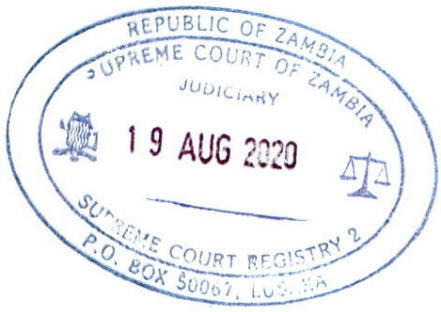
IN THE SUPREME COURT OF ZAMBIA **SCZ APPEAL NO. 7/2020**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:



JOSHUA LUNGU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
on the 14th July, 2020 and 19th August, 2020

For the Appellant: Ms. E.I. Banda, Senior Legal Aid Counsel

For the Respondent: Mrs. Muyoba-Chizongo, State Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Mwanza (AB) vs. The People (1973) Z.R. 432**

Legislation referred to:

1. **Section 122 of the Juveniles Act cap 53 of the Laws of Zambia**
2. **Section 213 of the Criminal Procedure Code Cap 88 of the Laws of Zambia**

The Appellant was convicted of the offence of defilement by the Subordinate Court sitting at Kitwe. The record shows that initially the appellant was charged with the offence of indecent assault. It

was alleged that on 27th January, 2012 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, he unlawfully and indecently assaulted his cousin, a girl aged 12 years. Upon conviction, the matter was remitted to the High Court where he was sentenced to 40 years imprisonment with hard labour by Mulongoti J (now in the Court of Appeal).

During trial, the prosecutrix gave evidence on oath after a *voire dire* was conducted by the trial magistrate. It was established by the prosecution that in January 2012 PW1, the aunt to the prosecutrix discovered that the prosecutrix had sores on her private part. The prosecutrix revealed that the appellant had defiled her four times in his house. He threatened to kill her if she revealed what he had done.

The prosecutrix was taken to the hospital for medical examination where it was confirmed that she had been defiled and she tested HIV positive.

At the close of the prosecution case, the trial court delivered a rather confusing ruling. In one breath he acquitted the appellant of the offence of indecent assault and put him on defence for the

offence of defilement and this was purportedly in compliance of Section 213 of the Criminal Procedure Code.

In his defence, the appellant completely denied any wrongdoing and merely talked about his arrest on the 7th April, 2012. He informed the court that he failed to challenge the testimony of the prosecution witnesses as he was absent minded.

In his judgment, the trial magistrate mentioned that in accordance with the provisions of Section 213 of the Criminal Procedure Code after putting the appellant on defence for the offence of defilement, and on the appellant's request, the doctor (PW4) was recalled for further cross-examination by the appellant. However, the record does not disclose any of this. In a nutshell, the trial magistrate found the prosecutrix to be a credible witness and convicted the appellant of the offence of defilement.

The trial magistrate remitted the record for sentencing to the High Court. As stated herein, the appellant was sentenced to 40 years imprisonment by Mulongoti J after she satisfied herself that the trial magistrate had properly conducted a *voire dire* and

properly analysed the evidence. She also considered the fact that the prosecutrix was HIV positive.

Ms. Banda learned Counsel for the appellant advanced two grounds of appeal. The two grounds attack the trial court for failing to comply with Section 122 of the Juveniles Act: that the *voire dire* was defective and that the conviction was based on the evidence of a child witness that lacked corroboration as to the commission of the offence and the identity of the offender.

At the hearing of the appeal, we specifically requested Mrs. Muyoba-Chizongo to address us on the ruling delivered by the trial magistrate at the close of the prosecution case as we considered it to be the determining factor as to whether this appeal had merit or not. We will produce the ruling of the trial court shortly in this judgment.

Mrs. Muyoba-Chizongo submitted that the trial magistrate erred when he acquitted the appellant for the subject offence and put him on defence for the offence of defilement. However, she noted that the trial magistrate partially complied with Section 213 of the Criminal Procedure Code when he allowed the appellant to

recall the doctor. She opined that partial compliance of Section 213 of the Criminal Procedure Code by the trial magistrate was not fatal to the prosecution case.

We now address our minds to the ruling delivered by the trial magistrate at the close of the prosecution case and it reads as follows:

> **"I have heard the prosecution's evidence and I have considered the offence the accused stands charged with. The evidence before me discloses the offence of defilement and not indecent assault. I am satisfied that the evidence before me established a prima facie case on defilement as such I acquit the accused on the offence of Indecent Assault contrary to Section 137 of the Penal Code and put you on your defence for the offence of defilement contrary to Section 138 in line with Section 213"**

The procedure adopted by the trial magistrate is not provided for under the Criminal Procedure Code. It was highly irregular and prejudicial to the appellant who was unrepresented, for the trial magistrate to acquit him of the charge of indecent assault which he was facing and then put him on defence on the more serious offence of defilement. The correct procedure is that the trial magistrate should have either acquitted the appellant or put him on his defence – to do both was an injustice to the appellant. More

importantly, the trial magistrate should have allowed the appellant to plead to the new charge of defilement.

The record shows that the trial magistrate invoked Section 213 of the Criminal Procedure Code, when he substituted the charge of indecent assault for that of defilement. Section 213 (1) states that:

> **213. (1) Where, at any stage of a trial before the accused is required to make his defence, it appears to the court that the charge is defective either in substance or in form, the court may, save as in section two hundred and six otherwise provided, make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.**
>
> **Provided that, where a charge is altered under this subsection-**
>
> **(i) the court shall thereupon call upon the accused person to plead to the altered charge;**
>
> **(ii) the accused may demand that the witnesses, or any of them, be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.**

A perusal of the record shows that the trial magistrate only complied with the second paragraph to the proviso but failed to

comply with the first paragraph to the proviso which is couched in mandatory terms. In addition, the trial magistrate had already acquitted the appellant on the charge of indecent assault and yet on the same facts, he put the appellant on his defence on a charge of defilement. What is the effect of the trial magistrate's ruling? On the failure by the trial magistrate to allow the appellant to plead to the charge of defilement, we had occasion to deal with a similar situation in the case of **Mwanza (AB) vs. The People**[1] and we held that:

> **(1) Where a new count is added under section 213 of the Criminal Procedure Code the failure to take plea to such new count is fatal to the trial of that count.**

In this case, the substituted charge of defilement is more serious and carries a stiffer punishment and the appellant was unrepresented – clearly he was deprived of a fair trial. In line with the position we took in the case of **Mwanza (AB) vs. The People** the fact that the appellant did not plead to the fresh count was fatal to the prosecution case apart from the fact that he was acquitted in the same case. We take the view that had the sentencing judge

properly addressed her mind to the proceedings before the Subordinate Court she would not have upheld the conviction.

In conclusion, as the appellant was convicted of a new count to which he did not plead, it is futile for us to consider the grounds of appeal raised by Ms. Banda. It follows, therefore, that the conviction is procedurally wrong, we quash it as well as the sentence. The appellant is acquitted forthwith.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE