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IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 064/2020**

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

ASTONE LIBONE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Chishimba, Ngulube JJA,

13th October, 2020 and 23rd October, 2020.

For the Appellant: H.M. Mweemba- Principal Legal Aid Counsel, Legal Aid Board

For the Respondent: G. Zimba- Deputy Chief State Advocate National Prosecutions Authority

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J U D G M E N T

Mchenga, DJP, delivered the Judgment of the Court.

Cases referred to;

1. Macheka Phiri v The People [1973] 145
2. Gift Mulonda v The People [2004] Z.R. 135
3. Michael Bwalya v The People CAZ No. 138/2018
4. Nsofu v The People [1973] Z.R. 287

Legislation referred to;

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

1. the Evidence Act, Chapter 43 of the Laws of Zambia

1. Background

1.1 The appellant, was tried before the Subordinate Court, sitting at Livingstone (Hon. S.M. Mukela), on a charge of defilement of a child, contrary to **section 138(1) of the Penal Code.** At the end of that trial, he was convicted and pursuant to **section 217 of the Criminal Procedure Code,** his case was committed to the High Court, for sentencing.

1.2 In the High Court (Mulife J.), sentenced him to 15 years imprisonment, with hard labour. He has now appealed against his conviction.

2. Evidence before the trial court

1.1 In December 2016, the appellant who lived in Livingstone's Malota Compound, invited a young girl, who lived near him, to sweep his house because his wife had gone to the village. When the girl entered the house, he had sexual intercourse with her, forcibly. He was to have sexual

intercourse with her, on two subsequent occasions in that month.

1.2 In the months that followed, the girl's sister in law noticed changes in her eating habits and built. The girl when subjected to a pregnancy test, was found to be pregnant. She then revealed that the appellant had on three occasions, had sexual intercourse with her.

1.3 The appellant and his relatives, were subsequently summoned to a meeting to discuss the issue by the girl's brother. At that meeting, the appellant admitted being responsible for the pregnancy. He also signed an agreement to that effect. The agreement was witnessed by his uncle.

1.4 In addition, the appellant went with the girl to a community health worker for counselling, on the pregnancy. They introduced themselves as a couple to the health worker.

1.5 The community health worker was also informed that the girl's age was 17 years. Though it is not clear who of the two, said that was her age.

1.6 During the trial, the girl's brother, in addition in addition to giving her date of birth as 8th August 2002, also produced an affidavit he had deposed to that effect. Further, the headteacher of the school the girl had attended, produced a school register that indicated that she was born on 28th December 2002.

1.7 In his defence, the appellant denied having had sexual intercourse with the girl at any point. He also claimed he had been compelled to sign the agreement.

3. Grounds of appeal

3.1 Two grounds have been advanced in support of this appeal. The first ground is that the age of the girl was not conclusively proved. As for the second, it is that the trial magistrate should have considered the availability of the defence in the proviso to **section 138(1) of the Penal Code**, to the appellant.

4. Arguments on proof of girl's age

4.1 Mr. Mweemba, advanced two arguments attacking the finding that the girl was below the age of 16 years at the time the offence was committed. The first, was premised on the cases of **Macheka Phiri v The People**[1] and **Gift Mulonda v The People**[2]. He pointed out that since age is an essential ingredient of a charge of defilement of a child, the girl's age should have been proved beyond all reasonable doubt.

4.2 He also argued that it was not sufficient for the girl's brother to simply point out that he knew when she was born, such evidence should have come from a person who was present when she was born.

4.3 In the second argument, which relates to the school register, Mr. Mweemba argued that it was not of any evidential value because the head teacher did not know the person who gave the information that was entered in it. He then referred to the case of **Michael Bwalya v The People**[3] and concluded by arguing that age, an essential ingredient of the offence, having not been proved, the conviction was not competent.

4.4 In response, Mr. Zimba argued that the testimony of the girl's brother sufficiently proved her age; he brought her up and it was unshaken in cross examination. Further, there was evidence from the school register which supported the finding that the girl was below the age of 16 years when the offence was committed.

5. Consideration of proof of age by court and decision

5.1 First of all, we have examined the record of appeal and have not found any evidence suggesting that it is the girl, who gave her age as 17 years, to the community health worker, as was claimed by Mr. Mweemba. In any event, even if she had said so, in the case of **Macheka Phiri v The People**[1], the Supreme Court pointed out that:

> **'it is not acceptable simply for a prosecutrix to state her age; this can be no more than a statement as to her belief as to her age. Age should be proved by one of the parents or by whatever other best evidence is available.'**

5.2 It follows, that even if the girl had said she was 17 years old, her brother's position on how old she was, should have been found to be credible.

5.3 Coming to the school register, **section 4 of the Evidence Act**, which deals with the admissibility of certain trade, business or professional records, in criminal proceedings, provides as follows:

> **(1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if-**
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> **(a) the document is, or forms part of, a record relating to any trade or business or profession and compiled, in the course of that trade or business or profession, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and**
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> **(b) the person who supplied the information recorded in the statement in question is dead, or outside of Zambia, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he**

> **supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.**
> **(2) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a fully registered medical practitioner.**

5.4 From the foregoing, it is clear that for the contents of official records to be admissible, it is not enough to simply show that it is part of an official record. It must be also be shown that the supplier of that information that was entered in the record had personal knowledge of the matters he supplied information on.

5.5 In this case, much as the school register is part of official record, the headteacher did not know the person who supplied the information on the girl's age. That being the case, we agree with Mr. Mweemba that the school the register was not helpful to the prosecution because it did not meet the threshold in

section 5 of the Evidence Act, for the admission of information in such records.

5.6 Notwithstanding, we take the view that the evidence of the girl's brother, did prove, beyond all reasonable doubt, that the girl was below the age of 16 years at the time the appellant had sexual intercourse with her. The girl's brother who had kept her since she was 4 years old, gave her date of birth and as pointed out by Mr. Zimba, his testimony was unshaken.

5.7 We are satisfied that the trial magistrate was entitled to accept his testimony on her date of birth. We are not persuaded by Mr. Mweemba's view that only a person who was present when a child was born, can satisfactorily give evidence on the date of birth.

5.8 We find no merit in the first ground of appeal and we dismiss it.

6. Arguments on availability of defence in proviso

4.1 In support of the second ground of appeal, Mr. Mweemba argued that in the face of evidence that

the girl gave her age as 17 years to the appellant and the counsellor, the trial magistrate should have proceeded to consider the availability of the defence in the proviso. The failure to do so was a misdirection.

4.2 Mr. Zimba's response was that there was no misdirection on the availability of the defence, as the appellant did not raise it.

7. Courts consideration of availability of proviso

7.1 The proviso to **section 138(1) of the Penal Code**, reads as follows:

> **'provided that it shall be a defence for a person charged with an offence under this section to show that the person had reasonable cause to believe, and did in fact believe, that the child against whom the offence was committed was of, or above, the age of sixteen.'**

7.2 In the case of **Nsofu v The People**[4], the Supreme Court held, inter alia, that:

> **'for a defence under the proviso to succeed an accused must satisfy the court (a) that he had reasonable cause to believe that the girl was of or**

above the age of sixteen years and also (b) that he did in fact believe this'

7.3 In our view, it is difficult to conceptualise a situation where an offender who denies having had sexual intercourse with a girl, can satisfy a court that he believed that the girl he had sexual intercourse with was above that age.

7.4 The availability of the defence, cannot, as suggested by Mr. Mweemba, be based on the trial magistrate's ocular observation of the appearance of a girl. What is material is the information that was available to an offender and the state of his mind at the time.

7.5 The defence is available to a person who has sexual intercourse with a girl who is below the age of 16 years old and such a person satisfies the court that he reasonably believed that the girl was above the age of 16 years. How can a court find that a person who denies having sexual intercourse with a girl, could have believed that the girl was above the age of 16 years? As we said earlier on, it is inconceivable.

7.6 In this case, even though the appellant claimed in cross examination, that the girl told him that she was 17 years, he denied having had sexual intercourse with her. That being the case, it is our view that there was no evidence before the trial magistrate, on which she could have considered the availability of the defence in the proviso.

7.7 The second ground of appeal equally fails.

8. Verdict

8.1 Both grounds of appeal having failed, the appeal is unsuccessful and we accordingly dismiss it. The appellant's conviction and the sentence imposed on him, are upheld.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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F.M. Chishimba
COURT OF APPEAL JUDGE

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P.C.M. Ngulube
COURT OF APPEAL JUDGE