SCZ. Appeal No.315/2014

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

BETWEEN:

BENTON KANGWANDA **APPELLANT**

AND

30 SEP 2020

THE PEOPLE **RESPONDENT**

Coram: Phiri, Wanki and Malila, JJS

On 3rd day of March, 2015 and 30th September, 2020

For the Appellant: **Mrs. C. K, Kabende, Senior Legal Aid Counsel.**

For the Respondent: **Mr. G. Zimba, Senior State Advocate.**

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Jutronich, Schutte and Lukin v The People (1965) ZR 9 (CA)**
2. **Sole Sikaonga vs The People, SCZ Judgment No. 29 of 2009**
3. **Noah Kambobe vs The People, (SCZ Judgment No. 13 of 2002)**

When we heard this appeal, we sat with the Hon. Mr. Justice M. E. Wanki who has since retired and migrated to the higher Bench. This is therefore the majority decision.

The appellant was tried and convicted by the Subordinate Court of the first class sitting at Lusaka on the 15th day of June, 2014, of the offence of Defilement of a girl child aged 11 years. He was subsequently sentenced to a term of 45 years imprisonment with hard labour by the Hon. Mr. Justice I. C. T. Chali. This appeal is against sentence only. One ground of appeal was canvassed; namely, that the learned trial Judge erred in law and fact when he sentenced the appellant to forty-five years imprisonment with hard labour considering that he was a first offender who was entitled to leniency.

The undisputed evidence that was before the trial court established that the appellant, then aged 51 years, was at his residence between the 1st and 7th of June, 2013. The appellant was a neighbor to the victim's family. The victim, who testified as PW1 after a successful voire dire assessment, knew the appellant very well and called him Shikulu (grandfather).

According to the victim, the appellant defiled her on three occasions. The first incident took place on the 1st of June, 2013 in broad day light. The appellant called her over to his house and sent her to buy him tomatoes. She bought the tomatoes and when she returned, he ordered her to take the tomatoes into his house. When she did so, he immediately followed her and demanded to have sex with her. The victim refused but the appellant forcefully removed her clothes and forced himself on her. During the assault, the appellant stuffed the victim's mouth with his clothes to prevent her from screaming. After he defiled her, he threatened to kill her if ever she told anyone about it. The victim was injured and in pain; and too scared to inform anyone about it.

On the second occasion, the appellant ordered the victim to go and draw some water for him. This was during the day. When she returned with the water the appellant ordered her to take it into the house. When she did so, the appellant grabbed her hand and undressed her as she screamed for help from her mother who, unfortunately, had already left for her market stand where she sold charcoal. No one came to her aid. The appellant undressed himself

and the victim, and defiled her. Thereafter, he threatened to kill her if she told anyone about it. On the third occasion, which occurred again in broad day light, the victim was outside her house taking tea soon after her mother left for the market. The appellant ordered her to bring a sweeping broom from her house over to him. When she did so, he grabbed her and pulled her over into his house where he repeated the defilement and the threats. During the assault, the appellant lifted her off her feet and placed her on his lapse like a baby and proceeded to defile her and to issue the usual threats. Thereafter, he dressed her up and ordered her to help him sort out his beans. As she did so, the appellant kept on going out and into the house, checking on the neighbours until PW3, the next neighbour came over to the appellant's house to check on the appellant's strange behaviour. When PW3 came to the appellant's house, he found the victim seated in the sitting room. He asked the appellant what the victim was doing in his house to which he responded that she was assisting him with the beans. The victim seized the opportunity to escape from the appellant and went to her mother's stand at the market. By that time, the victim could hardly walk and she reported the repeated assaults to her grandmother who checked

her. The victim was taken to the area police post and later to the University Teaching Hospital where she was treated and issued with a medical report.

According to PW2, the victim's mother, and PW3, the victim did not attend her school for three days and she had visible injuries to her private parts. The appellant admitted during trial that he was found by PW3 with the victim in his house. Medical evidence established that the victim was defiled.

On the basis of the established facts, the appellant was convicted as charged and subsequently sentenced to 45 years imprisonment with hard labour on account that he repeatedly took advantage of the victim to sexually assault her.

As we have said, the appellant does not have any quarrel with the evidence and the conviction. The question for us to resolve in this appeal is whether the sentence of 45 years imprisonment with hard labour comes to us with a sense of shock as to warrant our interference.

In support of the ground of the appeal, Mrs. Kabende submitted that the sentence imposed by the lower court was manifestly excessive such that the same should induce a sense of shock; that it was wrong in principle and certainly did not reflect any form of leniency which should be accorded to a first offender, which the appellant was. In support of the argument, Mrs. Kabende cited the case of **Jutronich, Schutte and Lukin v The People** [1] which guided that the court, in dealing with an appeal against sentence, should ask itself the following questions;

1. **Is the sentence wrong in principle?**
2. **Is it manifestly excessive so that it induces a sense of shock?**
3. **Are there any exceptional circumstances which would render it an injustice if the sentence were not reduced?**

Our attention was also drawn to our decision in the case of **Sole Sikaonga vs The People,** [2] where, in dealing with an appeal against sentence of forty years with hard labour imposed on a charge of defilement, we observed that forty years imprisonment for defilement imposed on a first offender who had not wasted the court's time was excessive, and was received with a great sense of shock Accordingly

we set aside the forty years imprisonment and substituted it with a term of 25 years imprisonment with hard labour. According to Mrs. *Kabende*, non consideration of the fact that the appellant was a first offender and entitled to some degree of leniency is an error in principle as observed by this court in the case of **Noah Kambobe vs The People,** [3]. We were accordingly asked to reduce the sentence in the present case.

We have examined the record of the appeal, the judgment of the trial court, and the Judge's notes on sentencing. We have also examined the submission made on behalf of the appellant. We must say, from the outset, that we entirely agree with Mrs Kabende's analysis of what is required when determining the question of adequacy or otherwise of a sentence of imprisonment at the appellate stage. We take note that the felony of defilement is severely punishable from the range of the mandatory minimum sentence of 15 years with hard labour to the maximum of life imprisonment. The overriding principle, however, is that each case must be judiciously considered on its own merits which must be balanced with the need for consistency and parity.

We have looked at our decision in the **Sole Sikaonga** [2] case where we reduced the sentence of 40 years imprisonment with hard labour to 25 years imprisonment with hard labour. We note that in that case, the appellant readily pleaded guilty and did not waste the court's time. In the present case, the appellant did not plead guilty and the case proceeded to full trial during which, as PW3 another neighbour was testifying, the appellant rose to agree with him that he was found with the victim who was seated in his room. The room turned out to be the scene of the repeated defilement.

Because of the full trial in the present case, the full extent and gravity of the appellant's felony emerged much more clearly. As a neighbour, the appellant took advantage of the victim when ever her mother left her home for her charcoal market stand. He did not care that she did not go to attend her school during the time he sent her to perform household chores while sexually abusing her and threatening to kill her if she revealed the abuse to her mother or to anyone else. He did not care that she suffered very serious injuries to her private parts as well as the loss of her self esteem and good health. In short, the appellant converted the victim girl child into his

own very abused child bride and a sexual slave instead of offering her protection in the absence of her parents. When we consider all these unique aggravating factors, we view the sentence of 45 years imprisonment with hard labour as befitting the facts and circumstances of this case. We do not agree that its imposition was a misdirection notwithstanding that the appellant is a first offender. Accordingly, we find no merit in the appeal and we dismiss it.

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G.S. Phiri

SUPREME COURT JUDGE

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M. Malila

SUPREME COURT JUDGE