IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 213/2020

(Criminal Jurisdiction)

BETWEEN:

LEMMY SABOI **APPELLANT**

VS

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 26th August 2021 and 19th November 2021

For the Appellant : Legal Aid Counsel — Legal Aid Board
For the Respondent : Senior State Advocate — National Prosecution Authority

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J U D G M E N T

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

1. *Wilson Mwenya vs The People (1990-1992) ZR 24*
2. *Sole Sikaonga vs The People (2009) ZR 178*
3. *Ivess Mukonde vs The People – SCZ Judgment No. 11 of 2011*
4. *Jabess Mvula vs The People – Appeal No. 131 of 2019*
5. *Jutronich & Others vs The People (1965) ZR 9*
6. *Dennis Nkhoma vs The People (2018) ZR 172*

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 This is a matter that makes very sad reading as the evidence that was deployed before the lower court was that of repeated defilement of a 10 year old girl by a 40 year old man. This happened in very regrettable circumstances in that the victim's mother had gone away for the weekend to a mountain for praying and had left her 3 children at home unattended. It is upon her return that she discovered that one of her children was not in the house. A search revealed the whereabouts of the child. She had been with the appellant from the time her mother had left the house and it was then discovered that he had carnal knowledge of her daughter Esther Phiri. Esther admires nurses uniforms and dreams of pursuing a career in nursing one day.

1.2 This appeal addresses the offence of defilement as well as how many counts of defilement can be proffered against an accused if the act is done repeatedly over a period of time.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The evidence was solicited from 4 prosecution witnesses. The first witness was Jenny Mapulanga (PW1) mother of the victim herein. It was her evidence that she was blessed with six

children, one of them was Esther Phiri at the time of trial she was aged 10 years. In a nutshell, her evidence was that she had gone to pray at the mountain on a Friday, November 8th, 2019 and returned on Sunday, November 11th 2019. She had left 3 of her children at home and Esther had in the meantime gone to school.

2.2 When she returned from her prayer session, she was surprised to learn that Esther had not returned from school since Friday. This disturbed her and she went in search of her daughter. Her investigations revealed that she was staying with the appellant who at one time had stayed in the same block with her but had since moved elsewhere in the neighbourhood.

2.3 Upon learning of Esther's whereabouts, she went to the appellant's house with her sister Mable. She saw Esther within the same yard, she retrieved her from there and an inspection of her private parts indicated that she had been sexually abused. The poor girl was subsequently taken to Kanakoli clinic where an examination confirmed that she had been sexually assaulted. A medical report was issued to this effect.

2.4 A search conducted in the appellant's house yielded the prosecutrix's school checked shirt in his bedroom which was also tendered in evidence.

2.5 The second witness was Getrude Manda, a 49 year old business lady who was neighbours with the appellant. She

recalled that the appellant had visited her makeshift store with a young girl whom he introduced as his child. During her conversation with him, he told her that he had taken the child from his sister in Chamawanse on account of his wife having left him. The appellant then proceeded to enter his house but shortly thereafter, he went back to her stand with the child (prosecutrix herein) and requested for some jiggies for her and paid for them. Later she observed the child playing with some other children. She diserned that the child was living in the appellant's quarters.

2.6 On 11th November, 2019 on a Sunday around 18.00hours, she was introduced to PW1 by her neighbour and informed her that she was the mother to the prosecutrix. Esther was subsequently apprehended and her private parts were inspected. She accompanied them to the clinic.

2.7 Esther Phiri (PW3) was the star witness for the prosecution, a grade 4 pupil. Her evidence was that the appellant was well known to her as he used to be her neighbour. On 8th November, 2019 at approximately 18.00 hours while she was seated on a tyre, the appellant went to get her and took her to his house in Kanakoli. Whilst there he prepared some food for her which she ate. He then closed the door and declared that it was time to sleep. They proceeded to the bedroom and they slept on the bed together.

2.8 In the morning he gave her a coin and went for work. It was her evidence that during the time that she was at his home, he

had sexual intercourse with her on several occasions. Her mother later picked her up and took her to the clinic and the police.

2.9 Under cross examination, she maintained that it is the appellant who went to get her and that she had slept in his bedroom.

2.10 The last witness in support of the case was a police officer woman Constable Jennifer Lusambo. She investigated the matter and charged and arrested the appellant with the offence of defilement. During the course of her investigations, she interviewed the appellant who freely and voluntarily confessed to having taken care of the victim for 3 days and nights without the parents' knowledge. According to him, he was taking care of the victim on humanitarian grounds on account of the fact that she was a neighbour and her mother was not home and had not left any food provisions for her. He, however, denied taking advantage of the victim.

2.11 Under cross examination, he did not put any questions across to this witness, but she stated that he told the police that he spent time with the victim for 3 days and had given this information out of his free will.

3.0 DEFENCE

3.1 In his defence, the appellant testified that on a Friday in November 2018, he knocked off from work and arrived home around 22.00 hours. At 23.00 hours, his neighbour informed him that he had found a child at his doorstep which child was

then brought to him. He recognised the child as Esther. She then told him she was hungry. He thereafter prepared some food for her. He advised the child to go back to her home but she declined saying there was no food. He went to the bedroom to sleep and gave her a blanket.

3.2 The following morning, she indicated that she wanted to see a friend. She then did not come back home. He went to the parent's house and found her sister. When he returned in the evening he was apprehended by a mob of people.

3.3 In cross examination he averred that he knew PW1 and had a good relationship with her. He also indicated that she could not falsely implicate him. He also said that he had a good relationship with the prosecutrix and knew her to be aged between 9 and 10. He insisted that he kept the child for 2 nights on humanitarian grounds. He did not deny that he had told PW2 that Esther was his child but in court, he did admit that he was not her biological father. He denied having any carnal knowledge of her.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 The trial court below was of the view that there was sufficient corroborative evidence warranting convicting the appellant based on the following:

4.2 That in answer to a question as to whether the appellant knew the age of the child, he responded that he believed her age to be between 9 and 10. The trial court was thus satisfied that

the appellant did not believe her to be 16 or above and further by ocular observation, the child could not have been mistaken to have been above the age of 16. The trial court found PW3 to be a child within the meaning of section 131A of the Penal Code. Thus the defence under the provison to **section 138** of the **Penal Code** was unavailable to the appellant.

4.3 The other finding was that the medical report showed that the sexual intercourse was confirmed as the hymen was broken and there were bruises on the *labia majora.*

4.4 On the question of identity, the trial court relied on the evidence of PW2 and PW4 that the appellant had the opportunity to commit the offence. The evidence of opportunity was from PW2 who testified that the appellant had gone to her store to buy jiggies and introduced the prosecutrix as his child. Further, the evidence of PW4 to the effect that the house of the appellant was visited and a checked school shirt belonging to the prosecutrix was found in his bedroom. Further, the appellant also confirmed having spent 2 nights with the prosecutrix on humanitarian grounds.

4.5 The Principal Resident Magistrate, Daniel Musonda, on the basis of the foregoing found the appellant guilty of two counts of defilement contrary to section 138 of the Penal Code and convicted him accordingly. The matter was sent to High Court for sentencing.

4.6 Justice I. Kamwendo being satisfied with the conviction proceeded to slap the appellant with a 35 year sentence of imprisonment with hard labour.

5.0 GROUNDS OF APPEAL

5.1 Dissatisfied with the conviction and sentence, the appellant has appealed to this court on two grounds as follows:

1. *The learned trial Magistrate erred in law and fact when it convicted the appellant in the absence of corroboration evidence as to identity of the offender.*
2. *The court below erred in both law and fact when it imposed an excessive sentence of 35 years imprisonment with hard labour when the appellant was a first offender deserving of the leniency of the court.*

6.0 APPELLANT'S ARGUMENTS

6.1 In support of ground one, learned counsel for the appellant argued that in terms of section 122(b) of the Juveniles Act, the evidence of the prosecutrix must be corroborated as a matter of law. Counsel submitted that in the present case, the only evidence led by the prosecution was that the prosecutrix was carnally known by the appellant was from the prosecutrix herself. Counsel pointed out that PW2 who was the neighbour only testified that the appellant introduced the prosecutrix as his child a few minutes before he entered the house with her.

After a while, he went back with the child to her stand and bought some jiggies for her.

6.2 Counsel contended that there was nothing unusual or out of the ordinary for opportunity to amount to corroboration as the appellant had explained that he had known the prosecutrix for some time and she had gone to his place to ask for food. The case of ***Wilson Mwenya vs The People***[1] was called in aid where it was held:

> *"Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him to the crime. 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."*

6.3 In the present case, counsel contended that there was no independent evidence led from the prosecution as to the identity of the offender apart from the evidence of the prosecutrix.

6.4 In support of ground two, counsel argued that the offence for which the appellant was convicted carries a minimum of 15 years and a maximum of life imprisonment. The appellant was sentenced to 35 years in the absence of any aggravating factors despite being a first offender. Our attention was drawn to the case of ***Sole Sikaonga vs The People***[2] where it was held:

"An ordinary case of defilement will ordinarily attract the minimum sentence of 15 years imprisonment. However, where an accused is found to have infected the victim with a sexually transmitted disease (STD), the offence will certainly attract a more severe sentence above the minimum sentence of 15 years."

6.5 Counsel asserted that the sentence of 35 years comes with a sense of shock. He, therefore, urged the Court to quash the conviction and set aside the sentence of 35 years imprisonment.

7.0 RESPONDENT'S ARGUMENTS

7.1 In response to ground one, learned counsel for the respondent submitted that the trial court did not err when it convicted the appellant for defilement because the circumstances and the locality of the opportunity amounted to corroboration of the commission of the offence. Counsel pointed out that there is evidence on record to the effect that the appellant had sexual intercourse with the prosecutrix several times. Further the prosecutrix stated that she slept with the appellant on the same bed in the bedroom. The appellant further confirmed when he was interviewed that he took care of the prosecutrix for three days and three nights without the knowledge of the parents. We were referred to the case of **Ivess Mukonde vs The People**[3] where it was held that where the appellant had

an opportunity to commit the offence, the circumstances and the locality of the opportunity would amount to corroboration of the commission of the offence.

7.2 Counsel contended that the cited case applies to the case *in casu* on the following evidence: PW3 stated that she slept in the appellant's bedroom and that she had sexual intercourse with him on several occasions. PW2 saw the appellant go into the house with PW3. The appellant admitted spending the night with PW3 in his house without the knowledge of the parents. He lied to PW2 that the prosecutrix was his child. That this evidence shows that the appellant had the opportunity to commit the offence. The circumstances and the locality of the opportunity raised suspicion because this was extrordinary which amounted to corroboration as to identity. To butrress this proposition, the case of ***Jabess Mvula vs The People***[4] was cited where it was held:

> *"There are a plethora of authorities on the evidence of opportunity...which clearly state that mere opportunity alone does not amount to corroboration but that there must be something out of the ordinary so as to raise suspicion."*

7.3 As regards the sentence of 35 years imprisonment counsel submitted that the sentence does not come with a sense of shock in that the appellant was aged 40 years old when he defiled a child of 10 years. The sentence was therefore within the parameters set out for the offence.

7.4 In concluding, counsel urged the court to dismiss the appeal.

8.0 HEARING OF THE APPEAL AND ARGUMENTS CANVASSED

8.1 When the matter came up for hearing of the appeal on 26th August, 2021, the learned counsel for the appellant Ms. Ponde informed the court that the appellant was abandoning the first ground of appeal and would only proceed on the second ground which was only on sentence.

8.2 Both counsel placed reliance on the heads of argument that were filed in this appeal.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have considered the record of appeal and the submisions of counsel in relation to the sole ground of appeal. The appellant is complaining that the sentence of 35 years imprisonment was excessive as the appellant was a first offender who ought to have been accorded leniency by being sentenced to the minimum mandatory sentence. On the other hand Mr. Sikazwe contends that the sentence was within the parameters of the stipulated sentence and should therefore not be interfered with.

9.2 A convenient and instructive starting point is the case of ***Jutronich and Others v The People***[5], where the erstwhile Chief Justice Blagden observed at page 10 as follows:

> *"In dealing with an appeal against sentence, the appellate Court should ask itself three questions:*

a) *is the sentence wrong in principle;*

b) *is it manifestly excessive so that it induces a sense of shock; and*

c) *are there any exceptional circumstances which would render it an injustice if the sentence were not reduced?"*

9.3 Thus an appellate Court may only interfere with a lower Court sentence, where the sentence is wrong in principle, or where the sentence is so manifestly excessive, or totally inadequate that it induces a sense of shock.

9.4 These principles of law were recently affirmed by the Supreme Court in the case of ***Dennis Nkhoma vs The People***[6]. The facts of the case were that the appellant appealed against his conviction on a charge of defilement of a girl under the age of 16 years, contrary to section 138(1) of the Penal Code. The complainant, aged 14 years and a grade 6 pupil, lived with the appellant (her uncle) at his house and testified that the appellant had sexual intercourse with her on successive nights.

9.5 In dismissing the appeal, the apex Court upheld the conviction and sentence of 35 years imprisonment with hard labour.

9.6 Turning to the case *in casu,* the sentence of 35 years is not wrong in principle considering that the offence in question carries a minimum of 15 years and a maximum sentence of

life imprisonment. It was therefore within the prescribed statutory parameters provided for the said offence.

9.7 Secondly the sentence does not come to us with sense of shock. We say so in view of the fact that there were aggravating factors from the age of the prosecutrix who was only 10 years at the time of the commission of the offence. The appellant breached the trust that the child reposed in him when she went to seek for food.

9.8 In our considered view, the sentence was proportionate to the seriousness and gravity of offence.

9.9 Thirdly, we do not any exceptional circumstances that would render it an injustice if the sentence were not reduced as the child was defiled repeatedly according to the record.

9.10 Before we conclude, we wish to comment on the fact that the appellant was charged with two counts but only convicted on one. We have analysed the evidence which is indicative of the fact that he had sexual intercourse with the prosecutrix on numerous times but what is not clear is whether it was over a period of one or two days. We appreciate that the trial magistrate was entitled to finding the offence was committed between 8th and 11th November, 2019; he should have acquitted him on the 2nd count. We do agree that the evidence reveals that he had sex with her many times.

9.11 In view of the foregoing, we are not pursauded to interfere with the discretion of the lower court on the sentence that it imposed. We accordingly uphold the 35 years sentence of

imprisonment with hard labour imposed on the appellant and dismiss this appeal against sentence.

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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