

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

Appeal No. 151 of 2021

BETWEEN:

FRANCIS ZULU

Appellant

AND

THE PEOPLE

Respondent



Coram: Mchenga DJP, Sharpe-Phiri and Muzenga JJA
On 14th June 2022 and 25th July 2022

For the Appellant: Mr. M. Kamanga of Messrs J.B. Sakala and Co.
For the Respondent: Ms. O. Muhwende of National Prosecution
Authority

J U D G M E N T

Sharpe-Phiri, JA, delivered the Judgment of the Court

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

Cases referred to:

1. Cipalo Coboza and Choboza v the People (1981) ZR 28
2. Chileya v the People (1981) ZR 33
3. Mwabona v the People (1973) ZR 28
4. Nsofu v the People (1973) ZR 287
5. Bernard Chisha v the People (1980) ZR 36

1.0 INTRODUCTION

- 1.1 This is an appeal against a Judgment of the High Court, Limbani, J holden at Kabwe on 23rd July 2021.
- 2.2 The appellant initially appeared before the Subordinate Court (Hon. S. Mwenya) on a charge of Defilement of a child contrary to **Section 138(1) of the Penal Code**. The allegation was that he had unlawful carnal knowledge of a child, under the age of 16 years in Kabwe on 6th November 2020.
- 2.3 The appellant denied the charge and the matter proceeded to trial. After the trial, the appellant was found guilty and convicted of one count of the offence of Defilement of a child contrary to **Section 138(1) of the Penal Code**¹ and was committed to the High Court for sentencing.
- 2.4 The High Court sentenced the appellant to 20 years imprisonment with hard labour.
- 2.5 This is an appeal against both conviction and sentence.

2.0 PROSECUTION CASE

- 2.1 The evidence in support of the prosecution's case was provided by 5 witnesses to the effect that on 6th November 2020, the prosecutrix's uncle, PW3 sent the prosecutrix to a shop in Kabwe at 7am in the morning to buy chicken.
- 2.2 The prosecutrix (PW4) who was 10 years old at the time, walked to the store on her own. On her way back, she was accosted by the appellant and two others, who grabbed her and dragged her to a nearby building, where the appellant gagged her mouth and removed her bottom clothing and had sexual intercourse with her whilst the accused's colleagues held her down. Thereafter, the appellant and his friends threatened to kill her if she disclosed what had happened to her.
- 2.3 After the Act, the prosecutrix returned home and according to PW3, she looked nervous. PW2 also indicated that he had seen the appellant the following day and he did not seem himself.
- 2.4 Subsequently, on 8th November 2020 while PW2, the prosecutrix's grandmother was washing clothes at home, she observed blood stains on the prosecutrix's clothing. On inquiry from the prosecutrix about the same, she denied any knowledge of the origin of the stain.

- 2.5 The following day, 9th November 2020, the prosecutrix confided in PW2 about what had happened to her. She then took the prosecutrix to the clinic, but was referred to the hospital where she was provided with a medical report.
- 2.6 The prosecutrix also told PW2 that it was their neighbour who had defiled her.
- 2.7 PW2 notified the prosecutrix's mother about what had happened to the prosecutrix. She immediately returned to Kabwe where she resided with PW3 and the prosecutrix. Upon inquiry from the prosecutrix about what had happened, she explained to her mother that she knew the person who had defiled her. The prosecutrix had also told her that following the ordeal, she went home and after returning the money to PW2, she proceeded to the bathroom where she observed a whitish discharge and blood from her vagina, which she had wiped with her skirt.
- 2.8 Following the discovery, PW2 reported the matter to the police. The evidence of PW5, a police inspector stationed at Bwacha Police Station in Kabwe was that she had been allocated with a file in relation to a defilement case involving the prosecutrix. She proceeded to interview the prosecutrix on what had happened and also warned and cautioned the appellant.

2.9 Based on the statements of the 4 prosecution witnesses and the medical report, she decided to arrest and charge the appellant for the offence of Defilement of a child. PW5 testified that the Police had been unable to apprehend the friends of the appellant who purportedly aided him in the offence.

3.0 **THE DEFENCE**

3.1 The defence had two witnesses. DW1 the appellant narrated that on 24th October 2020, two colleagues came from Ngabwe to help him repair a vehicle.

3.2 After completing the repairs two days later, they travelled to Ngabwe where he remained with his friends and only returned to Kabwe on 17th November 2020.

3.3 On 24th November 2020, whilst at his brother's house, police officers came to arrest him and took him to the police station. Under cross-examination, he denied knowing or defiling the prosecutrix.

3.4 The evidence of DW2, a driver/mechanic and colleague of the appellant essentially repeated what the appellant had indicated that they had travelled to Ngabwe on 26th October 2020, where they remained for a couple of weeks. He also confirmed that he had been with the appellant on the material day.

4.0 **DECISION OF THE COURT BELOW**

4.1 Having heard and analyzed the evidence before it, the learned Magistrate established that the prosecution had proved its case beyond reasonable doubt and therefore found the appellant guilty of the offence of Defilement of a child.

4.2 The case was remitted to the High Court for sentencing. The learned Judge sentenced the appellant to 20 years imprisonment with hard labour.

5.0 **THE APPEAL**

5.1 Being dissatisfied with the decision of the lower Court, the appellant brought this appeal on the following grounds:

- i) **The learned trial Court erred in law and fact when it did not warn itself on the dangers of convicting and on the dangers of securing a conviction on the uncorroborated evidence of the child prosecutrix.**
- ii) **The learned trial Court erred in law and fact when it failed to consider that the prosecutrix mentioned several other men who were present at the time of the alleged offence.**

- iii) **The learned trial Court erred both in law and fact when it failed to consider that no evidence of opportunity existed at the time of the alleged offence against the appellant.**

- iv) **The learned trial Court erred in law and fact when it relied on a medical report which was largely inconclusive and did not confirm for sure that defilement took place and the author of the medical report was not brought before Court.**

- v) **The learned trial Court erred both in law and fact when it failed to consider that the prosecution had failed to call a witness the author of the medical report in order that he or she might clarify the other possibilities of the wounding on the prosecutrix private parts as there was clear evidence that the medical report merely suspected defilement and did not confirm it especially that PW2 did not rule out the possibility of menstruation commencement.**

- vi) **The learned trial Court erred in both law and fact when it completely disregarded the evidence of the appellant's alibi that on the material date of the alleged offence the appellant was with him (DW2) and several other people far away from the place where the alleged offence took place but instead solely focused on the day of the appellant's arrest which had nothing to do with the alleged offence.**

- vii) **The learned trial Court erred in both law and fact when it completely ignored and disregarded the police's gross dereliction of duty when it failed to investigate the appellant alibis/possible alibis and also failure to apprehend any of the other suspects who allegedly aided the appellant in his alleged crime.**

6.0 **APPELLANT'S ARGUMENTS**

- 6.1 The appellant filed heads of argument in support of the appeal on 13th October 2022. On ground one, the appellant argued that the evidence of the prosecutrix, who was a child, needed to be corroborated for the trial Court to convict the appellant and in the absence of which, the Court should have demonstrated that it was satisfied that the danger of false implication had been averted in line with the case of **Bernard Chisha v the People**.
- 6.2 It was further argued that besides the prosecutrix' evidence, the only other evidence before the Court was an inconclusive medical report plus evidence of witnesses who were family members of the prosecutrix and had an interest to serve. It was further submitted that evidence of a witness who is a relative requires 'something more' regarding proof of facts in issue in a criminal proceeding as was established in the case of **Mwabona v the People**.

- 6.3 In arguing ground 3, the appellant submitted that the lower Court erred when it failed to consider evidence of opportunity as established in the case of **Nsofu v the People**. It was submitted that the evidence before the trial Court was that the appellant and the Prosecutrix lived in the same community but that there was nothing unusual warranting an opportunity on the part of the appellant to commit the alleged offence against the Prosecutrix.
- 6.4 In arguing ground 4 and 5, the appellant submitted the trial erred when it convicted the appellant based on an inconclusive medical report without hearing the author of the medical report. The appellant stated that the medical report as shown as shown at pages 55 and 56 of the record of appeal speculates as “suggestive of alleged defilement”, a finding which needed explanation by the medical expert who had examined the Prosecutrix and prepared the report.
- 6.5 The appellant submitted that it was well established principle that the fact of defilement being committed needed to be established and that if it was so confirmed, it must also be corroborated that it was indeed the appellant that committed the offence. They relied on the cases of **Nsofu v the People** and that of **Cipalo Cibozu and Chibozu v the People** among others as authorities for the aforesaid submissions.

6.6 Grounds 2, 6 and 7 were argued together. In the combined arguments regarding the three grounds, the appellant submitted that the trial Court completely disregarded the evidence of his alibi on the day of the alleged offence which was to the effect that on the material day, he was far away from where the offence is alleged to have been committed. It was therefore argued that there was dereliction of duty on the part of the Police to investigate the possible alibis and to arrest other people that are alleged to have aided the appellant in the commission of the alleged offence.

6.7 It was further argued that the evidence of the alleged accomplices was crucial to prove the offence alleged. The appellant relied on the case of **Lubinda v the People** among other authorities to show that there was dereliction of duty on the part of the police in investigating the alleged offence, which dereliction ought to lie in his favour in this appeal.

7.0 **RESPONDENT'S ARGUMENTS OPPOSING THE APPEAL**

7.1 The Respondent did not file Heads of Argument.

8.0 **THE HEARING**

8.1 The matter came up for hearing of the appeal on 14th June 2022. During appeal, the appellant was represented by Mr. Kamanga of Messrs J.B. Sakala and Company, while the respondent was

represented by Ms. O. Muhwende from National Prosecution Authority.

8.2 Mr. Kamanga relied on the Heads of Arguments filed on the 13th June 2022.

8.3 Ms. Muhwende made oral submissions on behalf of the respondent, to the effect that they did not support the conviction of the lower Court.

8.4 Counsel indicated that upon a careful perusal of the record of appeal, it was certain that there was no evidence to corroborate the identity of the offender. She stated that the only evidence before the Court was the testimony of the Prosecutrix, PW4, which according to **Section 122 of the Juveniles Act** required to be corroborated.

9.0 **CONSIDERATION OF THE APPEAL AND COURT'S DECISION**

9.1 We will first deal with the first ground of appeal which is concerned with the issue of corroboration. The appellant stood charged for the offence of defilement of a child contrary to **Section 138(1) of the Penal Code**. The evidence of PW1 at page 4 and that of PW4 at pages 7 and 8 of the record of appeal confirms that the Prosecutrix, PW4 was only aged 10 years at the time of the proceedings in the Court below.

9.2 Given the undisputed fact of the Prosecutrix's age, we agree with Counsel that her evidence is covered under **Section 122 of the Juveniles Act**. The said provision provides that:

“Where in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence on oath, and understand the duty of speaking the truth:

Provided that-

- (a) if in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence, on oath and does not understand the duty of speaking the truth, the court shall not receive the evidence; and***

- (b) where evidence admitted by virtue of this section is 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.***

- 9.3 The foregoing provision illustrates that an accused shall not be convicted, unless the evidence of a witness below the age of fourteen is corroborated by some other evidence implicating the accused.
- 9.4 A perusal of the record of appeal and judgment of the trial Court shows that there was no evidence other than confirmation by PW2 and PW3 that the appellant lived in the same community as the Prosecutrix. No other person testified that they saw the appellant with the Prosecutrix on the material day of the alleged offence. The only evidence that exists connecting the appellant to the Prosecutrix, is the testimony of the Prosecutrix herself which is covered under **Section 122 of the Juveniles Act** requiring corroboration.
- 9.5 The evidence of the Prosecutrix is that the appellant and two of his colleagues grabbed her and dragged her to a nearby building, where the appellant gagged her mouth and removed her bottom clothing and had sexual intercourse with her whilst the appellant's colleagues held her down.
- 9.6 Other than the said testimony by the Prosecutrix whose reception in Court is qualified by **Section 122** aforesaid, there is nothing else linking the appellant to the alleged offence.

9.9 Furthermore, the evidence of the appellant that he was in Ngabwe on the material day of the alleged offence which has been corroborated with the testimony of DW2 was not properly assessed by the trial Court and weighed against the testimony of PW2 who said that she saw the appellant the following day, and he did not appear to be himself.

9.10 In the circumstances, we do agree with Ms. Muhwende when she submits that there was no evidence corroborating the identity of the appellant as regards the commission of the alleged offence.

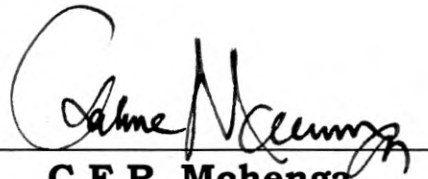
9.11 Further to the foregoing, the appellant did draw the attention to pages 55 and 56 of the record of appeal. The said page 56 shows the medical Doctor's opinion after examination of the Prosecutrix as "*injuries on suggestion of the alleged defilement*". These remarks in the medical report do not unmistakably confirm that the Prosecutrix was actually defiled. The Supreme Court also held in the case of **Cipalo Coboza and Choboza v the People** that:

“Medical reports usually require explanation not only of the terms used but also of the conclusions to be drawn from facts and opinions stated in the report. It is therefore highly desirable for the person who carried out the examination in question and prepared the report to give verbal evidence”.

9.12 Given the foregoing findings and conclusions, it is our position that the prosecution failed to establish the identity of the appellant as being the one linked to the alleged offence as required by law. The appeal therefore succeeds.

10. **CONCLUSION**

10.1 The first ground of appeal having succeeded, consideration of the other grounds of appeal will be otiose. We accordingly set aside the conviction and sentence of the appellant in the Court below and acquit him and set him at liberty forthwith.



C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE



K. Muzenga
COURT OF APPEAL JUDGE