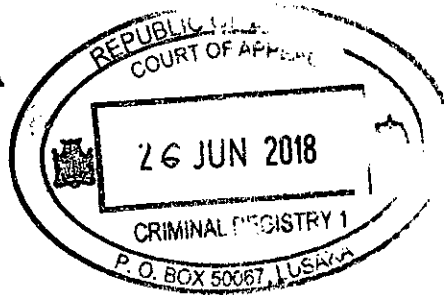


**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT NDOLA**
(Criminal Jurisdiction)

APPEAL NO. 177/2017

BETWEEN:**JOSEPH MUBANGA****VS****THE PEOPLE****APPELLANT****RESPONDENT**

CORAM: Makungu, Kondolo SC and Majula, JJA

On the 23rd day of February 2018 and 26th June, 2018

For the Appellant: Ms. K. Chitupila, Senior Legal Aid Counsel, Legal Aid Board

✓ For the Respondent: Mr. M. Lupiya, State Advocate, National Prosecutions Authority

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Emmanuel Phiri vs The People* (1982) ZR 77 (SC)
2. *Joseph Mulenga and another vs The People* (2008) 2 ZR 1
3. *Katebe vs The People* (1975) ZR 13.
4. *R vs Baskerville* (1916) 2 KB 658

5. *Machobane vs The People* (1972) ZR 101.

6. *R vs Mayers* (12 Cox CC 311)

7. *Reg. vs Young* (14 Cox CC 114).

Legislation Referred to:

Penal Code, Cap 87 of the Laws of Zambia as read with Amendment Act No. 2 of 2011, section 132

Works referred to:

Muna Ndulo and John Hatchard, The Law of Evidence in Zambia: Cases and Materials (Lusaka: Multimedia Zambia, 1991).

The appellant was convicted by the subordinate court for the offence of rape contrary to section 132 of the Penal Code, Cap 87 of the Laws of Zambia as read with Amendment Act No. 2 of 2011.

The particulars of the offence were that Joseph Mubanga, on the 13th day of October, 2016 at Kapiri Mposhi in the Central Province of the Republic of Zambia, had unlawful carnal knowledge of Ireen Simfukwe without her consent.

The key prosecution witness was PW1, Prisca Kunda who testified that on the material day the appellant, who is her brother in law, went to her place on a bicycle. She then told him to park his bicycle in front of the house. The appellant however proceeded to a kitchen where the prosecutrix (PW2) was sleeping in a drunken

stupor following a heavy drink up of a local brew popularly known as '*Chibuku*'.

It was PW1's testimony that after a while, she noticed that the appellant curiously took long to return from parking his bicycle, so she decided to check on him. To her surprise, when she reached the room where the prosecutrix was sleeping, she found the appellant with his trousers below his knees trying to zip them and also observed that the prosecutrix skirt was below her knees. She further noted that the prosecutrix who was still unconscious in a drunken state had been moved from the position she earlier slept in.

She then held the appellant by the hand and called for help from the neighbors to go to the scene and witness what the appellant had done.

The evidence of the prosecutrix who testified as PW2 was that on the material day, she went to drink "*Chibuku*" brew from 14:00hrs to 17:00hrs. She thereafter proceeded to PW1's kitchen room where she slept until the next day.

She was then told by her husband PW3 about what transpired the previous day while she was sleeping. After the matter was reported to the police, she checked her vagina and found some semen.

The matter was later reported to the Police who arrested and charged the appellant for the offence of rape. The prosecutrix also went for medical treatment and the medical doctor who examined

her, confirmed the presence of bruises and lacerations in the vagina wall, which was consistent with the allegation of rape.

In his defence, the appellant testified that on 13th October 2016, around 10:00hrs, he went to visit his in-laws PW2 and PW3 where he spent the day drinking *chibuku* brew. Between 18:00hrs and 19:00hrs he asked a child to take his bicycle to the kitchen so that he could proceed to his house considering that it was getting late. It was then that PW1 accused him of having had sexual intercourse with PW2. He denied committing the offence of rape.

In his judgment, the learned trial magistrate found that the prosecution had sufficiently proved the elements of the offence of rape. He believed the evidence of PW1 and also found corroboration of the sexual act from the testimony of PW2 when she said that she found some semen in her vagina as well as the medical report which confirmed that there was penetration. As regards the identity of the appellant, the trial Magistrate found that this was not in issue in that the appellant and PW1 to PW4 were all related in some way and found nothing to suggest any motive on their part to falsely implicate the appellant.

Following his conviction, the appellant was sentenced to 15 years imprisonment with hard labour. An appeal was subsequently launched to this court on behalf of the appellant on the single ground that:

The trial court erred in law and fact when it made a finding that there was corroboration of the offence.

The gist of the submissions on behalf of the appellant by Ms Chitupila was that in sexual offences, corroboration must be that of the prosecutrix and not that of the other witnesses. The case of ***Emmanuel Phiri vs The People***¹ was cited in which the Supreme court restated this principle. Ms. Chitupila also referred us to the writings of John Hatched and Muna Ndulo on ***The Law of Evidence in Zambia***¹ at page 149 to support her proposition.

On that basis, counsel called upon this court to allow the appeal and set aside the conviction and sentence.

Mr. Lupiya's response on behalf of the respondent was that it is not in dispute that PW2 was drunk and asleep at the time the offence was committed. He noted however that the material evidence of PW2 was that after she woke up she was told by PW3, her husband, about what happened. She later checked her vagina and found some semen although she did not tell the police.

Counsel stoutly argued that this evidence which went unchallenged in cross examination was corroborated by the medical report which confirmed that there was penetrative sex. The case of ***Joseph Mulenga and another vs The People***² was cited for the proposition that a trial court is entitled to find an accused guilty

¹ *Emmanuel Phiri vs The People* (1982) ZR 77 (SC)

² *Joseph Mulenga and another vs The People* (2008) 2 ZR 1

when prosecution witnesses lead evidence which goes unchallenged in cross examination.

Mr. Lupiya then turned to the issue of identity of the offender. He argued in this regard that PW1 in her testimony identified the appellant as the person whom she found with his pants below the knees in the kitchen where the prosecutrix was sleeping. He also pointed out that PW3 in his evidence told the court that he did not have sexual intercourse with PW2 on the material day.

It was counsel's contention that in any event, a court is competent to convict on the evidence of a single identifying witness even without corroboration for as long as the danger of false implication has been eliminated. To fortify this, he relied on the case of ***Katebe vs The People***³.

He urged us to find that there was nothing on the record of appeal which suggests that PW2, PW1 or PW3 would have had a motive to falsely implicate the appellant considering that he is also their relative.

We have considered the ground of appeal, the authorities cited by counsel as well as the judgment of the court below.

The learned authors of the ***Law of Evidence in Zambia: Cases and Material***¹ at page 128 define corroboration as independent evidence which supports the evidence of a witness in a material

³ *Katebe vs The People* (1975) ZR 13.

particular. Further Lord Reading CJ in the case of ***R vs Baskerville***⁴ at p 667 said:

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it may be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime was committed, but also that the prisoner committed it”.

The general rule is that a conviction is competent on the uncorroborated evidence of the complainant provided that there are special and compelling grounds for so doing. See ***Katebe vs The People***³ and ***Machobane vs The People***⁵.

Applying those principles to the instant case, we find indeed that there was evidence from the prosecutrix that an unknown person had unlawful carnal knowledge of her without her consent. This fact was corroborated by the subsequent medical examination which was conducted on the prosecutrix which confirmed that there was sexual connection. Learned counsel for the appellant vehemently argued that the semen which the prosecutrix found in her vagina could have been deposited by her husband. We have considered other pieces of evidence and find no basis to assail the trial magistrate for

⁴ *R vs Baskerville* (1916) 2 KB 658

⁵ *Machobane vs The People* (1972) ZR 101.

accepting as truthful the evidence of the husband PW3 when he said that he did not have sexual intercourse with her on that day. We therefore dispel the assertion that the husband lied when he said he didn't have sex with her that night.

The evidence of the prosecutrix was further corroborated by the testimony of PW1 who found the accused person with his trousers below his knees trying to zip them. We equally cannot fault the trial court for finding PW1 to have been a fair witness with no axe to grind against the appellant.

We now turn to consider the issue of consent of the prosecutrix to the sexual intercourse. We must at once state that no consent to sexual activity can be obtained where the victim is incapable of consenting to the activity. This includes circumstances where the victim is unconscious or is incapacitated by intoxication. There was uncontroverted evidence which was admitted by the appellant on pages 6 and 7 of the record of appeal to the effect that the prosecutrix was drunk and sound asleep during the entire ordeal. In our considered view, and as rightly argued by Mr. Lupiya, it is settled law that a person who is sleeping is incapable of giving consent to acts of a sexual nature. This principle of law was espoused in the cases of **R vs Mayers**⁶ as well as **Reg. vs Young**⁷.

⁶ *R vs Mayers* (12 Cox CC 311)

⁷ *Reg. vs Young* (14 Cox CC 114).

In casu the prosecutrix was too inebriated to recollect the incident in question, and certainly was incapable of consenting to sexual activity that occurred at the material time as she was asleep or unconscious.

We also wish to dismiss the notion that the prosecutrix or any party can give '**advance consent**' to sexual activity. Advance consent is not permitted at law for the simple reason that consent requires an on going conscious state of mind while the activity is occurring. This is because a party retains the right to revoke consent. The long and short of the foregoing is that the prosecutrix having been in the state of being incapacitated by intoxication had no legal ability to give consent. Further the belief that 'advance consent' can avail the appellant as a defence is untenable for reasons advanced.

We find that there was in fact corroboration of the prosecutrix testimony both as to the commission of the offence and the identity of the offender.

In light of what we have said, we hold that the appeal against conviction and sentence is bereft of merit and we accordingly dismiss it.

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C.K. MAKUNGU

COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE