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

APPEAL № 19/2018

BETWEEN:

TRAMPA MOONGA — Appellant

AND

THE PEOPLE — Respondent

REPUBLIC OF ZAMBIA
COURT OF APPEAL
27 SEP 2018
CRIMINAL REGISTRY 1
P.O. BOX 50067, LUSAKA

Coram: **Chashi, Lengalenga** and **Siavwapa, JJA**
on 22nd May, 2018 and 25th September, 2018

For the Appellant: Mr. H. M. Mweemba – Principal Legal Aid Counsel
(Legal Aid Board)

For the Respondent: Mrs. F. Nyirenda Tembo – Senior State Advocate

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J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

1. **THE MINISTER OF HOME AFFAIRS, THE ATTORNEY GENERAL v LEE HABASONDA (suing on his behalf and on behalf of SOUTHERN AFRICA CENTRE FOR THE CONSTRUCTIVE RESOLUTION OF DISPUTES (2007) ZR 207**
2. **GIBRIAN MWEETWA v THE PEOPLE (CAZ APPEAL № 12 OF 2017)**

3. **MACHEKA PHIRI v THE PEOPLE (1973) ZR 145**
4. **GIFT MULONDA v THE PEOPLE (2004) ZR 135**
5. **EMMANUEL PHIRI v THE PEOPLE (1982) ZR 71**
6. **EMMANUEL CHOLA v THE PEOPLE (CAZ APPEAL Nº 152 OF 2017)**
7. **MACHIPISHA KOMBE v THE PEOPLE (2009) ZR 282**
8. **KATEBE v THE PEOPLE (1975) ZR 13 (SC)**
9. **NDAKALA v THE PEOPLE (1974) ZR 19 (SC)**
10. **SEMANI v THE PEOPLE (1973) ZR 203 (CA)**
11. **SIKOTA WINA & PRINCESS NAKATINDI WINA v THE PEOPLE (SCZ JUDGMENT Nº 8 OF 1996)**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia – Section 138(1) as amended by Act Nº 2 of 2011.**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**
3. **The Juveniles (Amendment) Act, Nº 3 of 2011**

This is an appeal against conviction and sentence, arising from the judgment of the Subordinate Court.

The appellant, Trampa Moonga, was convicted on one count of defilement contrary to section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia as amended by Act Nº 2 of 2011, and sentenced to twenty-five years imprisonment with hard labour, effective from date of arrest.

The particulars of the offence were that, the appellant on unknown dates but in the month of June, 2015 at Namwala in the Namwala 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 and PW3.

PW1, Precious Chifwala was the mother to the prosecutrix, who informed the court that her daughter was born on 4th February, 2002. She testified that on 8th July, 2015 she was called for a meeting at the school attended by her daughter, the prosecutrix. During that meeting, the prosecutrix narrated how she met the appellant as she was going home from school and he offered her a ride on his bicycle which she accepted. She stated further that, when they reached Mulala Masompe tarmac junction, the appellant stopped and pulled her into a nearby bush where he had carnal knowledge of her.

PW1 later reported the matter at Niko police post but she was advised to report at Namwala police station which she did.

PW2, the prosecutrix who was fifteen (15) years at the time of trial gave sworn testimony in which she informed the court that, she knew the

area. She confirmed that she was born on 4th February, 2000 and she said that she attended Makaba Primary School.

PW2's evidence was to the effect that, on an unknown date in June 2015 whilst she was at school she had met the appellant who invited her and her friend to go to his shop which was near the school premises, at lunch time and they went there and he gave them each a packet of biscuits.

Later that same day when PW2 knocked off around 16:00 hours, she met the appellant who offered her a ride on the bicycle which she accepted. On the way home, when they reached a secluded area according to PW2's evidence, the appellant dragged her to a nearby bush where he removed her underwear and had sexual intercourse with her. She stated that, the ordeal was very painful and that she sustained some bruises on her vagina. She stated further that after the appellant had carnal knowledge of her, he got his bicycle and left using a different direction.

Thereafter, PW2 told the teacher she was staying with what transpired and the matter was initially reported to Niko police post but they

were referred to Namwala police station where she was issued with a medical report for examination at Namwala District Hospital.

When PW2 was cross-examined by the appellant she stated that he had carnal knowledge of her on 7th, 8th and 9th July. She said that she was taken to the hospital on 15th July, 2015. Even in cross-examination she maintained her earlier evidence that the appellant found her on the road and carried her on his bicycle and then he had carnal knowledge of her in the bush about 200 metres from the road.

PW3, Constable Crispin Mubanga investigated the case which he was assigned on 16th July, 2015. His evidence of the alleged defilement was based on what the prosecutrix told him. He also testified on the role he played after the report was made by taking the prosecutrix to Namwala District Hospital where she was examined by Dr. Agrippa Lungu who confirmed that her hymen was absent.

Thereafter, he embarked on proving the age of the prosecutrix by obtaining the class register from Makaba School which indicated that the prosecutrix was born in the year 2000.

According to PW3, further investigations led to the appellant's apprehension. The appellant was warned and cautioned and interviewed

in Tonga language in relation to the offence of defilement of the prosecutrix which he denied. PW3 later charged, arrested and detained the appellant.

PW3 identified and produced the medical examination report (exhibit **"P1"**) and an extract of the school register that confirmed that the prosecutrix was a *bona fide* grade 8 pupil of Makaba Primary School and indicated her year of birth as 2000 (exhibit **"P2"**).

In cross-examination, PW3 was challenged by the appellant over the alleged defilement and whether it was reasonable to examine the prosecutrix on 15th July, 2015 as opposed to the day on which she alleged she was defiled. He responded that it was reasonable as the appellant had threatened her not to tell anyone.

At the close of the prosecution case, the appellant was found with a case to answer and put on his defence. After his rights were explained to him, he opted to give sworn evidence in Tonga language.

The statutory defence was also explained to the appellant.

In his defence, the appellant testified that he was operating a shop near Makaba Primary School from 2007 to 2012 and that between 2012 and 2013, the new head teacher wanted to open a shop in the same area

where he was operating from. He stated further that in 2013 his shop was broken into and some items were stolen therefrom.

He testified further that, he was apprehended by members of the neighbourhood watch around 07:00 hours on 23rd July, 2013 and taken to Niko police post.

The appellant denied any knowledge of the defilement although he admitted that he recalled the testimony given by the prosecutrix that he had carnal knowledge of her.

The learned trial magistrate found the appellant guilty as charged and convicted him accordingly and later committed him to the High Court for sentencing.

The High Court upheld the conviction and sentenced him to twenty-five (25) years imprisonment with hard labour.

The appellant now appeals against the said conviction and sentence and he has advanced the following grounds:

1. **The learned trial court misdirected itself in law when it delivered a judgment which fell short of the standard required under section 169 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

2. **The learned trial court erred in law and in fact when it proceeded to receive the evidence of the prosecutrix on**

oath before satisfying itself as to her actual age at the time of trial.

3. **The learned trial court erred in law and in fact when it convicted the appellant in the absence of corroborative evidence as to both commission of the offence as well as identity of the offender.**

Mr. Humphrey Mweemba, Principal Legal Aid Counsel relied on the heads of argument filed into court.

In relation to ground one, he submitted that it concerns the defectiveness of the judgment that fell short of the standard required under section 169(1) of **The Criminal Procedure Code**[2] which provides as follows:

> **"169(1) the judgment in every trial in any court shall, except as otherwise expressly provided by this Code, be prepared by the presiding officer of the court and shall contain the point of or points for determination and decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."**

Mr. Mweemba relied on the Supreme Court's application of the requirement of the law in the case of **THE MINISTER OF HOME AFFAIRS, THE ATTORNEY GENERAL v LEE HABASONDA (suing on his behalf and on behalf of SOUTHERN AFRICA CENTRE FOR THE CONSTRUCTIVE RESOLUTION OF DISPUTES**[1] wherein the Court stated as follows:

> **"Every judgment must reveal a review of the evidence, where applicable, a summary of arguments and submissions, if made, finding of facts, the reasoning of the Court on the facts and the application of law and authorities, if any, to the facts."**

Mr. Mweemba submitted that this Court has upheld this law in a plethora of cases such as **GIBRIAN MWEETWA v THE PEOPLE**[2] in which it gave guidance on what the contents of a proper judgment should be.

With regard to the case *in casu,* he quoted a portion of the Court's judgment at page J3, third paragraph and line 10 where the learned trial Magistrate stated as follows:

> **"I shall not belabour to reproduce the evidence on the record, I will proceed to discuss the prosecution and defence evidence and make my findings of fact."**

He submitted that the approach taken by the court below was a misdirection which ought to render ground one to succeed.

Mr. Mweemba submitted further that a perusal of the judgment reveals that the learned trial Magistrate neither properly analysed the evidence nor gave any reasoning of the facts or applied the law and authorities as required by the law that provides the standard. He drew the court's attention to the fact that the learned trial Magistrate only

endeavoured to summarise the evidence and proceeded to conclude that she found the appellant guilty of defilement.

He contended that the court below ought to have discussed corroboration of the offender's identity in detail and the commission of the offence itself. He, therefore, submitted that this ground of appeal be allowed, and that for reasons demonstrated in the subsequent grounds, that the appellant be acquitted and be set at liberty forthwith instead of the court sending the matter for retrial.

In arguing of ground two, Mr. Mweemba drew this Court's attention to the evidence of PW1, Precious Chifwala, the biological mother to the prosecutrix in the record of proceedings where she testified on 31st August, 2015, that her daughter and victim was born on 4th February, 2002. He submitted that, what that evidence entails is that in February 2015, the prosecutrix turned thirteen years. He submitted further that after the amendment of section 122 of **The Juveniles (Amendment) Act № 3 of 2011,** the requirement to conduct a *voire dire* is tied to the age of the child witness. He reproduced the relevant provision of the law which provides as follows:

> **"Where, in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a**

witness, the court shall receive the evidence, on oath, of the child if in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth, provided that –

(a) if, in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence, on oath and does not understand the duty of speaking the truth, the court shall not receive the evidence; and

(b) where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused."

In view of the foregoing provision, Mr. Mweemba noted the total contrast in the date of birth of 4th February, 2000 given by the prosecutrix and the one of 4th February, 2002 given by her mother. He further referred to the medical report that indicated the prosecutrix to have been fourteen (14) years at the time of the examination. He submitted further that the law is clear with regard to the age of the child and on who is supposed to give it. He further submitted that in view of biological mother's evidence it ought to have been followed.

It was, therefore, humbly submitted that the learned trial Magistrate erred by not considering the evidence of the disparities in age of the

prosecutrix and when she proceeded to state that the prosecutrix was fifteen (15) years old and consequently not a child of tender years, even after PW1, the biological mother to PW2, the prosecutrix had testified that she was born in 2002 and not 2000.

It was contended by the appellant's Counsel that the court below erred by not conducting a *voire dire* as required by law and that, therefore, PW2's evidence should be discounted from the record. He argued that evidence of the Register in the absence of the people who made entries therein and those who provided the age testifying remains hearsay which is inadmissible as evidence.

He further contended that the conviction herein was flawed as the age of the prosecutrix remains uncertain and was not proved to the required standard. To support this argument, he relied on the case of **MACHEKA PHIRI v THE PEOPLE**[3] where it was held as follows:

> "(i) **Where the age of a person is an essential ingredient of a charge, that age must be strictly proved.**
>
> (ii) **It is not acceptable simply for a prosecutrix to state her age, this can be more than a statement as to her belief, as to her age. Age should be proved by one of the parents or on whatever other best evidence is available."**

Mr. Mweemba further relied on the case of **GIFT MULONDA v THE PEOPLE**[4] wherein the Supreme Court observed as follows:

> **"The age of the victim in defilement cases is crucial and a very essential ingredient of the charge."**

In the present case, the appellant's Counsel submitted that in view of the cited cases, the learned trial Magistrate should not have admitted the school register (exhibit **"P2"**) in evidence and he asked this Court to disregard it.

He further prayed that this Court entirely discounts PW2's evidence, allows the appeal, quashes the conviction, sets aside the sentence and releases the appellant forthwith.

With respect to ground three, Mr. Mweemba submitted that the evidence of defilement against the appellant is that given by PW2, the prosecutrix and that there is no other independent evidence to corroborate her evidence. He submitted further that even PW2's school friend referred to in her evidence was not called as a witness. He referred this Court to the case of **EMMANUEL PHIRI v THE PEOPLE**[5] where the Supreme Court held *inter alia* as follows:

> **"For 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. Failure by the court to warn itself is a misdirection."

Appellant's Counsel submitted that in the recent case of **EMMANUEL CHOLA v THE PEOPLE**[6], this Court commented on the requirement of corroboration in sexual offences and applied the principles in the case of **MACHIPISHA KOMBE v THE PEOPLE**[7] where the Supreme Court held as follows:

"1. **In criminal cases of a sexual nature, such as rape and defilement, corroboration is required as a matter of law before there can be conviction.**

2. **Corroboration must not be equated with independent proof. It is not evidence which needs to be conclusive itself.**

3. **Corroboration is independent evidence which leads to confirm that the witness is telling the truth when he or she says that the offence was committed and that it was the accused who committed it.**

4. **Law is not static, it is developing. There need not now be a technical approach to corroboration. Evidence of something more, which though not constituting corroboration as a matter of strict law, yet satisfies the court that the danger of false implication has been excluded, and it is safe to rely on the evidence implicating the accused.**

5. **Odd coincidences constitute evidence of something more. They represent an additional piece of evidence of**

something more, which the court is entitled to take into account. They provide a support of the evidence of a suspect witness as an accomplice of any other witness whose evidence requires corroboraton. This is the less technical approach as to what constitutes corroboration."

In the case *in casu,* Mr. Mweemba submitted that the alleged defilement took place in a bush and there was no evidence of any other person having seen the appellant with the prosecutrix on the date in question. He argued that as such there is no corroboration to support PW2's allegation that it was the appellant who had sexual intercourse with her. He submitted that there are no special compelling grounds to rule out inherent dangers of false implication.

Appellant's Counsel submitted further that the medical report clearly shows that the prosecutrix had previous sexual encounters, which indicates that there is a possibility that it is not the appellant who had sexual intercourse with her on the date in question.

He also drew the court's attention to the fact that there was no proper or specific date that was given when the alleged defilement took place. He noted from the evidence on record that PW1 testified that she was called by the teacher on 8th July, 2015 concerning the alleged

defilement whilst PW2 recalled that she met the appellant in June 2015 and that that is when she was defiled. He further observed that in cross-examination she stated that the defilement occurred a week after a show at Makaba which was from 7th, 8th and 9th July, 2015 and which entailed that it occurred on 16th July, 2015.

Mr. Mweemba further referred the Court to PW3's evidence in which he stated that PW2 told him that the appellant defiled her on 30th June, 2015 and she was only medically examined on 16th July, 2015.

He submitted that there is clearly so much uncertainty on the evidence of the date when the alleged commission of the offence occurred and there is no corroboration. He submitted further that the trial court did not even warn itself of the dangers of convicting on uncorroborated evidence, which he submitted was a misdirection.

He submitted that, therefore, in light of the evidence before the court below, there was no corroboration both as to the identity of the offender or the commission of the offence itself as is required by law.

Finally, it was contended by appellant's Counsel that the issues considered by the learned trial court did not amount to corroborative evidence or evidence of something more. He submitted that in the

absence of corroboration or evidence of something more, the conviction is not safe and must be quashed.

He, therefore, prayed that this Court allows the appeal, quashes the conviction, sets aside the sentence and sets the appellant at liberty forthwith.

After perusing the appellant's grounds of appeal and the heads of argument, Mrs. F. Nyirenda Tembo, Senior State Advocate informed the Court that the State did not support the conviction and sentence.

We have considered the evidence and the submissions by Counsel, together with authorities cited, the judgment of the trial court and the sentence passed by the High Court.

In ground one, Mr. Mweemba attacked the trial court's judgment for falling short of the required standard under section 169(1) of **The Criminal Procedure Code** which earlier was reproduced by Counsel in his heads of argument. We agree with the principle guidelines laid out in that provision of the law and the cited cases, especially the case of **MINISTER OF HOME AFFAIRS & ATTORNEY GENERAL v LEE HABASONDA (suing on behalf of SOUTHERN AFRICA CENTRE FOR THE CONSTRUCTIVE RESOLUTION OF DISPUTES (SACCORD)).**

The learned trial Magistrate by opting not to reproduce the evidence on record erred and misdirected himself. We say so because he fell into grave danger of not reviewing the said evidence properly and failing to give the reasoning of the court in arriving at the decision that he did. We observed from the said judgment that the learned trial Magistrate made two findings of fact, that the prosecutrix was carnally known and that she was below the age of sixteen years. However, despite the fact that he made those findings of fact, we observed that he failed to properly address his mind to the issue of the age of the prosecutrix. We are of the considered view that if the learned trial Magistrate had taken time to review the evidence properly as opposed to glossing over it, he would not have fallen into error of accepting the date of birth given by the prosecutrix. We find that consequently he misdirected himself on how to receive evidence from the prosecutrix.

Therefore, based on the arguments and submissions by Counsel and in following the Supreme Court's guidance in the **LEE HABASONDA** case, we find that ground one has merit. We, accordingly, allow it.

In ground two, Mr. Mweemba challenged the trial court's failure to adequately satisfy itself of the age of the prosecutrix before it proceeded to receive evidence from her.

We have considered the evidence and submissions on this ground. From the evidence on record, it is clear that the learned trial Magistrate accepted the evidence of the prosecutrix with regard to her age and her date of birth as opposed to that given by her biological mother, PW1. Therefore, in following the guidance given by the Supreme Court in the case of **MACHEKA PHIRI v THE PEOPLE** relied on by Mr. Mweemba that the age of a prosecutrix should be proved by one of the parents or whatever other best evidence that is available, we find as a fact that the learned trial Magistrate totally misdirected himself by accepting the evidence of the prosecutrix regarding her age.

What we find surprising was that the said evidence was accepted after PW1 had already given evidence of the age and date of birth of her daughter, PW2.

Furthermore, since the Court in the **MACHEKA PHIRI** case held that the age of the prosecutrix should be proved by one of the parents and PW1 satisfied that requirement, we find that the evidence in the school

register of the date of birth of the prosecutrix was superceded by PW1's evidence which we consider to be the best evidence.

In view of the evidence in the present case and the decisions in the cited cases of **MACHEKA PHIRI** and **GIFT MULONDA,** we accept Mr. Mweemba'a arguments in respect of ground two that the learned trial Magistrate misdirected himself and erred in law and in fact by proceeding to accept the victim's evidence as he did.

By accepting the evidence of the prosecutrix with regard to her age, it resulted in the court applying the cautionary rule as the age of fifteen (15) years is the one that was applied as opposed to a *voire dire* being conducted.

In view of PW1's evidence, we find as a fact that the prosecutrix was thirteen (13) years at the time of trial, having been born on 4th February, 2002 according to her mother PW1, Precious Chifwala. Having made that finding, we subsequently find that the learned trial Magistrate erred in law and fact by not conducting a *voire dire* as required by law, namely the Juveniles (Amendment) Act, № 3 of 2011 when a child below the age of fourteen is called as a witness.

We, therefore, find that ground two has merit and it, accordingly succeeds.

We further considered the evidence and Mr. Mweemba's arguments in respect of ground three that the learned trial Magistrate convicted the appellant in the absence of corroborative evidence of both the commission of the offence and the identity of the offender.

As we observed earlier, Mr. Mweemba relied on the cases of **EMMANUEL PHIRI v THE PEOPLE** and **EMMANUEL CHOLA v THE PEOPLE** to elucidate the requirement of corroboration in sexual offences.

In the earlier case of **KATEBE v THE PEOPLE**[8] the Supreme Court held as follows:

> **"(i) The general principle of the cautionary rule as to corroboration applies equally to sexual cases as to accomplice cases.**
>
> **(ii) If there are "special and compelling grounds" it is competent to convict on the uncorroborated testimony of a prosecutrix.**
>
> **(iii) Where there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against an accused, and the case is in practice no different from any others in which the conviction depends on the reliability of her evidence as to the identity of the culprit, this is a "special and compelling ground" which would justify a conviction on uncorroborated testimony."**

In the case before us, the offence was allegedly committed in June 2015 on a date the prosecutrix could not recall. According to evidence by PW1, she was called to the school which the prosecutrix attended on 8th July, 2015 where the headmaster and other teachers informed her of the alleged defilement.

The prosecutrix was taken to hospital on 15th July, 2015 and examined and the medical report disclosed a broken hymen and evidence of repeated vaginal penetration that was not explained by PW2 in her evidence.

We also observed from PW2's evidence on record that when she was cross-examined by the appellant, she stated that he had carnal knowledge of her a week after a show at Makaba which was on the 7th, 8th and 9th July.

From the evidence it is clear that the prosecutrix failed to make an early report of the alleged defilement. The case of **NDAKALA v THE PEOPLE**[9] is instructive on the failure to make early report and effect thereof. In that case the appellant was convicted of attempted rape and

the Supreme Court in allowing the appeal and quashing the conviction and sentence held as follows:

> **"The corollary to the principle that early complaint is admissible to show consistency is that the failure to make an early complaint must be weighed in the scales against the prosecution case."**

Similarly, in the case before us, we find that the failure by the prosecutrix to make an early report tilts the balance of the evidence against the prosecution case.

Furthermore, we find that there was no corroboration as to commission of the offence and the identity of the offender. In this case we observed earlier that PW2, the prosecutrix was thirteen (13) years at the time of trial and that as such a *voire dire* was supposed to be conducted before she could give evidence. A *voire dire* was not conducted as required by law and therefore, her evidence cannot be relied on, as it is no evidence at all. As submitted by Mr. Mweemba and in following the principle laid down in the decided cases cited, for sexual offences corroboration of both the commission of the offence and the identity of the offender is a legal requirement for a conviction to be considered safe. We also find that although there was medical evidence of a broken hymen, the

evidence of unexplained repeated vaginal penetrations and failure by the prosecutrix to make an early report of the alleged defilement raises concerns that remain unresolved.

In the circumstances, we find that the appellant's conviction on PW2's uncorroborated evidence is unsafe. We, therefore, find merit in ground three as well and it succeeds.

After finding that the appellant has succeeded on all three grounds, we still remained with an unresolved issue before concluding the appeal.

Having acknowledged that a *voire dire* was not conducted, the issue that we had to resolve is whether or not this would be a proper case in which to order a re-trial. To resolve that issue we looked at some of the authorities where guidance is given on the circumstances that would warrant the Court to order a re-trial. In the case of **SEMANI v THE PEOPLE**[10], the Court of Appeal (as it then was) made the following observation with regard to a defective or absent *voire dire.*

> **"Where a *voire dire* is defective or absent so that the evidence of the witness must be disregarded, this is not, in the absence of other unsatisfactory features of the case, a ground for declining to order a retrial..."**

Therefore, from the foregoing, it is clear that in the case of a defective or absent *voire dire,* the Court has a discretion to order a retrial, depending on the circumstances of the case.

In a later decision, the Supreme Court gave guidance on some of the circumstances that would warrant the Court to order a re-trial in the case of **SIKOTA WINA & PRINCESS NAKATINDI WINA v THE PEOPLE**[11], when it held *inter alia* as follows:

> **"A re-trial could be ordered if the first trial was flawed on a technical defect or if there were good reasons for subjecting the accused to a second trial in the interest of justice; whereas here, the prosecution has adduced all the evidence it had, there would be no point to order a re-trial."**

We, however, wish to distinguish the case cited from the present case in that this is a case in which the trial can be said to have been flawed on a technical defect, that is, the absence of a *voire dire*, so that the evidence of PW2 must be disregarded.

From the evidence on record we also observed that another unsatisfactory feature of this case, is the lack of corroboration. We found that, in this case, even if we were to order a re-trial, the only evidence that could possibly corroborate the evidence of the prosecutrix as to the identity of the offender would be that of her friend, Beauty, who was probably the

same age and whose evidence would require corroboration. The corroborative evidence of the prosecutrix would not be of any assistance to the prosecution case as it is trite law that the evidence of a child cannot corroborate that of another child.

In the circumstances, therefore, we find that this is not a proper case in which to order a re-trial. We, accordingly, allow the appeal, quash the conviction and set aside the sentence and direct that the appellant be set at liberty forthwith.

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J. Chashi
COURT OF APPEAL JUDGE

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F. M. Lengalenga
COURT OF APPEAL JUDGE

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M. J. Siavwapa
COURT OF APPEAL JUDGE