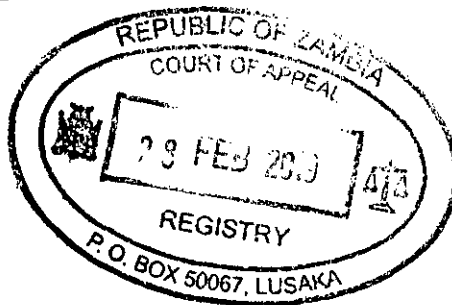


IN THE COURT OF APPEAL
HODLEN AT LUSAKA
(Criminal Jurisdiction)

APPEAL NO. 72/2018



BETWEEN:

BEN CHISI

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Chisanga JP, Makungu and Kondolo SC, JJA

On 4th and 5th October, 2018 and on 28th February, 2019

*For the Appellant : Mr. HM Mulunda -Messrs LM Chambers
Messrs AMC Legal Practitioners*

*For the Respondent : Mrs. Hakasenke Simuchimba- National Prosecution
Authority*

J U D G M E N T

KONDOLO, JA delivered the Judgement of the Court

CASES REFERRED TO:

1. **Machipisha Kombe v the People (2009) ZR 282**
2. **Emmanuel Phiri v The People (1982) ZR 77**
3. **Saul Banda v The People CAZ Appeal No. 117/2017**
4. **Ivess Mukonde v The People S.C.Z. Judgment No. 11 of 2011**

LEGISLATION REFERRED TO:

1. **The Penal Code, Chapter 87, Laws of Zambia**
2. **The Juveniles Act, Chapter 53, Laws of Zambia**

This Appeal is against conviction on a charge of Indecent Assault, by the Subordinate Court, contrary to **Section 137(1)** of the **Penal Code**.

The evidence in the court below is that the Prosecutrix, who was 5 years old at the material time, was indecently assaulted by the Appellant on 18th November, 2014. She was called to testify as PW3 and following a successful *voire dire*, she narrated her version of events. She told the Court that she went to the Appellants house asking where her grandmother was. Whilst there, the Appellant who she knew as Uncle Ben showed her pornographic video material on his phone in which a cartoon character by the name of "Dora the Explorer" was sucking a boys "dudu". She further told the court that the Appellant removed her skirt and pant and touched her dudu with his hands.

The prosecutrix recounted her ordeal to PW1, her elder sister who instructed her to report the incident to their mother, PW2. PW2 informed the court that the prosecutrix recounted what had happened and that Uncle Ben had suggested to the prosecutrix that they try to perform the acts contained in that video but she refused. The matter was then reported to the prosecutrix's father and the family later reported the matter to Kaunda Square Police Station. The following day, they went to the University Teaching Hospital where the Prosecutrix was examined and a Medical Report issued.

The arresting Officer, Detective Constable Kabwe, admitted that he arrived at the charge of indecent assault based on the statements of PW1, PW2 and PW3, which indicated that the Prosecutrix was indecently assaulted by the Appellant by showing her a video, removing her skirt and underwear and proceeding to touch her private parts. He testified that the alleged pornographic video was not

verified and that there were no witnesses who saw the prosecutrix watching the video on the Appellant's phone.

In his defence, the Appellant stated that on the material day, he returned home between 21:00 and 21:30 hours and found his mother and siblings in the house. He retired to bed and the following day he was called by his mother around 15:30 hours informing him that some individuals, who turned out to be police officers, were looking for him. The police officers asked for his phone and password and went through his phone. He was then accused of showing pornographic material to the Prosecutrix but the police found no such video on his phone. We should state here that the arresting officer told the court that he investigated the matter after the docket was allocated to him and it is of note that during cross examination, he testified that the prosecutrix told him that the Appellant did nothing to her.

After considering the evidence, the Magistrate found that the Prosecutrix's evidence remained unshaken when she testified that the Appellant showed her the pornographic video and requested her to perform the acts depicted in it but that she refused and he then touched her private parts. The trial magistrate also remarked that the prosecutrix recounted her ordeal to PW1 and PW2.

In light of the above, the Magistrate found the Appellant guilty and cited **Machipisha Kombe v The People** ⁽¹⁾ in which the Supreme Court guided that in sexual offences corroboration is required as a matter of law but that odd

coincidences constitute "something more" (corroboration). They represent an additional piece of evidence which a court is entitled to take into account.

According to the trial magistrate the facts of this case showed odd coincidences which she described as follows;

"The odd coincidences in this case that support the evidence of PW3 is that the accused had a phone which had Dora a cartoon she loves in human form sucking the dudu of a boy. Even though this video was not found on the phone, why would PW3 make up such a story and why would she say she told Uncle Ben to be nice to her when touching her dudu I see no reason why PW3 would lie. The story PW1 and PW2 gave to court is the same as what PW3 told them at home and also in court."

The Magistrate discounted the Appellants evidence that he was not at home on the material day because that only came out during his defence and he had not raised it earlier. She questioned his failure to call a witness to confirm that he was not at home during the material period as the evidentiary burden to do so was on him because he had raised it in his defence.

The court convicted the Appellant on the basis that touching the prosecutrix's private parts amounted to indecent assault and that it was safe to rely on PW3's evidence because the danger of false implication had been removed and that, *"The corroboration confirms that PW3 is telling the truth and offence was committed and it was committed by the accused. There was no reason for PW3 to lie."*

Indignant at the findings of the Lower Court, the Appellant moved this Court to quash the conviction on six grounds, namely:

1. **The Court below erred in law and fact when it convicted the Appellant solely on uncorroborated evidence of PW3 herein;**
2. **The Court below erred in law and fact when it convicted the Appellant of indecent assault despite acknowledging that on the indictment the Prosecutrix did not state the indecent assault;**
3. **The Court below erred in law and fact when it found as an odd coincidence that the Appellant had a phone which had Dora, a cartoon which the Prosecutrix loves, when no such a phone or let alone a video of such cartoon was brought before Court by the prosecution;**
4. **The Court below erred in law and fact when it convicted the Appellant of indecent assault despite the fact that the prosecution omitted to produce the Appellant's phone in dereliction of duty;**
5. **The Court below erred in law and fact when it convicted the Appellant on the inconsistent evidence of the Prosecution.**
6. **The Court below erred in law and fact when it failed to adjudicate on the issue of alibi raised by the Appellant.**

The Appellant was represented by two law firms namely, Messrs AMC Legal Practitioners who filed a Notice of Non-Appearance indicating that they would not attend the hearing but rely on their filed Heads of Argument and Messrs LM Chambers who also filed Heads of Argument and whose Mr. Mulunda attended the hearing and stated that the Appellant would rely of the filed Heads

of Argument. Counsel for the Respondent attended the hearing and opted to likewise rely on their filed Heads of Argument.

Having considered the arguments filed by both parties, it is our considered view that the success or failure of this appeal hinges on the 1st ground of appeal namely that *"The Court below erred in law and fact when it convicted the Appellant solely on uncorroborated evidence of PW3 herein"*. We shall, however, consider all the grounds as one except Ground 6 which has not been argued by either party and which we deem as abandoned.

Counsel for the Appellant cited the case of **Emmanuel Phiri v The People** (2) in which the Supreme Court laid down the law that in matters involving 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 of the said dangers is a misdirection.

The prosecutrix and star witness in this case was under the age of 14 and in that regard counsel for the Appellant submitted that according to **Section 122** of the **Juvenile's Act's** the evidence of a child below the age of 14 must be corroborated by some other material evidence implicating the accused.

It was submitted that the Magistrate misdirected herself when she found as an odd coincidence, that the Appellant had a phone whose contents included pornographic material as described by the Prosecutrix when, other than the prosecutrix' testimony, no such evidence was presented to the court because the

investigating officer did not see the alleged pornographic video and did not produce the said phone in court. It was further argued that there was no basis for the trial magistrate to arrive at the conclusion that the prosecutrix had no reason to lie against the Appellant.

Counsel for the Appellant submitted that the trial magistrates finding that the prosecutrix was indecently assaulted was wrong because PW3 stated that the *accused only put his hand on her dudu* and this was not supported by any other evidence. It was stated that the prosecutrix' mother PW2 did not testify that the prosecutrix told her any such thing and that her testimony in court was at variance with her statement to the police who she told that the prosecutrix refused to do what the accused asked her to do and she went home. It was further pointed out that the investigating officer testified as follows, "*The prosecutrix said the accused did nothing to her and that is my testimony.*" (page 30 paragraph 19-20 Record of Appeal)

It was argued that other than the prosecutrix's evidence, there was no material evidence implicating the Appellant because the odd coincidence was no coincidence at all and could not amount to something more and sufficient to corroborate the prosecutrix evidence. It was submitted that the conviction should be quashed.

Counsel for the Respondent supported the conviction and likewise cited the principle of corroboration set out in the **Emmanuel Phiri Case** (supra) but argued that the prosecution evidence had passed the test. It was submitted that

the evidence clearly showed that the Appellant was well known to PW3 because they had lived in the same house for four years thereby ruling out the danger of honest mistake.

It was further submitted that added to this was the fact that there was nothing on the record that indicated that the prosecutrix had any reason to falsely implicate the Appellant. According to the prosecution the trial magistrate was on firm ground because these two factors added up to something more and met the statutory requirement in **Section 122 of the Juveniles Act** and were thus sufficient to corroborate the evidence as to the identity of the Appellant as the offender. It was finally submitted that PW3 stated that she was touched on her private parts by the Appellant and that amounted to indecent assault and the allegation was corroborated by the medical report. On this basis it was submitted that the trial court was on firm ground when it convicted the Appellant.

We have considered the Record of Appeal as well as submissions by counsel for both sides. As earlier stated, the thrust of the appeal is that the trial court convicted the Appellant on the basis of the uncorroborated evidence of the Prosecutrix.

The requirement for corroboration when receiving evidence from children below the age of 14 as set out in **Section 122 of the Juveniles Act**, is applicable in all cases regardless of the genre of the crime. This must be considered together with established case law that in sexual offences there must be corroboration

supporting the commission of the crime and supporting the identity of the perpetrator. One of the most cited authorities in that regard is the case of **Emmanuel Phiri v The People** (supra).

In **Machipisha Kombe v The People** ⁽³⁾, the Supreme Court stated that corroboration in sexual offences must not be equated with independent proof; it is not evidence which needs to be conclusive in itself but must be independent evidence which tends to confirm that the witnesses is telling the truth that the offence was committed and by the Accused. In the same year Mwanamwambwa, SJ, as he then was, delivered the Judgement in **Kombe v The People** ⁽⁴⁾ in which the following was said;

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

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 satisfy the Court that the danger of false implication has been excluded and that it is safe to rely on the evidence implicating the accused"

In **Saul Banda v The People** ⁽⁴⁾ which was an appeal before this Court, guided by the principle stated in the **Machipisha Case** ⁽¹⁾ we found that the evidence of a child ought to be corroborated by something more, including

circumstances that presented an opportunity for the Appellant to commit the offence.

In casu, the Prosecution's main witness was the Prosecutrix herself who testified that the Appellant showed her a pornographic video on his phone and in cross examination added that he touched her genital area and she was left in pain. She repeated this story to her elder sister, PW1. The Medical Reports at pages 39 and 40 of the Record of Appeal both show that the Prosecutrix's hymen was torn. This is consistent with the Prosecutrix's evidence that she was touched on her private parts and she felt pain. Further, she stated at page 13 of the Record of Appeal that only two individuals had touched her private parts i.e. the doctor and the Appellant. Whether or not it was defilement or indecent assault, the fact of the matter is that the Prosecutrix was sexually assaulted. The learned Magistrate therefore misdirected herself when she discarded the Medical Reports on the basis that, this being an indecent assault charge, they were unnecessary and because no witnesses were called to speak to "the discrepancies" thereon. We agree with the submission by the State on this point and we can only arrive at the inescapable conclusion that the Prosecutrix was sexually assaulted and the commission of the offence was sufficiently proved.

What remains to be determined is whether or not the prosecution evidence passes the test for corroboration of the identity of the offender as set out in the already cited law. Apart from the Prosecutrix (PW3), the Prosecution presented its case through 3 other witnesses namely PW1, PW2 and PW4 who testified that

they were just told of the incident by PW3. With regard to evidence of identification, the evidence of the said witnesses was hearsay and therefore of no corroborative value.

In **Ivess Mukonde v The People** ⁽⁵⁾ a father defiled two girls one of whom was his daughter. The two were below the age of 14 and were defiled on the same night by the Appellant. The Court noted that their evidence required corroboration and the Record disclosed that their mother, on the material day, left them at the house, in the same room with no means of escape and they reported the incident almost immediately. The Court found that though evidence was that of minors, the opportunity that existed and the Appellant placing himself at the scene were sufficient proof and amounted to corroboration of identity.

Reverting to the case before us, the Magistrate took cognizance of the fact that the said witness' evidence could not corroborate PW3's evidence and proceeded to comb the record to establish if there was "anything more" that could amount to corroboration. After conducting that particular exercise, the trial magistrate said as follows'

"The odd coincidences in this case that support the evidence of PW3 is that accused had a phone which had Dora a cartoon she loves in human form sucking the dudu of a boy. Even though this video was not found on the the phone why would PW3 make up such a story and why would she say she told uncle Ben to be nice to her when touching her dudu.

"Why would she say he touched her on her dudu if accused did not do it. I see no reason why PW3 would lie. The story PW1 and PW2 gave to court is the same that PW3 told them at home and also in court."

The facts the trial magistrate identified as odd coincidences are facts testified to by the prosecutrix, which themselves require corroboration and therefore fail the test of corroborative value.

The credibility of PW3's evidence i.e. establishing whether or not her story is to be believed is precisely why **section 122 of the Juveniles Act** requires that the evidence of children under the age of 14 be corroborated. The Appellants Heads of Argument refer to the book **Evidence (2nd Edition)** by professor Nokes where he described the quality of the evidence of young children as follows;

"The sworn evidence of a young child, whether accomplice or not, requires corroboration in practice; and the judge should warn the jury of the risk of acting on the uncorroborated evidence of such children. There is no fixed rule as to when children grow out of this category. The evidence of young children is always subject to doubt. Very young children live largely in a world of imagination, and their powers of observation, understanding, memory and expressions are rudimentary. Most children are influenced by what they hear from adults, not necessarily by way of deliberate suggestion or instruction. Yet the evidence of children may beaccurate, particularly with regard to offences committed against themselves."

The trial magistrate added another dimension to her reasoning by stating that the Appellant did not testify in-chief that he was not at home but only volunteered that information during cross examination. She opined that the burden of proving that he was not at home during the material period shifted to the Appellant and she questioned why he had failed to produce a witness to prove that he was not at home. According to the trial magistrate the fact that there was no reason for PW3 to lie and that the Appellant had failed to prove that he was not at home worked against the Appellant.

As we see it, the trial magistrate was attempting to establish opportunity which can, depending on the circumstances, amount to "something more" (**See. Kombe v The People and Soul Banda v The People**). This reasoning again falls bereft of the test because there was no independent evidence tendered by any witness that supported PW3's evidence that the Appellant was with her during the material period. In short, there was no evidence before the court requiring the Appellant to respond to and the question of the burden of proof shifting to the Appellant did not arise at all.

We agree with the Appellants argument that the evidence of the prosecutrix PW3 required to be corroborated. The fact that she was touched on her private parts was corroborated by the medical report but there was no corroboration of the identity of the perpetrator. The trial court therefore erred by convicting the Appellant on PW3's uncorroborated evidence as to the identity of the perpetrator.

This appeal therefore succeeds and the Conviction and Sentence of the Lower Court are quashed and the Appellant is set at liberty forthwith.

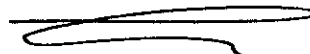
Dated at this day of 2019



.....
F.M. CHISANGA
JUDGE-PRESIDENT



.....
C.K. MAKUNGU
COURT OF APPEAL JUDGE



.....
M.M. KONDOLO SC
COURT OF APPEAL JUDGE