosecutrix in her bedroom whilst his wife was in a drunken state. The child shouted for help but owing to her drunken state, the grandmother did not come to her aid. The prosecutrix informed her mother about this the following morning. The appellant was confronted by the mother to the prosecutrix and other family members. He admitted to having had sexual intercourse with the prosecutrix. The matter was reported to Serenje police where the prosecutrix was issued with a medical report and subsequently treated at Serenje District Hospital. The appellant was apprehended by members of the Neighbourhood Watch who conveyed him to Serenje Police. There, he admitted to

committing the charge. He was arrested and charged with the offence of defilement.

The record states that the charge was read to him and the proviso explained to him to accord him a defence. The appellant admitted the charge and said he understood the charge. The court then entered a plea of guilty. After the facts were read, and the appellant confirmed they were correct. The court convicted the appellant and remitted the case to the High Court for sentencing. He was sentenced to 18 years with hard labour.

Dissatisfied with conviction and sentence by the lower court, the appellant has advanced two grounds of appeal as follows:

1. The learned trial magistrate erred both in law and in fact when he failed to ask necessary questions that would have disclosed the ingredients of the offence; and
2. The learned trial magistrate was in error when he admitted the facts when they disclosed more than the offence to which the appellant took plea and admitted.

At the hearing of the appeal, Mr. Mweemba, on behalf of the appellant, relied on the written heads of argument filed on 27th March, 2018. He referred us to the case of **Gideon Hammond Millard v. The People**[1] in which the Supreme Court stated that –

> ***"Where the accused is not represented, it is necessary for the court to ask certain questions to which the accused must respond in order to ensure particular ingredient of the offence are disclosed."***

Mr. Mweemba submitted that where an accused is represented, the case may be different and the questions going to the ingredients of the offence may not be necessary. He submitted that in the instant case the appellant was not represented and it was necessary for learned magistrate to have gone a step further to ensure that the appellant knew exactly what he was taking plea to and what in fact he was admitting to. Counsel submitted that it was doubtful that the plea is unequivocal as it does not disclose the ingredients of the offence. He submitted that this was a proper case for the court to order a re-trial, or to acquit the appellant and set him at liberty as there was no evidence upon which a conviction was obtained.

With respect to ground two counsel submit that it is a principle of law that trial must be fair and an accused must be given a fair hearing as per **Article 18 of the Constitution of Zambia**. [2] We were referred to the facts in this matter which show that the appellant took plea to only one count of defilement contrary to **Section 138 of the Penal Code supra**. That however, the facts disclosed more than one offence and went on to state that the appellant had carnal knowledge with the prosecutrix on several days which he was not charged with nor ever took plea to. It is submitted that this was prejudicial to the appellant and the Court should not have gone to admit these facts.

It is further submitted that these were wrong in principle and should be excluded and expunged from the record.

In response to ground one, Mrs. Bah-Matandala relied on respondent's submissions filed on 28th March, 2018. It is submitted that the trial court did not err in law and fact as it asked the necessary questions which disclosed the ingredients of the offence of defilement. That the trial court discharged its duty by reading

the charge and explaining it fully. Counsel submitted that in *casu* "fully" meant that each and every ingredient of the offence was explained to the appellant. Further, that the proviso was also read and explained to the appellant as a defence to the prosecutrix's physical appearance, and the appellant thereafter admitted the charge which he understood. Mrs. Bah-Matandala submitted that the plea was unequivocal because the appellant did not give any explanation as to why he defiled the prosecutrix aged twelve (12) years old but simply admitted the charge upon being informed of the elements of the offence he faced.

Counsel submitted that the appellant understood the charge and that is why he admitted to it. She submitted that it is unmistakably clear from the statement offence, in particular, the statements relating to the questions by the court and the particular response by the appellant in relation to the offence that the full ingredients of the offence were put forward to the appellant unequivocally. Thereafter a plea of guilty was entered. Counsel submitted that the statement of offence and particulars of the offence on record clearly show all the ingredients of the offence which the court explained.

The case of **The People vs. John Kapalu Kanguya**[2] was referred to on this principle.

In response to ground two it was submitted that the statement of fact is not at all defective. Learned counsel submitted that the statement of facts was admissible into evidence as it established the ingredients of the offence committed by the appellant and disclosed that it was the appellant who committed the offence. That the offence was committed more than once, and yet he only got one count for the defilement of his grandchild aged only 12 years old. Counsel prayed that we find no merit in the appeal, and uphold the findings of the trial could in relation to both conviction and sentence.

We have carefully considered the whole record of appeal as well as the written heads of argument. We shall deal with both grounds of appeal simultaneously. As we see it the main issue for consideration is whether the plea was properly taken in the magistrate's court.

The record shows that the appellant, who was unrepresented, appeared in court for plea on 3rd February, 2016. The record then reveals the following:

> "***Court:*** ***reads the charge and explains fully and the proviso is read and explained to the accused that it is a defence if the her appearance.***
>
> ***Accused:*** ***admitted the charge and understands the charge.***
>
> ***Court:*** ***enters a plea of guilty."***

We agree with the authority cited by Mr. Mweemba to the effect that where an accused is not represented, it is necessary for the court to ask questions to which the accused must respond in order to ensure particular ingredients of the offence are disclosed.

In *casu*, whilst the record shows that the charge was read out, and the proviso was fully explained, it does not disclose whether questions were put to the appellant, disclosing the particular ingredients of the offence of defilement. It was submitted by Mrs. Bah-Matandala that the particular responses by the appellant in relation to the ingredients of the offence were shown in the

statement of offence. Counsel relied on the case of **The People v. John Kapalu Kanguya, supra**. Whilst we are not bound by that case being a High Court decision, it does not, in fact, support the respondent's position. In that case, the accused was charged with driving a motor vehicle under the influence of intoxicating liquor or drugs contrary to section 198 of the Roads and Road Traffic Act Cap 766. Upon being charged he said, "I understand the charge, I plead guilty." Thereafter the court recorded a plea of guilty. The facts were read out and he admitted them to be correct. It was held in that case that the plea was equivocal because the magistrate should have satisfied himself that the accused admitted each and every ingredient of the offence with which he was charged, before accepting a plea of guilty.

In the case of **Ezara Moyo v The People,**[3] the appellant was convicted of theft of a motor vehicle. When called upon to take plea he said:

> ***"I understand the charge. I admit the charge. I stole the motor vehicle in question."***

The contents of social welfare reports were tendered in evidence and revealed that the appellant and his co-accused had taken the vehicle for a "joy ride". The Supreme Court held *inter alia:*

> ***"The words "I stole" do not constitute an unequivocal plea of guilty to the offence of theft, even where an accused person states that he understands the charge and admits the offence."***

In *casu*, we hold that the plea was not properly taken because the ingredients of the offence were not disclosed. Further, even though the statement of facts were admitted this would not cure the defective plea taken without disclosure of the questions asked.

With respect to the statement of facts at page 4 of the record, we note that the appellant was only charged with one count of defilement. However, three counts are disclosed in the statement to which he did not admit, having only been charged with one count. We agree with counsel for the appellant, that he was not charged with more than one count and never took plea to several counts. Our view is that a statement of facts should not contain evidence of facts which an accused person has not pleaded guilty to. By

admitting these facts into evidence the learned trial magistrate misdirected himself in law because the appellant was charged with one count of defilement.

In the view we have taken, we set aside the conviction and sentence, and we send the matter back to the subordinate court for the plea to be retaken.

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F.M. CHISANGA
JUDGE PRESIDENT

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F.M. CHISHIMBA
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE