

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

APPEAL No 73/2018

BETWEEN:

KENNETH MASHEKA

Appellant

VS

THE PEOPLE

Respondent



CORAM: **Chashi, Lengalenga and Siavwapa, JJA**
on 25th and 27th September, 2018 and 20th November, 2018

For the Appellant: Mr. H. M. Mweemba – Principal Legal Aid Counsel
Mr. E. Mazyopa – Senior Legal Aid Counsel

For the Respondent: Mrs. C. Mwansa – Deputy Chief State Advocate

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

- 1. MWABA v THE PEOPLE (1974) ZR 264**
- 2. NSOFU v THE PEOPLE (1973) ZR 381**
- 3. GIFT MULONDA v THE PEOPLE (2004) ZR 135**

4. **HOME AFFAIRS & ATTORNEY GENERAL v LEE HABASONDA (2007) ZR 207**
5. **GIBRIAN MWEETWA v THE PEOPLE (CAZ APPEAL N^o 12 OF 2017)**
6. **MUYUNDA MUZIBA & ANOR v THE PEOPLE (2012) 3 ZR 539**
7. **MUVUMA KAMBANJI SITUNA v THE PEOPLE (1982) ZR 115**
8. **KENIOUS SIALUZI v THE PEOPLE (2006) ZR 87**
9. **EMMANUEL PHIRI v THE PEOPLE (1982) ZR 71**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia – section 138(1) as amended by Act N^o 15 of 2005 and Act N^o 2 of 2011**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

This is an appeal against the conviction and sentence of twenty (20) years imprisonment with hard labour effective from date of arrest imposed on the appellant for the offence of defilement contrary to section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia as amended by Act N^o 15 of 2005 and Act N^o 2 of 2011.

The particulars of the offence were that the appellant, on a date unknown but in the month of May, 2015 at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia had unlawful carnal knowledge of a girl under the age of sixteen (16) years.

The prosecution case was anchored on the evidence of PW1, PW2, PW3 and PW4.

PW1, was the prosecutrix who was aged sixteen (16) years at the time of trial, there was no need for a *voire dire* to be conducted. Her evidence was to the effect that, on an unknown date in May, 2015 around 20:00 hours she was at home when she received a phone call from the appellant. At that time she did not know the appellant's name. She only knew that he was her cousin's friend and their neighbour.

According to PW1's evidence, the appellant told her to go to Nakatindi market to collect items for her cousin. When she arrived at Nakatindi market, the appellant told her that he wanted to have sex with her and that he did not have anything to give her. He forced her to have sex with him. She did not tell the appellant her age and that she was fifteen years at that time in May, 2015. PW1 was born on 16th September, 1999.

It was PW1's further testimony that in the month of June she missed her monthly period. When another month passed without her having her monthly period, she realised that she was pregnant and she confronted the appellant who told her to have an abortion. Thereafter, PW1 asked her

grandmother to look for drugs for her to terminate the pregnancy. However, her grandmother took her to the clinic where it was confirmed that she was three months pregnant.

According to PW1, her grandmother informed her mother who was in Kasumbalesa at that time. She had left PW1 with her brother PW2. PW1 was advised to report the matter to the police which she did. She was accompanied by her grandfather to Dambwa Police Post where she was issued with a medical report form to undergo a scan which she did.

The medical examination report exhibited as "**P4**" confirmed that PW1 was sixteen (16) weeks pregnant and fifteen (15) years old at that time.

In cross-examination, PW1 stated that the appellant neither proposed to her nor asked her age. She said that he forced her to have sex with him. She further stated that she told the appellant that she was pregnant in August.

PW2 was James Siamutema whose evidence was that his mother left him with PW1 and during that time he got a contract for four months. PW1 used to remain at home and one day when he was off duty, PW1 revealed that she was pregnant. According to PW2's testimony, at that

time PW1 did not disclose who was responsible for her pregnancy. He informed the Court that his sister was fifteen (15) years at that time. He only learnt who was responsible after a family meeting that he was a neighbour.

It was PW2's further testimony that after discussions, the appellant admitted that he was the one who impregnated PW1.

PW3, Anne Mukamba's evidence was to the effect that she has three children and among them PW2 and PW1 who was born on 16th September, 1999. As proof of PW1's age, PW3 exhibited before the Court, PW1's school identity card and an affidavit.

It was PW3's further evidence that in April she went to Kasumbalesa and left PW1 and PW2 at home. Whilst she was there, in July she received a phone call that PW1 was pregnant. When she inquired who was responsible for PW1's pregnancy, she was told that it was the appellant who was the next door neighbour. PW3 did not know him by name.

Later on in October when PW3 returned from Kasumbalesa, she summoned the appellant and told him that he should be paying them K300.00 monthly. According to PW3 the appellant accepted that he was responsible for PW1's pregnancy but he was not supportive. At the end of

