

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE**

Appeal No. 168/2020

(Criminal Jurisdiction)

BETWEEN:

DICKSON TEMBO

VS

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 19th May 2021 and 27th May 2021

For the Appellant : Ms. Z. Ponde, Legal Aid Counsel — Legal Aid Board
For the Respondent : Mr. M. Libuku, Senior State Advocate — National Prosecution Authority

J U D G M E N T

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

1. *Emmanuel Phiri vs The People* (1982) ZR 77 (SC).
2. *Philip Mung'al Mwanamubi vs The People* SCZ Judgment No.9 of 2013.
3. *R vs Baskerville* (1916) 2 K.B. 658.
4. *Daniel Banda vs The People* (CAZ Appeal No.2 of 2019).

1.0 INTRODUCTION

- 1.1 The appellant was convicted of defilement and sentenced to a term of imprisonment of 25 years imprisonment by Mr. Justice K. Limbani.

2.0 EVIDENCE IN THE COURT BELOW

- 2.1 The evidence elicited from the prosecution was from five (5) witnesses. It was sometime in February 2019 when the prosecutrix's mother went to sell ground nuts in Chisamba and left her three daughters namely; Velocia aged 13, the prosecutrix herein, Eurita aged 2 years and Happy aged 7 years respectively.
- 2.3 Whilst she was away on this business trip, her husband took the children from where they ordinarily slept into the room where he slept with her mother. He was then wrapped in a *chitenge* material and proceeded to have sexual intercourse with his step daughter Velocia. After he finished this reprehensible act, he threatened her that if she told her mother, he would kill her.
- 2.4 On two subsequent occasions, he defiled her yet again and this took place when the mother was away from home. The poor girl feared to narrate this ordeal to anyone on account of the threats that had been issued by the father.
- 2.5 A few months down the line, her mother noticed the bulge of her stomach and proceeded to examine it. She inquired as to what the hard part on the stomach was. After being interrogated by her mother, the prosecutrix exposed the step-father by telling the mother that he had defiled her.

- 2.6 She was subsequently taken to Levy Hospital where she was examined and found to be 4 months pregnant. In her evidence, this innocent little girl told the court that the appellant had a history of quarreling with her. She was unwavering under cross examination and insisted that it was the appellant who defiled her and made her pregnant. And that the only reason she had not told the mother earlier was that he had threatened to kill her.
- 2.7 Velocia's uncle, Rainford Hambweka Siamamuwa, was notified of the pregnancy by Falecy Muyoba (PW4), mother of the prosecutrix. Together with her, they reported the matter to the police.
- 2.8 Falecy Muyoba confirmed the age of Velocia and provided an under five (5) card. She narrated that she confronted her daughter in 2019 after noticing physiological changes in her body such as breasts getting bigger. Upon touching her stomach, she found it was hard. On further interrogation, Velocia explained to her how the appellant had defiled her on 3 occasions when she had been away in Lusaka.
- 2.9 A medical report was tendered by Doctor Kingsley Chimpeli Linte who also gave oral evidence. After conducting a scan it was revealed that she was 8 weeks pregnant.

2.10 Investigations were conducted by Detective Sergeant Bibian Tembo (PW5) who subsequently charged and arrested the appellant.

2.11 In his defence, the appellant vehemently denied that he had intercourse with his step daughter, Velocia. He claimed that at the time he was alleged to have had intercourse with her, he was not staying with the mother and he was not staying at the house but was at Kasenga village. Under cross examination he admitted that in April 2019 his wife, Felacy, had gone to sell ground nuts in Lusaka and he had remained with Velocia, her siblings and his in-laws. He stated that it was not possible that he could have defiled Velocia because he always remained at home with his in-laws.

3.0 FINDINGS AND DECISION OF THE LOWER COURT

3.1 After analyzing the evidence before him, the trial magistrate came up with the following findings of fact:

- 1) That the prosecutrix was below the age of 16 years. The age was supported by the mother and the under 5 card.
- 2) That there was corroboration of the commission of the offence as confirmed by the medical doctor's report.
- 3) That the appellant was properly identified as he was not a stranger to the prosecutrix.

3.2 Regarding the question of opportunity, the trial court found that the appellant remained with the Velocia at his home when

the mother was away from home and it was at this time that he had carnal knowledge of her. Therefore the circumstances and locality of opportunity amounted to corroboration.

- 3.3 The trial court was of the view that there was nothing to motivate Velocia and the mother or other witnesses to lie or fabricate a story against the appellant. He thus ruled out the dangers of false implication. Being satisfied on the question of identity and commission of the offence, the lower court proceeded to jail the appellant for 25 years.

4.0 GROUND OF APPEAL

- 4.1 Dissatisfied with the judgment of the court below, the appellant has appealed on the basis that there was no corroboration as to the identity of the offender.

5.0 APPELLANT'S HEADS OF ARGUMENT

- 5.1 The summary of the written heads of arguments on behalf of the appellant is that for a conviction of defilement to stand, there must have been proof that the prosecutrix who was below 16 was carnally known, and that it was the accused who committed the offence. Ms. Ponde argued that this evidence must be corroborated as a matter of law in line with the Juveniles Act and the case of ***Emmanuel Phiri vs The People¹***.

- 5.2 It was contended that there was a misdirection on the part of the lower court when it found corroboration as to identity from the fact that the appellant used to live with the prosecutrix in the same house. She spiritedly argued that the danger of false implication was therefore not ruled out.
- 5.3 It was her prayer that the appeal be allowed and the conviction quashed.

6.0 RESPONDENT'S HEADS OF ARGUMENT

- 6.1 The State submitted in writing as follows: that the trial court was on firm ground to convict the appellant as the offender's identity was properly corroborated. Mr. Libuku argued that while corroboration is essential in sexual offences, the court can still convict on uncorroborated evidence of the prosecutrix. He vehemently submitted that sexual offences are done in secrecy and it is only parties to such sexual encounters who can know and identify each other.
- 6.2 It was contended that the appellant had the time and opportunity to commit the offence. In this vein, Mr. Libuku adverted to the case of ***Philip Mungal Mwanamubi vs The People***² where it was held:

"In an appropriate case opportunity can constitute corroboration."

- 6.3 With these brief submissions counsel urged us to dismiss the appeal.

7.0 CONSIDERATION AND DECISION OF THE COURT

- 7.1 We have considered the record of appeal and the submissions of Counsel. The issue that has been raised in this appeal is whether there was corroboration as to the identity of the perpetrator.

- 7.2 It is trite law that in sexual offences, such as the one the appellant was charged with, there must be corroboration as to the commission of the offence and identity of the offender. This is in line with the decision of the Supreme Court as stated in ***Emmanuel Phiri vs The People***¹ where it was held:

“In sexual offences there must be corroboration of the offence and identity of the offender in order to eliminate the danger of false complaint and false implication.”

- 7.4 Particularly where a witness is a juvenile who is below 14 years, section 122 (b) of the Juveniles Act provides that there must be corroboration as a matter of law. The proviso to this section enacts as follows:

“where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by

some other material evidence in support thereof implicating the accused.”

- 7.5 Thus corroboration is independent evidence which supports the evidence of a witness in a material particular. We take liberty to quote from the holding of Lord Reading CJ in the classic case of **R vs Baskerville**³ at page 667 where he 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 has been committed but also that the prisoner committed it.”

- 7.6 In the present case, the trial Magistrate was alive to the requirement of corroboration and also considered the authorities on the subject. With regard to the commission of the offence, corroboration was established through the medical report.

- 7.9 With regard to the identity of the perpetrator, the record reveals that there was only the evidence of the prosecutrix which the trial Magistrate concluded that the appellant was identified on. There is no independent evidence to support or corroborate the evidence on identity which is required as a matter of law.

7.10 It has been suggested by the State that the appellant being the step father had the opportunity and the time which may amount to corroboration as to identity.

7.11 In the case of ***Daniel Banda vs The People***⁴ we gave the following guidance on when opportunity may amount to corroboration at page J15:

“... for such opportunity to be said to have corroboration value there should have been something unusual or out of the ordinary as to raise suspicion as to the interaction of the accused with the prosecutrix.”

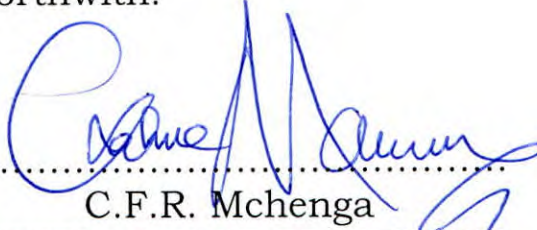
7.12 In *casu*, the appellant was the step father to the prosecutrix who used to stay with her in the same house. There was therefore nothing unusual or suspicious about the two being found together in the same house.

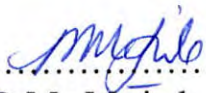
7.13 Anchoring opportunity on parties who stay in the same house is problematic. The reason we say so is that it is not out of the ordinary to amount to corroboration as we said in the ***Daniel Banda*** case. Pertaining to the case at hand it was the prosecutrix who gave a detailed account of what transpired. It is that particular evidence that needs corroboration as a matter of law. There was no other independent evidence to back up the prosecutrix's story. There is no other evidence that confirms or gives legal support to her sorrowful story. There being no corroboration or separate item of evidence

implicating the appellant as the perpetrator, our hands are tied.

7.14 Thus the finding by the Magistrate that there was corroboration as to identity was not supported by the evidence on record. We accordingly find merit in the sole ground of appeal.

7.15 On the basis of the foregoing it is our considered view that the conviction was not safe and we hereby quash it. The appellant is set at liberty forthwith.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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B.M. Majula
COURT OF APPEAL JUDGE


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K. Muzenga
COURT OF APPEAL JUDGE