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1PA/096/2017

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

NELSON JUMA CHULU

J U D G M E N T

STATUTES USED

PENEL CODE CAP 87

ACT NO 15 OF 2005

CASES REFERRED TO

KATEBE v THE PEOPLE (1975) Z.R. 13 (S.C.)

NSOFU V THE PEOPLE [1973] ZLR 287

BUTEMBO VS THE PEOPLE [1976] ZLR 193

EMMANUEL PHIRI V THE PEOPLE [1982] ZLR 77

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

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 NELSON JUMA CHULU on unknown dates but between September, 2015 and December, 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia had unlawfully carnal knowledge of VERONICA MWANZA 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 the charge that if at the time of committing this offence he thought the child was of or above the age of 16 years. Accused responded in the affirmative.

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 VERONICA MWANZA 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 no witnesses.

PW1 was VERONICA MWANZA the Prosecutrix in this matter. She was aged 15 years old and was a pupil in Grade 8 at Nyumba Yanga Basic School. Voire dire was not conducted as she was above the age requiring Voire dire. According to her in September, 2015 around 0600hrs, she went into the bedroom of her Grandfather the accused to go and get her uniforms. Accused was sleeping on a bed. The house was two roomed. The wife to accused had gone for work. Accused pushed her with his legs. She wanted to go out but accused woke up and pulled her and pushed her on the bed. Accused undressed her of her clothes and pant and held her tight

and got his penis and inserted it into her vagina. After finishing accused told her not to tell anyone and that if she did she would go mad. She went to have a bath and went to school. In October, 2016 around 0500hrs she was in the sitting room preparing to go to school and accused's wife had left for work. Accused came and found her dressing and pushed her on the mattress and had sex with her. This was in the sitting room on her mattress. Accused inserted his penis on her vagina and afterwards gave her a K50. She then stopped having periods and discovered that she was pregnant. She was scared to tell anyone. The pregnancy started showing. Her mother PW2 came and asked her if she was pregnant and as to who was responsible. She revealed that it was her Grandfather the now accused who had sex with her. She was taken to Ng'ombe Police Post where the matter was reported and was issued with a medical report form. She went to UTH where she was given another document and was examined. She identified the documents marked P1 collectively. She identified accused as the person who had sex with her. When the pregnancy reached nine months she went to Bauleni Clinic but failed to deliver and so was referred to UTH where she was operated on and had a baby. The child was now 1 year old. In XXN she told the court that the first incidence, her Grandmother had gone for work. The child was born on 25/06/16.

Accused had sex with her twice. It was in September, 2015 and September, 2015 that they had sex. In 2016 she had a baby. She left accused's home when she got pregnant. Accused told her to abort before people knew. Her Grandmother knew that she was pregnant. She did not tell accused because she was scared. Her Grandmother was now deceased. Accused ran away. Accused ran away when he knew that she was pregnant. She now had a child. They did not go to Court when her Grandmother was still alive because accused ran away. Accused was arrested when he went for the funeral of his wife.

PW2 was ASEDI MWANZA the mother to PW1. According to her PW1 was her daughter and born on 25/09/2003 and was now 15 years old. In 2015 she was 12 years old and was staying with PW2's Aunt who was the young sister to her father. She was Doris Phiri. In 2016 she went to Ng'ombe compound to visit her Aunt and when she saw PW1 she looked to be pregnant. PW1 looked fat and the breasts looked big. She asked PW1 if she was pregnant and PW1 admitted and said that her Grandfather the accused was responsible. She then took PW1 to the Police at Ng'ombe and reported the case. PW1 was issued with a medical report form and was taken to UTH where she was examined. At UTH PW1 was given another document. She was found to be pregnant. Later she had a baby boy through caesarean section at UTH. She identified

the medical report forms marked P1. She identified accused.

In XXN she told the court that accused was at his home when she knew that PW1 was pregnant. She did not find accused when she went to find out from the accused. It was in February, 2016 when she went looking for accused. Accused's phone was off. The child was born on 25/06/2016. She told the wife to accused that PW1 was pregnant. Accused's wife was deceased. She died three weeks ago. Accused was not around when his wife got sick. PW3 was BEN ZULU a Teacher at Umodzi Community School. He was the Head Teacher. His duties were to enroll pupils in school see to it that pupils were coming to school and report using the Register. PW1 was at Umodzi Community School and enrolled on 25/02/2015 and was in Grade 6. According to the records he had they show that she was born on 26/09/2003. PW1 was taken to his school by her Grandmother Doris Phiri. He had an enrolment form and the Register which he identified marked P2 collectively. PW1 was impregnated in November, 2016. The case was reported to him and he allowed her to write her Grade 7 exams. PW1 was now in Grade 8.

In XXN he told the court that on the pregnancy he told the wife of accused about it. Accused's wife was now deceased. He did not tell accused because he did not find accused at his home on several occasions.

In REXN he told the court that the wife to accused was Doris Phiri.

PW4 was PRISCA KANGOMA the arresting officer based at Mtendere Police Post. On 19/02/16 she was on duty when she received a report of Defilement from PW2 who reported on behalf of her daughter PW1 that she was defiled and impregnated by the Uncle to PW2. Acting on the report she made a follow up and discovered that the suspect the now accused was at large. She interviewed accused's wife Doris Mwanza over the deceased who told her that she did not know his whereabouts of her husband. She continued investigating the matter until on 06/07/2017 when she received information that accused was seen at his home as he came to mourn his wife who passed on. She made a follow up and apprehended accused and took him to the police. She interviewed accused but did not give her a satisfactory reply. She then made up her mind to charge and arrest accused for Defilement C/S 138(1) of Cap 87 as read with Act No. 15 of 2005. Under warn and caution statement in Nyanja the language that he appeared to understand better, he gave a free and voluntary reply denying the charge. She identified accused and also identified the medical report forms marked P1. She was not given the birth record and the explanation was that it got burnt in the house in Petauke. She then went to Umodzi Community School where the

victim PW1 used to go to school. She met PW3 who showed her the enrolment form and the Register which she identified marked P2. According to the school records, PW1 was aged 14 years.

There was no XXN by accused.

Accused was put on his defence. However, before he could give his testimony he asked that the court recalls PW2 and PW3 which application was granted.

In XXN OF PW2 by ACCUSED, she told the court that accused stayed with PW1 since 2012. It was PW2's Aunt who got PW1. Her Aunt was accused's wife.

When it came to XXN of PW3, accused changed and said that he wanted the court to recall PW4 which application was granted.

In XXN OF PW4 BY ACCUSED, she told the court that she never went to accused's home. She was looking for accused within Ng'ombe compound. The funeral happened in June, 2017. She was not there when accused was defiling the child. It was the members of the neighborhood watch who apprehended accused.

Accused was put on his defence. He gave sworn evidence and called no witnesses.

According to him he started staying with PW1 in 2006. PW1 was his Grandchild because he married her Grandmother. In 2007 PW1 was taken by her mother. In July, 2014 accused's wife got

unwell. In November, 2014 they again got PW1 to stay with. PW1 was in Grade 7 and was 15 years. She was born in 2009. PW1 started school at PW3's place and was put in Grade 6 in 2015. In the second term she went for holiday. On 06/09/2015 she came back. On 30/09/15 accused went to Livingstone and Namwala. On 28/11/2015 he came back home. On 22/02/16 upto April, 2016 he was at home. On 02/06/17 his wife died. On the day of burial he was apprehended by Police that he defiled the child in 2015. He did not know the defilement case.

In XXN he told the court that PW1 was born in 2009. She was now 18 years old. He first saw her in 2006 when she was in Grade 1. Accused was the only man at that place. He heard PW1 testify that in September, 2015 in the morning accused had sex with her when she went to collect uniforms. He went to Namwala for business.

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 dates. I find that it was the accused that had sex with her. I find that the prosecutrix was aged below 16 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 dates. According to her in September, 2015 around 0600hrs she went into the bedroom where accused was sleeping for her to get her uniforms and the light was on. The wife to

accused had gone for work. Accused then pushed her with his legs. As she wanted to go out, accused woke up and pulled her and pushed her on the bed. Accused then undressed her of her clothes and pant and held her tight and inserted his penis into her vagina. After finishing accused told her not to tell anyone and that if she did she would go mad. She went to have a bath and went to school. Again in October, 2015 around 0500hrs she was in the sitting room preparing to go to school. The wife to accused had gone for work. Accused then came and pushed her on the mattress and had sex with her. Accused inserted his penis into her vagina. After accused finished having sex with her he gave her a K50. Later PW1 stopped having her periods and discovered that she was pregnant and was scared to inform anyone. The pregnancy however, started showing. When her mother PW2 visited she was asked if she was pregnant and who was responsible. She revealed that she was pregnant and the one responsible was accused who had sex with her. She was taken to the police to report. She was taken to UTH where she was examined. The medical report forms P1 showed that she was defiled and was 22 weeks old pregnant.

This is confirmed by PW2 who observed that PW1 was pregnant because without anyone witnessing the ordeal, she 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 was defiled by the accused her Grandfather and upon being examined at UTH it was found that she was defiled and was even 22 weeks pregnant. This was corroboration enough because a reasonable period of its occurrence it was reported to PW2 and then the police. Infact PW2 immediately took PW1 to the police after discovering that there was something strange with PW1. This just shows that something more happened. Accused had an opportunity to commit the said offence looking at the fact that at that time, it was in early in the morning and his wife had gone for work and it was only accused and PW1 in the house and the place was quiet. Accused knew that his wife was not in the house hence the opportunity. 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 the victim's Grandmother from the house and the time was early in the morning and also the fact that there was only PW1 there. She communicated what had happened to her to PW2 within a reasonable time and there is an explanation of the delay in reporting because she was threatened by accused that if she told anyone she would go mad. This is a child and it is very possible for a child to believe that. 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 a pregnancy came out of the sexual act. 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 in that house at that particular moment. 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. The condition of the hymen was that it was consistent with a non-acute sexual assault 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 hymenal remnants and pregnancy test was positive and 22 weeks old foetus after an ultra sound scan. 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 a pregnancy the inference is that it was accused who tampered with the private part for it to have hymenal remnants and also for the girl to conceive.

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 on two occasions early in the morning of September and October 2015 accused had sex with her when her Grandmother the wife of accused had gone for work. Later she stopped having her monthly periods and discovered that she was pregnant. Upon being asked by her mother PW2 who came to visit she told her that it was accused who had sex with her and was responsible. The matter was reported to the Police and went to UTH where she was examined and was found to have been defiled and pregnant. The case of the pregnancy was also reported to the Head Teacher PW3 Of Umodzi Community School who tried to see accused but to no avail. PW2 also tried to see accused but to no avail as accused had run away from home. Even the Police Officer PW4 tried to look for accused but to no avail as he had run away from home. It was during the day when accused was having sex with PW1 and PW1 was able to see accused and further no issues of mistaken identity can arise. There was light in the house which helped her to identify accused. Accused was also her Grandfather and used to stay with him in the same house and knew him very well. It is impossible to believe that another unknown male person could have defiled PW1. The inference therefore being that it was accused who was the only male adult at that moment who took

advantage of the absence of any other person and ended at defiling the victim. The evidence of the said witness was corroborated by independent evidence of PW2 who received a report of defilement after she observed that PW1 was getting fat and the breasts were growing big 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 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 hymeneal remnants and was pregnant which qualify the case of Emmanuel Phiri v The People that there must be something more and that something more is the private interference. The prosecutrix also reported almost immediately that defilement had been done on her to PW2 and that it was the accused that defiled her and the defiler ran away from his home and was reported to the police by PW2.

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 cogency 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 PW1 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 and PW2 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 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 PW2 the mother to the prosecutrix was that she was aged 15 and years old and in 2015 she was 12 years old. PW1 was born on 25/09/2003. This is supported by P2 the School enrolment form for Umodzi Community School where PW1 was enrolled that in 2015 when the incident occurred she was 12 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.

Having seen the victim myself it is impossible to believe that she was of or above 16. She was below the age of 16 years and to be specific she was 12 years old in 2015 when the incident occurred.

The defence by accused that he did not have sex with the child and was surprised to be taken to the police over that allegation is a blue lie. Further that he was not at home as was in Livingstone and Namwala is also a lie aimed at misleading the Court. Accused ran away from his own home and only came to mourn his wife. The question is why did he run away? The answer being that he had a guilt mind of having defiled and impregnated his Granddaughter and it was difficult for him to face her. PW2, PW3 and PW4 testified to the fact that accused was nowhere to be seen. I wonder how all could conspire to testify against accused. Accused only came to mourn his wife and thought people had forgotten about his crime. This was a well planned move by accused. His defence is an afterthought meant to mislead the court.

The state has discharged its burden to prove the alleged crime of defilement against the accused beyond reasonable doubt and I accordingly find him **GUILTY** Of 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 and **I CONVICT** him accordingly.

DELIVERED IN OPEN COURT THIS 9TH DAY OF OCT 2017.

A.N.

HON A.N WALUSIKU



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