



1PA/172/2016

IN THE SUBORDINATE COURT
OF THE 1ST CLASS FOR THE LUSAKA
DISTRICT, HOLDEN AT LUSAKA.
(Criminal Jurisdiction)

BEFORE MRS A N WALUSIKU

THE PEOPLE
VS
MBAO CHIPOKA

J U D G M E N T

Cases referred to:

GIFT MULONDA VS THE PEOPLE (2004) ZLR 135 (SC)

KATEBE V THE PEOPLE (1975) ZLR 13 (SC)

NSOFU V THE PEOPLE (1973) ZLR 287

PHIRI EMMANUEL V THE PEOPLE (1982) ZLR 77

In this case the accused stands charged with Defilement Contrary to Section 138 [i] of the Penal Code Chapter 87 of the Laws of Zambia as read with Act No 15 of 2005. The particulars of the offence allege that **MBAO CHIPOKA** on 07/09/16 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia had unlawfully carnal knowledge of JULIET MUKUBWE a girl under the age of 16 years.

The proviso was explained to the accused before plea was taken that he had a defence to this charge if at the time of having sex with the said girl he thought the girl was of or above the age of 16.

The accused pleaded not guilty to the charge.

I warn myself at the outset that the onus to prove the case beyond all reasonable doubt lies on the prosecution and there is no onus on the accused to prove his innocence. The accused is entitled to give and call evidence or say nothing at all and if he elects to say nothing this does not affect the burden on the prosecution. If after considering all of the evidence in this case there is any doubt in my mind as to the guilt of the accused then the accused must be given the benefit of that

doubt.

In order to establish the guilt of the accused the prosecution must satisfy me upon each and every ingredient of the offence charged.

Turning to the count, Section 138[I] of the Penal Code as read together with Act No 15 of 2005 states that;

"any person who unlawfully has carnal knowledge of any child below the age of 16 years is guilty of the felony and is liable to imprisonment for not less than fifteen years and may be liable to imprisonment for life".

The prosecution therefore must establish:

1. That the prosecutrix had sexual intercourse with someone on the material date
2. That it was the accused person who had sexual intercourse with the prosecutrix on the material date
3. That the prosecutrix was below the age of 16 years on the material date

The prosecution has alleged that the accused had carnal knowledge of JULIET MUKUBWE a girl under the age of 16 years.

Thus the prosecution has to prove that the prosecutrix had sex with someone on the material day. That it was the accused who had sex with the said girl on the material day and that the girl was below the age of 16years on the material date.

I will now consider the evidence in this case. The prosecution called four witnesses. The accused elected to give sworn evidence and called two witnesses.

PW1 was **JULIET MUKUWE** the Prosecutrix in this matter. She was aged 13 years old. Voire Dire was conducted to ascertain if the child witness understood the duty to tell the truth, the seriousness of the occasion and if she had sufficient intelligence. It was found in the affirmative. According to her on unknown date around 1800hrs, she was cooking. Her uncle the accused was outside and her Aunt DW2 was having a bath. Accused followed her in the kitchen and held her by the neck. Accused undressed and also undressed her. Accused removed her from the chair she saw on and made her to lie down. She was wearing a Chitenge wrap and accused just removed it. Accused loosened his belt and opened the zip. He removed her pant and lay on her top. Accused put his penis on her vagina. Accused in the process was moving his waist. After he finished he moved away.

Her Aunt DW2 then came and asked her as to why she was crying. She told her that her Uncle had sex with her. DW2 told her to go and report to the Headman. The following day she went to report to her Grandfather and people were told and accused was apprehended. She sustained a painful vagina and not able to walk properly. They went to the Police to report and she was issued with a Medical Report form. She was taken to University Teaching Hospital where she was examined. She was given another document and they took them to the police. She identified the Medical Report form and Rape/Examination report marked P1. She also identified accused.

In XXN she told the Court that accused was outside and went to the Kitchen. She told DW2 that accused had sex with her when she asked. Accused held her when she was cooking in the kitchen. She cried when accused had sex with her the reason DW2 heard and asked her. She did scream. DW2 was able to confirm that she was told that accused had sex with PW1. Accused was on her top and had sex with her. She reported that accused had sex with her to her father. She did not report to her Grandfather the same day because it was dark. Accused warned her not to tell others. DW2 shouted at accused. Accused just told her that he was going to buy a bag for her. They went to the police after two days.

PW2 was FELISTUS NTALASHA a farmer. On 08/09/16 early in the morning PW1 went to her and told her that her Uncle Chipoka that accused had carnal knowledge of her the previous evening. PW1 was 13 years old. She was born in Chamuka Village. She had her Under five Card which she identified marked P2. She then went to report the matter to Headman CHRIST NTALASHA but did not find him. She just left a word. The following day she went back to the Headman and reported the matter. The Headman went to accused's house and later took accused to his house. PW1 was her Grandchild. Together that went to Kalebalika Police Post where the matter was reported. PW1 was issued with a document and they went to UTH. AT UTH they were given another form and she was examined. She was given medication. She identified accused as the person who defiled the girl.

In XXN she told the court that it was the following day that PW1 reported the matter to her that accused had sex with her. PW1 stayed with accused. It was accused's wife DW2 who asked her to stay with PW1. DW2 the wife to accused was the Aunt to PW1. PW1 told her that accused had sex with her. She reported to the Headman that accused had sex with PW1. They did go to the Police. The headman called the vigilante to take accused to the

Police. It was in the morning around 0900hrs to 1000hrs when PW1 went to report. She did not know that PW1 lied to her that accused had sex with her.

Pw3 was DOREEN MULEYA the arresting officer based at Ngwerere Police Station. On 12/09/16 she was on duty when she was allocated a docket of case of Defilement in which the complainant was JULIET MUKUWE aged 13 years who reported that she was defiled by her Uncle Chipoka Mbao. Acting on the docket, she interviewed the complainant who narrated to her that on 08/09/16 whilst she was cooking in the kitchen the Uncle the now accused had sex with her. The accused was already in custody. Medical Report forms were brought from UTH and were consistent with the allegation. She interviewed the accused who told her that he did not have sex with the girl. She was not satisfied with that explanation and so she charged and arrested him for Defilement C/S 138 of Cap 87. Under warn and caution statement in Nyanja he gave a free and voluntary reply denying the charge. The girl was aged 13 years old. She came across an Under five card to that effect which she identified marked P2. She also identified the medical report forms marked P1 collectively. She further identified accused.

In ~~XXN~~ she told the Court that the evidence that she had that accused had sex with PW1 was the medical report forms. She believed that accused had sex with the girl because the medical report forms said so. It was in the kitchen that accused had sex with PW1. She believed PW1. PW1 was removed from accused's place after accused had sex with her. She was shown the scene of crime in the kitchen. It was accused's wife DW2 who showed her.

PW4 was CHRIST NTALASHA a Headman of Mukwanka Village, Chiertaincy Mungule. On 08/09/16 his mother PW2 went to inform him that the child PW1 was defiled by the now accused. PW1 was 13 years old and was a daughter to his young brother. On 09/09/16 he went to accused's house and found his wife DW2 and asked her on the whereabouts of accused. DW2 told him that he was in the house. He told her to come out and call accused. He also asked for PW1. WHEN they came out they sat down. He asked accused that he had information that they did not stay well with PW1. Accused told him that there was peace. He asked over what he had heard that PW1 had been defiled. PW1 told him that accused had defiled her. He asked accused to pay attention to what PW1 had said. Accused answered that **"if I had sex with her then I had sex"**. He asked DW2 the wife to accused if she had

heard what accused had said and DW2 told him that she was fed up with the husband. He took all the three and took them to his house and called the security men of the village called 'Vigilantes'. The Vigilantes took accused to the Police. PW1 and PW2 also went to the Police to report. He identified accused.

In XXN he told the Court that it was on 09/09/16 when he went to accused's house. When he asked DW2 accused's wife that if accused had sex with the child, DW2 said that she was tired of accused. DW2 did not tell him that after asking PW1 about accused having had sex with PW1, PW1 refused to have had sex with accused. PW2 reported to him that accused had sex with PW1. Accused admitted to him that if he had sex with her then he had sex.

Accused was put on his defence. He gave sworn evidence and called two witnesses.

According to him on 05/09/16 he was with PW1, DW3 and DW2 at his home. He was in the Sitting room. DW2 was bathing in the house while DW3 was folding clothes in the bedroom. PW1 was in the kitchen cooking. Around 1900hrs, PW1 told DW2 that accused wanted to have sex with her. DW2 asked him if it was true that he wanted to have sex with the child and accused denied because they were all there. After three days, DW4, Headman Mukwanka

went to him and he was called. PW4 told him that PW1 had reported that accused had sex with her. DW2 was asked and she said that she asked PW1 if accused wanted to have sex with her and that after asking her PW1 refused to have had sex with accused. PW1 was present and accused asked her if he had sex with her and she admitted and said that accused had sex with her. Accused was taken to the house of PW4 where he found a lot of people there. He was taken to the Police where he was detained and came to Court.

In XXN he told the Court that PW1 was his niece. PW1 was related to DW2 his wife. He had stayed with PW1 for 9 months. He was before Court when PW1 testified. He heard what she said. He denied to have gone to the kitchen to grab her. The kitchen and the house were within short range. There were lights in the house. He used batteries for lighting system. He did ask PW1 questions on the time of defilement. They stayed the five of them at their house. The fifth person was Agrippa. There was also a 4 year old son. He was before Court when PW4 testified. He denied to have defiled PW1.

DW2 was MEMORY NTALASHA the wife to accused. According to her on 09/09/16 in the morning she saw PW4 go to her home. He told her

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that he was looking for accused. Accused was in the house and she called him. Accused was asked by PW4 as to how they were staying with PW1. Accused said that they stayed well. Accused was told to accompany PW4 as he had an issue with him. She also followed. At the house of PW4 accused was told that he had sex with PW1 on Wednesday. She was asked if she knew about that and she told him that she did not know about that story. She told him that at that time she was just at home. She asked as to where it happened from because she was around. The kitchen where it was alleged to have taken place there was no space as the space was just for a brazier. She asked PW1 as to why she did not shout for help but she did not say anything. Accused was taken to the Police.

In XXN by accused she told the Court that she was not asked by the headman PW4 over the sex.

In XXN by the state she told the Court that she had told the Court about what happened on 09/09/16. She did not tell the headman PW4 anything. She did not know anything that happened on Wednesday. She was not aware that the accused told court that she asked him if he wanted to have sex with PW1. PW1 did not tell her that accused wanted to have sex with her. On the material day PW1 did not tell her anything on the sex. She did

not give any statement to the police. She did not talk to PW1 on the day accused was apprehended. The headman DW4 was her brother. She knew PW2. PW2 was the sister to her mother. She was aware that PW2 came to testify. There was no story of sex that she heard over accused. She denied that defilement took place in the kitchen because she was in the bathroom for 5 minutes and the kitchen was filled up with maize in sacks.

DW3 was ALICE NTALASHA. According to her on 09/09/16 in the morning DW4 came and got accused to his house. She remained behind. Later around 1100hrs with DW2 they followed to DW4's house. They asked where accused was and were told that he had been taken to the police because he had sex with PW1 on Wednesday. There was nothing that she knew that happened on Wednesday.

There was no XXN by accused.

In XXN by the state she told the Court that what she told the court was what she knew. She did not go to the police. She followed after accused was taken by DW4. She was there when PW1 alleged that she was defiled. She was in the bedroom. PW1 was in the kitchen. She disputed that sex took place in the kitchen because the kitchen was too small and there were bags of maize and the space was for the brazier only. She heard the story of

PW1 being defiled. She was told that it was in the kitchen. The time she said she was defiled, DW2 was with her in the kitchen. She was staying with PW1. ON Wednesday she was chatting with POW1. She did not observe any changes .

This is the evidence before me. I now state my findings of fact. I find that the prosecutrix had sex with someone on the material date. I find that it was the accused that had sex with her. I find that the Prosecutrix was aged 16 or above on the material date.

Having found the facts I must now apply the law to those facts. I ask myself if on these facts the accused has in law committed the offence charged. At this stage I warn myself on the dangers of convicting on uncorroborated evidence because the law requires that in sexual offences such as defilement and rape, the evidence must be corroborated or independently supported by other evidence to preclude the possibility of false implication. If the test of intercourse and the identity of the offender and age of the victim are resolved against the accused he must be convicted. However, justice is for both the victim and the accused. Therefore, if there is any doubt as to the stringent proof of any of these ingredients, it is settled law that the

doubt however slight must be resolved in the acquittal of the accused.

In considering the first ingredient of defilement, I apply my mind to the prosecution evidence alleging that the prosecutrix was a victim of unlawful sexual intercourse on material date. According to the prosecutrix she had sex with accused on the material date. She said that she was in the kitchen cooking around 1800hrs. Her Aunt DW2 was having a bath. Accused went to the kitchen and held her by the neck. Accused then undressed her and he also undressed by way of loosening the belt and opened the zip. He removed her pant and lay on her top and inserted his penis on her vagina. After he finished he moved away. Her Aunt DW2 then came and asked her as to why she was crying. She told DW2 her Aunt that her uncle the now accused had sex with her. DW2 advised her to go and report to the Headman PW4. The following day she reported to her Grandfather and accused was apprehended. She sustained a painful vagina and was not able to walk properly. Further the matter was reported to PW2 and they reported the matter to the police immediately. This is confirmed by PW2 and PW4 themselves because without anyone witnessing the ordeal, they would not have known what had

happened to the victim. This amounts to corroboration. When PW1 was taken to the police she reported that she had been defiled by the accused her Uncle the now accused and upon being examined at UTH it was found that she was defiled. This was corroboration enough because within a reasonable time of its occurrence it was reported to DW2, PW2, PW4 and then the police. Infact PW4 through the Vigilantes immediately took accused to the police. This just shows that something more happened. Accused had an opportunity to commit the said offence looking at the fact that at that particular time in the kitchen was only PW1. DW2 was having a bath and DW3 was folding clothes in her bedroom and the time was late. Infact there was no disturbance and nothing to fear and this even made it worse for accused to have courage and have sex with PW1. In the case of **KATEBE v THE PEOPLE** (1975) Z.R. 13 (S.C.) it was held that:

- (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 this case there are special compelling grounds to convict the accused looking at the opportunity he had to commit the offence. He took advantage of the absence of other people at the kitchen and the time was quite late in the evenings and also the fact that there was only PW1 there. She communicated what had happened to her to DW2 within a short time. DW2 asked her as to why she was crying and she told her that accused had sex with her. This evidence was supported accused who told Court that DW2 asked him if at all he wanted to have sex with PW1 after PW1 reported to DW2. There has also been no motive that has been shown for the prosecutrix to deliberately and dishonestly make a false allegation against the accused. The prosecutrix has also been reliable in her evidence as to what happened to her which makes it qualify as a special compelling ground which has justified the conviction. Infact there was corroboration in this case because almost immediately the sexual act was reported to DW2. PW1 did experience pain as suggested by the medical

report form P1. PW1 was truthful about the turn of events.

When the sex was taking place only the prosecutrix and accused witnessed it. The accused had an opportunity to have sex with the prosecutrix. He was the only male at the house that day. The inference therefore being that no any other person apart from accused had an opportunity to have sex with PW1. There is no doubt that the sexual intercourse did not take place. There was hymenal tears at 3 and 7 o'clock position, of the victim which confirms that she did have sex with someone and the question is who had sex with her . The answer being the person who had an opportunity and this person being the now accused. The evidence which is here is corroboration. The medical report forms P1 shows that there were injuries on the vagina. I have appreciated the evidential value of the medical report forms. Evidence has been led to the fact that someone had sex with the girl and the fact that the girl was found to have tears on her vagina, the inference is that it was accused who tampered with the private part for it to have injuries.

This brings me to the second ingredient that it was indeed the accused person who had sex with PW1. PW1 testified that it was accused that that had sex with her. She told court that accused followed her in the kitchen and held her by the neck. Removed

her from the chair and undressed her and he also undressed by loosening his belt and opened the zip and lay on her top and inserted his penis in her vagina and started moving his waist about. After he finished he moved away. Her Aunt DW2 came and asked her as to why she was crying. It was during the evenings PW1 was able to see accused and further no issues of mistaken identity arose. It is impossible to believe that another unknown male person defiled PW1. The inference therefore being that it was accused who was the only male adult at that place at that time who took advantage of the absence of any other person outside and ended at defiling the victim. The evidence of the said witness was corroborated by independent evidence of PW2, PW4 who received a report of defilement within reasonable time. Further this is supported by the evidence of accused who was asked by DW2 if at all he wanted to have sex with PW1 almost immediately within an hour after it happened and PW1 went further to report the matter to the police station. It is settled law of sexual crimes that the evidence must be corroborated or independently supported by other evidence. As it was stated in the case of NSOFU V THE PEOPLE [1973] ZLR 287, for evidence to be corroboration as a matter of law, it must not only tend to confirm that the offence had been committed, but must also tend to confirm that it was the accused who committed

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it.

In this case the commission and identity of the offender has been proved that indeed it was accused who had sex with the girl.

The case of EMMANUEL PHIRI V THE PEOPLE [1982] ZLR 77 is instructive on this subject. The Supreme Court held that: "In a sexual offence, 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 misdirection".

In the case before me there has been corroboration of commission of the offence and the identity of the offender. The prosecutrix was found with injuries on her private part which qualify the case of Emmanuel Phiri v The People that there must be something more and that something more is the private part injuries. The prosecutrix also reported almost immediately that defilement had been done on her and that it was the accused that defiled her and the defiler was asked firstly by DW2 and secondly by PW4 and reported to the police by PW1.

I am alive to the fact that in a proper case, though, notwithstanding that there was no corroboration of the witness's

evidence where such corroboration should have been, a conviction might still lawfully be secured. The test was set out in the case of BUTEMBO VS THE PEOPLE [1976] ZLR 193, where the Supreme Court stated that: "The test is, does there exist corroboration of such manifest congruency that the conclusion is not to be resisted that the court properly directed would certainly have arrived at the same conclusion".

In this case the court has been properly directed and cannot resist the conclusion that it was actually accused and not any other person who had sex with the child.

On the facts and evidence before me, I have found independent testimony which has strengthened the evidence of PW~~5~~ as to who had sex with her. She has satisfied the requirements in the cases of **EMMANUEL TEMBO V THE PEOPLE AND BUTEMBO V THE PEOPLE** cited above. The evidence of PW1, PW2, PW3 and PW4 does not sound suspicious and I have no difficulties to believe this evidence.

While it can be argued that the other male persons were not suspects, there would be equal force in the opposite argument that it was perfectly possible that accused and not any other

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person had sex with the child.

The third ingredient is the proof of age of the victim. The victim must be proved to have been below the age of 16 on that date of the alleged crime. The evidence of PW1 and PW2 was that she was aged 13 and years old. Age of a victim in sexual offences such as defilement is very crucial as it is one of the ingredients and also the most important ingredient which makes the offence to qualify as defilement. In the case of **GIFT MULONDA VS THE PEOPLE (2004) ZLR 135 (SC)** it was held that:

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

Section 138. (1) of Cap 87 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;**

Provided that it shall be a defence for a person charged with an offence under this section to show that the person had reasonable cause to believe, and did infact believe, that the

child against whom the offence was committed was of, or above, the age of sixteen.

Having seen the victim myself it is possible to believe that she was of or above 16. The Under-five card P1 shows that she was born on 03/06/2003 which makes her age to be below 16. However, the said Under-five Card was recently issued. It bears fresh writings. The writings also look to be for one and the same person. I wonder if that facility has only one person through out to record. I have difficulties to believe that the Under-five card P1 is a genuine card. This has brought doubt in the mind of the Court.

The state has not discharged its burden to prove the alleged crime of defilement against the accused beyond reasonable doubt and I accordingly find him NOT **GUILTY** Of Defilement Contrary to Section 138[1] of the Penal Code Chapter 87 of the laws of Zambia as read with Act No 15 of 2005 and I **ACQUIT** him accordingly.

DELIVERED IN OPEN COURT THIS 24TH DAY OF April 2017.



