

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL 210/2020

HOLDEN AT LUSAKA AND KABWE

(Criminal Jurisdiction)

BETWEEN:

DAMSON KASHIMBI

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA,

On 26th August 2021 and 20th October 2021.

For the Appellant: K. Katazo, Legal Aid Counsel, Legal Aid Board.

For the Respondent: S. Mwila, State Advocate, National Prosecution Authority.

J U D G M E N T

Mchenga, DJP, delivered the Judgment of the Court.

CASES REFERRED TO;

1. R v Herchie [1920] AD 575
2. Mwandila v The People [1979] Z.R. 174
3. Harrison Zimba v The People [1970] Z.R. 101
4. Mark Herbert Kaunda v The People [1982] Z.R. 26

LEGISLATION REFERRED TO:

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

1.0 BACKGROUND

1.1 The appellant, appeared before the Subordinate Court, sitting at Kabwe (Hon. F.B.M. Ngosa), facing a charge of Defilement of a Child, contrary to **section 138(1) of Penal Code**.

1.2 He denied the charge and the matter proceeded to trial.

1.3 At the end of the trial, he was convicted for the offence and committed to the High Court for sentencing.

1.4 In the High Court (Limbani, J.), he was sentenced him to 40 years imprisonment, with hard labour.

1.5 He has appealed against the conviction.

2.0 GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

2.1 One of the grounds of appeal is that the charge did not disclose any offence.

2.2 In support of that ground of appeal, Mr. Katazo argued that the charge was defective because the particulars of offence did not indicate the age of the victim, an essential ingredient of the offence of defilement.

2.3 He referred to the case of **R v Herchie**¹ and submitted that the appellant's conviction cannot stand because of the defect.

2.4 In response, Mrs. Mwila referred to the case of **Mwandila v The People**² and submitted that although the charge was defective, the conviction must be upheld because the appellant suffered no prejudice.

2.5 He knew the charge he was facing and was able to put up a defence. Since he was not prejudiced in any way, there was no miscarriage of justice.

3.0 CONSIDERATION OF THE APPEAL AND COURT'S DECISION

3.1 From the outset, we wish to point out that the circumstances on which the case of **Mwandila v The People**², was decided, are completely different from what is at hand in this case.

3.2 That case was concerned with the number of offences that were set out in a count. The court took the view that even if the charge was defective on account of the offences in a count,

the offender suffered no prejudice because he knew the charges he was facing.

3.3 This case is different, it is concerned with whether the charge did disclose any offence.

3.4 The particulars of offence on which the appellant was tried, alleged as follows:

'DAMSON KASHIMBI on 1st February 2020, at Kabwe, in the Kabwe District of the Central Province of the Republic of Zambia, had unlawful carnal knowledge of a girl namely Mwakawele Carol.'

3.5 The offence of defilement is set out in **section 138(1) of the Penal Code**. It provides that:

'Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life;'
.....'

3.6 The term 'child', in that provision, is defined in **section 131A of The Penal Code**, as being 'a person below the age of sixteen years'.

3.7 It follows, that the particulars of offence, in a properly drawn out charge of defilement, must at least allege that:

- (i) the offender had unlawful carnal knowledge;
and
- (ii) that the person who was carnally known, was a child or a person below the age of 16 years.

3.8 In this case, although the charge did allege that the appellant had unlawful carnal knowledge, it did not allege that the girl the appellant carnally knew, was a child or below the age of 16 years. That deficiency was material, in that the charge did not disclose any offence.

3.9 In the case of **Harrison Zimba v The People**³, the appellant was charged with the offence of attempted housebreaking contrary to **sections 271 and 352 of the Penal Code**. The particulars alleged

that he attempted to break into the dwelling house of one Stephen Muntangola.

3.10 However, no mention was made of the fact that the attempted entry, was accompanied by an intention to commit a felony therein.

3.11 He appealed against the conviction.

3.12 On appeal, it was held that the failure to mention, in the particulars of offence, the fact that his entry or attempted entry, was accompanied by an intention to commit a felony, was a material defect and that the charge, disclosed no offence.

3.13 The court also held that the defect could not be corrected on appeal.

3.14 This can be contrasted from the situation in the case of **Mark Herbert Kaunda v The People**⁴. The appellant and another, were convicted for obtaining money by false pretences. He appealed against conviction and sentence.

- 3.15 One of the issues that arose was the defect in the particulars of offence, which indicated that he obtained a stated amount of money, when what he obtained, was a cheque in that amount.
- 3.16 The Supreme Court held that where a charge is defective in mere description of the thing obtained and the substance of the charge remained the same, an amendment could cure the defect.
- 3.17 It was also held that the error did not make the charge bad, but simply defective and no embarrassment or prejudice was suffered by the accused on account of the error.
- 3.18 Going by the decisions in the cases of **Harrison Zimba v The People**³ and **Mark Herbert Kaunda v The People**⁴, it cannot be said that the charge in this case was defective and is amenable to amendment. The charge was bad for not disclosing the age of the victim, a material ingredient of a charge of defilement. In fact, it disclosed no offence.

4.0 VERDICT

4.1 In the circumstances, we find that the conviction
is not satisfactory.

4.2 We allow the appeal, set aside the conviction and
quash the sentence.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....
B. M. Majula
COURT OF APPEAL JUDGE

.....
K. Muzenga
COURT OF APPEAL JUDGE