**IN THE COURT OF APPEAL OF ZAMBIA** Appeal No. 197/2020
**HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

BETWEEN:

**MISHECK STANDWELL MWANZA** **APPELLANT**

AND


**THE PEOPLE** **RESPONDENT**

**CORAM: Mchenga DJP, Majula and Muzenga JJA**
**On 25th August, 2021 and 16th November, 2021.**

For the Appellant: Mr. L. E. Eyaa, Messrs Limus E. Eyaa and Partners

For the Respondent: Mrs. M. K. Chitundu, Deputy Chief State Advocate, National Prosecution Authority

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# J U D G M E N T

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**MUZENGA JA, delivered the Judgment of the Court.**

Cases referred to:

1. **Nsofu v The People (1973) ZR 287 (SC)**
2. **Partford Mwale v The People – Court of Appeal No. 8 of 2016**
3. **Ernest Kabwita v The People – SCZ Appeal No. 345/2013**
4. **Morgan Gibson Mwape v The People – Court of Appeal No. 31 of 2016**
5. **Yokonia Mwale v The People – SCZ Appeal No. 28 of 2014**
6. **The People v Antifellow Chagabba – SCZ Selected Judgment No. 54 of 2017**

7. **Justus Simwinga v The People – SCZ Selected Judgment No. 20 of 2018**
8. **Machobane v The People (1972) ZR 101**
9. **Emmanuel Phiri v The People (1982) ZR 77**

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**

## 1.0 INTRODUCTION

1.1 The appellant was charged with one count of the offence of Defilement contrary to **Section 138 (1) of the Penal Code[1]**. The particulars of the offence allege that on 31st March, 2018, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia the appellant had unlawful canal knowledge of a girl under the age of 16. He was subsequently convicted and committed to the High Court for sentencing, where Lady Justice M. Mapani Kawimbe sentenced him to thirty years imprisonment with hard labour.

## 2.0 EVIDENCE IN THE COURT BELOW

2.1 The appellant's conviction was secured by the evidence of four prosecution witnesses. The prosecutrix testified as PW1. A

summary of her evidence was that on three different occasions the appellant who is her step father entered into her bedroom in the night and touched her breasts and private parts. When she tried to enquire from him why he was doing that, the appellant threatened to beat the prosecutrix and to stop paying her school fees.

2.2 She further told the trial court that on two other occasions, the appellant entered into her bedroom in the night and had sexual intercourse with her. It was her testimony that on the fateful day when he was caught by her mother, the appellant called her into his bedroom and locked the door. Before he could do anything to her, her mother arrived. She started knocking on the door continuously. Her step father told her to hide underneath the bed, after which he opened the door for her mother. When her mother entered the bedroom, an argument over school fees ensued between her and her step father.

2.3 She told the trial court that when her mother saw her underneath the bed, she asked PW1 what she was doing there. It was her testimony that she narrated to her mother what had been going on. Her mother then asked her to call her biological father to come as there was a big issue. She told the trial court that when her biological father arrived with police officers, she was taken to the

police where she gave a statement and was issued with a medical report form which she took to University Teaching Hospital.

2.4 The second prosecution witness was Modesta Mutinta Lundu, the mother to the prosecutrix and a wife to the appellant. A summary of her evidence was that on the fateful, when she returned home from her errands, she found her younger children around the fire. She entered the house and started looking for the prosecutrix. She told the trial court that she tried to open the door to her bedroom and found that it was locked. She peeped in the door and noticed that the door was locked from inside. She knocked for close to forty minutes before the appellant could open the door. When he opened the door, she started searching the room thinking that the appellant had another woman in there only to find her daughter under the bed. She enquired from PW1 what was happening, and she explained everything. She asked her to call her biological father to come and see what had happened. She also called her neighbours to come and see what had happened. Later the police came through and arrested the appellant. PW1 was taken to the hospital and medical examination was conducted. PW2 said her daughter (PW1) was 14 years old.

2.5 The evidence of PW3, Collins Mutambo, the biological father to PW1 was essentially similar to the evidence of the prosecutrix with regards the call she made to her father. In addition, PW3 told the trial court that when he arrived at the scene, he was too furious and wanted to beat the appellant but his uncles advised him to keep calm. He said PW1 was 14 years old, and was born on the 17th March, 2004. He produced PW1's Birth Certificate.

2.6 PW4 was Albina Sikamonze, a police officer who testified that on 31st March, 2018 at 08:00 hours while on duty, she was allocated a docket of defilement of a child aged 13 years. She interviewed the victim who stated how she was defiled by her step father. She also interviewed the appellant and after the interview she made up her mind to charge and formally arrest the appellant for the subject offence.

**3.0 THE DEFENCE**

3.1 In his defence, the appellant opted to give evidence on oath and did not call any witnesses. He denied any wrong doing and the version of what transpired on the material day was that he went to his children's school to pay school bus fares. Whilst there, the head teacher informed him that there was a balance to be paid on the

school fees. He told the trial court that he got surprised because he had given the money to his wife to liquidate the said balance.

3.2 He went home and did not find his wife but he found the prosecutrix washing plates and his twins playing outside. It was his testimony that he sat in the sitting room to watch television and while there he saw his wife enter the premises through the window. He then got up and went to his bedroom to look for his garments that he wanted to be washed. While in the room, he called the prosecutrix to go and collect the said garments for her to wash.

3.3 He told the trial court that it was after the prosecutrix entered their bedroom, that his wife also entered the bedroom. That PW2 found the prosecutrix standing in the bedroom. He then asked his wife where she took the money he gave her to pay school fees for the children and a quarrel ensued between the two. PW2 queried why the prosecutrix was in their bedroom and he denied having done anything to her. PW2 then asked her daughter to call her biological father to come through and see what had happened. He also told the trial court that PW2 shouted for neighbours and when the police arrived, he was taken into custody.

3.4 In cross-examination he maintained that he did not do anything to his step daughter.

## 4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 The trial court considered the evidence and concluded that there was overwhelming evidence implicating the appellant. The trial court reasoned that the only reasonable inference that can be drawn as to why the appellant called the prosecutrix to go into the bedroom was to sexually assault her. That there was no reason to doubt the version of the prosecutrix story which was supported by the findings of the medical report and corroborated by the evidence of PW2. Accordingly, the appellant was found guilty of the offence of defilement.

## 5.0 GROUNDS OF APPEAL

5.1 Unsettled by the conviction and sentence, the appellant filed two grounds of appeal couched as follows:

**(i) That the conviction is against the weight of the evidence and that the lower court erred in relying and basing the conviction on the evidence of witnesses all of who are witnesses with an interest to serve.**

**(ii) That the sentence is too harsh for a first-time offender.**

## 6.0 APPELLANT'S ARGUMENTS

6.1 In supporting the grounds of appeal the learned Counsel submitted that the evidence of all the witnesses in this matter ought to have

been corroborated. Counsel cited the provisions of **Section 122(b) of the Juveniles Act**[2], which provides that:

> **"where the evidence of a child of tender age is admitted and 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."**

6.2 It was submitted that the provisions of the **Juvenile Act** requires corroboration as a matter of law.

6.3 It was further submitted that the occurrences of the alleged defilement of the prosecutrix by the appellant were never corroborated at each alleged occurrence as to the commission of the offence. It was contended that the last instance where PW2 allegedly found the prosecutrix and the appellant in the privacy of their bedroom cannot be said to be corroboration of commission of the offence as no defilement occurred on that particular day. Further, it was submitted that the doctor who issued the medical report was not called to testify as to the contents of the medical report as it didn't indicate when the alleged defilement could have occurred and whether the tearing of the hymen was as a result of the penetration of the penis or could have resulted from other activities.

6.4 It was counsel's further submission that the opportunity to commit an offence is not conclusive in itself. We were referred to the case, **Nsofu v The People**[1] where the Supreme Court observed that:

> **"whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular cases."**

6.5 It was submitted that the evidence against the appellant was proffered by witnesses of own interest to serve. That PW1 was the prosecutrix, PW2, her mother and PW3, her father. The only independent witness could have been the doctor who was never called. We were referred to the case of **Partford Mwale v The People**[2] where we held **evidence of witnesses with a possible interest to serve requires corroboration and the court must warn itself of danger of false implication of the accused and go further to satisfy itself of danger of false implications.** It was counsel's further submission that PW2 had a misunderstanding with the appellant, over school fees of their children and therefore wanted to falsely implicate the appellant and therefore called PW3, the biological father to the prosecutrix telling him that the appellant had defiled their daughter. That PW2 and PW3 were witnesses with

a possible interest to serve and the magistrate should have warned herself of the danger of false implication which she did not do.

6.6 In conclusion, we were urged to allow the appeal, set aside the conviction and sentence as the evidence relied on by the court to secure the conviction was not corroborated and neither did the trial magistrate warn herself.

## 7.0 RESPONDENT'S ARGUMENTS

7.1 On behalf of the respondent, the learned counsel, supported the conviction and sentence. In responding to the two grounds of appeal, it was contended that the trial court was on firm ground when it found the appellant guilty of committing the offence of defilement as there was overwhelming evidence against the appellant which safely warranted the court below to convict. It was contended that the witnesses who the appellant has stated to be witnesses with interest to serve had nothing to motivate them to testify against him. Instead they had more to lose by testifying against the appellant than they had to gain. It was submitted that the prosecutrix was the step daughter to the appellant and depended on him. PW2 was also married to the appellant and had two children with him and she depended on the appellant for their

livelihood. What interest would they possibly have in wrecking their lives and putting their source of income and breadwinner in prison?

7.2 We were referred to the case of **Ernest Kabwita v The People**[3] in which the Supreme Court enunciated the principle that **absence of any motive for the prosecutrix to tell a lie against the accused person was a special and compelling circumstance.** It was contended that from the medical report on record, it is evident that the prosecutrix was defiled and that out of all the people in the community she lived in, she cannot only opt to implicate the appellant. Counsel contended that not only did the appellant place himself on the scene but also had an ample opportunity to defile the prosecutrix. We were referred to the case of **Nsofu v the People** *supra* where it was held that:

> **"mere opportunity alone does not amount to corroboration, but the opportunity may be of such a character as to bring in the element of suspicion, that is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroborations."**

7.3 According to Counsel, the appellant corroborated what the prosecution witnesses had said when he told the court that indeed PW2 found him with PW1 in the bedroom.

7.4 On the issue of witnesses with possible interest to serve, we were referred to the case of **Morgan Gibson Mwape v The People**[4] in which we pronounced ourselves on issues surrounding witnesses with a possible interest to serve, by restating the law as laid down in the case of **Yokonia Mwale v The People**[5] where the Supreme Court held that:

> **"A conviction will thus be safe if it is based on the uncorroborated evidence of witnesses who are friends and relatives of the deceased or victim provided that on the evidence before it, those witnesses could not be said to have a bias or motive to falsely implicate the accused, or any other interest of their own to serve. That what was key was for the Court to satisfy itself that there was no danger for false implication."**

7.5 Additionally, we were referred to the case of **The People v Antifellow Chagabba**[6] where the Supreme Court opined that:

> **"where witnesses are related or friends to the victim or accused, need for corroboration doesn't arise unless there is evidence which discloses that they have interests of their own to serve concerning the matter, or that they have any other motive to falsely implicate accused."**

7.6 It was contended that it is not enough to merely allege that the witnesses were related or friends to the prosecutrix, it must be shown that the said witnesses had their own interest to serve or that they

had a motive to falsely implicate the appellant. In this case it is very apparent that the witnesses had no interest to serve or had motive to falsely implicate the appellant.

7.6 It was counsel's submission that the appellant deserves a stiffer sentence than what was meted out on him owing to the fact that the appellant betrayed the trust relationship between him and his step daughter. In summation, we were urged to uphold the conviction of the court below.

## 8.0 HEARING OF APPEAL

8.1 At the hearing of the appeal, learned counsel for the appellant Mr. Eyaa and learned counsel for the respondent Mrs. Chitundu informed us that they were placing full reliance on the filed arguments. We are grateful for their submissions.

## 9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the arguments by both parties and the judgment sought to be assailed.

9.2 At the commencement of trial, the trial court observed, when the prosecutrix was called to the stand that she was underage and therefore she would conduct a *voire dire.* This is no longer the basis for conducting a *voire dire.* Following the amendment to **Section 122** of the **Juveniles Act** *supra,* a *voire dire* must be conducted

where the intended witness is below the age of 14. It is therefore not a question of observation by the court. It is tied to age. The observation by the trial court was thus an error.

9.3 Further, the prosecution should not have called the prosecutrix as the first witness. This is because she cannot give evidence of her own age, especially that age is material for the court to determine whether or not to conduct a *voire dire*. The Supreme Court in the case of **Justus Simwinga v The People**[7] gave guidance to trial courts at page J9 in the following words:

> **"It is trite law that s. 122 states that a child below the age of 14 years who is possessed of sufficient intelligence and understands the duty of speaking the truth shall give evidence on oath. In our view, it is desirable that at trial the prosecution first calls the parent or guardian to establish the age of the child before calling the child to the stand. The child cannot prove his/her own age. Trial courts must guard against making wrong conclusions as to the age of the prosecutrix without direct evidence."**

9.4 The mother (PW2) and father (PW3) to the prosecutrix testified that the prosecutrix was aged 14 years old, having been born on the 17th March, 2017. If the trial court had heard the parents first, it would not have conducted the *voire dire*. We therefore find that the *voire dire* conducted herein was unnecessary as the prosecutrix at the time of trial had attained the age of 14. We shall disregard the *voire*

*dire* as it was unnecessary. We shall consider the evidence of prosecutrix as having been received without *voire dire*.

9.5 It follows therefore that the argument by learned counsel for the appellant that corroboration in this case is required as a matter of law falls off on account of the foregoing. There is nonetheless a requirement for corroboration as a matter of practice on account of the offence being a sexual one.

9.6 Mr. Eyaa argued that there was no corroboration on the record and that PW2 and PW3 were witnesses with a possible interest to serve on account of their relationship to the prosecutrix. It was learned counsel's further submission that PW2 had a misunderstanding with the appellant, over school fees of their children and therefore wanted to falsely implicate the appellant.

9.7 We wish to state that it is not automatic that a witness becomes a suspect witness merely because they are relatives or friends of the victim. It must be established from the evidence on the record that they indeed had a bias or motive to falsely implicate the accused. It is thus cardinal for a court to satisfy itself that the danger of false implication is excluded and when it so does, a conviction can be safe (see **Yokoniya Mwale** case *supra*).

9.8 We have found nothing on the record which would suggest the presence of motive for PW2 and PW3 to falsely implicate the appellant. The argument is that PW2 was not paying school fees for children and that when confronted about it, she decided to falsely implicate the appellant. The appellant never raised any of this in cross-examination of PW2. The appellant only brought it out during his defence. In any event, according to PW1, after the appellant finally opened the door to the bedroom, before PW2 discovered PW1 hiding under the bed, that is when the appellant accused PW2 of not paying school fees. This appeared like an attempt to disrupt PW1 from searching the bedroom. We find that in the circumstances of this case, if the learned trial court had directed its mind to this issue, it would still have found that PW2 and PW3 had no interest to falsely implicate the appellant. We thus find that they had no actual interest to serve and as such we find no merit in this argument.

9.9 With regard to the requirement for corroboration, the trial court warned itself against the dangers of convicting on uncorroborated evidence and proceeded to find that the appellant had opportunity to commit the offence. This is in compliance with the requirement of the law.

9.10 It is trite that in cases where corroboration is required, as a matter of practice, a trial court must first consider whether or not corroborative evidence is there on the record. Where corroborative evidence is absent, a trial court must warn itself of the dangers of convicting on uncorroborated evidence. Then the trial court must proceed to examine the evidence for evidence of **"something more"** or what is referred to as **"special and compelling grounds"** in **Machobane** terms (see the case of **Machobane v The People**[8]).

9.11 We cannot thus fault the decision of the trial court in this respect. The medical report was very clear and did not require a medical doctor to explain it, as it provided corroboration as to the commission of the offence. With regard to corroboration as to the identity of the offender, since corroboration is required as a matter of practice, evidence of something more or indeed special and compelling grounds suffice after a warning by a court. The accused was found with PW1 in the locked bedroom by his wife (PW2), she called upon him to open the door to no avail. PW2 could see the key in key hole, meaning the appellant was in the bedroom. The appellant did not open the door until 40 minutes later. When the appellant finally opened the door, PW1 was found hiding under the

bed. Upon inquiry, that is when she disclosed what the appellant had been doing to her. The discovery of the prosecutrix in the locked bedroom under the bed amounted to something more. It confirmed her story that the appellant had previously sexually abused her in his bedroom. The Supreme Court in the case of **Emmanuel Phiri v The People**[9] held *inter alia* that:

> **"It is a special and compelling ground, or that something more which would justify a conviction on uncorroborated evidence, where, in the particular circumstances of the case there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against, an accused; and the case in effect resolves itself in practice to being no different from any other in which the conviction depends on the reliability of her evidence as to the identity of the culprit."**

9.12 We are satisfied that in the circumstances of this case that PW1 had no motive to falsely implicate the appellant. We agree with the arguments by counsel for the respondent on this score. We find no reason to overturn the decision of the court below. We thus find no merit in ground one and we dismiss it accordingly.

9.13 We note that the appellant filed two grounds of appeal but argued only ground one. The second ground related to sentence. We have considered the sentence of 30 years imprisonment with hard labour imposed by the court below and the reasons given for the sentence.

9.14 We find no reason for us to interfere with the sentence. We thus dismiss the second ground of appeal for want of merit.

9.15 For avoidance of doubt, we dismiss both grounds of appeal. We uphold the conviction and sentence of 30 years imprisonment imposed by the court below.

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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**