IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 36/2020**

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

WHITESON TEMBO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Kondolo SC, Chishimba and Mulongoti, JJA**

On 26th and 31st August, 2020

For the Appellant: *M. Marabesa (Ms) Legal Aid Board*

For the Respondent: *S. Simwaka Senior State Advocate- National Prosecution Authority*

J U D G M E N T

***MULONGOTI, JA**, delivered the Judgment of the Court*

cases referred to:

1. ***Katebe v The People (1975) ZR 13***
2. ***Machipisha Kombe v The People (2009) ZR 282***

3. ***Kalaluka Musole v The People (1963-1964) Z. and N.R.L.R 173 (CA)***
4. ***Nachitumbi and another v The People (1975) ZR 285 (SC)***
5. ***Manewe v The People (2005) BLR 276***
6. ***Mwaba v The People (1974) ZR 264 (SC)***
7. ***Hakagolo v The People- Appeal No. 607/2013***

Legislation referred to:

1. ***The Penal Code, Chapter 87 of the Laws of Zambia***
2. ***The Juveniles Act, Chapter 53 of the Laws of Zambia***

1.0 **Introduction**

1.1 The appellant, Whiteson Tembo, was convicted of one count of defilement by the Subordinate Court and sentenced to 25 years imprisonment with hard labour by his Lordship Limbani J, sitting at Ndola.

1.2 The particulars in the information alleged that, the appellant had unlawful carnal knowledge of RS (also referred to as the prosecutrix), a girl below the age of 16.

2.0 **Evidence Adduced in the Court Below**

2.1 On 3rd December, 2018, Margaret Mwenya (PW2) was seated at her home with Maureen. Later, Maureen told her that a girl had run into her house. When she

went to check she found the girl (RS) who said she was scared of being killed by a man who she had struggled with in the bush.

2.2 PW2 asked the girl to take a seat, but she had difficulties and blood was dripping from her vagina. Shortly, the man (appellant) appeared and called the girl. PW2 asked him why he was chasing the girl, and the appellant said the girl was his girlfriend.

2.3 PW2 asked him why he had scratched her if she was his girlfriend. PW2 then called for the help of her neighbours. They took the girl to the hospital. PW2 said by ocular observation the girl appeared to be about 12 years old.

2.4 In cross-examination, PW2 stated that the girl confirmed that the appellant had carnal knowledge of her.

2.5 RS aged 12, testified on oath as PW4 after the Judge conducted a *voire dire*. She narrated that on 3rd

December, 2018 her grandmother (PW3) had sent her to buy sugar.

2.6 When she reached the shop, she met the appellant who appeared drunk. He held her by the hand and dragged her. She shouted for help to no avail.

2.7 The appellant dragged her until they reached a certain house. He unlocked the door and dragged her inside where he had carnal knowledge of her.

2.8 She escaped as the appellant was putting on his trouser. She ran into the nearest house (PW2's) where the door was open. Blood was dripping from her vagina which stained her clothes.

2.9 The appellant followed her and asked for forgiveness but PW2 took her to the police where the matter was reported.

2.10 PW3 (RS's grandmother) testified that RS was taken home by the police who informed her that she (RS) had been defiled.

2.11 On 4th December, 2018 PW5 the arresting officer was led to PW2's house by the appellant where RS's black pant was recovered. The appellant told PW5 that RS was his girlfriend.

2.12 PW1 was RS's mother who testified that RS was born on 4th October, 2006, thus aged 12 years and two months at trial date.

2.13 When called upon to defend himself, the appellant confirmed he met RS at his barber shop on 3rd December, 2018. After he finished attending to his client, he asked RS to escort him. She agreed. They ended up at his home, where she freely entered. He asked her to help him clean the house. After cleaning she run away to an unknown person's house.

2.14 He followed her. The owner of the house asked him how he was related to RS and he said she was his girlfriend. However, RS denied knowing him.

2.15 It was his testimony that RS, when asked if he had had carnal knowledge of her, refused. That is how he was taken to the police on allegation of theft.

2.16 In cross-examination, he said RS told him that she was 17 years old. He denied seeing blood on her body on the material day.

3.0 Consideration of the Evidence and Decision of the Trial Court

3.1 After analysing the evidence, the learned magistrate Malenga found that RS's testimony was corroborated as required by **section 122 of the Juveniles Act**. He reasoned that RS and appellant met in broad daylight on the material day and they were seen by appellant's mother DW2, when they passed by her house.

3.2 Relying on the case of **Katebe v The People**[1], the magistrate ruled out any question of mistaken identity of the appellant by RS.

3.3 The trial magistrate also found that the fact of RS having been carnally known on the material day was

confirmed by the medical report and the appellant himself who claimed RS was his girlfriend.

3.4 The case of **Machipisha Kombe v The People[2]** was cited as authority that:

> ***"Law is not static; it is developing. There need not now be a technical approach to corroboration. Evidence of something more, which though not constituting corroboration as a matter of strict law, yet satisfies the court that the danger of false implication has been excluded, and it is safe to rely on the evidence implicating the accused. Odd coincidences constitute evidence of something more. They represent an additional piece of evidence which the court is entitled to take into account. They provide a support of the evidence of a suspect witness or an accomplice or any other witness whose evidence requires corroboration. This is the less technical approach as to what constitutes corroboration."***

3.5 The trial court further observed that it was not disputed that RS and appellant were at his sister's home. Thus, the appellant had an opportunity to commit the offence.

3.6 The appellant was found guilty and convicted of one count of defilement contrary to **section 138(1) of the Penal Code.**

3.7 The appellant was accordingly sentenced to 25 years imprisonment with hard labour by the High Court.

4.0 **The Appeal**

4.1 Dissatisfied, the appellant has appealed to this Court on the ground that:

> ***"The lower court erred in law and in fact when it convicted the appellant when he raised the defence of mistake and further neglected to offer an ocular observation of the prosecutrix to dismiss his defence."***

4.2 In support of the appeal, the appellant filed heads of argument. The gist is that after the statutory defence was explained to the appellant, he pleaded the defence of mistake.

4.3 This, according to the appellant's counsel, meant that the trial court ought to have discounted the appellant's defence by offering an ocular observation of the prosecutrix. The appellant admitted that he had carnal knowledge of the prosecutrix because she told him that she was aged 17.

4.4 The case of **Kalaluka Musole v The People**[3] was cited in support of the argument that it was mandatory that the court in its Judgment discounts the defence by offering its ocular observation.

4.5 The quoted portion of **Kalaluka Musole v The People**[3] case holds:

> ***"A person who does or omits to do an act under an honest and reasonable, but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist."***

4.6 The appellant reasonably believed that the prosecutrix was 17 years old as she told him so. Additionally, DW2 (appellant's mother) testified that she saw the prosecutrix when appellant took her home, and to her observation, she looked to be 17 years old.

4.7 According to counsel, the prosecution did not adduce any evidence to negative this piece of evidence.

4.8 To worsen the situation, the trial court equally neglected to address this issue by not offering its

ocular observation. We were urged to acquit the appellant because at this stage it cannot be ascertained if indeed the prosecutrix could be mistaken for a 17 year old.

4.9 In addition, that the failure by the magistrate to offer its ocular observation is so fatal such that a re-trial cannot be conducted as the prosecutrix has obviously advanced in age. Reliance was placed on the case of **Nachitumbi and another v The People**[4] that:

> ***"It is not in the interest of justice that an accused person should undergo a second trial because of failure of the prosecution to present the matter properly at the first. However, where there is no prejudice to the accused and it is a question of making good a technical defect such as proving a photograph or the test material of ballistics expert or the bringing of a newspaper to court, the interests of justice requires that there be a new trial.***

4.10 In *casu*, a re-trial will not serve its purpose and is not in the interest of justice.

The respondent's heads of argument

4.11 In response, the respondent filed its heads of argument in which it is submitted that the proviso to

section 138(1) of the Penal Code, is a specific statutory defence. It is thus incompetent for him to rely on the defence of mistake of fact under **section 10 of the Penal Code.**

4.12 It was further submitted that for the proviso to succeed, the appellant was required to satisfy the trial magistrate that he had a reasonable cause to believe that the prosecutrix was of or above the age of 16.

4.13 The prosecutrix refused the appellant's claim, that she told him that she was 17 years of age.

4.14 At page 8 lines 8 to 11 of the record of appeal, the prosecutrix under cross-examination stated:

> ***"I don't even know the barbershop you are talking about and I don't know you. I don't even understand Bemba, I just came to visit, and thus I couldn't understand what you were saying or know where you were taking me. I couldn't respond to whatever you were saying because we were unable to communicate."***

4.15 This piece of evidence was not challenged when the appellant was called upon to defend himself.

According to the respondent, thus the prosecutrix did not tell the appellant she was 17 years as they were unable to communicate.

4.16 It was the further submission of counsel that the Penal Code does not set out the test to apply when construing *'reasonable cause'* in the proviso. Learned counsel sought reliance on the case of **Manewe v The People**[5] in which the Chief Justice of Botswana put the test thus:

> ***"The essential idea embodied in the provision, in my view, is that if it is made to appear to the Court that an accused person had good grounds for believing that the girl was 16 years or above and in fact believed it to be so, then the defence should be available to him. To have reasonable cause to believe implies an objective standard, with the implication that ordinary reasonable people in the shoes of the accused would have found the grounds influencing the mind of the accused to be reasonable and capable of giving or making him to believe"***

4.17 The record herein shows nothing discernible from the evidence which shows that the appellant in fact believed that the prosecutrix was 17 years old. He did not point out any physical appearance or indeed any

other reason which could have induced him to believe so.

4.18 Thus, the learned state advocate maintained that it was inconceivable for a 12 year old to be mistaken for a 17 year old. The gap is too big even considering that she maybe growing fast. Therefore, failure by the trial court to state his ocular observation does not take away the fact that he saw her when she testified.

4.19 Accordingly, the underlying principle in the statutory defence is that the accused is required to direct questions to the prosecution witnesses as to the age of the prosecutrix. The Supreme Court decision in **Mwaba v The People**[6] was relied upon thus:

> ***"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 question of the girl's age."***

4.20 In **Hakagolo v The People**[7] the Supreme Court observed thus:

"Further, it must be made clear here that the whole purpose of the Court explaining the proviso is so an accused understands, that the onus is on him to prove that his belief that the girl was above the age of 16 years was reasonable."

4.21 In conclusion, it is submitted that the defence was unsuccessful in *casu*.

5.0 **Issues On Appeal**

5.1 After considering the arguments by counsel and the Judgment appealed against, the following are the issues arising on appeal:

5.1.1 Was the proviso satisfied merely by the appellant's allegation that RS told him that she was aged 17? Was appellant required to do more?

5.1.2 Was the magistrate failure to offer his ocular observation fatal to the prosecution's case?

6.0 **Consideration of Issues on Appeal and Decision**

6.1 Upon perusal of the record of appeal, in particular the Judgment of the trial magistrate, we can understand the appellant's consternation.

6.2 We note that the trial magistrate did not in fact consider the appellant's testimony at defence stage at all. The magistrate concentrated on issues of corroboration of RS's testimony both as to identity and commission of the offence. Yet, in his defence, the appellant denied having carnal knowledge of RS. He spoke about how she helped him clean the house and that she suddenly run off.

6.3 We are thus inclined to dismiss this appeal because the appellant denied having carnal knowledge of RS. Therefore, the issue of the statutory defence does not arise. It is trite that the defence is available to an accused person who had carnal knowledge of a girl aged 16 and below, on a reasonable belief that the child was above 16.

6.4 The appellant's testimony was that he was taken to the police on issues of theft.

6.5 Furthermore, the record reveals at page 2 that after the defence in the proviso was explained to him, the

appellant said: *"I understand the charge and I admit... I had carnal knowledge of RS...She told me she was 17."*

6.6 The trial court entered a plea of not guilty and rightly so. This is because the appellant's assertion that RS told him she was aged 17 had to be proved at trial and essentially goes to issues of consent, which are not the concern of the proviso nor the offence of defilement. The proviso speaks to reasonable belief by the accused that the prosecutrix was above 16 due to perhaps her features.

6.7 The said proviso to **section 138 (1) of the Penal Code as amended in 2011**, is couched thus:

> ***"Any person who unlawfully and carnally knows any child commits a felony and is liable to a term of imprisonment of not less than fifteen years and maybe liable to imprisonment for life.***
> **Provided that it shall be a defence for a person charged with the offence under this section to show that the person had reasonable cause to believe, and did in fact believe, the child against whom the offence was committed was of, or above, the age of sixteen."** *underlined in emphasis*

6.8 Therefore the appellant had the opportunity at trial to demonstrate his belief that RS was above 16 but

instead he denied having carnal knowledge of RS. Thus, the trial magistrate was not encumbered to consider the defence as the appellant denied having carnal knowledge of RS. We must state here that what is stated at plea stage is not part of the evidence.

6.9 We are of the firm view that, even though the magistrate said nothing about his ocular observation of RS, the crucial consideration is that the appellant denied having carnal knowledge of her. The magistrate's failure to do so was not fatal to the prosecution's case, in the circumstances of this case.

6.10 However, we must point out that in appropriate cases, it is cardinal for the trial magistrate to state their ocular observation of the prosecutrix where the defence is raised that the accused reasonably believed the prosecutrix to be above 16 years.

6.11 In light of all the foregoing, we find no merit in the sole ground of appeal on the basis that the appellant denied having carnal knowledge of RS. The defence was thus not available to him.

6.12 The appeal is accordingly dismissed. The conviction and sentence are upheld.

M.M. KONDOLO, SC
COURT OF APPEAL JUDGE

F.M. CHISHIMBA
COURT OF APPEAL JUDGE

J.Z. MULONGOTI
COURT OF APPEAL JUDGE