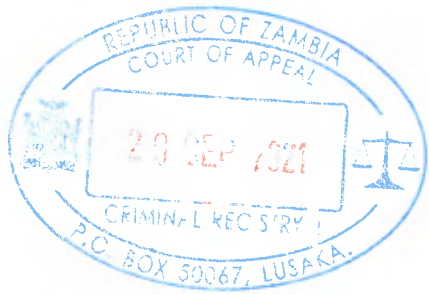
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 231/2020**
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

BETWEEN:

BENJAMIN GIFT MATE **APPELLANT**



AND

THE PEOPLE **RESPONDENT**

CORAM: KONDOLO SC, BANDA-BOBO, MUZENGA, JJA
On 23rd and 29th September, 2021

For the Appellant : *Mrs. A Banda - Legal Aid Counsel*
For the Respondent : *Mr. M. Libakeni - State Advocate, National Prosecution Authority*

J U D G M E N T

KONDOLO JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **Emmanuel Phiri v The People (1982) ZR 77 SC**
2. **Katebe v The People (1975) ZR 13 SC**
3. **Mwambona v The People (1973) ZR 28**
4. **Yokoniya Mwale v The People SCZ/285/2014**
5. **Musupi v The People (1978) ZR 271**
6. **Kambarage Mpundu Kaunda v The People (1990-92) ZR 215**
7. **Joseph Mulenga & Another v The People (2008) Vol. 2 ZR 1**
8. **Anayawa & Sinjambi v The People SCZ/143.144/11**
9. **Eddie Christopher Musonda v Lawrence Zimba SCZ/14/2012;**
10. **George Chombaoma v The People SCZ/19/2017;**

11. **Abednigal Kapeshi & Ben Kayula v The People SCZ/25/2017**
12. **Kalebu Banda v The People (1977) Z.R. 169 (S.C.)**
13. **Abraham Mwanza & Two Others v The People (1977) Z.R. 221 (S.C.)**

LEGISLATION REFERRED TO:

1. **The Penal Code, Chapter 87, Laws of Zambia**
2. **Criminal Procedure Code, Chapter 87, Laws of Zambia**

The Appellant was convicted by the Magistrates Court of the offence of rape contrary to **Section 132 of the Penal Code.** The conviction was confirmed by the High Court and the Appellant was sentenced to 18 years imprisonment with hard labour. He has appealed against conviction.

The brief background is that the Appellant was originally charged with the offence of attempted rape contrary to **section 134 of the Penal Code** but after putting him on his defence the learned trial magistrate exercised her authority under **section 213 of the Criminal Procedure Code** and upgraded the charge to the more serious one of rape aforesaid.

During the trial PW1 Sandra Chikuku, testified that on 12th September, 2019 as she was sleeping, she heard the door to her house open and someone entered her bedroom. She was facing the

entrance and she recognised the intruders face because the lamp was on. She asked what he wanted, but he rushed to her and squeezed her neck and they engaged in a struggle whilst she was naked and he managed to put his penis into her vagina.

She asked him what he wanted and why he was squeezing her neck. He said he wanted to have sex with her and let go of her neck, whereupon she screamed and he squeezed her neck again. Her brother-in-law who lived nearby heard the commotion and came to the house and found the Appellant on top of her and he apprehended him. He called PW1's husband and they took Benji to the headman and thereafter to the police station. PW1 said she was examined at Macha Hospital as her neck was swollen and her back was burned. She identified the Appellant as Benji.

Under cross examination she insisted that he had sex with her against her will.

PW2 Given Mazwanga, said he heard someone screaming around 23:00 hours and he went to his sister-in-law's house about 100 meters from his house and he found the door open. He observed Benjamin on top of PW1 "inside her thighs" and he was squeezing her neck. He recognised Benjamin because there was a light and he called PW1's husband and they went to the headman

who advised them to take Benjamin to the police the following day. He identified the Appellant as Benjamin. There was no meaningful cross examination of PW2.

The arresting officer was PW3 Martha Mwenda who stated that whilst on duty she received a report in which PW1 reported that the Appellant attempted to rape her and, in the process, she sustained bruises on the back and the right knee. PW3 gave her a medical report form and the injuries were consistent with the alleged circumstances and she opened a case of attempted rape. PW2 told the arresting officer that the Appellant touched her private parts whilst naked and as he tried to insert his penis inside her, she pushed him and she ran in the direction of her brother-in-law's house screaming. He came out and struggled with the assailant who ran away and he chased him but didn't catch him and they went to his house but didn't find him there. The Appellant was apprehended later on.

Under cross examination PW3 said she was aware that the medical report does not support the allegation that the assailant had inserted his penis inside PW1.

As indicated earlier, after considering the evidence, the trial magistrate exercised her authority under **section 213 of the**

Criminal Procedure Code and upgraded the charge to the more serious one of rape aforesaid. The plea was retaken and PW1 was recalled for cross examination.

PW1 further told the court that she saw the doctor four days after the incident because he wasn't there when she went to the hospital on the first day. She told the doctor that she was raped and he checked her vagina but she didn't know if he had recorded it on the medical form. She insisted that the Appellant raped her.

In his defence the Appellant testified that on a date he couldn't remember he passed through PW1's house to collect his money. Later that evening around 22:00 hours PW1's husband went to the Appellants house and accused him of having sex with his wife. He later reported the same thing to the Appellant's mother who called the Appellant to come and discuss the issue with him.

The Appellant stated that PW1 was lying against him because her husband owed him money. He denied that it was PW2 who apprehended him as he was apprehended by PW1's husband who took him to the chiefs palace and later to the police station.

Under cross examination the Appellant said he went to PW1's house around 16:00 hours and not at night and he didn't have sex

with her. He stated that he had never quarrelled with PW1 but she could be accusing him because her husband owed him money.

The learned trial magistrate properly warned herself that the law requires that in sexual offences both the commission of the crime and the identity of the offender must be corroborated. She cited the case of **Emmanuel Phiri v The People** [1] to that effect. She further cited the case of **Katebe v The People** [2] which stated that where the victim is above the age of 14, the cautionary rule applies to the effect that a court can convict on the uncorroborated evidence of the victim where there are special and compelling grounds which rule out the possibility of false implication.

The trial magistrate held that, *in casu*, the Appellant had the opportunity to commit the offence, PW1 had known him for a long time and the room was lit with a torch thus ruling out the possibility of mistaken identity. That PW1 and PW2 had no motive to deliberately and dishonestly implicate the Appellant. The trial magistrate dismissed as untruthful and an afterthought the Appellant's claim that he was being falsely implicated because PW1's husband owed him money and that he only went to PW1's house to get the money. The trial magistrate found that, when looked at together, the foregoing pieces of evidence provided

special and compelling grounds upon which to convict the Appellant and she convicted him accordingly after which the High Court imposed a sentence of 18 years imprisonment.

Dissatisfied with the verdict, the Appellant has appealed on the following two grounds;

1. ***The learned Court below erred in law and fact when it misapplied the law on witnesses with an interest to serve and concluded that the evidence of PW1 was corroborated by PW2.***
2. ***The learned trial court erred in law when it relied heavily on the evidence of PW1 and PW2 while disregarding the apparent inconsistencies with the evidence of PW3.***

The Appellant filed heads of argument indicating that the two grounds would be argued together.

The main thrust of the argument is that the court should have found that PW2 was a witness with a possible interest to serve because he was PW1's brother in law. The implication being that PW2's evidence could not corroborate PW1's evidence because such evidence required to be supported by something

more. That the trial court erred because it failed to warn itself that PW1 and PW2 were biased witnesses.

According to the Appellant, the inconsistency between the testimony of PW1 and PW2 with that of the arresting officer demonstrated that PW1 and PW2 were biased and therefore had a motive to deliberately and dishonestly make a false allegation against the Appellant. That the trial magistrate should have considered that the Appellant testified that he went to PW1's house to get the money her husband had borrowed and this was not an afterthought because he had raised it in cross examination of PW3. The Appellant cited the cases of **Mwambona v The People** [3], **Yokoniya Mwale v The People** [4], **Musupi v The People** [5] **and Kambarage Mpundu Kaunda v The People** [6].

The Appellant emphasised that the trial court should have taken particular note of the fact that PW3's account of what PW1 and PW2 told her was completely different from what they told the court. That the discrepancies were significant and relying on such evidence to convict the Appellant was unsafe and the inconsistencies should have been resolved in favour of the Appellant unless there was good reason not to do so. In support of

this, the case of **Mushemi v The People (1982) ZR 7**1 was cited as follows;

> *"The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness. The judgment of the trial court faced with such conflicting evidence should show on the face of it why a witness who has been seriously contradicted by others is believed in preference to those others."*

The Respondent filed heads of argument in response stating that the Appellant had cited the **Kambarage Kaunda Case (supra)** out of context as the principle therein had been qualified by the **Yokoniya Mwale Case (supra)** which stated that there is no general proposition that friends and relatives of the victim are always to be treated as witnesses with an interest to serve. That such witnesses should only be treated as suspect witnesses where the evidence shows that they *"have a bias or an interest of their own to serve, or a motive to implicate the accused"*.

It was pointed out that PW1 was not cross examined about the Appellant's claim that he visited her house to collect money owed to him by her husband. He chose to cross examine PW3 a person

against whom the allegation was not levelled. The case of **Joseph Mulenga & Another v The People** [7] was cited and it was submitted that in the circumstances there was nothing on the record that pointed to PW1 as a biased witness. The trial court warned itself with regard to the rule set out in the **Emmanuel Phiri Case (supra)** and concluded that there was no chance of mistaken identity as there was enough light in the room and because she had known the Appellant for a long time. Further, that the medical report confirmed that PW1 had been attacked and corroborated her evidence that the Appellant raped her.

With regard to PW2 it was submitted that nothing on the record suggested that he was biased and when the Appellant had the opportunity to cross examine PW2 so as to expose the alleged bias, he failed to do so.

The Respondent's answer to the lower courts failure to act on the contradictions between the evidence of PW1 and PW2 vis-à-vis PW3, was to seek solace in the case of **Anayawa & Sinjambi v The People** [8] where the Supreme Court held as follows;

> *"While we agree that the trial Judge should have addressed the contradiction relating to how long the 1st Appellant was in custody before the statement was recorded, we take the*

view that the contradiction did not go to the core of the prosecution case. Clearly, the Court was more interested in the circumstances that prevailed during the recording of the warn and caution statement than the length of days that he stayed in custody."

The Respondent posited that the subject contradictions did not go to the root of the Respondent's case and the trial magistrate had considered the credibility of PW1 and PW2 and concluded that neither of them had any reason to make a false allegation against the Appellant. That the finding of credibility arose after the trial magistrate assessed her findings of fact and as a trial court, she was in the best position to do so. The cases of **Eddie Christopher Musonda v Lawrence Zimba SCZ/14/2012; George Chombaoma v The People SCZ/19/2017; Abednigal Kapeshi & Ben Kayula v The People SCZ/25/2017** were referred to.

At the hearing, the learned senior state advocate Mr. Libakeni agreed that proof of penetration was required to sustain a conviction for the offence of rape. He further conceded that the medical report did not prove penetration but submitted that it was not in all cases that a medical report could prove rape as not all rapes result in injury.

Mr Libakeni submitted that PW1 stated that penetration occurred and PW2's evidence that he observed the Appellant on top of PW1 corroborated PW1's testimony that she was raped. That PW2's testimony need not be conclusive as of itself but it, together with other evidence supported the evidence of rape.

Ms Banda, legal aid counsel, on behalf of the Appellant rejoined by pointing out that PW1 reported a case of attempted rape to the police and the medical report did not show that penetration occurred. That even though PW2 said he saw the Appellant on top of PW1 he did not say he observed penetration meaning that his evidence was not enough to corroborate penetration. Further, that PW2 gave a conflicting statement to PW3 who stated that he did not tell her that he found the Appellant on top of PW1.

Ms Banda noted that PW2's testimony was inconsistent with what he told the arresting officer PW3 as he did not tell her that he found the Appellant on top of PW1. She opined that the **Emmanuel Phiri Case (supra)** was clear that in sexual offences, the evidence of the offence or act must be corroborated.

We have considered the record and the arguments filed by the parties and shall determine the two grounds of appeal as one.

It is important that we begin with the defence's submission that PW and PW2 were both witnesses with a possible interest of their own to serve meaning that neither of the two's evidence could corroborate that of the other. Various defence counsel continue to raise this issue without addressing their minds to the several authorities which have clarified that merely being a friend or relative of the complainant does not automatically consign such a person into the category of suspect witnesses. We agree with Mr. Libakeni that there is nothing on the record that suggests that PW1 and PW2 should be considered as witnesses with a possible interest of their own to serve and the Appellants arguments in this regard are rejected. See the **Yokoniya Case (supra)**.

As correctly pointed out by both parties the **Emmanuel Phiri Case (supra)** reinforced the requirement that both the evidence that the offence was committed and the evidence of the identity of the offender must be corroborated. In that case, the Supreme Court held as follows;

> *"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 implication. Failure by the court to warn itself is a misdirection."*

In casu the trial magistrate at page 35 of the record of appeal warned herself on the need for such evidence to be corroborated. With regard to corroboration of PW1's evidence that the Appellant was the person who raped her the trial court observed that PW1 and the Appellant lived in the same village and she had known him for a long time and that there was enough light in the room. To this we add the fact that there was a long struggle. Quite significantly, the appellant placed himself at the scene though he insisted that he was there much earlier in the day.

The trial magistrate further found that PW2 corroborated the evidence of identification because when he arrived at the scene he found the Appellant on top of PW1.

We on our part have no hesitation in agreeing with the lower court that the identity of the Appellant as the person who attacked PW1 in her home was adequately corroborated because her evidence in that regard could stand alone on the basis of the cautionary rule espoused in the case of **Katebe v The People (supra),** especially that there was no motive to falsely implicate him.

The Appellant was originally charged with attempted rape and the evidence of PW3 is of particular relevance in that regard. This is what she said at page 11 of the record of appeal;

> *"I received a report of attempted rape in which Sandra Chikuku ..... reported that Cliff Benjamin Mate attempted to rape her and, in the process, she sustained bruises on the back and on the right knee ..... A medical report form was issued and the injuries were consistent with the alleged circumstances ..... Acting on the report I opened a case of attempted rape ...."*

We have not lost sight of the fact that PW3 was a prosecution witness, a very important one at that, because after evaluating what she was told by the persons she interviewed, she decided to charge the Appellant with attempted rape. This was after looking at the medical report which, according to her showed that the injuries suffered by the complainant, PW1, were consistent with the alleged circumstances. Those circumstances being that she was attacked by a person who was trying to rape her and, in the process, she sustained a number of bruises.

We further note that the prosecution was happy with her evidence and the record shows no attempt by the prosecution to

have her clarify her evidence which was evidently contradicting the evidence of PW1 and PW2 on the details of what occurred during the attack on PW1.

Mr. Libakeni's cited the case of **Anayawa & Sinjambi v The People (supra)** and his argument on this score was that the contradictions did not go to the root of the Respondents case because the trial court had found PW1 and PW2 to be credible witnesses. He however did not explain, what in his view was the root of the prosecution case.

In our view the root of the Respondents case lay in the report received by the police from PW1 who told them that the Appellant had attempted to rape her. The trial court, after considering the evidence of PW1 and PW2 decided to exercise its power and enhance the charge from attempted rape to one of rape. In so doing, the trial court did not explain why it considered the evidence of PW1 and PW2 more reliable than that of PW3 and did not even consider the fact that PW3 was a prosecution witness. The root of the prosecution's case is the allegation of rape and the prosecution evidence supporting the allegation is contradictory.

In the case of **Kalebu Banda v The People** [12] the Supreme Court held as follows;

"..... Thus, when evidence has not been obtained in circumstances where there was a duty to do so - and a fortiori when it has been obtained and not laid before the court - and possible prejudice has resulted, then an assumption favourable to the accused must be made ..... The presumption is simply notional evidence, to be considered along with all other evidence in the case. Thus, in a rape case the failure to obtain medical evidence when there was a duty to do so means that the court must proceed as if a doctor had testified that he had examined the prosecutrix and found no evidence that force was used nor any evidence of intercourse. If the prosecutrix alleged that she had submitted without resistance as a result of threats, whilst the defence was consent, such evidence would be neutral; but if she alleged that force was used to overcome her resistance this national evidence would be very strong in favour of the accused.

The Supreme Court further expressed itself on the issue of medical reports in the case of **Abraham Mwanza & Two Others v The People (1977) Z.R. 221 (S.C.)** where it held as follows;

(i) There may be cases in which a medical report will be sufficient to supply this information without it being necessary to call the doctor, but medical reports usually require explanation not only of the terms used but also of the conclusions to be drawn from the facts and opinions stated in the report.

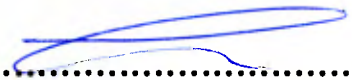
(ii) It is highly desirable save perhaps in the simplest of cases for the person who carried out the examination in question and prepared the report to give verbal evidence in the court.

We note that according to PW1 at page 22 of the record of appeal, she told the doctor who was examining her that she had been raped. The medical report, however, makes no mention of any examination or medical investigation in that regard but confines itself to injuries sustained on other areas of the body. The prosecution did not call the doctor as a witness to explain the purpose of the medical examination and whether or not he did in fact examine PW1 for evidence of penetration. If we confine ourselves to the medical report which appears on the record of appeal as "P1", it clearly indicates that the purpose of the medical report was with regard to a complaint of attempted rape.

The conflict between the evidence of PW1 and PW2 with that of PW3 cast a shadow on the credibility of the prosecution evidence on the charge of rape which would require "something more" to satisfy a court that the danger of false complaint has been removed. The most obvious way this could have been done was to call the doctor who examined PW1 to come and explain the nature of the medical examination he conducted and the implications of his findings. The failure by the prosecution to call the doctor should weigh in favour of the Appellant. In the circumstances we find that the act of rape was not corroborated and the conviction in that regard is quashed and the sentence is set aside.

However, we did earlier in this judgement find that there was sufficient evidence to place the Appellant at the scene and that the evidence of identity was sufficiently corroborated. Despite our finding that the evidence of rape was not sufficiently corroborated, we find that PW1's evidence of the attack launched on her by the Appellant is corroborated by the evidence of PW2 and the medical report which show that the Appellant attempted to rape PW1 as evidenced by the injuries she sustained.

In the premises, the Appellant is accordingly convicted on the reduced charge of attempted rape and sentenced to 15 years imprisonment with hard labour.



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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE