

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

APPEAL NO. 27,28,29,30
/2020

BETWEEN:

ABDOUL SOUL

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: CHISANGA, JP, SICHINGA AND NGULUBE, JJA.

On 25th August and 2nd September, 2020.

For the Appellant: *Mrs M. K. Liswaniso, Legal Aid Counsel,
Legal Aid Board.*

For the Respondent: *Mr C. Sakala, State Advocate,
National Prosecution Authority.*

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Ilunga Kabala and John Masefu vs The People (1981) Z.R.103*
2. *Emmanuel Phiri vs The People (1978) Z.R.79*
3. *Gideon Hammond Millard vs The People (1998) S.J. 34 (SC)*
4. *Mwaba vs The People (1974) Z.R. 264*
5. *Gift Mulonda vs The People (2004) Z.R.135*

Legislation referred to:

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

Introduction

1. The appellant was convicted of the offence of defilement contrary to section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia as read with Act Number 15 of 2005 and Act Number 2 of 2011. The particulars of the offence are that Abdoul Soul, on an unknown date but between 1st and 2nd September, 2016 at Kalulushi in the Kalulushi District of the Copperbelt Province of the Republic of Zambia had unlawful carnal knowledge of FK, a girl under the age of sixteen years.
2. When the matter was committed to the High Court for sentencing, the appellant was sentenced to twenty years imprisonment with hard labour with effect from 2nd September, 2016, the date of his arrest.

Evidence before the trial court

3. The prosecution's case in the court below was anchored on the evidence of PW1, PW2 and PW3. According to PW1, the prosecutrix, on 1st September, 2016 at about 20:00 hours, she was in the company of Mama Zyambo and Kufa Zyambo who were supposed to take her to her sister's house. On the way, they met three young men. The prosecutrix went ahead and left Mama Zyambo and Kufa Zyambo talking to the young men.

4. Soon thereafter, Mama Zyambo and Kufa Zyambo went to where the prosecutrix was and told her that they were going to a funeral. They asked her to remain with the young men but the prosecutrix refused to do so. Nevertheless, the three young men got her and dragged her to a shelter in a nearby market and as this was happening, Mama Zyambo and Kufa Zyambo looked on. The young men pushed the prosecutrix, made her lie down on the ground and undressed her.
5. Thereafter, one of the young men defiled her and after that, the appellant also defiled her. After a while, a motor vehicle drove by and parked. The driver beamed light at the shelter where the prosecutrix was defiled and the three young men ran away. The prosecutrix shouted for help and her father, who was within the market heard her shout and went to her aid.
6. When her father arrived at the scene, one of the young men confronted him and stated that the prosecutrix was his wife and in the process, he hit the prosecutrix's father. The young man was then apprehended by the Council Police and in the course of investigations, he revealed that he and his friends gave K100.00 to Mama Zyambo and Kufa Zyambo so that they could have unlawful carnal knowledge of the prosecutrix.

7. The second witness for the prosecutrix, Reuben Kasongole was the prosecutrix's father. His testimony was that on 1st September, 2016, he was at the market at about 21:00 hours when he heard a person shouting for help. He recognized the voice as his daughter's and rushed to where the noise was coming from. He saw his daughter running and that two boys were chasing her. When he got to where his daughter was, a young man confronted him in an effort to get the prosecutrix and stated that she was his wife. When PW2 asked when he married the prosecutrix, the young man punched him. He was subsequently apprehended by the Council Police. PW3, Detective Sergeant Mundia was the arresting officer. In the course of investigations, she came across a medical report which she tendered before the court.
8. In his defence, the appellant stated that he was falsely accused of having defiled the prosecutrix, as he was never at the scene where the alleged defilement occurred. The appellant denied having unlawful carnal knowledge of the prosecutrix and that he was not with her on the material night. The learned trial magistrate found that the prosecutrix was defiled by the appellant after Mama Zyambo and Kufa Zyambo got K100.00 from the appellant and his colleagues.

9. In sentencing the appellant, the learned High Court Judge noted the fact that at the time of taking plea, the learned trial Magistrate did not explain the proviso to section 138(1) of the Penal Code to the appellant. The Court was of the view that the appellant pursued a line of defence which was inconsistent with a defence under the proviso and concluded that the appellant's conviction was secure as he was not prejudiced by the fact that the statutory defence contained in the proviso to section 138(1) of the Penal Code was not explained to him at the time of taking plea. The court found that the conviction was well founded and accordingly upheld it. The appellant was sentenced to twenty years imprisonment with hard labour.

Ground of Appeal and Heads of Argument thereof

10. Dissatisfied with the conviction and sentence, the appellant lodged an appeal in this court advancing the following ground of appeal-
- The Trial Judge erred in law and fact when he found that there could not have been any mistaken identity with regard to the identification of the appellant as the person who defiled the prosecutrix in this matter.**
11. In arguing the sole ground of appeal, it was submitted that there could have been mistaken identity with regard to the identification

of the appellant as the person who defiled the prosecutrix. It was submitted that the prosecutrix did not know the appellant and was seeing him for the first time that evening. Counsel argued that no identification parade was conducted to test the prosecutrix's identification of her assailants and that since this was not done, the possibility of honest mistake was not ruled out.

12. We were referred to the case of ***Ilunga Kabala and John Masefu vs The People***¹ on the objective of an identification parade being that of testing a witness's ability of identifying a person that the witness claims to have previously seen. It was contended that failure by the arresting officer to conduct an identification parade was procedurally wrong and amounted to a dereliction of duty.
13. Counsel went on to submit that there was nothing on record to show that there was corroboration as to the identity of the offender. The court was referred to the case of ***Emmanuel Phiri vs The People***² where it was held that-

“In a sexual offence, there must be corroboration of both the commission of the offence and the identity of the offender to eliminate the danger of false complaint or false implication.”

14. It was submitted that there could have been mistaken identity with regard to the identification of the appellant as the person who defiled the prosecutrix. We were urged to uphold the appeal, quash the conviction, set aside the sentence and set the appellant at liberty.
15. At the hearing of the appeal, Mrs Liswaniso, Legal Aid Counsel submitted that she would rely on the sole ground of appeal and the heads of arguments filed.
16. Mr Sakala, on behalf of The People made viva voce submissions. He stated that he supported the conviction and that a casual perusal of the sole ground of appeal indicates that the appellant is appealing against findings of fact. Counsel submitted that an appellate court should not interfere with findings of fact unless they are found to be perverse. According to Counsel, the evidence of PW1 was unchallenged in cross examination and further submitted that the appellant spent ample time with the prosecutrix who was able to identify him without difficulty.
17. It was submitted that the trial court made a finding of fact that there was no mistaken identity and that further, the medical report corroborated the evidence of PW1. We were urged to uphold the conviction. When the court asked Counsel if the appellant was not prejudiced because he was unrepresented and due to the fact that

proviso to section 138 of the Penal Code was not explained to him, he conceded that he was prejudiced.

18. In reply, Mrs Liswaniso submitted that the appeal was a mix of both fact and law and that the possibility of honest mistake was not ruled out. She submitted that the appellant was apprehended way after the alleged attack. We were urged to uphold the appeal and acquit the appellant.
19. We have considered the ground of appeal, the written heads of argument, submissions by Counsel and the record of appeal. As we see it, the issue for consideration is whether the plea was properly taken in the magistrate's court. The record shows that the appellant was unrepresented and that he appeared in court for plea on 15th September, 2016. The record then reveals the following:

Charge explained to the accused fully in Bemba.

Count one:

Accused when called upon to plead says:

Accused one: I understand the charge.

I deny the charge.

Accused two: I understand the charge.

I deny the charge.

Count two:

Accused three: I understand the charge.

I deny the charge.

Accused four: I understand the charge.

I deny the charge.

Court records not guilty for all four accused.

Adjourned and remanded in custody.

20. In the case of **Gideon Hammond Millard vs The People**³ 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 ingredients of the offence are disclosed.”

In the instant case, the appellant was not represented and it was necessary for the learned magistrate to have gone a step further by asking relevant questions to ensure that the appellant was sure as he took plea.

21. Further, the record of appeal discloses that the proviso to section 138 of the Penal Code was not read and explained to the appellant and there is no indication on record that the learned trial magistrate addressed his mind to the proviso. In the case of **Mwaba vs The People**⁴ the Supreme Court held that-

(1) It is a rule of practice that where it appears that an unrepresented accused person may be intending to plead guilty to a charge of

defilement the proviso to section 138 of the Penal Code should be explained to him.

(2) Even where an accused person pleads not guilty, it is desirable that the proviso be explained before plea, but certainly at an early stage in the proceedings so that the accused may have the opportunity to direct his cross-examination of the prosecution witnesses to the questions of the girl's age.

(3) In a borderline case, in terms of age, the failure to explain the statutory defence to an accused is an irregularity which may be cured if there has been no prejudice."

22. Further, in the case of *Gift Mulonda vs The People*⁵, the Supreme Court held inter alia that-

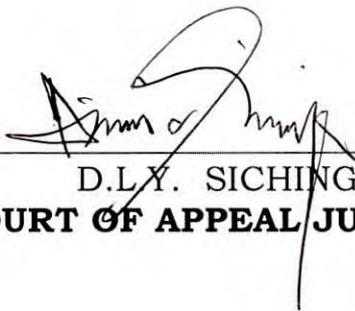
"It is a rule of practice that the proviso to section 138 of the Penal Code should be explained to an accused person."

For the reasons highlighted above, we are of the view that the plea was not properly taken because the proviso to section 138 of the Penal Code was not explained to the appellant. As such, the

appellant, who was unrepresented, suffered prejudice and was not given an opportunity to defend himself adequately. We accordingly set aside the conviction and sentence and we send the matter back to the subordinate court for re-trial before another magistrate.



F. M. CHISANGA
JUDGE PRESIDENT - COURT OF APPEAL



D.L.Y. SICHINGA
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE