

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL 209/2020

HOLDEN AT LUSAKA AND KABWE

(Criminal Jurisdiction)

BETWEEN:

MABVUTO NYIRONGO

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA,

On 26th August 2021 and 21st October 2021.

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

For the Respondent: 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. R v Wilson [1914] 58 Cr. App. Rep. 304
2. King v Job Whitehead [1929] 1KB 99
3. Kombe v The People [2009] Z.R. 282
4. Ives Mukonde v The People, SCZ Judgment No. 11 of 2011
5. Chimbo and Others v The People [1982] Z.R. 20
6. Emmanuel Phiri and Others v The People [1978] Z.R. 79

LEGISLATION REFERRED TO

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Juveniles Act, Chapter 53 of the Laws of Zambia

1. BACKGROUND

- 1.1 The appellant, appeared before the Subordinate Court, sitting at Mumbwa (Hon. M. Chizawu), on a charge of defilement of a child, contrary to **section 138 (1) of the Penal Code.**
- 1.2 The allegation was that on 22nd August 2019, at Mumbwa, he had unlawful carnal knowledge of a child under the age of 16 of years.
- 1.3 He denied the charge, and the matter proceeded to trial.
- 1.4 At the end of the trial, he was found guilty of committing the offence and convicted. He was then committed to the High Court, for sentencing.
- 1.5 In the High Court (Limbani, J.), sentenced him to 40 years imprisonment with hard labour.
- 1.6 He has appealed against the conviction only.

2. CASE BEFORE THE TRIAL MAGISTRATE

2.1 The evidence before the trial magistrate was that on 24th August 2019, at about midday, the prosecutrix's mother was at their house in Mumbwa. With her, at home, were the appellant, her husband, and the prosecutrix, who is her daughter. The prosecutrix was 11 years old at the time.

2.2 Her husband was in the house, while the prosecutrix and herself were outside the house, doing the laundry.

2.3 She instructed the prosecutrix to take some laundry into the house. Soon after entering the house, she dashed out.

2.4 Immediately after the prosecutrix run out of the house, the appellant came out, got on his bicycle and rode off. He was never to return.

2.5 When she was asked why she had run out of the house, the prosecutrix told her mother that the appellant had attempted to take hold of her. She explained that in previous instances, whenever he did that,

he would also forcibly have sexual intercourse with her.

2.6 The prosecutrix's mother reported the case to the police the following morning, and was issued with a medical report. On being examined, the doctor found that the prosecutrix had had sexual intercourse previously.

2.7 The appellant was subsequently arrested and charged with the offence that is the subject of this appeal.

2.8 In his defence, the appellant gave unsworn evidence. He denied having ever had sexual intercourse with the prosecutrix. He also denied fleeing from their house after the incident. He said he left on the instruction of the owner of the farm on which they lived, to look for named persons.

2.9 Further, he said his wife had falsely incriminated him because she had squandered his business money.

3. FINDINGS BY THE TRIAL MAGISTRATE

3.1 The trial magistrate rejected the appellant's defence, finding that there was no basis on which

his wife and daughter, could have falsely implicated him.

3.2 He accepted the prosecutrix evidence that the appellant had sexual intercourse with her prior to the 24th of August 2019. He also found that the fact that the appellant had sexual intercourse with the prosecutrix, was corroborated by her mother's testimony that she ran out of the house where he was.

4. GROUND OF APPEAL AND ARGUMENT IN ITS SUPPORT

4.1 The sole ground of appeal is that the appellant was convicted on the uncorroborated evidence of the prosecutrix.

4.2 Mr. Katazo pointed out that **Section 122 of the Juveniles Act**, required the prosecutrix's testimony to be corroborated. He referred to the case of **King v Job Whitehead¹** and substituted that the corroborative evidence should have come from an independent source and not a witness whose evidence also required corroboration.

4.3 He concluded by arguing that where corroboration is required as a matter of law, its absence was fatal to a case. He referred to the case of **R v Wilson**² in support of the proposition.

5. STATE'S RESPONSE TO THE APPEAL

5.1 The state supports the conviction.

5.2 Mrs. Mwila referred to the cases of **Machipisha Kombe v The People**³ and **Ives Mukonde**⁴, and submitted that the prosecutrix's evidence incriminating the appellant, was corroborated by evidence that he had the opportunity to commit the offence.

6. CONSIDERATION OF APPEAL AND DECISION OF THE COURT

6.1 The first issue that we will deal with, is Mr. Katazo's submission that a witness whose evidence requires corroboration, cannot be corroborated by another witness whose evidence equally requires corroboration. That is not the correct position of the law.

6.2 In the case of **Chimbo and Others v The People**⁵, the Supreme Court, *inter alia*, held that:

'The evidence of suspect witness cannot be corroborated by another suspect witness unless the witnesses are suspect for different reasons.'

- 6.3 The correct position of the law, is that it is that witnesses requiring corroboration can corroborate each other as long as the reasons for their evidence requiring corroboration is not the same.
- 6.4 It is possible for a witness with a possible interest of their own to serve or an accomplice, to corroborate the evidence of a child, whose evidence has been received by virtue of **section 122 of the Juveniles Act**. The converse, is also the case.
- 6.5 However, that situation did not arise in this case, because the corroborative evidence was given by the prosecutrix's mother.
- 6.6 On the evidence that was before the trial magistrate, we do not find any basis on which the trial magistrate could have been classified her as a suspect witness or a witness with a possible interest of her own to serve.

6.7 In this case, the fact that the prosecutrix was defiled is not contested. What is in issue is the question whether, the identification of the appellant by his daughter, as the offender, was corroborated.

6.8 The trial magistrate found that it was corroborated by evidence that can be classified as 'something more'. This is the evidence of the prosecutrix's mother that the prosecutrix ran out of the house where the appellant was.

6.9 First of all, the evidence by the prosecutrix's mother that she saw her daughter running out of the house can be classified as evidence independent of the prosecutrix. It is therefore fit for consideration as being corroborative evidence.

6.10 However, it is our view that the principle set out in the case of **Machipisha Kombe v The People**³ is not applicable to the facts of this case. The appellant did not commit the offence on the day the prosecutrix dashed out of the house.

6.11 That being the case, it cannot be said that there was evidence that he had the opportunity to commit the offence, and it was corroborative.

6.12 Notwithstanding, it is our view, that the trial magistrate was correct, when he found that the evidence of the prosecutrix running out of the house, was corroborative because it amounted to 'something more'.

6.13 In the case of **Emmanuel Phiri and Others v The People**⁶, Baron, D.C.J, said the following, on what constitutes 'something more':

'In the case now under consideration, there are many odd coincidences to which reference has already been made. Those coincidences do, in my view, constitute evidence of "something more"; they represent "an additional piece of evidence" which this court is entitled to take into account; they provide a support for the testimony of the accomplices.

.....

It is obvious that where the learned trial judge decided this case, his approach towards corroboration was one of strict law; he unsuccessfully looked for it from an independent source. Then, without looking for evidence of "something more", he relied upon his faith in the truth of the evidence of the accomplices

and on that basis convicted all the three appellants as charged. This was a misdirection. However, had he adopted a less technical approach as to what constitutes corroboration, that is to say, had he looked for "other evidence" or evidence of "something more" that "support(ed)" or "confirm(ed)" the evidence of the accomplices, or which amounted to "evidence tending to confirm other evidence", he must inevitably have found it to exist and that consequently it was safe to convict.'

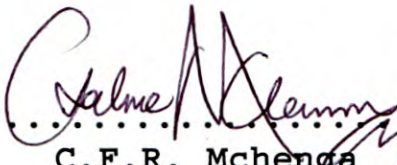
6.14 While evidence of the prosecutrix running out of the house, on its own, falls short of independent evidence that proves that the appellant committed the offence, it does confirm or support, the prosecutrix's evidence that he had previously grabbed her and forcibly had sexual intercourse with her.

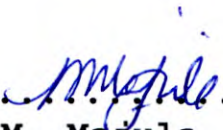
6.15 The fact that the appellant attempted to grab the prosecutrix at about midday, when his wife was outside the house, gives credence to her allegation that he did it on several occasions when she was away.

7. VERDICT

7.1 We find no merit in the sole ground of appeal. The sole ground of appeal, having not been successful, the appeal fails.

7.2 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**. We also uphold the 40 years sentence imposed on him.

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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