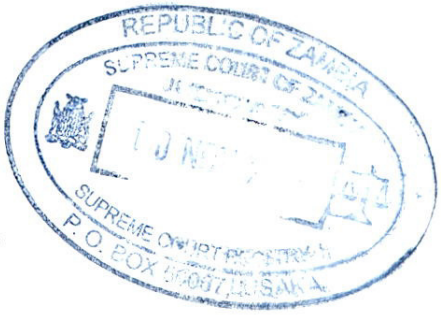
**IN THE SUPREME COURT OF ZAMBIA APPEAL NO.60,61/2020**
**HOLDEN AT LUSAKA**
*(Criminal Jurisdiction)*




BETWEEN:

**MUSHEKWA MUSHENYA** **1ST APPELLANT**
**MUKELA MATAKALA** **2ND APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**

**Coram: Muyovwe, Hamaundu and Chinyama, JJS**
On 1st September, 2020 and 9th November, 2020

For the Appellants : Ms Z. Ponde, Legal Aid Counsel

For the State : Ms P. Nyangu, State Advocate

---

## JUDGMENT

---

**HAMAUNDU, JS,** delivered the Judgment of the Court

Cases referred to:

1. **Zimba v The People (1970) ZR 101**
2. **Gideon Hammond Millard v The People (1998) ZR 52**
3. **The People v John Kapalu Kanguya (1979) ZR 288**
4. **Joseph Nkole v The People (1977) ZR 351**

Works referred to:
**Oxford Advanced Learners Dictionary; 7th edition;**
**A.S. Horby; 2010; Oxford; Oxford University Press**

This appeal is against conviction.

On 30th April, 2015, the two appellants who are husband and wife, respectively, appeared before the subordinate court at Senanga on a charge that was couched as follows:

> **"STATEMENT OF OFFENCE:** *SELLING A PERSON CONTRARY TO SECTION 143 OF THE PENAL AMENDMENT ACT NO. 15 OF 2005.*
>
> **PARTICULARS OF OFFENCE:** *MUSHEKWA MUSHENYA AND MATAKALA MUKELA on the 25th April, 2015 at maround compound in the Senanga District of the Western Province of the Republic of Zambia, jointly and whilst acting together, did advertise a human being for sale namely MWIYA MASHEKWA to one GHEDI MUSSE".*

When the charge was read to them, the 1st appellant was recorded as having replied as follows:

> **"I understand the charge. I admit the charge, I advertised Mwiya Mashekwa for sale at K15,000.00 and he is my son. I had intended to spend the money on my general daily livelihood and tackle poverty"**

The 2nd appellant was recorded as having replied as follows:

> **"I understand the charge, I admit the charge. I advertised Mwiya Mashekwa at K15,000.00 I intended to use the money to tackle poverty but I tried to advise accused 1 against selling a person"**

With those responses, the subordinate court entered pleas of guilty for both appellants. The facts that were read to the court stated

that, on the 25th April, 2015 around 14:00 hours, the two appellants approached a man who managed Nasla Beef Company in Senanga, a Mr Ghedi, and told him that they were selling their son at K60,000.00. Astonished by the approach, Mr Ghedi secretly phoned the police who sent a Chief Inspector Mufaalo to pose as an employee of Nasla Beef Company. Arrangements were made to go and collect the son who was being sold. Mr Ghedi provided transport. The appellants took Mr Ghedi and Chief Inspector Mufaalo to their home and brought out their son aged 3 years. They all drove to Chief Inspector Mufaalo's house where he took out money and gave the appellants. It was while the appellants were counting the money that other police officers who had been in hiding pounced on the appellants and apprehended them.

Both appellants agreed that the facts as read to the court were correct. The court, consequently, convicted them of the offence. On committal to the High Court for sentence, the learned judge sentenced, first, the 2nd appellant to 25 years imprisonment with hard labour. The judge then sentenced the 1st appellant to 26 years simple imprisonment. To explain the difference in the sentence the learned judge said *"since she was the master mind"*. It seems that the learned judge was under the impression that the wife was the 1st

appellant and the husband the 2nd appellant. However, the particulars of the accused on the charge sheet which was before the subordinate court shows that it was the other way round.

The appellants now appeal on the following two grounds:

1. **That the trial court erred in convicting the appellants for the said offence because the particulars of the charge did not disclose the offence**
2. **That the trial court erred in convicting the appellants on pleas of guilty that were equivocal.**

In the first ground of appeal the appellants point out that while the statement of the offence charged them with selling a person, the particulars of the offence stated that they merely advertised a person for sale. They argue that, because of that variance, there had been no reasonable information as to the nature of the offence which would have enabled the appellants to properly plead.

The general approach to such defects is that they become incurable only if the particulars omit a fundamental and essential ingredient such that no offence becomes disclosed by the particulars. In **Zimba v The People**[1] where, on a charge of attempted house breaking, the particulars omitted to allege that the accused attempted to break in with intent to commit a felony therein, the Court of Appeal, the forerunner to this court, held that the omission

was fundamental because the intention to commit a felony was an essential ingredient of the offence, and without it no offence had been disclosed.

In this case, the offence was for selling a person. The particulars stated that the appellants advertised a person **for sale** (bold font is for emphasis). The intention to sell was disclosed. The appellants could not be in any doubt as to what it is that they were alleged to have committed; it was selling a person. We do not, therefore, think that there was a material defect in the charge. We find the first ground to be without merit.

In the second ground, counsel for the appellants pointed out that the record shows that the appellants only responded that they **advertised** (bold font is for emphasis) their child. According to counsel, the appellants' answers showed that the magistrate did not put forward questions to show that the appellants **sold** (bold font is for emphasis) their child, an essential ingredient of the offence. We were referred to the case of **Gideon Hammond Millard v The People**[2] where, by implication, we said that, in the case of an unrepresented accused, care must be taken to ensure that he fully understands the elements of the offence to which he is pleading guilty. Counsel then argued that, in the circumstances, the pleas of

the appellants were equivocal because the appellants did not admit to every ingredient of the offence.

With regard to the facts which the appellants agreed to, counsel referred to the case of **The People v John Kapalu Kanguya**[3], a High Court decision, which holds that admitting the facts does not validate an equivocal or imperfect plea. We were urged to uphold this ground and allow the appeal.

We have set out the answers which the appellants gave in response to the magistrate's question. According to the **Oxford, Advanced Learners Dictionary**, one of the meanings of sell is: *"to offer something for people to buy"*. The responses by both appellants were that they advertised their son **for sale** (bold font is for emphasis) at K15,000. That is one of the definitions of *"selling"*. So, the questions that the magistrate asked the appellants covered the ingredients of the offence. We therefore find no merit in the second ground of appeal as well.

We must mention, as we observed earlier, that the learned judge due to error swapped the sentences that she meted out on the appellants. The judge intended to mete out 26 years simple imprisonment on the wife because, in the judge's view, she was the mastermind of the offence. The judge wrongly assumed that the wife

was the 1st accused in the case. As a result, it was the husband who ended up receiving that sentence. As a matter of fact, it is the husband who was in the forefront in selling the child, and it is the wife who had earlier tried to dissuade her husband from doing so. In our view, therefore, the sentences were meted out in error. We set them aside. In their place we sentence the 1st appellant to 25 years imprisonment with hard labour with effect from his date of arrest. We sentence the 2nd appellant to 25 years simple imprisonment with effect from her date of arrest.

In passing, we wish to point out that in 2015 when the appellants were charged, the offence under **Section 143** of the **Penal Code** had long been repealed through **Act No. 2 of 2011**. This was because in 2008, the **Anti-Human Trafficking Act, 2008** was enacted and, in there, the offence in the **Penal Code** was replicated. In **Joseph Nkole v The People**[4] where a wrong section of the **Penal Code** was referred to, we held that such an error did not make a charge bad but merely defective, and that in the absence of embarrassment or prejudice to the accused, the proviso to **Section 15** of the **Supreme Court of Zambia Act** would be applied.

In this case, the appropriate law under which the two appellants would have been charged existed, in the form of **Section 3** of the

**Anti-Human Trafficking Act**. The offence that had been under **Section 143** of the **Penal Code** and the offence in **Section 3** of the **Anti-Human Trafficking Act** both dealt with the same subject; that is the trafficking of people. We wish to add also that even the sentences that the learned sentencing judge passed on the appellants under the repealed law are within the range or band provided under **section 3** of the **Anti-Human Trafficking Act**; in fact, where the offence involves a child, 25 years is the minimum sentence. We therefore think that, had it been brought to the attention of the trial court that the charge was under a repealed section, the simple remedy would have been an amendment for the charge to be under the **Anti-Human Trafficking Act**. In the circumstances, we see no prejudice which the appellants suffered by being charged under the repealed section. This therefore is not a case where we would quash the conviction.

All in all, this appeal stands dismissed.

.....
E. N. C. Muyovwe
**SUPREME COURT JUDGE**

.....
E. M. Hamaundu
**SUPREME COURT JUDGE**

.....
J. Chinyama
**SUPREME COURT JUDGE**