

IN THE SUBORDINATE COURT OF THE

2SPD/158/2015

FIRST CLASS FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

VERSUS

MOSES KANGWA



Before the Hon. Magistrate Mr. Humphrey Matuta Chitalu, at 09:00 hours this 30th day of August, 2017.

For the People: Munenga (Public Prosecutor)

For the Accused: In person

JUDGMENT

STATUTES REFERRED TO:

1. *Constitution of Zambia, Cap 1, Art 18*
2. *Penal Code, Cap 87 as read with Act No. 15 of 2005 and Act No 2 of 2011, ss, 13, 131A and 138(1)*
3. *Juveniles (Amendment) Act No. 3 of 2011, s 122*

CASES REFERRED TO:

1. *Woolmington v. DPP (1935) ALL E.R 1*
2. *Mwewa Murono v. The People SCZ Judgment No. 23 of 2004*
3. *R v Chapman (1952) 1 QB 100*

4. *R. v Chinjamba* 5 N.R.L.R. 384.
5. *Hughes* (1841) 9 C & C
6. *R v Baskerville* [1916] 2 KB 658
7. *David Zulu v The People* (1977) ZR 151 SC
8. *A-G for Northern Ireland v Gallagher* (1963) AC 349

OTHER AUTHORITIES:

1. **OXFORD ADVANCED LEARNER'S DICTIONARY 7th edn Oxford University Press at page 215**

In this case the accused, Moses Kangwa stand charged with one count of defilement of a child contrary to section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence allege that on the 12th September, 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, the accused had unlawful carnal knowledge of Mary Phiri a girl under the age of 16 years.

The accused pleaded not guilty.

I warn myself at the onset that the onus is upon the prosecution to prove their case beyond all reasonable doubt and there is no onus on the accused to prove his innocence. The landmark decision in the case of *Woolmington v. DPP* (1935) ALL E.R 1, held that:

“In criminal cases it is the duty of the prosecution to prove the accused’s guilt beyond all reasonable doubt.”

This doctrine is lucidly entrenched in our ***Zambian Republican Constitution, Chapter 1 of the Laws of Zambia*** which states in ***Article 18(2) (a)***:

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.”

In this regard the Supreme Court made its pronouncement in the case of ***Mwewa Murolo v. The People SCZ Judgment No. 23 of 2004*** when it held:

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from the beginning to the end on the prosecution. The standard of proof must be beyond all reasonable doubt.”

The accused is entitled to call and give evidence or say nothing at all. If he elects to remain silent this does not affect the burden on the prosecution to prove the guilt of the accused to the required standard. If, after considering all the evidence, there is any doubt in my mind as to the guilt of the accused then the accused must be given a benefit of that doubt.

The ***Penal Code (Amendment) Act No. 15 of 2005 in section 138(1)*** constitutes the offence of child defilement and it is written in the following terms:

“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.”

Section 131A of the said enactment defines “***child***” means, “***a person below the age of sixteen years.***”

It appears from the above provisions the victim of the offence of child defilement could either be male or female. Similarly, the accused could either be male or female depending on the circumstances. In the circumstance therefore, in order for the prosecution to secure a conviction on the charge of child defilement the following elements must be proved namely that the accused:-

- 1. Had unlawful carnal knowledge***
- 2. of a child***

The ***proviso to section 138(1)*** which was reintroduced by the ***Penal Code (Amendment) Act No. 2 of 2011*** is written in the following terms:

“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 in fact believe, that the child against whom the offence was committed was of, or above, the age of sixteen.”

It follows therefore, that reasonable belief that the child is of or over sixteen years is a defence on the charge of child defilement. Furthermore, arising from the use of the concept ***“unlawful carnal knowledge”***, it appears the offence of child defilement cannot be committed by a husband on his wife aged below 16 years as marital carnal knowledge is lawful. In the case of ***R v Chapman*** (1952) 1 QB 100, the word ***“unlawful”*** in the definition was held to apply to intercourse outside the bonds of marriage. This was the position in the case of ***R. v Chinjamba*** 5 N.R.L.R. 384.

According ***OXFORD ADVANCED LEARNER’S DICTIONARY 7th edition Oxford University Press at page 215***, the phrase ***“Carnal knowledge”*** means sexual intercourse. By law sexual intercourse is deemed complete upon proof of penetration only. In the case of ***Hughes*** (1841) 9 C & C, it was held:

“Penetration is established on proof of slightest entry of the accused’s penis into the victim’s vagina; the hymen need not rupture. Slightest penetration is sufficient to constitute sexual intercourse.”

Having laid down the legal principles applicable for analysis of the offence of child defilement, I now in turn consider the evidence in this matter. The prosecution called four witnesses. The first prosecution witness PW1, was Joyce Mwashongo the mother to the alleged prosecutrix in this matter. According to the witness she is on separation from her husband one Aaron Phiri. That her children were living in Chazanga compound with Moses Kangwa and Alice the uncle and aunt respectively. It was submitted that on the 17th September, 2015 she called the father to her children demanding to see the children ones Mary Phiri and Martin. That the former husband informed her that Mary Phiri her second born daughter had been defiled by the uncle one

Moses Kangwa the accused in this matter. PW1 submitted that Mary Phiri was born on the 25th January, 2005. It was stated that the birth certificate as well the under-five clinic card were lost by the aunt. Nonetheless, PW1 submitted that she had an admission form from the child's school showing the birth day of the child namely the 25th January, 2005. The document was admitted into evidence as Exhibit P1.

That the matter was reported at Chazanga Police Post. The accused did not cross examine PW1.

The second prosecution witness PW2, was Mary Phiri the alleged prosecutrix in this case. PW2 recalled at 18 00 hours on the 12th September, 2015 she was at the accused's house. According to PW2 the accused is her uncle. It was submitted that Alice Mwale, PW2's aunt was at another house 200 meters away from the accused's house selling beer. It was asserted that the accused found PW2 by the Care tap in the company of Mercy, Zaliwe, Joyce and Grace when he asked PW2 to go and sweep his house. PW2 submitted that she went alone to sweep the accused's house. That the accused gave her the keys to the house. The witness stated the accused started following behind. It was submitted that PW2 entered the accused's house, lit the candle and went to sweep the accused's bedroom. According to PW2 the accused came at his one roomed house separated by a curtain. That the witness wanted to come out of the house. PW1 submitted the accused pushed her on the bed, removed his clothes and pants. It was asserted that the accused was wearing blue pair trousers the same he wore on the day the witness testified in this court. PW2 stated that the accused removed her trousers, shirt and pants. That the accused started doing bad manners. The witness stated that the accused inserted his penis into her vagina. That the witness felt pain in her vagina. According to PW2, the accused left her alone. That she dressed up and ran away. It was submitted that the witness did not tell any person about what happened. PW2 submitted that on the second incident the accused found the witness washing the plates. That she was at the house belonging to Alice

Mwale, the accused's wife. It was submitted that Alice was asleep when the accused came on the second incident. According to PW2, Alice's house is a two bedroomed house. That the accused asked the witness to go and wash plates at his house. It was submitted that PW2 got the keys from the accused and went at his house. That the house was empty. PW2 asserted that as she was getting the plates, the accused came held her by the hand and pushed her on the bed. The accused removed his clothes and that of the witness. That accused again inserted his penis into her vagina. It was submitted that the accused said that if she told her aunt the accused would kill her. That PW2 did not tell any person. That on the third occasion the accused sent the witness to go and sweep his yard. That the accused asked PW2 to go into the bedroom and get the money by the television. PW2 stated that the accused followed her into the house. That the accused pushed PW2 on the bed. That nonetheless, he did not close the door. It was submitted that the accused got on top of PW2 and had carnal knowledge of her. It was submitted that Alice came at the accused's house. That Alice called PW2's name. According to PW2, she was in bed when she heard her name being called. That the accused left PW2 alone. That Alice found the accused naked and that PW2 had only pants in her hand. It was submitted that Alice slapped PW2 in her right chick. That accused's brother passed by and was invited into the house. PW2 submitted that the matter was reported at Chazanga Police Post. That PW2 was referred to the University Teaching Hospital (UTH).

In cross examination, PW2 stated that the accused was alone when he found PW2 at the tap in the company others. That the accused came from Alice's house where he had been drinking beer. It was submitted that Alice found PW2 in the chair at accused's house. That PW2 told people that the accused held and pushed her on the bed.

The third prosecution witness PW3, was Jackson Bwalya. According to this witness he recalled in October, 2015 he was the Acting Head Teacher for Chazanga Reachout Community School. That whilst on duty, he received a

police officer from Chazanga Police Post. That the officer asked PW3 if he knew Mary Phiri. It was submitted that PW3 gave the officer the enrolment form for PW2. The witness identified and produced Exhibit P1 as the enrolment form for the child.

In cross examination PW3 stated that PW2 was his pupil.

The fourth prosecution witness PW4, was detective chief inspector Mubita Moya from Emmasdale Police Station. According to PW4, he is the Criminal Investigations Officer (CIO) at the said police station. That he was summoned to appear before court to give evidence on behalf of the deceased arresting officer who was based at the said police station. It was submitted that the deceased officer was number 32627 detective Constable Mukosai. That the said officer was under the command of Emmasdale Police Station. According to PW4, the officer died on the 13th October, 2016. It was asserted that since the officer who investigated the matter and arrested the accused was dead, PW4 was before court to read a statement recorded by the deceased officer. The statement was read, I quote,

"I am number 32627 detective constable Mukosai a duty attested member of the Zambia Police Service based at Chazanga Police Post. I wish to report to your office that on 15th September, 2015 I took up a docket of defilement of a girl under the age 16 years for investigations. This is a case in which female Joyce Mashonga complained that her daughter was defiled by a known person. A medical report was issued. At the police, I interviewed Joyce Mashonga who revealed to me that the suspect called Moses Kangwa was already in police cells. I interviewed Moses Kangwa in connection with the alleged offence. He could not give me a satisfactory reply. A warn and caution statement was administered to Moses Kangwa in English the language he understands better. He gave a free and voluntary reply denying the charge. The accused was charged and arrested for the subject offence."

The said recorded statement by one number 32627 detective constable Mukosai was produced into evidence as Exhibit P2.

It was submitted that two medical reports were issued to female Mary Phiri aged 10 years. The same were produced into evidence as Exhibits P3 and P4 respectively.

PW4 was not cross examined by the accused.

The accused gave evidence on oath and he called no witnesses. According to the accused he recalled it was at around 09 00 hours to 10 00 hours on 12th September, 2015 when he received a phone call from his friend one Boyd Sichilima. It was submitted that the friend wanted to meet the accused at Mrs. Alice Mwale's place. The accused stated that Alice is his former girlfriend. It was asserted that when the accused went at that place which is an alcohol place, he found a lot of people. That the accused found Boyd at the said place who explained to him that he wanted the accused to fill in the Zambia Revenue Authority T-pin. That the accused was doing a part time job for Boyd. It was submitted that the dual stayed at the place for 2 to 3 hours and parted company thereafter. The accused stated that he went to his house. He further submitted that his house was a one room big apartment in Chazanga compound which was demarcated from the sitting room by curtains. That the accused opened the door to the house and without locking the door, he went to rest in his bedroom. The accused asserted that after an hour he heard someone calling from outside the house. That the accused recognized the voice was that of Mary Phiri, the niece to Alice Mwale, his former girlfriend. According to the accused he could tell Mary Phiri was in the company of a friend. That the dual opened the door and entered the house. It was submitted that the friend remained outside as Mary got inside the house. According to the accused he asked Mary Phiri what she had come to do. The accused submitted that before the girl could answer, the accused heard a voice of another person that was Alice's young sister one Cristabel Phiri in the company of Alice. According to

the accused Cristabel started shouting and beating Mary Phiri alleging that the accused defiled the girl. That she started shouting outside and that people came and flooded the accused's small room. That Alice tried to reason with her sister. That Cristabel alleged that the accused had been sleeping with the child in order to boost his business by way of magic. The accused asserted that a mob descended upon accused beating and dragging him at Chazanga Police Post. According to the accused on the 15th September, 2015 detective constable Mukosai arranged for the accused to meet Mary's mother. That the accused was interviewed in connection with the offence. According to the accused, he did not commit the offence.

In cross examination, the accused said that he knows PW1 who is a sister to Alice Mwale. That Alice Mwale was accused's girlfriend. The accused asserted that he used to spend nights at Alice's place. That the accused knew Mary Phiri who used to be kept by Alice his former girlfriend. The accused stated that at one time Mary Phiri came and entered his house. That the accused was alone and sleeping when Mary Phiri entered his house. It was submitted that the accused did not call Mary Phiri to come and clean his house. The accused submitted that he saw Exhibit P4. That the document shows that Mary Phiri was defiled. It was submitted that Mary testified that it was the accused who defiled her.

Having heard all the witnesses in this matter, I now make my findings of fact. It is not in dispute that Mary Phiri the prosecutrix in this matter is a child below the age of sixteen years. It was submitted that the under-five clinic card and birth certificate were lost by the child's aunt. However, the mother to Mary Phiri testified in this court that Mary Phiri was a child born on 25th January, 2005. Further, PW3 the Acting Head Teacher testified that Mary Phiri was his pupil at Chazanga Reachout Community School. He produced into evidence Exhibit P1, the school admission form which shows the birth day of the child is 25th January, 2005. I also had an opportunity of observing the ocular features

of the child. I am quite satisfied that she was aged 10 years when the alleged defilement occurred.

Furthermore, there is no dispute that the child was sexually abused or defiled. The medical reports Exhibits P3 and P4 clearly demonstrates that the child sustained vaginal injuries which findings are consistent with the alleged circumstances of defilement.

Having made my findings of fact, I now apply the law to the facts. The principle applicable to cases of this kind is, as is well known, as follows: On the one hand, it is of the utmost importance that little children should be protected against conduct of the kind which is here alleged to have taken place; the conduct of the accused, if the PW2's story is to be believed, was indeed of the most filthy and revolting character. That is one side of the matter. On the other hand, this is a charge which it is easy for the child to bring, and difficult for the man against whom it is brought to refute. Therefore, it has been long laid down, not as a rule of law but as a rule of practice that it is unsafe for the court to convict on the evidence of the child alone. In the case of **R v Baskerville** [1916] 2 KB 658, Lord Reading said:

“Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, corroboration would exist to show not only that the crime was committed but that it was committed by the accused.”

I have carefully considered the facts of this case. In my view the questions posed by the facts for my determination are:

1. Whether or not the offence was committed and that it was committed by the accused;
2. Whether there is independent testimony which affects the accused by connecting or tending to connect him with the crime; and
3. Whether the defence of intoxication can avail the accused

I have already indicated that I have no doubt in my mind that PW2 was carnally known. The only question that remains to be answered is whether the accused defiled PW2. There is direct evidence from the prosecutrix that the accused had carnal knowledge of the child on three occasions from his house. This piece of evidence was not challenged or controverted by the accused. Further on the material day of 12th September, 2015 the child stated that the accused had asked her to go and get money from his bedroom. Whilst the child was in the bedroom the accused without locking the entrance door to the house went into his bedroom and had carnal knowledge of the child. The child submitted that Alice the former girlfriend to the accused and aunt to the child found the accused naked and the child only had her pant in her hand. This crucial evidence was not challenged by the accused.

This then brings me to another aspect, which is the question of whether there is independent evidence which affects the accused by connecting or tending to connect him with the crime. Circumstantial or indirect evidence *per se* is not inferior to direct evidence or testimony and it is competent for the court to act or convict the accused on such evidence. The only condition precedent to its admissibility is that before I can feel safe to convict the accused upon such evidence at my disposal, according to the case of **David Zulu v The People** (1977) ZR 151 SC, I must warn myself of the dangers associated with circumstantial evidence namely wrong inference and that the evidence must attain such a degree of cogence such that the only inference is that of guilty. I wish to state that some pieces of evidence connecting the accused to the commission of the offence is indeed circumstantial. The question is: Has the said corroborative evidence which to me is circumstantial passed the test espoused by the **David Zulu case**? In my considered opinion the answer is in the affirmative. Alice the aunt to the prosecutrix was accused's girlfriend. There was uncle and niece relationship between the accused and the child. The accused would ask the child to do things for him such as cleaning his house or plates at his house. Like it occurred on the material day, the accused was

alone with the child at his house. He had the opportunity and had carnal knowledge of the child.

There is evidence on record that prior to the incident the accused had been drinking alcohol. Intoxication under **section 13 of the Penal Code Chapter 87 of the Laws of Zambia** is a defence to crime of specific intent such as rape. The proviso provide as follows:-

“S 13 (2) Intoxication shall be a defence to any criminal charge if, by reason thereof, the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing, and

(a) The state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) The person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) the provisions of section one hundred and sixty-seven of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

His lordship Cullinam J, as he was then had occasion to consider the defence of intoxication and insanity as intervening defence in the case of the ***The People v Kufekisa*** (1975) ZR 244 where he held:

“Where a specific intent is essential element in the offence, evidence of drunkenness rendering the accused incapable of forming such intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he is so drunk that he is incapable of forming the intent required, he cannot be convicted of a crime which is committed only if intent is proved.”

The accused's testimony was to the effect that he freely and voluntarily took alcohol and was throughout very conscious of the environment around him. There is no evidence suggesting that by reason of intoxication he was temporarily insane or incapable of forming the necessary intent required to constitute child defilement. I am satisfied beyond doubt that the defence of intoxication does not arise in this matter. In the case of ***A-G for Northern Ireland v Gallagher*** (1963) AC 349, in the House of Lords Lord Denning stated at p. 382:

“If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on his self-induced drunkenness as a defence to the charge of murder, nor even reducing it to manslaughter. He cannot say that he got himself into such stupid state that he was incapable of an intent to kill.....the wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do.”

With those few remarks I am satisfied there is abundant independent evidence connecting, or implicating the accused or confirming in some material particular not only that a crime has been committed but also that the accused committed it. In the circumstances I have no doubt in my mind and I find the accused guilty as charged of the offence of child defilement contrary to section

138(1) of the Penal Code Chapter 87, of the Laws of Zambia and I convict him accordingly.

Delivered in Open Court this 30th day of August, 2017.



HUMPHREY MATUTA CHITALU

ACTING SENIOR RESIDENT MAGISTRATE.