IN THE COURT OF APPEAL OF ZAMBIA APPEAL No.112/2019
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

MOURICE MWEENE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Kondolo, Makungu and Siavwapa, JJA
On 18th January and 24th February, 2020

For the Appellant: Mr. I. Nyambe Legal Aid Counsel, Legal Aid Board
For the Respondent: Mr. S. Zulu, State Advocate, National Prosecutions Authority.

JUDGMENT

Makungu, J.A delivered the judgment of the court.

Cases referred to:

1. *Katebe v The People (1975) Z.R 13 (S.C)*
2. *Joe Banda v The People SCZ Appeal No.183 of 2013*
3. *Ilunga Kabala and John Masefu v The People (1981) Z.R 102 (S.C)*
4. *Simon Choka v The People (1978) Z.R 243*
5. *Anayewa and Sinjambi v The People (Appeal No.143.144/2011)(2012) ZMSC 69*
6. *The People v Robert Phiri and Another (1980) Z.R 249*
7. *Chimbini v The People (1978) Z.R 191 (C.A)*
8. *The People v Benson Phiri and Sonny Mwanza SCZ Judgment 25 of 2002*
9. *George Musupi v The People (1978) Z.R 271 (S.C)*

10. *Yokonia Mwale v The People, SCZ appeal No. 285/2014.*
11. *Dennis Nkhoma v The People Appeal No.52 of 2015*
12. *Nzala v The People (1976) Z.R 221*
13. *Charles Nalumino v The People (1986) Z.R 102*
14. *Tapisha v The People (1973) Z.R. 222*
15. *Ivess Mukonde v. The People SCZ Judgment no. 11 of 2011*

Legislation referred to:

1. *Penal Code, Chapter 87 of the Laws of Zambia*

1.0 INTRODUCTION

1.1 This is an appeal against the judgment of High Court Judge, Kenneth Mulife, upholding the decision of the Subordinate Court sitting at Namwala in which the appellant was convicted of one count of defilement contrary to section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia. Particulars of the offence were that the appellant, on 21st March, 2017 at Namwala in the Namwala District of the Southern Province of the Republic of Zambia, did have unlawful carnal knowledge of V. M. a girl under the age of 16 years.

2.0 PROSECUTION'S CASE

2.1 The prosecution called five witnesses: The prosecutrix's mother Roster Mandevu as PW1, V.M the prosecutrix as PW2, Joseph Siamugande Mandyenkuku PW2's uncle as PW3, Mubanga Chrispin the Investigating Officer as PW4 and Violet K. Siamabele the head teacher at Namusonde Primary School as PW5.

2.2 The combined evidence of the prosecution witnesses was that; PW2 aged 14 years was staying with her uncle, the appellant, in Namusonde at the material time. On the night of 21st March, 2017 as she was sleeping, she was awakened by the appellant's daughter Table who told her that the appellant wanted to see her. When she went outside, the appellant told her that the bath water had become cold and she should go back to sleep. She went back to sleep, then he called her again. This time, he dragged her into the bathroom which was nearby and had carnal knowledge of her on the ground whilst covering her mouth with his hand.

2.3 After the incident, PW2 went to her parents' place where she found her mother PW1 and uncle PW3. Her father was not there. She narrated to them that the appellant had carnal knowledge of her at night on 21st March, 2019. Kebby called the appellant and asked him to report to PW1's house the following morning but he travelled there the same night. The following morning the meeting was held, where the issue of defilement of PW2 by the appellant was tabled and the appellant just started crying without giving any explanation. The following day when the appellant's father learnt about the defilement, he gave PW1 a goat to sell so that the proceeds could be used to take PW2 to the hospital. About three days after the fact, the appellant went and apologized to PW3 and five others and contributed K90 to pay at the hospital. Thereafter, PW2 was taken to Kasenga clinic where she was examined and referred to Namwala District Hospital. The matter was reported to the police where she was issued with a medical report form which was later filled in by a medical practitioner and signed on 31st March, 2017.

2.4 PW4 investigated the matter and informed the court that under warn and caution, the appellant told him that he only asked PW2 to take soap to him when he was bathing. PW5 confirmed that PW2 was enrolled at Namusonde Primary School in grade 8 since 23rd January, 2017 and she was 14 years old as she was born on 30th November, 2002 as per official school register marked P2.

3.0 DEFENCE CASE

3.1 The appellant gave evidence on oath and called two witnesses namely; Doris Muzenga his wife as DW2 and Lasco Kalonga his colleague as DW3.

3.2 In brief, their evidence was that; On 21st March 2017, between 19 hours and 20 hours, the appellant and DW3 had planned to travel to Choma. Before setting off for Choma, they made a stopover at his house so that he could change his clothes and inform his wife that he was going to Choma. At home, they found everyone still awake. From there, they drove to Choma. They returned the following day, before he reached home, he received a phone call from Kebby Madyenkuku PW2's uncle

asking him to go PW1's home early in the morning the following day. He arrived home at 22 hours where his wife informed him that she had learnt that he had defiled PW2. Upon hearing this, he left for Kasenga where he arrived between 01: 00 and 02: 00 hours. The matter was tabled the following morning. During the meeting, Kebby, Mphande Madyenkuku with his two wives were present when he denied the allegations of defilement.

3.3 The appellant stated that his father gave away his goat as payment for the treatment of his legs by Desmond.

3.4 On 26th March he gave Kebby K90 to take PW2 to the hospital because they were insisting that he had defiled her and yet he was innocent. He was arrested on 3rd May, 2017 at Mphande's house.

3.5 DW2's evidence was that on the material night, the appellant went home with his friend as the appellant had to change his clothes and he did not stay long. DW3 confirmed that he was with the appellant when the appellant went home to change his clothes before they proceeded to Choma.

4.0 LOWER COURT'S DECISION

a) On the issue of the alleged alibi the lower court found that the appellant had not raised it when he was questioned by the police. That under warn and caution, the appellant told the police that he asked the victim for soap as he was in the bathroom and therefore he had the opportunity to defile her. The police had no notice of the alibi as required by the case of **Katebe v The People.** [1] Nevertheless, the alibi had been negatived as the explanation by the appellant to the police about the soap, placed him at the crime scene. The Magistrate pointed out that PW4's evidence was not discredited. The appellant corroborated PW2's evidence that he called her to the bathroom on the material night.

b) The crying and apologizing when confronted, showed he had a guilty mind. The court opined that it was inconceivable that a person who was not at home at the alleged time, would be crying and apologizing over a serious matter like that, unless he had committed an offence. He therefore found the alibi false.

c) The fact that he apologized and paid K90 to take the victim to the hospital also corroborated PW2's evidence.

d) The prosecutrix was below 16 and the accused had unlawful carnal knowledge of her. He therefore found him guilty as charged and convicted him accordingly.

e) The lower court then committed him to the High Court for sentencing. The learned Mr. Justice Mulife, sentenced him to 17 years imprisonment with hard labour with effect from 30th July, 2018 when bail was revoked.

5.0 GROUNDS OF APPEAL

5.1 The appellant has appealed to this Court against both conviction and sentence based on the following grounds:

1. *The learned trial Judge erred both in law and in fact when he convicted the appellant for the offence of defilement despite the appellant having advanced the defence of alibi that proved he was not in town when the offence was committed.*
2. *The learned trial court erred in law and fact when it relied on the evidence of a single identifying witness PW2 who had a possible interest to serve in rejecting the appellant's defence of*

alibi without satisfying himself that the dangers of false implication had been ruled out.

6.0 APPELLANT'S ARGUMENTS

6.1 On ground one, it was submitted that the trial court erred in law and fact when it refused to accept or consider the evidence of an alibi by the appellant. It was the appellant's evidence that he only went home to change his clothes that night. This was confirmed by DW2 and DW3. The court erroneously stated that the alibi was false as it was not brought to the attention of the police. Counsel argued that the law does not require an alibi to be brought to the attention of the police for it to succeed. The appellant's evidence of alibi should have been rebutted by the prosecution. In support of this, he relied on the case of **Joe Banda v The People**[2] where it was stated *inter alia* that;

"The accused person is entitled to bring up any issue relevant for his defence and in our considered view the appropriate time to do so is when it is his turn to give evidence in his defence."

6.2 On the same point, reliance was placed on the case of **Ilunga Kabala and John Masefu v The People**[3] where it was held that;

"In any criminal case where an alibi is alleged, the onus is on the prosecution to disprove the alibi. The prosecution takes a serious risk if they do not adduce evidence from witnesses who can discount the alibi, unless the remainder of the evidence is itself sufficient to counteract it."

6.3 It was the appellant's counsel's contention that the trial court, in denying the evidence of an alibi, erroneously stated that the appellant apologized for the offence. PW2's evidence did not disclose that the appellant apologized for the offence. This was brought up by PW3.

6.4 The appellant's giving of a K90 to assist with transportation of PW2 to the hospital did not amount to an apology. The appellant denied apologizing to anyone for the defilement and as such, the court should have considered the said defence. We were urged to allow this ground of appeal.

6.5 In support of the second ground of appeal, it was submitted that the only evidence purportedly linking the appellant to the commission of the offence came from PW2. Her evidence was that the appellant called her to the bathroom and had carnal knowledge of her. DW2 and DW3 were in the same house and they could have heard something happening if at all the alleged offence was committed on the same day. The appellant never mentioned anything about going to take a bath and neither were his witnesses challenged in this regard.

6.6 In addition, on 19th March, 2017, PW2 was found drinking a substance that contained soda by DW2 who threatened to take her back to her parents. This suggests that PW2 was capable of lying because she was suspected to be pregnant. This coupled with the evidence that the appellant once questioned PW2 about a certain boy he saw her with, made her a witness with a possible interest to serve.

6.7 Counsel contends that PW2 could have had sex prior to the 19th and 21st March with another person and was trying to hide it. Therefore, the court should have treated PW2's

evidence as suspect, and warned himself of the dangers of placing reliance on her uncorroborated evidence. Counsel relied on the case of **Simon Choka v The People**[4] where it was stated that;

"A *witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanor and plausibility of his evidence. That something more must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness."*

6.8 The evidence of PW1, PW3 and PW4 is all based on what PW2 told PW1 that the appellant had sex with her. The medical report showed that PW2 had healed bruises on the vagina which could indicate that another person, other than the appellant had carnal knowledge of her earlier than 21st March, 2017.

6.9 In light of the foregoing, counsel urged us to allow this ground of appeal as well. He prayed that the conviction be quashed and the appellant be acquitted.

7.0 RESPONDENT'S ARGUMENTS

7.1 In countering ground one, it was submitted that DW2 stated that the appellant went home with DW3 around 19 to 20 hours merely for the appellant to change his clothes. DW3 did not mention the time when they left for Choma. This evidence clearly shows that the appellant was at home in the evening on 21st March, 2017.

7.2 Counsel further submitted that the alibi was false and an afterthought as it was not brought to the attention of the police. In this regard, reliance was placed on the case of **Anayewa and Sinjambi v The People**[5] where the court stated that;

"*The 2nd appellant claimed that he told the police that on the material day he was with his wife. However, we find that this issue was not raised in cross-examination of the investigating*

officer. It was not sufficient for the 2nd appellant to merely state in his defence that he was with his wife the whole day on the material day. The defence should have been raised earlier in order to give the prosecution a chance to address it. As it is, we can only conclude that it was an afterthought."

7.3 Counsel further submitted that the appellant raised the alibi late. He should have raised it earlier by telling the police to enable them investigate it or he could have at least cross-examined the arresting officer on the issue. DW2, the wife to the appellant and DW3 a friend to the appellant were both suspect witnesses with a possible interest to serve. Counsel prayed that the first ground of appeal be dismissed.

7.4 In countering ground two, it was submitted that the court can convict on the evidence of a single identifying witness depending on the circumstances of the case as was held in the case of **The People v Robert Phiri and another.**[6]

7.5 Counsel also referred us to the case of **Chimbini v The People**[7] where it was held inter alia that;

"Most important among the factors to be taken into account is whether the witness knew the accused prior to the incident..."

7.6 This principle was applied in the case of **The People v Benson Phiri and Sonny Mwanza**[8], where the court found that the testimony of a single identifying witness who knew the accused prior to the incident was adequate to support a conviction.

7.7 In light of the foregoing, it was submitted that PW2 knew the appellant very well prior to the incident and they were living together and she had enough time to observe him at the material time. Therefore, the dangers of an honest mistake had been excluded.

7.8 As regards the appellant's contention that PW2 had an interest to serve, it was contended that her testimony was truthful as she had no reason or motive to be biased or to give false evidence. In the case of **George Musupi v The People**[9] , it was held among things that;

"The critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but

whether he is a witness who, because of the category in which he falls or because of the particular circumstances of the case, may have a motive to give false evidence."

7.9 Reliance was also placed on the case of **Yokonia Mwale v The People**[10], where the Supreme Court stated among other things that;

"*Evidence of a witness does not become suspect just because he or she is a relative of the deceased or victim of the crime, as in this case... there must be evidence before the trial court upon which the court can conclude that there was bias or interest to serve ....*"

7.10 On this basis, counsel contended that PW2, having been found drinking a substance that contained soda by DW2 and being questioned about a certain boy the appellant had seen her with, does not in any way make her a witness with a possible interest to serve. In addition, the evidence which was before court did not disclose any motive on the part of PW2 to falsely implicate the appellant.

7.11 The fact that the appellant asked for forgiveness should be taken that he apologized for the defilement.

7.12 On the issue of the medical report that there were healed bruises on the vagina, it was submitted that this report was consistent with the allegation that the appellant had carnal knowledge of PW2 on 21st March, 2017 as she was only examined by medical personnel five days later and there was enough time for the bruises to show signs of healing. The medical report corroborates the evidence of defilement and to fortify this argument, counsel relied on the case of **Dennis Nkhoma v The People.**[11]

7.13 On the basis of the foregoing arguments, the prayer was that the second ground of appeal be dismissed and that the appeal should fail in its entirety.

8.0 DECISION OF THIS COURT

8.1 We have considered the record of appeal and the arguments made by the learned counsel for both parties. We shall deal with the grounds of appeal together since they are related.

8.2 The law is settled that an alibi must be properly raised by an accused person at the earliest opportunity and that such an allegation can only be investigated if the accused provides details as to witnesses who could vouch for him. When an alibi is properly raised, it is the prosecution's onus to negative it. The cases of **Katebe v. The People** [1] and **Nzala v. The People** [12] give these guidelines.

8.3 It is clear from the evidence on record that the appellant did not raise an alibi at the time that the case was being investigated. This explains why he did not cross examine PW4 about it. In his evidence, he did not state that he told the police that he was not at the crime scene at the material time.

8.4 Since an alibi was not properly raised, the police had no duty to investigate it and the prosecution had no burden of rebutting it.

8.5 It is imperative for us to comment on the lower court's finding that although the alibi was not raised at the outset of the investigation, but at trial, the alibi was negatived by the evidence from PW4 that the appellant told him under warn

and caution that he only asked PW2 to give him soap that night as he was bathing. We are of the considered view that that incriminating evidence by PW4 was not properly handled as it was tantamount to a confession and the defence was not asked whether they had any objection to it at the time that it was raised. In the case of **Charles Nalumino v. The People** [13] it was held that:

"It is immaterial whether or not an accused is represented by counsel. The court must in all cases ask the defence whether they wish to object to the admission evidence of a confession."

8.6 That piece of evidence should therefore not have been relied upon by the court as it is unsafe to convict on it.

8.7 In the case of **Tapisha v. The People** [14] it was held *inter alia* that in such instances if prejudice has resulted, or may have resulted, the appellate court must ignore the confession.

8.8 In this case, the appellant was prejudiced by the impropriety and we shall ignore the confession.

8.9 The fact that the appellant was at home that night, and there was no evidence as to when he left the house, is ample evidence that he had the opportunity to commit the offence which he was charged with as rightly found by the lower court on page 5 of the judgment.

8.10 In the case of **Ivess Mukonde v. The People** [15] it was held *inter alia* that:

"Whether evidence of opportunity is sufficient to amount to corroboration, must depend upon all the circumstances of a particular case. The circumstances and locality of the opportunity may be such that in themselves amount to corroboration."

8.11 Considering all the circumstances of this case, we find that the locality of the opportunity in itself amounted to corroboration.

8.12 We reject the appellant's counsel's submission that if defilement had taken place then DW2 and DW3 would have heard something because page 9 of the record of appeal, lines 16 -17 show part of PW2's evidence in chief that she felt a lot

of pain. She tried to shout but the appellant covered her mouth with his hand. It is therefore clear that she did not shout for DW2 and DW3 to hear.

8.13 For reasons stated above, we uphold the lower court's finding that the alleged alibi was false and an afterthought.

8.14 In considering whether PW2 was a suspect witness, we have in mind the cases of **Simon Choka v. The People** [4], **The People v. Robert Phiri and Another** [6], **Chimbini v. The People** [7] and **Yokoniya Mwale v. The People** [10].

8.15 It is trite law that in sexual offences, both the commission of the offence and the identity of the offender have to be corroborated, the case of **Ivess Mukande v. The People** [15] refers.

8.16 By implication, every prosecutrix's evidence must be treated with caution. The lower court treated PW2's evidence with caution as it looked for corroborative evidence, which it found.

8.17 It is not in dispute that the appellant was PW2's uncle and therefore it was impossible for her to fail to identify him as she

obviously knew him very well. He had called her twice that night and she had the opportunity of seeing and hearing him as he told her that the bath water was cold and later as he dragged her into the bathroom and defiled her. The danger of false implication was therefore not there. There was no evidence at all suggesting motive on her part to falsely implicate the appellant.

8.18 PW2's evidence of identification of the appellant was corroborated by the appellant himself. The lower court at page 4 of the judgment rightly pointed out that when the appellant was confronted with the allegation of defilement, he just cried and apologized. This conduct was indicative of his guilty conscious. *"It is inconceivable that a person who was not at home at the alleged time would be crying and apologizing over a serious matter like this one, unless he committed the offence."*

8.19 We however take it that the payment of K90.00 for the prosecutrix to be taken to the hospital did not at all corroborate the identification evidence.

8.20 We therefore set aside the lower court's finding on page 4 of the judgment that the payment corroborated the evidence of identity of the appellant as the defiler.

8.21 The evidence of PW2 as a single identifying witness who knew the appellant very well prior to the incident, was in the circumstances of this case adequate to support the conviction as it was well corroborated.

8.22 We agree with the respondent's counsel, that the fact that DW2 found PW2 drinking a liquid with soda in it and threatened to take her back to her parents, does not indicate that she was a suspect witness. The record shows that PW2 was cross-examined about a boy that the appellant had seen her with and the bottom line on page 10 of the record shows her answer that; *"I recall you talked to me about a boy who came to our place. I told you that I knew nothing about him."* Our position is that PW2 could not have possibly decided to falsely implicate the appellant because she knew nothing about that boy.

8.23 As regards the question of corroboration of the defilement itself, the fact that the appellant asked for forgiveness meant that he was guilty of having had unlawful carnal knowledge of PW2 as there was nothing else to apologise for. We note that he apologized to persons not in authority and therefore it was safe for the court to rely on that evidence.

8.24 On the issue of the medical report, we accept the submissions by counsel for the respondent that the report was consistent with the allegation of defilement as PW2 was only examined by medical personnel five days after the fact and that was enough time for the bruises to show signs of healing. We find accordingly, that the medical report also corroborated PW2's evidence that the appellant defiled her the night of 21st March, 2017.

8.25 On the basis of the foregoing, the conviction was safe and it is hereby upheld.

8.26 As for the sentence, the appellant's counsel merely requested us not to tamper with it should we uphold the conviction, and gave no reasons as to why not.

8.27 Since the appellant defiled his own niece, whom he was keeping, he actually breached her trust. This is an aggravating factor which renders the sentence of 17 years imprisonment shocking to us as it is too low under the circumstances. We therefore see fit to quash the sentence and instead sentence the appellant to 35 years imprisonment with hard labour.

9.0 CONCLUSION

9.1 In sum, the appeal fails in its entirety and is dismissed.

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M.M. KONDOLO
COURT OF APPEAL JUDGE

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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J. SIAVWAPA
COURT OF APPEAL JUDGE