IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL NO. 109 OF 2021**

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

GIFT CHIPUNDE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Makungu, Sichinga, and Muzenga, JJA**

On 17th February, 2022 and 25th July, 2022

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

For the Respondent: Mr S. Zulu, State Advocate, National Prosecutions Authority

---

JUDGMENT

Sichinga, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Goba v The People (1966) ZR 113***
2. ***Emmanuel Phiri v The People (1982) ZR 77***
3. ***Darius Sinyinza v The People (2009) Z.R. 24***
4. ***Bernard Chisha v The People (1980) ZR 36***
5. ***Dennis Nkhoma v The People SCZ Appeal No. 52 of 2015***

6. ***John Mbao v the People SCZ Appeal No. 115 of 2011***
7. ***Padford Mwale v The People CAZ Appeal No. 8 of 2016***
8. ***Richard Daka v The People SCZ Judgment No. 23 of 2013***
9. ***Kasonde Twambo v The People CAZ Appeal No. 87 of 2017***
10. ***Makhanganya v R (1963) R and N, 698***
11. ***Sakala v The People (1972) ZR 42 (Reprint)***

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 an appeal against the Judgment of the Subordinate Court of the First Class for the Mumbwa District in which the appellant was convicted of the offence of defilement contrary to ***section 138 (1) of The Penal Code***[1] as read with ***Act Number 15 of 2005*** and ***Act No. 2 of 2011.*** The appellant was subsequently committed to the High Court for sentencing, and sentenced to a term of 40 years imprisonment with hard labour with effect from 17th July, 2020, the date of arrest.

1.2 The particulars of the offence are that the appellant, on 13th July, 2020 at Mumbwa in the Mumbwa District of the Central Province of the Republic of Zambia, unlawfully had carnal knowledge of SNK, a girl under the age of sixteen (16) years.

2.0 The prosecution evidence

2.1 The case for the prosecution was centred on the evidence of three witnesses: PW1, SNK, the prosecutrix; PW2, Idah Kwandu, the mother to the prosecutrix; and PW3, the arresting officer.

2.2 PW1, a child of tender years gave evidence after the court conducted a voire dire. The evidence of PW1 in the main and of relevance to the case was that the appellant, who she knew, came to her home on a date she could not recall. He invited her to his house, and she left with him. When they got to his one-roomed house, he undressed her and had carnal knowledge of her, what she referred to as 'bad manners'. Thereafter, he took her to Dube's shop where he bought some cigarettes. She said he told her not to tell anyone about what transpired. She was subsequently taken to the hospital. She identified the appellant as someone she had known for a long time.

2.3 Under cross-examination, she repeated that the appellant had sexual intercourse with her, after which he took her to Dube's shop where he bought cigarettes. Thereafter, he took her home.

2.4 PW2, Idah Kwandu, the prosecutrix's mother, told the court that on 13th July, 2020, she travelled to Lusaka from Mumbwa. Around 22:00 hours, she received a call from one Gabbie informing her that the appellant had defiled her child. PW2 requested Gabbie to apprehend and take him to Nangoma Police Station. She learnt that the appellant was already in police custody at the same station.

2.5 PW2 narrated that when she got to the police station, she asked the appellant why he had defiled her daughter. He responded, *"Nshinshibe ichiwa icha ingile muli ine"* (I do not know what devil had entered me). PW2 said she had examined the child and found that she had sperms around her buttocks area and her vagina was reddish with traces of blood. A medical report form was issued by the police and the child was attended to at the hospital. It was PW2's testimony that the child was six (6) years old at the time that she was defiled. She produced an under five card to show the child's age. She said she had known the appellant for five (5) months. She saw him often as he would visit a man that she worked with. PW2 identified the appellant in court.

2.6 In cross-examination, she said she had never expected the appellant to defile her child.

2.7 PW3, the arresting officer, testified that she was assigned to the case on 15th July, 2020. She interviewed the appellant, who was in custody. She found his responses unsatisfactory. The appellant denied the charge. She then charged and arrested him for the subject offence. She produced the under 5 card and medical report in evidence.

3.0 The defence

3.1 The appellant alleged, in his defence that on the material day he had gone to the child's home to see her father. Following his visit, the child followed him to his home whilst insisting on being given one kwacha (ZMW 1.00) to buy sweets. He said she entered his house as he was cooking his food. The appellant said he never bought the sweets for the child as the shops were

closed. He said he was subsequently apprehended by the child's father, who took him to his home and accused him of defiling the child.

3.2 Under cross-examination, the appellant said the child was outside his house demanding for the money. He said the child's father was not aware at the time that he was with the child.

4.0 The decision of the trial court

4.1 The court found the following facts as undisputed: The child was six (6) years old at the material time, having been born in 2012; the appellant was with the child for most of the evening when she was defiled; the appellant did not dispute that he went to his house with the child, when he prepared his meal, and then went with her to a shop to buy cigarettes; as per the medical report, the child's hymen was absent, there was whitish vaginal discharge found on the child's vagina, and that she had a urinary tract infection; and the child identified the appellant as the person who defiled her.

4.2 The court found that the state had proved its case that the appellant committed the crime. The court rejected the defence, found him guilty as charged, and convicted him accordingly. On committal to the High Court for sentence, the appellant was sentenced to 40 years imprisonment with Hard Labour.

5.0 The appeal

5.1 Aggrieved with the judgment of the subordinate court and the sentence of the High Court, the appellant appealed against the conviction and sentence, and preferred the following grounds of appeal:

1. ***The learned trial court erred in law and in fact in receiving the evidence of a child on oath after a defective voire dire and ruling; and***
2. ***The learned trial court erred in law and in fact in convicting the appellant in the absence of corroborative evidence or evidence of something more to exclude the danger of false complaint and false implication.***

6.0 Appellant's submissions

6.1 On behalf of the appellant, Mrs Tembo-Tindi, learned Legal Aid Counsel filed written heads of argument on 16th February, 2022. The summary of the written heads of argument on ground one is that, the record shows that after a *voire dire* was conducted, the prosecutrix did not appreciate the consequences of telling lies and by necessity did not understand the obligation to speak the truth. That this made the receipt of her evidence or testimony unwarranted and in defiance of the requirements of the law. Reference was made to the case of ***Goba v The People***[1] where it was held *inter alia* that:

> ***"When no proper voire dire is carried out the evidence of the witness should be discounted entirely."***

6.2 We were hence urged to allow this ground of appeal and expunge the testimony of the prosecutrix from the record.

6.3 The gist of the written heads of argument on the second ground was that there is no corroboration on record to show that the appellant committed the crime. Counsel called in aid the case of ***Emmanuel Phiri v The People***[2] where it was held *inter alia* that:

> ***"In a sexual offence there must be corroboration of both commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Failure by the court to do so is a misdirection."***

6.4 We were also referred to the case of ***Darius Sinyinza v The People***[3] in which the Supreme Court held to the effect that victims of defilement are suspect witnesses, as such, their evidence must be corroborated.

6.5 It was submitted that PW2, the mother to the prosecutrix cannot corroborate the testimony of her daughter as she belongs to a category of persons that can easily influence the testimony of the child, as such, she is suspect. In support of this submission the case of ***Bernard Chisha v The People***[4] was cited, where it was observed that a child, due to immaturity of mind is susceptible to the influence of third persons and as such, a child's evidence requires to be corroborated.

6.6 It was submitted that there is no direct evidence from any independent witness to suggest that the appellant committed the offence. That the allegation of opportunity to commit the offence is not only inconclusive but too speculative as there ought to have been something more, especially for the fact that the child claimed to have walked home without crying.

6.7 It was argued that no conviction of defilement can stand in the absence of corroboration as to the commission of the offence and the identity of the offender.

6.8 We were urged to quash the conviction and to set him at liberty.

7.0 Respondent's submissions

7.1 On behalf of the state, the learned State Advocate, Mr. Zulu supported the conviction and the sentence. In his written submissions, filed on 16th February, 2022, he submitted that the *voire dire* was properly conducted. He submitted that after answering the questions that were asked by the trial court, the court came to the conclusion that the child possessed enough intelligence to understand the importance of telling the truth. He urged us to look at the *voire dire* in totality and not just one of the answers the child witness gave. He submitted that the Magistrate did not err when he received the evidence of the child and urged us to dismiss the first ground of appeal.

7.2 In response to the second ground of appeal it was submitted that the key witness in this matter was PW1, the prosecutrix. She testified that the person who defiled her was the appellant. That there was medical evidence in the form of a medical report-P1 which was produced by PW3. P1 showed that the hymen was absent, that there was whitish vaginal discharge which was seen in the vagina of the prosecutrix, which findings were consistent with the prosecutrix being defiled. It was submitted that this evidence corroborated the evidence of PW1 being defiled. Reliance was placed on

the case of ***Dennis Nkhoma v The People***[5] in which the Supreme Court held *inter alia* that:

> ***"The medical evidence in the form of a Medical Report corroborates the issue of defilement."***

7.3 The state also called into aid the case of ***John Mbao v the People***[6] where the Supreme Court stated that:

> ***"We have stated in many cases that opportunity to commit the crime can amount to corroboration."***

7.4 It was submitted that the prosecutrix mentioned the appellant as the person who defiled her. The appellant had been with the prosecutrix for a long time on the day the defilement occurred. That the appellant testified that he was with the child at his home whilst he prepared his meal and later went to the shops where he bought his cigarettes. That this was ample time for him to have committed the offence. It was submitted that this corroborated the prosecutrix's evidence.

7.5 In conclusion, the state submitted that both the evidence of the commission of the offence and the identity of the offender has been corroborated. The case of ***Emmanuel Phiri v The People*** *supra* referred to. We were urged to dismiss both grounds of appeal.

8.0 The decision of this Court

8.1 We have carefully considered the evidence on record, the Judgment of the trial court and the submissions by both learned counsel. On the first ground of appeal, we intend to consider the evidence of PW1, the prosecutrix, as it

is most crucial given that it is the evidence which needs to be corroborated. The arguments in support of the first ground of appeal were based on ***section 122 (1) of The Juveniles Act*** *supra.* As rightly pointed out by the state, the law applicable is as follows:

> ***"122. 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 if, 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 understands 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".***

8.2 We have stated before that the import of the aforestated provision for emphasis purposes is that:

1. A child of tender years is a child below the age of fourteen years.
2. A child of tender years can only give evidence on oath, if in the opinion of the court, the child is possessed of sufficient intelligence

to justify the reception of the child's evidence. The child understands the duty of speaking the truth.

3. There is no longer provision for a child of tender years to give unsworn evidence.

4. Where the evidence of a child of tender years 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. (See ***Padford Mwale v The People***[7]***)***

8.3 The argument by counsel for the appellant is that the *voire dire* by PW1 should not have been accepted because the prosecutrix told the trial court that she did not know what happens to liars, which shows that she did not appreciate the consequences of telling lies. That by necessity, she did not understand the obligation to speak the truth.

8.4 In the ***Padford Mwale*** case, upon conducting a *voire dire,* the trial court concluded by stating that, *"The Prosecutrix has sufficient intelligence to warrant receiving the evidence on oath."* We went on to find that the *voire dire* was defective based on the Supreme Court's guidance in ***Richard Daka v The People***[8]

8.5 In the said ***Richard Daka*** case, the Supreme Court held after analysing the *voire dire* in issue as follows:

> ***"The court concluded that the child possessed sufficient intelligence to give evidence on oath but it did not specifically state that the child understood the importance of telling the truth. Therefore, from the***

requirements of the law under section 122 of the Juveniles (Amendment) Act, 2011, we are satisfied that the voire dire was defective."

8.6 The importance of recording the *voire dire* as well as the trial court's conclusion cannot be over emphasised. In the recent case of ***Kasonde Twambo v The People***[9], we restated what the Federal Supreme Court said in the case of ***Makhanganya v R***[10] at page J4 of our judgment:

> ***"Unless a voire dire is carried out as I have indicated, a trial court cannot be satisfied that a child is fit to be sworn, ... and unless a voire dire is recorded, an appellate court cannot be satisfied that the trial court has appreciated and carried out its duty."***

8.7 The Supreme Court reaffirmed the ***Makhanganya*** case in ***Sakala v The People***[11] where it held:

> ***"It is essential with regard ta a juvenile of tender years that the trial court, not only conducts a voire dire, but also records the questions and answers and the trial court's conclusion to enable the appellate court be satisfied that the trial court has carried out its duty."***

8.8 We have looked at the contents of the entire voire dire conducted by the learned trial court and the subsequent order given (Pages 5 to 7 of the record of appeal). The trial court's inquiry in the *voire dire* conducted, in part, went as follows:

"Court:	***Is it good to tell lies?***
JW:	***It is not good to tell lies.***
Caurt:	***Why is it not good to tell lies?***
JW:	***I do not know what happens to people who tell lies.***

Court: ***Are you a liar?***

JW: ***I am not a liar."***

8.9 After conducting the *voire dire,* the trial court made the following order:

> ***"The Juvenile Witness understands the importance of telling the truth, she is able to understand English and she answered the questions even before the interpreter could tell her the interpreted words. The Juvenile Witness is to be sworn as she possesses enough intelligence as to understand the importance of telling the truth. Child to be sworn in Tonga the language that she understands."***

8.10 It is apparent, from the questions asked by the trial court, that there was no response as to the duty to speak the truth. The child simply stated that she was not a liar, and in its conclusion the trial court stated that she understood the importance of telling the truth. It is therefore evident, that the trial court did not make a finding in conformity with ***section 122 of the Juveniles Act***. We are satisfied that the *voire dire* was in fact defective, and as such the evidence of the prosecutrix is discounted entirely, meaning it is *void ab initio.*

8.11 Upon discounting the evidence of the prosecutrix, there remains insufficient evidence to warrant a re-trial. This is therefore, not a proper case in which we can order a re-trial.

9.0 Conclusion

9.1 In the view we have taken, the conviction is unsafe. In the circumstances, we allow the appeal. The conviction and sentence are set aside, and the appellant set at liberty forthwith.

C. K. Makungu

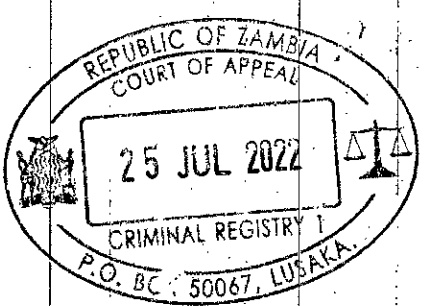
Court of Appeal Judge

D.L.Y. Sichinga, SC

Court of Appeal Judge

K. Muzenga

Court of Appeal Judge


REPUBLIC OF ZAMBIA
COURT OF APPEAL
25 JUL 2022
CRIMINAL REGISTRY I
P.O. BOX 50067, LUSAKA