

**THE STATE**

**Versus**

**NKOSILATHI GUMBO**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 19 OCTOBER 2023

**Review judgment**

**DUBE-BANDA J:**

[1] This matter was placed before me on automatic review. The accused was charged with the crime of having sexual intercourse with a young person as defined in s 70(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Criminal Law Code). Section 70 of the Criminal Law Code makes it a crime for anyone to have extra-marital sexual intercourse with a young person or to commit indecent acts with a young person. In this case it was alleged that the accused had unlawful extra marital sexual intercourse once with the complainant a girl under the age of sixteen. According to the outline of the State case, on 29 May 2023 the accused had sexual intercourse with the complainant. The accused pleaded guilty and was duly convicted and sentenced to 36 months imprisonment of which 18 months was suspended on the usual conditions of good behavior, and the remaining 18 months suspended on conditions of community service.

[2] The accused was charged with contravening s 70(1)(a) of the Criminal Code, and the provision states that:

“Sexual intercourse or performing indecent acts with young persons

(1) Subject to subsection (2), any person who—

(a) has extra-marital sexual intercourse with a young person; or

(b) .....

(c) .....

shall be guilty of sexual intercourse or performing an indecent act with a young person, as the case may be, and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both.”

[2] On the 24th May 2022 the Constitutional Court declared that provisions of the Criminal Law Code governing the age at which children can consent to sexual intercourse unconstitutional. The court was delivering its judgment in the case of *Kawenda v Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 3/2022. The Court ordered *inter alia* that:

- i. Sections 70, 76, 83 and 86 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] are declared unconstitutional and are hereby set aside.
- ii. The orders of constitutional invalidity made in paras (2) and (3) above are hereby suspended for 12 months from the date of this order to enable the respondents to enact a law that protects all children from sexual exploitation in accordance with the provisions of s 81 (1) (e) of the Constitution of Zimbabwe.

[3] The Constitutional Court suspended the declaration of invalidity for a period of 12 months to allow the competent authorities to correct the defect and amend the law. The order was made on 24 May 2022, and the 12 months expired on 25 May 2023. No law has been enacted to protect all children from sexual exploitation as ordered by the Constitutional Court. By operation of law, the effect of the failure to enact a law as ordered by the Constitutional Court is that the declaration of invalidity came into effect on the expiry of the period of 12 months, i.e., on 25 May 2023.

[4] The case of *State v Moyo* HB 210/23 is pertinent in this regard. KABASA J stated therein, that:

“Section 70 was therefore declared unconstitutional and set aside but such was to be held in abeyance for 12 months so the respondents could address the cause of such invalidity. With the expiration of those 12 months section 70 as well as the other sections affected were unconstitutional and set aside. Put differently there was to be no section 70, 76, 83 and 86 unless the respondents acted within the 12 month period, and consequently a conviction or a charge could not competently stand on a provision that was set aside.

The respondents did not heed the court’s call. The order was granted on 25 May 2022. Twelve months lapsed in or around May 2023 and with that the order declaring section

70 unconstitutional became effective. Section 70 of the Code was accordingly set aside.”

[5] According to the outline of the State case, the accused had sexual intercourse with the complainant on 29 May 2023. At the time the accused had sexual intercourse with the complainant, the 12 months period allowed by the Constitutional Court for the alignment of the law with the provisions of the Constitution had expired, and the declaration of invalidity had come into effect and thus s 70 of the Criminal Law Code had been struck down. Therefore, the accused was charged, prosecuted, convicted and sentenced with contravention of a non-existent law. Charging, prosecuting, convicting and sentencing an accused person with a non-existent law is an irregularity so fundamental that the law cannot countenance. Such proceedings are susceptible to be reviewed and set aside. I therefore, find that the proceedings in the trial court were not in accordance with real and substantial justice, as a result, a substantial miscarriage of justice has actually occurred. The conviction cannot stand.

In the result, I make the following order:

The conviction and sentence be and is hereby quashed and set aside.

Dube-Banda J .....

Kabasa J agrees .....