

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

MOSES NGENDA

AND

THE PEOPLE

RESPONDENT

Coram: Makungu, Sichinga and Muzenga JJJA

On 16th February, 2022 and 25th March, 2022.

For the Appellant: Mrs. L. Tembo Tindi of Legal Aid Board

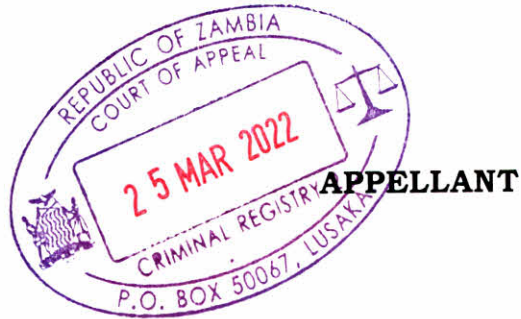
For the Respondent: Miss S. Zulu State Advocate of National Prosecution Authority

JUDGMENT

Makungu J.A delivered the judgment of the Court.

Cases Referred to:

1. *Darius Sinyinza v. The People* SCZ Judgment No. 2 of 2009
2. *Dorothy Mutale and Another v. The People* (1997) SJ 51(S.C)
3. *Dickson Sembauke Changwe and Another v. The People* (1988 – 1989) ZR 144
4. *Mandula v. The People* 1993/94) ZR 91



5. *Dennis Nkoma v. The People* CAZ Appeal No. 52 of 2011
6. *John Mbao v. The People* SCZ Appeal No. 115 of 2011
7. *Ilunga Kabala and John Masefu v. The People* (1981) ZR 102
8. *Ringson Mpalaula and Two Others v. The people* SCZ Appeal No. 80 of 2009

Legislation referred to:

1. *The Penal Code Chapter 87 of the Laws of Zambia*
2. *The Criminal Procedure Code Chapter 88 of the Laws of Zambia*
3. *Juveniles (Amendment) Act NO. 3 of 2011*

1.0 INTRODUCTION

1.1 The Subordinate Court of the first class tried and convicted the appellant of defilement of S. N. a child below the age of 16 years, contrary to Section 138 (1) of the Penal Code Chapter 87 of the Laws of Zambia as read with Acts No. 15 of 2005 and No. 2 of 2011.

1.2 The High Court sentenced him to 44 years imprisonment with hard labour with effect from the date of his arrest. This is an appeal against both conviction and sentence.

2.0 EVIDENCE BY THE PROSECUTION

- 2.1 The prosecutrix was aged 10 years old at the material time as she was born in 2009. The appellant is her step father.
- 2.2 The prosecutrix (PW1) in her evidence in-chief testified that, on 28th November, 2019 at night, while her mother was asleep in her bedroom, the appellant went to the bedroom where she was sleeping with her siblings, and had sexual intercourse with her. That he had been sleeping with her for a long time and she lied to her mother that he was fond of touching her legs because he had threatened to beat her.
- 2.3 The following morning, her mother and aunt checked her vagina and took her to the police station and later to Liteta Hospital where she was examined by a doctor.
- 2.4 Under cross examination, the prosecutrix stated that on 28th November, 2019, the appellant was in night shift. He did not have sexual intercourse with her. He only got some tobacco from her bedroom and left. In cross examination, she stated that nobody had sexual intercourse with her that night.

2.5 The prosecutrix's mother (PW2) testified that the incident complained of occurred, on 25th November, 2019 at home at Stable Farm. That night, there was a power outage and she went to sleep in her bedroom around 20:00 hours, while her husband (the appellant) slept in the sitting room as he was waiting for power to be restored. At 01:00 hours, she woke up and found that the power had been restored. She did not find the appellant in the sitting room but in the children's room where he stood over the prosecutrix, near the mosquito net, fully dressed in a T-shirt and shorts. He was holding the shorts. Upon seeing her, the appellant left the room and requested her not to tell her relatives or his, about what he wanted to do. He then requested her to check the prosecutrix to see if he had done anything to her. She was unable to do so because she was struck with shock and therefore powerless.

2.6 In the morning, she asked the prosecutrix what the appellant had done to her the previous night. Her response was that, he had touched her legs, which she said he usually did whenever he was drunk.

2.7 PW2 stated that she went ahead and checked the prosecutrix's vagina but found no evidence of defilement. Around 16:00 hours, she informed her neighbour, Fridah Meleki what had transpired the previous night. At the request of the police, Fridah Meleki checked the prosecutrix's private parts even in comparison with the prosecutrix's age mates' private parts but found nothing wrong.

2.8 The following morning, she was given a medical report form by the police and she took the prosecutrix to Liteta Hospital where a doctor found evidence of defilement.

2.9 Under cross examination, PW2 repeated her side of the story and stated that she reported the matter to the police on 28th November, 2019, but due to lack of transport, she only took the prosecutrix to the hospital on 2nd December, 2019.

2.10 PW3 Sibula Lubinda, the Medical Doctor, testified that on 2nd December, 2019, he physically examined the prosecutrix at Liteta Hospital as she had complained of having been defiled.

He found lacerations on the right lateral side of the vagina and a perforated hymen. These findings were in his opinion, consistent with trauma on the vagina which meant that, the vagina was penetrated although there was no seminal fluid. He could not tell what caused the trauma.

2.11 PW4 the Arresting Officer, testified that on 28th November, 2019 he received a report from PW2 by telephone that, her daughter aged 10 years was defiled by her step father, the appellant. He followed up the report and went to Sable Farm where he apprehended the appellant. Later, the prosecutrix was examined by PW3 who issued the medical report produced in evidence.

2.12 Under cross examination, he stated that the defilement occurred on 25th November, 2019 but it was reported to the police on 28th November, 2019.

3.0 DEFENCE EVIDENCE

3.1 In his defence, the appellant testified that on 28th November, 2019 he was absent from home as he had gone to Momboshi.

He was arrested by PW4 on 30th November, 2019 and accused of having defiled the prosecutrix on 28th November, 2019. He stated that he was not home from the 27th November until 29th November.

- 3.1 He confirmed that he did not challenge PW2 when she said the defilement occurred on 25th November, 2019. He stated that was at home on the night of 25th November 2019 and there was no power and he was the only man in the house.
- 3.2 However, he stated that on 25th November they all retired to bed around 20:00 hours and no one remained in the sitting room. Further, that PW2 lied when she said he remained in the sitting room. When power was restored, she did not find her on top of the prosecutrix. That the reason why the prosecutrix and PW2 implicated him was because he usually went to visit his junior wife at Chisamba Ranch.
- 3.3 In re-examination, he stated that if he had committed the offence on 25th November, 2019, he would have been apprehended then.

3.4 DW2 was Fridah Meleki who testified that he was the appellant's neighbour. That it was on the 30th of a month she could not remember but in 2019, when she was called by the police officers and PW2 to go and check if the prosecutrix had been defiled by the appellant. She checked her in the presence of PW2 and found no evidence of defilement.

3.5 Thereafter she was requested to compare her 7 year old daughter's vagina with the prosecutrix's vagina. She compared them and found that they were both intact.

4.0 THE SUBORDINATE COURT'S JUDGMENT

4.1 Upon considering the evidence on record, the learned Magistrate found inconsistencies in the evidence of the prosecution witnesses as follows:

4.2 PW1 stated that she was defiled on the 28th November, 2019 which was also the date in the indictment. To the contrary, PW2 and PW4 stated that she was defiled on 25th November, 2019.

- 4.3 The Magistrate stated that the inconsistencies were cleared by the fact that PW1 was a young child who possibly forgot the material date. That the conflict in dates was also cleared by the following facts:
- 4.4 On 25th November, 2019 both the appellant and PW2 stated that they were at home and there was no power. Soon after that date, the appellant left home for Momboshi. PW2 reported the matter to the police on 28th November, 2019 after speaking to PW1 and informing DW2. The appellant returned home on the 29th November, 2019.
- 4.5 The Magistrate therefore found that the alleged defilement occurred on 25th November, 2019.
- 4.6 She found that the Medical Report was proof that the prosecutrix was carnally known and that is corroborative of the prosecutrix's evidence. Further that, PW2 proved that the prosecutrix was below the age of 16 years.
- 4.7 As regards the identity of the offender, the Magistrate found that the prosecutrix stated that she was defiled several times before

by the appellant who was found on the material date by PW2 standing over her whilst holding the front of his shorts and, he ran out upon seeing PW2.

4.8 That PW2 got suspicious when the appellant requested her to check the prosecutrix and see if something had happened to her and not to say a word to his or her relatives about the incident.

4.9 The Magistrate noted that the appellant in his testimony focused on the dates when he was not home. He however, admitted in cross examination that he was there on 25th November when PW1 was allegedly defiled.

4.10 The Magistrate found that PW1 stated that he did not defile her because she was scared to speak the truth and to even look at the accused who had clearly intimidated her.

4.11 That there was an indication that the abuse possibly started before the 25th November, 2019 and had been ongoing without PW2 having a clue.

4.12 Further findings were that the appellant had the opportunity to defile the prosecutrix.

4.13 The Magistrate considered whether the appellant was falsely implicated and found that the appellant had not mentioned his other wife in his evidence-in-chief and did not cross examine PW2 about her.

4.14 That there was no evidence of animosity between the appellant and the prosecution witnesses.

4.15 Further that *“the appellant defiled the prosecutrix on 25th November, 2019 and on countless occasions by the way she behaved in Court all scared, refusing to answer or mixing up her testimony, by her demeanour appeared threatened by his presence.”*

4.16 The Magistrate stated that she had no doubt in her mind considering how the appellant came into contact with the prosecutrix, seeing that they lived in the same house to be that, something more that removes the case out of the realm of false identification.

4.17 The appellant was therefore found guilty as charged, convicted and the matter was referred to the High Court for sentencing.

5.0 GROUNDS OF APPEAL

5.1 The appellant has raised two grounds of appeal as follows:

1. *The Learned trial court erred in law and fact when it found that the offence was committed on the 25th November, 2019 and not 28th November, 2019 in the absence of any amendment to the indictment, thereby contravening the provisions of Section 213 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia.*
2. *The learned trial court erred in law and fact when it convicted the appellant for the offence of defilement based on uncorroborated and insufficient evidence.*

5.1 APPELLANT'S HEADS OF ARGUMENT

5.1 According to the appellant's heads of argument filed on 9th February, 2022, on the first ground of appeal, it is submitted that the indictment shows that the offence occurred on 28th November, 2019 as alleged by PW1. However, PW2 and PW4 both testified that the alleged defilement took place on 25th November, 2019.

5.2 The appellant's counsel contended that the court below erred in finding that the contradictions were cleared by the evidence of PW2 and the appellant and that PW1 possibly forgot the material date because, the indictment indicates in the particulars of the offence that, the defilement took place on 28th November, 2019. Counsel submitted that, the indictment is what informs an accused person of any charge laid against him in order for him to be able to defend himself. We were referred to **Section 34 of the Criminal Procedure Code** which provides as follows:

“Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”

5.3 That the appellant was prejudiced as the indictment gave the material date which is different from the court's findings. He was not given an opportunity to answer the charge with respect to the 25th November, 2019.

5.4 Counsel for the appellant went on to argue that should we find that the appellant was given notice of the 25th November, 2019 as the date on which the offence occurred, we should find that such notice was insufficient to render the trial as fair because the notice was given equivocally during trial in PW2 and PW4's evidence.

5.5 We were referred to **Section 213 of the Criminal Procedure Code** which provides as follow:

“213. (1) Where, at any stage of a trial before the accused is required to make his defence, it appears to the court that the charge is defective either in substance or in form, the court may, save as in section two hundred and six otherwise provided, make such order for the alternation of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the Court thinks necessary to meet the circumstances of the case:

Provided that, where a charge is altered under this subsection-

- (i) The court shall thereupon call upon the accused person to plead to the altered charge;**
- (ii) The accused may demand that the witnesses, or any of them, be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.**

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) or there is a variance between the charge and the evidence as described in

subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”

5.6 In view of the foregoing provisions, counsel for the appellant contended that, the indictment ought to have been amended in order to give proper notice of the particulars of the charge. The charge cannot be rectified by the findings of the court especially where the defence relied on is that of an alibi as in this case where the appellant had raised an alibi with regard to the 28th of November.

5.7 We were therefore urged to allow the first ground of appeal. On the second ground of appeal, it was argued that the appellant was convicted on uncorroborated and insufficient evidence. Evidence adduced by the prosecutrix required corroboration by some material evidence in support thereof implicating the accused. To fortify this submission, reference was made to **Section 122 of the Juveniles (Amendment) Act No. 3 of 2011.**

5.9 The case of **Darius Sinyinza v. The People**¹ was also relied upon where it was held that

“Victims of defilement are suspect witnesses and their evidence should always be corroborated.”

It was contended that apart from the prosecutrix whose evidence was contradictory in itself with regard to the appellant, having had carnal knowledge of her, there is no other allegation of defilement.

5.10 That the medical report which the lower court relied on indicates that, at the time of examination, PW1 had lacerations on the right lateral side of the vaginal canal and that the hymen was perforated. PW3 the Doctor who examined the prosecutrix confirmed his findings and stated that they were consistent with trauma to the vagina. He stated that what he meant by trauma is that something penetrated the vagina. However he was unable to tell what caused the trauma. In addition, PW1 was examined after the alleged defilement by her mother (PW2), and her neighbour (DW2) and they both did not see any indication of defilement. Therefore, there was insufficient evidence to

support the evidence of PW1 to an extent where the offence of defilement can be said to have been proved beyond reasonable doubt.

5.11 Counsel further submitted that PW2 and PW4's evidence was anchored on what PW1 told them. So their evidence was mostly hearsay. There was no explanation given by the prosecutrix to clarify the different dates. Furthermore, it was not stated that PW2 waited a few days from 25th November before she reported the matter to the police.

5.13 The evidence from PW1 and PW2 was that PW1 was examined the following morning after the defilement. Thereafter, the matter was reported to the police, thus negating the assumption that the matter was reported days after the alleged material date.

5.14 Counsel further contended that there is more than one inference that can be drawn from the evidence on record. Therefore the lower court should have adopted the one that is more favourable to the appellant or resolved the lingering

doubts in favour of the appellant. In support of this submission case of **Dorothy Mutale and Another v The People**².

5.15 In a nutshell, it was contented that had the court below properly analysed and evaluated the evidence on record, it would have acquitted the appellant. We were therefore urged to allow the appeal, set aside the conviction and set the appellant free.

6.0 RESPONDENT'S SUBMISSIONS

6.1 During the hearing of the appeal, learned counsel for the respondent relied on the written submissions filed on the same date with leave of the court. The respondent agrees with the Subordinate Court that the defilement occurred on 25th November, 2019 for the reasons given by that Court.

6.2 Counsel referred us to **Section 213 (2) of the Criminal Procedure Code** and submitted that the inconsistency in the material dates stated in the indictment and in the evidence of PW2 and PW4 is not material according to the above provision for this reason there was no need to amend the information.

6.3 She conceded that the indictment informs an accused person of the charge laid against him or her so or that he or she can prepare to defend himself. However, she referred to **Section 34** of the **Criminal Procedure Code** which states that:

“Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

6.4 It was counsel’s contention that the charge sheet which was before the Subordinate Court was in compliance with Sections 34 and 213 (2) of the Criminal Procedure Code.

6.5 The respondent’s counsel went on to rely on the case of **Dickson Sembauke Changwe and another v The People**³ where the Supreme Court held as follows:

“For discrepancies and inconsistencies to reduce or obliterate the weight to be attached to the evidence of

a witness, they must be such as to lead the court to entertain doubts on its reliability or veracity either generally or on particular points.”

6.6 She contended that in this case, the discrepancies and inconsistencies as regards the date on the indictment and the evidence, did not create any doubt in the mind of the court that it was the appellant who committed the offence. That it was also held in the case of **Mandula v The People**⁴ that:

“Minor discrepancies in the prosecution evidence that do not go to the root of the case are not fatal, to the prosecution’s case.”

6.7 For the foregoing reasons, it was submitted that the trial court rightly found that the offence was committed on 25th November, 2019 and not 28th November, 2019 even though the information was not amended.

6.8 In opposing the second ground of appeal, it was submitted that PW1 in her testimony stated that she was defiled and this evidence required corroboration. Her evidence was

corroborated by the testimony of PW3 the doctor and the medical report which he issued after examining her. Reliance was placed on the case of **Dennis Nkoma v The People**⁵ where it was held as follows:

“The medical evidence the form of a medical report corroborates the defilement.”

6.9 That as regards the identity of the offender, PW1 testified that it was the appellant who had carnal knowledge of her not only on the 25th November, 2019 but several times before that date in the same bedroom.

6.10 It was contended that the appellant had the opportunity to defile her because they lived together in the same house and such opportunity can amount to corroboration. In this regard, the case of **John Mbao v The People**⁶ was cited.

6.11 Citing the case of **Ilunga Kalabe v The People**⁷, counsel submitted that it was an odd coincidence that the appellant was found in the bedroom with PW1 whilst holding the front of his shorts and he tried to explain the awkward position he was in.

Therefore the trial court was entitled to take the odd coincidence as corroborative evidence.

6.11 In conclusion, our attention was drawn to the case of **Ringson Mpalaula and two others v The People**⁸ where the Supreme Court held inter alia as follows:

“We have time and again stated that it is a well-established principle of the law that the learned trial judge is a trier of fact, and has the advantage of observing the demeanor of witnesses, to determine as to who was telling the truth in the trial. The appeal court will not interfere with the findings of fact of the lower Court unless it is apparent that the trial court fell into error.”

6.12 In light of the foregoing authority, it was submitted that the trial court had the advantage of observing the demeanor of the witnesses in this case. As regards PW1, the court noticed and noted that:

“She was clearly intimidated by him (the accused) and there was a possibility she was clearly afraid for her

life even when she testified in court, she was scared to speak or even look at the accused.”

For this observation by the trial court, we were urged not to interfere with the findings of fact especially with respect to PW1.

6.13 Counsel finally submitted that on the totality of the evidence on record, the case was proved beyond reasonable doubt and the appeal should be dismissed for lack of merit.

7.0 OUR DECISION

7.1 We have looked at the record of appeal and the written submissions. We shall deal with the grounds of appeal together as they are related. The first ground of appeal raises the question whether ***Section 213 of the Criminal Procedure Code*** was breached by the court.

7.2 Our interpretation of ***Section 213(1)*** which the trial court referred to, is that, the Court may amend a charge which in its own opinion seems to be defective either in substance or form at any stage of the trial before the accused is put on his defence, as the Court thinks necessary to meet the circumstances of the

case. It is clear to us that it is not mandatory for the court to amend the charge but discretionary as the word “*may*” is used in this provision.

7.3 **Subsection (2) of Section 213 of the Criminal Procedure Code** provides inter alia that, variance between the charge and the evidence adduced in support of it with respect to time at which the alleged offence was committed is immaterial. This subsection makes reference to “*time*” and not the date of occurrence of the offence. The provision was actually meant to protect proceedings that are instituted within time (if any) limited by law for the institution thereof. This provision does not apply to the case in hand because the issue relates to the material date and not the time of occurrence of the alleged defilement.

7.5 **Section 34 of the Criminal Procedure Code** which was referred to by the respondent’s counsel, is quoted at paragraph 5.2 herein. It clearly makes it mandatory for the charge to contain a statement of the specific offence or offences with which the accused is charged, together with “such particulars

as may be necessary for giving reasonable information as the nature of the offence charged.” (emphasis applied). The provision states that every charge containing the said particulars shall be sufficient. The grievance by the appellant is that the material date stated in the information differed from the evidence of PW2 and PW4. The charge gives 28th November, 2019 while both witnesses said the offence occurred on 25th November.

7.8 The statement of offence read:

“Defilement of a child; contrary to Section 138(1) of the Penal Code Chapter 87 of the laws of Zambia as read with Acts No. 15 and No. 2 of 2011”

“Particulars of offence: Moses Ngenda, on the 28th day of November, 2019 at Chibombo in the Chibombo District of the Central Province of the Republic of Zambia, had unlawful carnal knowledge of S N, a child below the age of 16 years.” It is our considered view that, the information contains a clear statement of the offence with which the appellant was charged and sufficient particulars giving reasonable information as to

the nature of the offence charged. Therefore it was sufficient. That is why the appellant when pleading to it stated that he understood the charge and he was not guilty.

7.9 Counsel for the appellant has argued that the appellant was prejudiced by lack of an amendment of the material date in the information to read 25th November, 2019. Further that the court erred to find that the prosecutrix was defiled on 25th November, 2019. We take the view that, the appellant was not prejudiced by the said difference because he freely answered questions in cross examination as regards what transpired in the house on the night of 25th November, 2019. The relevant evidence is at page 32 of the record of appeal, lines 10 to 34.

7.11 In summary, he stated that on the 25th November, 2019 he was in day shift. He knocked off at 17:00 hours and spent the night in the house with his family including the prosecutrix. That there was no power and PW2 did not find him on top of the prosecutrix. That PW1 and PW2 both implicated him because they were jealous of his other wife. Further that he did not defile her.

7.12 We hold that it was not necessary under the circumstances to amend the information. However, we accept that the lower court erred when it found that the offence was committed on the 25th of November, 2019 because, the prosecutrix did not mention that date in her evidence. She only adduced evidence of what transpired on 28th November, 2019. According to her evidence he did not defile her on 28th November. He only went into her room to get some tobacco and left.

7.13 The other reasons why the lower court erred to find that the appellant defiled her on 25th November, are that: PW2 stated that on 25th November at night, she found the appellant standing in the children's bedroom whilst holding his shorts. The same night, he challenged her to check PW1 to see if she had been defiled, but she did not because she was in shock. She checked PW1 the following morning on 26th November, and found no evidence of defilement. DW2 stated that she was requested to check PW1 on the 30th of a month she could not remember and she found no evidence of defilement. Her evidence remained unchallenged.

7.14 It is clear from the record that PW1 was only taken to Liteta hospital on 2nd December, 2019, six (6) days after the alleged material date. That is when PW3 found evidence of trauma and lacerations to PW1's vagina but he could not tell what caused the trauma.

7.15 The evidence stated above should have raised a doubt in the mind of the trial magistrate. Had she carefully analyzed it, she would have found as we do now that six days elapsed between the alleged material date and the date of examination of the prosecutrix by PW3. There was no evidence of what PW1 was doing and where she was between 28th November and 2nd December 2019. Since PW2 and DW2 did not find any evidence of defilement between the 26th and 30th November, it is possible that PW1 was defiled after 30th November. So there was no cogent evidence that she was defiled on 25th November. Due to the inconsistencies in the evidence of PW1 and PW2, it is not even clear when the matter was reported to the police. Clearly, the finding by the lower court that she was defiled on that date

was perverse and not based on a proper analysis of the evidence. As a result, the finding is hereby set aside.

7.16 For the foregoing reasons, the first ground of appeal partly succeeds. The above analysis flows into our determination of the second ground of appeal and we hold that there was insufficient evidence of defilement as PW1 did not adduce evidence that she was defiled on 25th November, 2019 by the appellant and PW2's evidence was flawed as stated above. We also note that PW4 gave hearsay evidence.


7.19 PW1 and PW2's evidence was that PW1 was taken to the hospital to be examined as to whether she was defiled, the day after the alleged material date and yet PW3 contradicted that evidence by stating that he examined PW1 on 2nd December 2019 and not earlier.

7.20 PW2's evidence differs from that of DW2 in that PW2 said DW2 checked PW1 on 26th December and yet DW2 said she checked her on the 30th of the month she could not remember. This raised a doubt as to who between the two was telling the truth.

7.21 The case of **Dickson Sembeuke Changwe and another v the People** supra applies as the discrepancies and inconsistencies mentioned herein reduce the weight to be attached to the evidence of PW1, PW2 and PW4 as the same have led us to entertain doubts as to its veracity generally.

8.0 CONCLUSION

For the aforementioned reasons, the appeal succeeds. It follows that the conviction and sentence are both quashed and the appellant is acquitted and set free.


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C. K. MAKUNGU
COURT OF APPEAL JUDGE


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D.L.Y SICHINGA, SC
COURT OF APPEAL JUDGE


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K. MUZENGA
COURT OF APPEAL JUDGE