

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL 118/2020

HOLDEN AT LUSAKA AND KABWE

(Criminal Jurisdiction)

BETWEEN:

UTHIN PHIRI

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Sichinga, JJA

On 24th March 2021 and 21st October 2021

For the Appellant: B. Banda, Legal Aid Counsel, Legal Aid Board

For the Respondent: C.S. Mwila, State Advocate, National Prosecutions Authority

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

CASES REFERRED TO:

1. Mwewa Murono v The People [2004] Z.R. 207
2. Dorothy Mutale and Another v The People [1995-97] Z.R. 227.
3. Clifford Dimba v The People HPS/24/2014
4. Macheka Phiri v The People [1973] Z.R. 143
5. Bernard Chisha v The People [1980] Z.R. 36

6. Emmanuel Phiri v The People [1982] Z.R. 77
7. Liswaniso v The People [1976] Z.R. 277
8. Ilunga Kabala and John Masefu v The People
[1981] Z.R. 102
9. Machipisha Kombe v The People [2009] Z.R. 282

LEGISLATION REFERRED TO:

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

1.0 INTRODUCTION

- 1.1 This appeal emanates from the judgment of the High Court (Chitabo, J.), delivered in Chipata on 11th December 2019.
- 1.2 The appellant, initially appeared before the Subordinate Court (Hon. F.M. Musaka), on a charge containing one count of the offence of defilement contrary to **section 138 (1) of The Penal Code.**
- 1.3 The allegation was that on 17th November 2018, at Chadiza, he had unlawful carnal knowledge of a girl under the age of 16 years.
- 1.4 He denied the charge and the matter proceeded to trial.

1.5 At the end of the trial, he was convicted and committed to the High Court for sentencing because the offence attracted a mandatory minimum sentence which exceeded the sentencing jurisdiction of the trial court.

1.6 The High Court sentenced him to the mandatory minimum sentence of 15 years imprisonment, with hard labour.

1.7 He has now appealed against conviction.

2.0 EVIDENCE BEFORE THE TRIAL COURT

2.1 The evidence before the trial magistrate was that on 17th November 2018, at around 21:00 hours, the prosecutrix was at home with her sister-in-law, Romania Zulu. They stayed at one of the houses in the teacher's compound at Mwangazi School in Chadiza.

2.2 The appellant knocked on the window to her bedroom and persuaded the prosecutrix to come out of the house using the window.

- 2.3 He took her to a toilet that was at the back of the house, and had sexual intercourse with her. He then gave her K22.50 and two pills to take, to prevent falling pregnant.
- 2.4 As the appellant was leaving the premises, he was seen by Point Mbewe and David Tembo. They reported him to Romania, the same night.
- 2.5 The following morning, Romania traced the prosecutrix's footsteps from her bedroom's window to toilet. She observed a point, at the back of the toilet, at which the ground was 'disturbed'. The colour of the soil at that point, was similar to the colour of the soil seen on the prosecutrix's wrapper.
- 2.6 The Deputy Head Teacher at Mwangazi School was informed of the discovery. On being questioned, by him, the prosecutrix revealed that the appellant had sexual intercourse with her that night.

- 2.7 On the same day, the matter was reported to Chadiza Police Station. A medical report form was issued to the prosecutrix, who, on being examined at Chadiza District hospital, on 20th November 2018, was found to have previously had sexual intercourse.
- 2.8 The prosecutrix's mother gave evidence that she was born on 20th March 2004 and was 14 years old at the time the offence was committed.
- 2.9 In his defence, the appellant gave sworn evidence. He also called Eric Soko and Jackson Ngulube as his witnesses.
- 2.10 He denied committing the offence. He said on 17th November 2018, he went to the Deputy Headmaster's house, together with other teachers, for a drink beer.
- 2.11 He left the place at around 21:26 hours and went straight home after escorting a colleague, who was very drunk.

- 2.12 The following morning, around 06:00 hours, David and that colleague went to his house. David then asked him about his whereabouts the previous night, because there was a rumor that the prosecutrix had been defiled.
- 2.13 On the same day, around 22:00 hours, he was apprehended in connection with the offence.
- 2.14 Eric's evidence was that the appellant arrived home at 21:00 hours, on the material night, and went to sleep. He conceded that he did not check the time or know what the appellant did prior to that.
- 2.15 Jackson's testimony was that the appellant was summoned to a meeting to discuss some concerns raised by the prosecutrix's brother. At that meeting, the appellant admitted having followed the prosecutrix to the field. He also admitted having knocked at the prosecutrix's window on the material night.

3.0 THE TRIAL COURT'S FINDINGS

3.1 The trial magistrate found that Point and David corroborated the prosecutrix's evidence that the appellant was the offender.

3.2 He also found that the medical report corroborated prosecutrix's evidence that the appellant had sexual intercourse with her.

3.3 All in all, he found that the charge of defilement was proved beyond all reasonable doubt.

4.0 PROCEEDINGS IN THE HIGH COURT

4.1 Satisfied that the charge of defilement had been proved in the Subordinate Court, the judge proceeded to sentence the appellant.

4.2 Noting that he was a first offender, and that there were no aggravating factors, the judge imposed the mandatory minimum sentence of 15 years.

5.0 GROUNDS OF APPEAL

5.1 The four grounds filed in support of this appeal, raise two issues:

- (i) The prosecutrix's age not being proved; and
- (ii) The prosecutrix's testimony not being credible nor corroborated.

6.0 APPELLANT'S SUBMISSION THAT PROSECUTRIX'S AGE WAS NOT PROVED

6.1 Mr. Banda referred to the case of **Mwewa Murono v The People**¹ and pointed out that each and every ingredient of a charge of defilement, should be proved beyond all reasonable doubt.

6.2 He submitted that in this case, the age of the prosecutrix was not satisfactorily proved. This is because there was conflicting evidence on her age, between the prosecutrix and the doctor who examined her.

6.3 The prosecutrix said she was 14 years old, while the doctor said the prosecutrix's father told him that she was between 15 or 16 years old.

6.4 He also argued that in the circumstances, documentary evidence should have been led to satisfactorily prove her age.

6.5 He concluded by referring to the case of **Dorothy Mutale & Another v The People²** and submitting that in the face of the conflicting evidence, the trial court should have drawn an inference favourable to the appellant, that is, that the prosecutrix was above the age of 16 years.

7.0 RESPONDENT'S SUBMISSION ON PROOF OF THE PROSECUTRIX'S AGE

7.1 In response to the argument that the prosecutrix's age was not proved, Mrs. Mwila submitted that the trial magistrate was right, when he accepted the prosecutrix's testimony

that she was below the age of 16 years at the time the offence was committed.

7.2 She also submitted that there was no need to produce documentary evidence to prove the prosecutrix's age because her mother testified on it. She relied on the case of **Clifford Dimba v The People**³, in support of the proposition.

8.0 COURT'S CONSIDERATION OF ARGUMENTS ON PROOF OF THE PROSECUTRIX'S AGE

8.1 In the case of **Macheka Phiri v The People**⁴, it was held that:

(i) Where the age of a person is an essential ingredient of a charge, that age must be strictly proved; and

(ii) it is not acceptable simply for a prosecutrix to state her age; this can be no more than a statement as to her belief as to her age. Age should be proved by one of the parents or by whatever other best evidence is available.

8.2 First of all, it is our view that there was no conflicting evidence on the prosecutrix's age.

- 8.3 The age given by the doctor was based on hearsay evidence, as the person who told him of the prosecutrix's age (her father), did not come to court to testify.
- 8.4 In the case of the age given by the prosecutrix, the case of **Macheka Phiri v The People⁴**, makes it clear that it should not be relied on because it is "no more than her belief".
- 8.5 The prosecutrix's mother testified and she told the trial magistrate that her daughter was born on 20th March 2004.
- 8.6 Since the offence was committed on 17th November 2018, it is clear that the prosecutrix was 14 years old at the time the offence was committed.
- 8.7 As regards Mr. Banda's argument that documentary evidence should have been led to prove the prosecutrix's age, we are of the view that since her mother conclusively proved the issue, there was no need for such evidence.

8.8 As was held in the case of **Macheka Phiri v The People⁴**, a parent can give evidence, including oral evidence, of a child's date of birth. The credibility of such evidence, will be dependent on the power of recollection and the particular circumstances of each case.

8.9 We are thus satisfied that there was no conflicting evidence on the prosecutrix's age and that it was proved beyond all reasonable doubt at she was below the age of 16 years at the time the offence was committed.

8.10 The arguments that the prosecutrix's age was not proved, are thus dismissed.

9.0 THE PROSECUTRIX'S TESTIMONY NOT CREDIBLE NOR CORROBORATED.

9.1 Mr. Banda submitted that the prosecutrix's evidence incriminating the appellant, lacked credibility because it was only disclosed after she was forced by the Deputy Headmaster. He

referred to the case of **Bernard Chisha v The People⁵**, in support of the proposition.

9.2 Mr. Banda also argued that the prosecutrix's evidence incriminating the appellant required corroboration to rule out the danger of false incrimination. This is because she admitted having had sexual relationships with other persons, prior to this case.

9.3 He referred to the case of and **Emmanuel Phiri v The People⁶** in support of the proposition that the prosecutrix's evidence required corroboration.

10.0 RESPONDENT'S SUBMISSION ON PROSECUTRIX'S TESTIMONY
NOT BEING CREDIBLE NOR CORROBORATED.

10.1 In response, Mrs. Mwila argued that the prosecutrix was not induced to implicate the appellant.

10.2 She submitted that in any case, going by the decision in **Liswaniso v The People**⁷, illegally obtained evidence is admissible.

10.3 Mrs. Mwila further submitted that the appellant did not dispute proposing love to the prosecutrix or giving her K22.50, after having sexual intercourse with her or being seen coming from the yard where the prosecutrix lived, on the night in question.

10.4 She argued that being seen coming from where the prosecutrix lived, amounted to an odd coincidence and was corroborative. She referred to the case of **Ilunga Kabala and John Masefu v The People**⁸, in support of the proposition.

11.0 COURT'S CONSIDERATION OF ARGUMENTS THAT PROSECUTRIX'S TESTIMONY WAS NOT CREDIBLE OR CORROBORATED

11.1 First of all, we do not think that the fact that the prosecutrix was pressured or threatened, into disclosing what happened on

the material night, warrants classifying her testimony as illegally obtained evidence.

11.2 If anything is to be made out of it, at worst, it can only be said the manner in which the prosecutrix was made to disclose what had happened, was inappropriate.

11.3 In any case, since that evidence related to the commission of a sexual offence, it required corroboration.

11.4 In the case of **Machipisha Kombe v The People**⁹, the Supreme Court had the following to say on the subject of corroboration in sexual offences:

(i) Corroboration must not be equated with independent proof. It is not evidence which needs to be conclusive in itself.

(ii) Corroboration is independent evidence which tends to confirm that the witness is telling the truth when he or she says that the offence was committed and that it was the accused who committed it.

- 11.5 The evidence incriminating the appellant was that given by the prosecutrix, that on 17th November 2018, at night, he went to their house and had sexual intercourse with her behind the toilet.
- 11.6 There was also evidence from Point and David, that, that night, they saw the appellant leaving the yard of the house where the prosecutrix lived.
- 11.7 In addition, there was evidence from Jackson that at a meeting, the appellant admitted having knocked at the window of the bedroom.
- 11.8 Further, Romania's evidence was that she observed footmarks from the window of the prosecutrix's bedroom to a point behind the toilet, where the ground was 'disturbed'. The soil at that point, matched the colour of the soil that was on the wrapper the prosecutrix wore that evening.

11.9 Although the evidence of Romania, Point, David and Jackson, did not, on its own incriminate the appellant, it was independent evidence, which confirmed or corroborated the prosecutrix's testimony.

11.10 The net effect of this evidence, was to confirm the prosecutrix testimony that she came out of the house that night, through the window, and had sexual intercourse with the appellant, behind the toilet.

11.11 The argument that the prosecutrix's evidence was not credible nor corroborated, therefore fails.

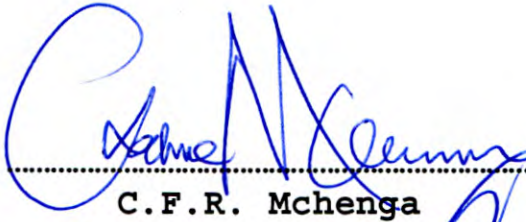
12.0 VERDICT

12.1 All the arguments in support of the appeal having been unsuccessful, this appeal collapses.


12.2 We dismiss it and uphold the appellant's conviction for the offence of Defilement of a

Child contrary to **section 138(1) of The Penal Code.**


12.3 We also uphold the sentence imposed on him. He shall serve a sentence of 15 years imprisonment, with hard labour, from the 18th of November 2018.



.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



.....
F.M. Chishimba
COURT OF APPEAL JUDGE



.....
D.L.Y. Sichinga
COURT OF APPEAL JUDGE