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**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA**

APPEAL No. 51/2018

(Criminal Jurisdiction)

B E T W E E N:

SEMMY LASCO KAVINGA

VS

THE PEOPLE



APPELLANT

RESPONDENT

***Coram: Mchenga DJP, Chishimba and Majula, JJA
On 21st day of August, 2018 and 20th August, 2019***

For the Appellant: Ms. M. Marebesa - Legal Aid Counsel, Legal Aid Board.

For the Respondent: Mrs. C. M. Hambayi - Deputy Chief State Advocate, NPA.

JUDGMENT

MAJULA, JA delivered the judgment of the court.

Cases referred to:

1. *Emmanuel Phiri vs The People* (1982) ZR 77.
2. *Mugridge vs S* (657/ 12) [2013] ZASCA 43.
3. *Rex vs Swiggelaa, Murray* 1950 (1) PH, H61 (A)
4. *Joseph Mulenga and Another vs The People* (2008) ZR.1 Vol 2.
5. *DPP vs P* [1991] 2 A. C. 447
6. *Makin vs The Attorney-General for New South Wales* (1894) AC 57

7. *R vs Smith (1915) 11 Cr App 229.*
8. *DPP vs Boardman (1975) AC 421.*
9. *R vs Flattery (1877) 2 QBD 410.*
- 10 *R vs Williams (1923) 1 KB 340.*
- 11 *David Zulu vs The People (1977) Z.R. 151.*
- 12 *Gideon Hammond Millard vs The People (1998) SJ.34.*
- 13 *Isaac Njovu vs The People Appeal No.63/2017.*

Legislation referred to:

1. *Penal Code, Chapter 87 of the Laws of Zambia*
2. *The Court of Appeal Act No. 7 of 2016*

Works referred to:

1. *PJ Richardson, Archibold Criminal Pleading, Evidence and Practice (1999) Thomas Reuters (Legal Limited).*

1.0 INTRODUCTION

- 1.1 The appellant appeared before the Subordinate Court charged with 4 offences. One count of rape, one count of attempted rape and two counts of indecent assault. He pleaded guilty to one count of indecent assault and denied the charges in the rest of the offences.

2.0 SUMMARY OF EVIDENCE IN THE TRIAL COURT

- 2.1 The facts, as can be gleaned from the record reveal that the appellant, who is known as an Apostle, used to conduct prayers from 20.00 hours to about 23.00 hours on Monday and Tuesdays every week for about a year in the house of Winfridah

Banda, (referred to as PW1 in the court below). He also claimed to have prophetic powers and on one occasion he prophesized to Winfridah that her late husband's relatives had put something in her stomach and she needed to sleep with her son-in law. This revelation was made when Winfridah was in the house with the appellant. The appellant went further to explain that the person responsible for this state of affairs would come as a witch at Winfridah's home but upon arrival there, the witch would turn into a human being. That being the case Winfridah was instructed not to lock the door, in order to allow this being to enter and remove what he had deposited. Winfridah was further instructed to sleep alone because if she slept with the children they would scream and lose their voices.

2.2 Winfridah lived in a two bedroomed house. She complied with the instructions given by the appellant and at some point, during the course of the night a person came who squeezed her stomach and sucked her breasts. PW1 narrated in graphic detail how this person inserted his finger in her vagina and thereafter inserted his penis. She had been wearing her night dress and the assailant undressed her and warned her against doing anything. In obedience she looked away and slept. Semen was discovered on her night dress the following morning which was shown to her sister two weeks later.

2.3 The following morning after the incident the appellant called Winfridah and told her he was seeing her being blessed and she

should buy mineral water which he would pray for. Winfridah did as she was told and took the mineral water which the appellant prayed for and she was instructed to bath in it for four days. He further informed her that an angel would visit her. After a period of four (4) days had elapsed whilst Winfridah was asleep in the same room with Isabel Mwanza, the same person who had intercourse with her on the first occasion came and moved her from where she was sleeping. He removed her pants and inserted his finger. He then had sex with her again.

- 2.4 After this encounter, the appellant (*who Winfridah continuously referred to as the Apostle*) called her and told her an angel had visited her and had left something on the window seal. Upon checking the window seal at 05.00 hours, Winfridah found a pant by the window. She later inquired from the appellant whether she could use the pant and he responded in the affirmative. Thereafter she expressed concern about the sort of deliverance by asking her daughter Angela who in turn asked the appellant what type of deliverance he was conducting. His retort was she should not judge him because she was not his God.
- 2.5 Winfridah saw it fit to consult another Pastor by the name of Sata regarding the deliverance. Pastor Sata assured her that he would engage the appellant and solicit an apology from him as there was no such deliverance. The event that followed was that the appellant approached Angela in order to attempt

reconciliation, however, he and the latter differed. Winfridah advised Angela to await delivery of her baby as she was carrying the appellant's pregnancy.

- 2.6 Winfridah subsequently received complaints from her three daughters, Helen, Maria and Violet that the appellant was removing coins from their bodies, sucking their breasts and fondling their private parts.
- 2.7 It was upon receiving these disturbing reports that she arrived at the conclusion that the appellant was the same person having sex with her as he was doing the same thing to her daughters.
- 2.8 Winfridah categorically stated that had she been allowed to open her eyes, she would not have allowed him to sleep with her. According to her she had not attempted opening her eyes during the ordeals as she had been threatened with going blind if she did so. She went on to state that the appellant had had sex with her on five different occasions. That she only reported to the police after two months had elapsed as she was waiting for her daughter to give birth.
- 2.9 She concluded that it was the appellant who used to have sex with her after her daughters had notified her of the latter's behavior towards them.
- 2.10 The evidence of Violet Banda who was PW2 in the trial court was similar to that of Winfridah. Violet was told by the

appellant that a person would come at night to remove the coin from her stomach and she should sleep alone and naked. A red string was given to her to wear around her waist. The appellant advised her against looking, touching or screaming when this mysterious person would come. She did as was instructed, wore the red string and slept on the couch. Her sisters slept in their bedroom and the mother in her own bedroom.

2.11 She later felt the presence of something and being afraid she screamed and went to her mother's bedroom. In the company of her mother and with the aid of some light they found the appellant who upon being requested if there was another way that the coins could be removed said only his friend in Solwezi had an alternative method of doing so. He convinced Violet that he could help her if they slept in the same room in order for him to provide protection. She obliged and went into his room and sat in the corner.

2.12 The appellant took a Bible and started reading from it. He then asked her to sleep and share the same blanket with him. Upon doing so she removed her pants as ordered and he inserted his finger in her vagina. He said she had a coin in her left breast. After some time of caressing her he showed her a K1 coin which he claimed had come out of her although she did not feel it coming out. Violet requested to see her mother in order to explain to her what had transpired but she was stopped. The appellant went on to tell her that she had another coin

embedded in her which was from Malawi and very strong and it would hinder her ability to have children. The appellant proceeded to undress himself and remained with a pair of boxer shorts.

2.12 In the meantime, Violet had put her pant back on and the appellant asked her to remove it. He then started touching her vagina again and claimed the coin was now on the right side which he subsequently showed to her. After this display he began to remove his boxer shorts. When she asked the reason why he was undressing he ordered her to keep quiet. She saw his penis and he advanced close to her in an attempt to touch her but she declined and started screaming for her mother. He then increased the volume on the radio but this did not stop her cry for help. She dressed up, got her chitenge and coins and ran away to her mother's house. She narrated her experience with the appellant to her mother and showed her the coins. One coin was a Zambian K1 and the other was a Malawian coin gold in colour. Her mother reported the matter to the police.

2.13 Only one question was put to Violet during cross-examination which was regarding the penis. She confirmed having seen the appellant's penis and described it as short.

2.14 The third witness for the prosecution was Alimira Banda aged 19 years, a pupil in grade 10. Her evidence was materially similar to that of her mother Winfridah. She recounted what transpired between 18th and 20th August, 2015. That whilst at

her mother's place, the appellant summoned her to his room where he informed her that she had a coin in her stomach which was on her left side and she needed deliverance through prayers. He went on to explain that a person would come at night and suck her breasts while she was sleeping. Alimira was cautioned against looking at him as doing so would result in her becoming blind. The appellant further advised her not to touch him as she would become lame and if she shouted she would lose her voice.

- 2.15 She then pleaded with him to find another way he would assist her as she was scared and he told her he would. She was told to enter the room and kneel down. This was between 22 hours to 23 hours while the mother was sleeping. After kneeling the appellant put a paper between her knees and said she should remove her pants otherwise the coin would not come out. Thereafter she was made to sit where he sleeps on the floor and he begun to fondle her vagina and suck her breasts. Alimira experienced pain in her breasts and asked him to stop but he continued sucking them. He then showed her a coin which allegedly came out of her vagina which he put on a white plain paper and asked her to leave. She went home and slept. The following day she recited what had happened to her mother.
- 2.16 The matter was reported to the police. She strongly refuted the assertion that she allowed the appellant to suck her breasts and

touch her vagina and stated in cross-examination that the appellant had told her the coin would bring her problems.

2.17 Isabel Mwanza was the fourth witness. Her evidence was to the effect that on a day she could not recall in August, she was asleep in the same bed with her aunt, Winfridah when the latter received a call around 01.00 hours from the appellant who told her that the people who troubled her family had left a pant by the window. As it was late, she discouraged her aunt from going to check. Around 05.00 hours the following morning, PW1 went outside and found a white pant which Isabel also saw. The pant was later burnt. She insisted that it was the appellant who called and told Winfridah that someone had left a pant for her.

2.18 Maureen Phiri was another witness for the prosecution who recounted that she knew the appellant and they used to have prayers twice a week. That in August the previous year Winfridah called her to her house and showed her a blue night dress which had semen on it and which was subsequently burnt by the former.

2.19 Detective Sergeant Bernadette Phiri was the officer who upon receiving a report, investigated the matter, charged and arrested the appellant with indecent assault, rape and attempted rape after he failed to give a satisfactory explanation.

3.0 APPELLANT'S DEFENCE

- 3.1 In his defence, the appellant stated that he was an Apostle of the Spirit of Christ Fellowship. In January, 2015 he had been invited by his aunt Jacklyn Lungu to conduct prayers which he did three times a week from 19.00 hours to 20.00 hours. He was then called by his mother in-law Winfridah that she had consulted a witchdoctor who diagnosed that she had a disease which could only be cured if she slept with an in-law. He was moved by this revelation and as he was leading prayers in fellowship, he asked if they could be praying together. It was his evidence that he had quarreled with his wife (Winfridah's daughter) who had moved back to her mother's house. According to him it was in February when three of his sister-in-laws namely Hellen, Priscovia and Alimira paid him a visit at his house and requested him to go for prayers with them. He stated that he had heard the testimony of Winfridah but denied having carnal knowledge of her.
- 3.2 Regarding the testimonies of Violet and Alimira he denied caressing them, fondling their vaginas and sucking their breasts. He also denied threatening them with becoming deaf or blind if they revealed his actions to anyone. The appellant denied committing the offences.
- 3.3 He called two other witnesses. Jacqueline Lungu was the appellant's aunt whose testimony was that the appellant had impregnated Winfridah's daughter. She expressed ignorance as

to why the appellant was in court. She told the court that the appellant was a prophet who used to fellowship with the Banda family and prophesy to them. She was not aware that he raped Winfridah and attempted to rape Violet.

- 3.4 The second defence witness, Rhoda Kapembeze was the appellant's biological mother. Her brief evidence was that her son was a Pastor who impregnated someone. She denied any knowledge of her son having committed any of the offences.

4.0 CONSIDERATION OF THE EVIDENCE BY THE TRIAL MAGISTRATE

4.1 After analyzing all the evidence before him and the case law in relation to sexual offences, the trial Magistrate came to the following findings of fact:

- a) That the appellant is the one who had carnal knowledge of Winfridah without her consent because only he and Winfridah knew about the 'person' who was coming during those nights.
 - b) That the appellant intended to have carnal knowledge of Violet because he had fondled her vagina and took off her underwear in an attempt to penetrate her without her consent.
 - c) That the appellant sucked the breasts and fondled Alimira's vagina and was therefore guilty of indecently assaulting her.
- 4.2 After his conviction, the appellant was referred to the High court for sentencing. In the court below the appellant was sentenced as follows:

Count one - 25 years imprisonment with hard labour (IHL)

Count two – 3 years IHL

Count three – 20 years IHL

Count four – 20 years IHL

- 4.3 The sentences were to run concurrently. The basis for these sentences was that the appellant: “used the name of the church to advance his sexual perversion and against members of one family, thereby putting all of them at risk in event that he had any disease.”

5.0 GROUNDS OF APPEAL

- 5.1 Disenchanted with the conviction and sentence of the court below, the appellant has appealed to this court fronting two grounds of appeal namely:

1. *The lower court erred in law and in fact when it convicted the appellant herein in counts 1, 2 and 3 when there was no corroboration as to both the identity of the accused and the commission of the offence.*
2. *The lower court erred in law and in fact when it did not enter a plea of not guilty in respect of count four after the accused asked for the charges to be read to him again as he did not understand the charges he was facing just before he gave his defence.*

6.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE 1ST
GROUND OF APPEAL

- 6.1 In support of 1st ground of appeal, it was submitted that the trial court erred when it convicted the appellant in counts 1,2 and 3 in the absence of corroboration.
- 6.2 Counsel referred us to the case of ***Emmanuel Phiri vs The People¹*** where it was held that in sexual offences, there must be corroboration of both the commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication.
- 6.3 Counsel contended that in relation to the matter in *casu*, there was no medical evidence to prove that Winfridah was raped by the appellant. It was further argued that Winfridah in her testimony told the court that her eyes were closed throughout the sexual intercourse with the purported "angel" whose identity was never established.
- 6.4 Counsel further observed that as Winfridah is the mother to Violet and Alimira, there was need for independent witnesses to corroborate their evidence. It was contended that there was also evidence of a difference between the appellant and the complainant's family regarding one of Winfridah's daughter who was impregnated by the appellant, hence the possibility of false implication cannot be ruled out.

7.0 RESPONSE TO THE 1ST GROUND OF APPEAL

- 7.1 Counsel for the respondent also filed heads of argument. In response to the 1st ground of appeal it was submitted that the testimony of Winfridah to the effect that it was the appellant who had sexual intercourse with her, was corroborated by the evidence of Maureen who stated that Winfridah showed her a night dress which was stained with semen.
- 7.2 She further submitted that for Winfridah to disclose such an intimate matter to Maureen, it shows that she was genuinely dismayed with what had happened and therefore did not consent to such acts. Counsel contended that it is therefore safe to conclude that the appellant coerced Winfridah to submit to sexual intercourse by false representation which is provided for in **section 132 of the Penal Code**. We were referred to the cases of *Mugridge vs S²* and *Rex vs Swiggelaa, Murray³* as persuasive authorities for Counsel's proposition.
- 7.3 In relation to count 2, Counsel argued that the close proximity of the parties' houses shows that the appellant had the opportunity to commit the offence. According to Counsel, this corroborates the evidence of Violet. Counsel observed that the appellant's identity was clearly established when he failed to even cross examine Violet who also gave a description of the appellant's penis. To buttress his submission, Counsel cited the case of *Joseph Mulenga and Another vs The People⁴* where it was held that the accused person should cross examine

prosecution witnesses to challenge facts which are disputed during trial.

8.0 EVIDENCE IN SUPPORT OF COUNTS 1, 2 AND 3

8.1 Before we deal with whether the testimony of the complainants in counts 1, 2 and 3 was corroborated, we will review the evidence in support of counts 2 and 3.

8.2 In the second count the appellant was charged with the offence of attempted rape contrary to section 134 of the Penal Code. This section provides as follows:

“Any person who attempts to commit rape is guilty of a felony and is liable to imprisonment for life.”

8.3 Further the definition of “attempt” is provided in section 389 of the Penal Code which enacts:

“389(1) when a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence he is deemed to commit the offence.”

8.4 Thus, there are two requisites to this offence. The first is the intention to commit the overt act and a manifestation of his intention by some overt act which is adapted to the fulfillment of the offence.

8.5 The facts of this case in relation to the attempted rape on Violet Banda disclose that the appellant approached the prosecutrix with an intention to have sexual intercourse with her under the guise of removing coins which were put in her stomach. The state of mind is evidenced by the words uttered by the appellant and his conduct towards the prosecutrix. This was that he told her to remove her pants, inserted his fingers into her vagina and then removed his underwear. She however called for help which resulted in his failure to have sexual intercourse with her.

8.6 From this discourse, we are convinced that the appellant had reached the commencement of the execution of the intended crime. We therefore cannot fault the trial Magistrate for arriving at the conclusion that the appellant had committed the offence of attempted rape.

8.7 Moving to count three, the appellant was charged with the offence of Indecent Assault contrary to section 137(1) of the Penal Code. The comments of the trial Magistrate, in relation to this offence, were as follows at page 37 of the record of appeal:

"It is also the evidence of PW3 that the accused sucked her breasts and fondled her vagina tricking her into thinking that he was conducting deliverance and she reasonably thought he was doing so as a Pastor. She did not give her consent to be indecently assaulted."

8.8 The evidence on record reveals that the identity of the perpetrator was not contested and the appellant admitted patronizing Winfridah's house for purposes of conducting deliverance prayers. This also confirms that he had the opportunity to commit the offence. It is our considered view that no motive to falsely implicate the appellant can be discerned from the evidence of the prosecution witnesses in relation to this offence.

9.0 WAS THE TESTIMONY OF THE PROSECUTION WITNESSES CORROBORATED?

9.1 Corroborating evidence is evidence that tends to support a proposition that is already supported by some initial evidence, therefore, confirming the proposition. In this case, scrutiny of the judgment shows that the trial magistrate was alive to the need for corroborative evidence in this case. He made reference to the relevant case law but made no mention of there being any corroborative evidence in the judgment. In ***Emmanuel Phiri vs The People***¹ it was held as follows:

- i. *In a sexual offences there must be corroboration of both commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Failure by the court to warn itself is a misdirection.*
- ii. *A conviction may be upheld in a proper case notwithstanding that no warning as to corroboration has been given if there in fact*

exists in the case corroboration or that something more as excludes the dangers referred to.

10.0 SIMILAR FACT EVIDENCE

10.1 Similar fact evidence is evidence tendered in a criminal trial to demonstrate that the accused previously engaged in the relevant prohibited activity. According to the Editors of **Archbold Criminal Pleading, Evidence and Practice 1999**, in paragraph 13-5, the basis for admitting similar fact evidence is that it has a probative value. They go on to state that:

*“The leading case must now be taken to be the decision of the House of Lords in **DPP v. P.**⁵ The sole speech was delivered by Lord Mackay L. C. his Lordship concluded (at p. 460) that the essential feature of evidence to be admitted under the “similar fact” rule is that its probative force in support of the allegation being tried is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed, but restricting the circumstances in which there is sufficient probative force to overcome the prejudice of evidence relating to another crime to cases where there is some striking similarity between them is to restrict the operation of the principle in a way which give too much effect to a particular manner of stating it, and is not justified in principle.”*

10.5 In **DPP vs Boardman**⁸, it was stated that the general principle is that similar fact evidence will be admissible when the evidentiary value thereof outweighs the potential for prejudice.

10.6 The appellant told Winfridah, Violet and Alimira that spells had been cast on them and that a stranger would, in the night come to exorcise them. They were all instructed to sleep alone and not look at this being. They were also advised to allow the being do whatever he wanted. In the case of Violet and Alimira, they ended up identifying the appellant in the presence of Winfridah. We are of the considered view that the facts of this case reveal that there are exceptional circumstances which give rise to the admissibility of similar fact evidence. The appellant's conduct to Violet and Alimira can be admitted to draw an inference that he was the same person who raped Winifridah. His identity is tied down to past conduct which in this case we find admissible. We have no difficulty in arriving at the conclusion that the evidential value outweighs the potential for prejudice.

10.7 In the face of the similar fact evidence we have just reviewed, it is our view that properly directing himself, the trial magistrate would have found that it corroborates the testimony of Violet and Alimira that they were sexually molested by the appellant. It provides the "something more" referred to in the case of **Emmanuel Phiri vs The People**¹ that rules out the possibility of false implication.

**11.0 CIRCUMSTANTIAL EVIDENCE IMPLICATING APPELLANT
IN WINFRIDAH'S RAPE**

- 11.1 As can be gleaned from the record, at least five occasions, a person had carnal knowledge of Winfridah. However, she did not identify the perpetrator, because she feared the consequences that would befall her as warned by the appellant. She only concluded that it was the appellant who had sex with her after receiving similar reports from her daughters.
- 11.2 It is imperative in our view to interrogate whether or not these set of facts establish absence of consent, notwithstanding the fact that the prosecutrix submitted to the intercourse.
- 11.3 We have drawn inspiration from some British cases on the question of what is considered as obtaining consent through fraud. In *R vs Flattery*,⁹ the defendant John Flattery (JF) posed as a medical doctor and surgeon. The complainant; a young woman aged 19, consulted JF with respect to an illness she was suffering from. JF advised that surgery was required. Under the pretext of performing surgery, JF had sexual intercourse with the complainant. JF was convicted of rape.
- 11.4 In yet another insightful case of *R vs Williams*¹⁰ whose facts are that the defendant, a singing lessons tutor, convinced his 16-year-old student to have sexual intercourse with him for the purpose of improving her singing voice. He told her he was performing an act to improve her air passages. The issue that

arose for determination was, did the student consent? It was held that her consent was vitiated by fraud as to the nature and quality of the act.

11.5 What is clear from the foregoing is that if there is deception as to the nature and purpose of the act, consent can be vitiated. It is our view that that the trial magistrate properly found that Winfridah was raped. But the question is by who?

11.6 The evidence implicating the appellant is circumstantial. He is the one who told Winfridah to leave her door open. He also told her not to look at the visitor. On two occasions, he called her to confirm after the stranger had sexual intercourse with her. There is also evidence that he told Winfridah's daughters that he was going to exorcise them. He demanded that they be alone at the time and like their mother, he ended up sexually molesting them.

11.7 In the case of **David Zulu v The People**¹¹ the Supreme Court dealing with circumstantial evidence, held as follows;

"It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt."

11.8 It is our view that properly directing himself, the trial magistrate would have still found that the circumstantial evidence implicated the appellant in PW1's rape. He is the only one who knew about the medium who would visit her in the night and the fact that another person committed the offences is out of question. On the evidence on record, the only person who could have committed the offence is the appellant.

11.9 Having found that the appellant's rape of Winfridah was proved by circumstantial evidence and that the molesting of Violet and Alimira was corroborated by similar facts evidence, we find no merit in the 1st ground of appeal and we dismiss it.

12.0 ARGUMENTS IN SUPPORT OF THE 2ND GROUND OF APPEAL

12.1 In support of the 2nd ground of appeal, Ms. Marebesa drew our attention to page 24 of the record of appeal, lines 4 to 10 and submitted that before the appellant gave his defence, he asked the court to explain the charge to him to which he thereafter denied. Counsel observed that the record does not however show what was explained to the appellant to which he pleaded not guilty. It was then contended that the error by the court entailed that the appellant was subjected to an unfair trial, contrary to an accused person's rights contained in the Constitution. She accordingly beseeched us to quash the conviction in respect of count four.

13.0 ARGUMENTS IN RESPONSE

13.1 In response to the 2nd ground of appeal, Counsel for the respondent submitted that the appellant's admission under count 4 was unequivocal in line with the guidance of the Supreme Court in ***Gideon Hammond Millard vs The People***.¹²

Counsel accordingly beseeched this court to dismiss the appeal and uphold the judgment of the court below.

14.0 WAS THE PLEA TO COUNT 4 EQUIVOCAL?

14.1 We now turn to consider ground two which in effect is challenging the plea entered by the appellant in respect of count 4. The contention is that the plea was not equivocal. We find it imperative to reproduce a portion of the proceedings in the court below. On the 23rd August, 2016 when called upon to take plea, the following was the response by the appellant:

Accd: I understand the charge and I admit

- *Yes I did indecently assault the complainant*
- *I touched her breasts*
- *She didn't allow me to touch her breasts*
- *I don't know why I did, I just touched her*
- *I did not have any lawful authority or justification to act as I did.*

Court: - Plea of guilty."

14.2 On the 31st August, 2016 the facts were read out in Open Court and the appellant responded as follows:

“Accd: - I understand the facts

- They are true and correct*
- Nothing to amend”*

14.3 The court found the appellant guilty of the offence and convicted him upon his own admission.

14.4 It is settled law that a plea of guilty must be unequivocal, which means that it must be clear and free from ambiguities. This being the case, when an unrepresented accused has pleaded guilty, a Magistrate has a duty to satisfy himself or herself as to whether he understands the constituent elements of the offence charged. In order to ascertain this, he or she must ask the accused specifically if he admits to every element constituting the offence.

14.5 Examination of the proceedings we have just reproduced clearly indicated that the appellant admitted all the ingredients of the offence in count 4 without qualification when he was asked. We are satisfied that the charge was fully explained to the appellant. The plea was unequivocal and cannot therefore be set aside.

14.6 In light of the preceding paragraphs, we hold that the ground is destitute of merit and dismiss it accordingly.

15.0 INTERFERENCE WITH SENTENCE

15.1 Though this is an appeal against conviction only, **section 16(4) of the Court of Appeal Act**, provides as follows:

“The Court may, on an appeal, whether against conviction or sentence, increase or reduce the sentence, impose such other sentence or make such other order as the trial court could have imposed or made, except that-

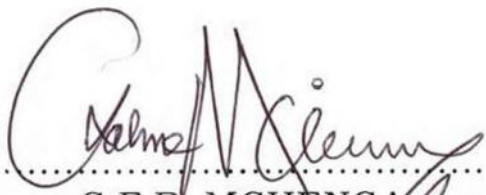
(a) in no such case shall a sentence be increased by reason of or in consideration of evidence that was not given at the trial; and

(b) the court shall not interfere with a sentence just because if it were a trial court it would have imposed a different sentence, unless the sentence is wrong in principle or comes to court with a sentence of shock”


15.2 The salient features of this case are that the appellant is a religious leader, currently commonly known as a prophet. The victims of his sexual abuse are a mother and her daughters, who attended the appellant’s religious outfit. The evidence on record also points at the fact that he used his position as a religious leader to sexually abuse a family that had just lost a husband/father. This is an issue that should not be taken lightly.

15.3 In view of these aggravating circumstances the sentence comes to us with a sense of shock. There is therefore need for stiffer

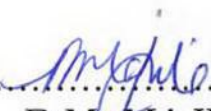
punishment and to substitute the sentence by the lower court. In respect of count 1, we impose a sentence of 45 years, count 2, 40 years, counts 3 and 4, 20 years imprisonment with hard labour. The sentences are to run consecutively in light of the observation by the Supreme Court in the case of *Isaac Njovu vs The People*.¹³ In that case, it was held that sentences will only run concurrently if the series of offences are committed in a continuity of purpose. In this case it cannot be said that there was continuity of purpose although the appellant's actions were similar to the original act. The appellant committed the acts on different days and we cannot say that it was a series of offences committed in the course of conduct, therefore the appropriate sentences imposed must run consecutively.



 C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT



 F.M. CHISHIMBA
COURT OF APPEAL JUDGE



 B.M. MAJULA
COURT OF APPEAL JUDGE