IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.18/2023**

HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

MABVUTO BANDA **APPELLANT**

VS

THE PEOPLE **RESPONDENT**

CORAM: **Hamaundu, Kabuka, Chisanga, JJS**

On 4th April, 2023 and 14th April, 2023.

For the Appellant: Mr. E. Mazyopa, Senior Legal Aid Counsel
For the Respondent: Mr. K. I. Waluzimba, Deputy Chief State Advocate

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JUDGMENT

Chisanga, JS delivered the Judgment of the Court.

Cases Referred to:

1. **PHIRI V. THE PEOPLE (1982) Z.R. 77**
2. **WILSON MWENYA V. THE PEOPLE (JUDGMENT NO. 5 OF 1990)**
3. **MACHIPISA KOMBE V. THE PEOPLE (2009) ZR 282**
4. **DILHUKU V. THE REPUBLIC (2012) 2 ALL ER 162**
5. **NYAMBE V. THE PEOPLE (1973) ZR 208**
6. **MUSHEMI V. THE PEOPLE (1982) ZR 71**
7. **MWEWA MURONO V. THE PEOPLE (2004) ZR 207**
8. **SITUNA V. THE PEOPLE (1982) ZR 115**
9. **LUKOLONGO AND OTHERS V. THE PEOPLE (1986) ZR 115**
10. **CHIMBO & OTHERS V. THE PEOPLE (1982) ZR 70**
11. **MUSHALA AND OTHERS V. THE PEOPLE (1978) ZR REPORT P 81**

INTRODUCTION

1] The appellant was tried and convicted for the offence of rape by the Subordinate Court of the first class at Kabwe. The particulars of the offence state that on 31st December, 2011, the appellant, at Kabwe, in the Kabwe District of the Central Province of the Republic of Zambia, had unlawful carnal knowledge of a woman named Gloria Musonda, without her consent. Mwikisa J, sentenced him to 50 years imprisonment with hard labour.

BACKGROUND

2] In the court below, the State called three witnesses against the appellant. PW1 was the complainant. She testified that on 31st December, 2011 at around 02:00 hours, she was asleep in her home. Her husband was not around. She heard several knocks on the door, to which she did not respond. The next thing she heard was a bang, and the door swung open. The accused person entered the house naked. She recognised him as the person who had gone to her home during the day, to ask for a person who did not live there. The light was on when he entered, but he turned it off, and advanced towards her. She ran outside where she saw

the clothes of the assailant. She was held by four men, who were outside. She shouted for help to her mother-in-law, but her assailants ordered her to keep quiet, threatening to kill her. When she tried to run away, someone kicked her, and she fell down. Her underwear was ripped off. Two men held her hands and two others held her legs. She was pinned down in this manner, while the appellant raped her for about eight minutes. She was eight months pregnant at the time.

3] According to PW1, the assailant bit her on the right cheek while one of his confederates hit her on the other one with something. During those 8 minutes, she struggled to free herself. She bit the assailant on his arm and then pushed him off. His confederates took off after the rape. PW1 grabbed the assailant's trousers together with her torn underwear and ran to her mother's abode while shouting for help. The accused gave chase. When she got to her mother's place, her mother came out of the house in a state of undress. The accused caught up with her, retrieved the clothes she had, and ran away.

4] PW1 went to Central Police and was later examined at the General Hospital. PW1 added that she did not know the accused

person. When he came that morning, he was seen by her mother, and when she explained to her mother, the latter knew him by name. The accused person was later apprehended by the vigilantes and taken to her home. She identified him as the person who had raped her.

5] In cross-examination, she testified that she saw the accused who was wearing gumboots that left prints on the ground.

6] PW2 was the complainant's mother-in-law. She testified that on 31st December, 2011 PW1, her daughter-in-law, ran to her house crying that she was being killed. When PW2 went outside, she saw the accused person running away into the bush. She saw his face as there was moonlight. She had known him for a long time. He used to visit her place for her daughter. She had also seen him during the day time, when he went to ask for someone who used to live in Nagoli. When he was apprehended, he was taken to her home and she identified him.

7] PW3 was inspector Osward Silungwe. He testified that on 4th January, 2012, he was allocated a case of rape to investigate. He was assisted by the neighbourhood watch. The accused person

was apprehended. PW3 interviewed the complainant, who had bruises and was swollen. He also interviewed the appellant who denied the charge. He observed that the accused person had bruises on his arm and was swollen on the right side of the forehead.

8] When found with a case to answer and put on his defence, the accused testified that on 1st January, 2012, he was accosted by a vigilante, who informed him that the headman wanted to see him. He was apprehended and handcuffed. The following morning, the headman informed him that he had raped PW1. He was not found with anything. He was thereafter taken to the Police Station.

9] In cross-examination, he testified that on 31st December, 2011, he was working in Schemes Area away from the village. He later went to drink beer with a friend and spent the night at the bar.

DECISION OF THE COURT BELOW

10] The trial magistrate found that PW1 was indeed raped by a person who was also seen by PW2. He also found that during the day, the accused person had gone to PW1's home, and inquired

about a person who did not live there. The learned trial magistrate was satisfied that PW1 and PW2 identified the culprit who had gone to their residence during the day, and convicted the accused person of the offence of rape. He was sentenced to 50 years imprisonment with hard labour by the High Court.

GROUNDS OF APPEAL

11] Dissatisfied by this turn of events, the convict, now appellant has appealed on three grounds:

1. The learned trial court erred in law and fact when it convicted him based on poor identification evidence.
2. The learned trial magistrate misdirected himself by convicting the appellant based on a wrong finding of fact.
3. The learned trial court erred in law and fact to convict the appellant because he never told the court where he was at about 02:00 hours on 31st December, 2011 thereby shifting the burden of proof.

APPELLANT'S HEADS OF ARGUMENT

12] On behalf of the appellant, it is submitted that the trial magistrate should not have relied on the identification of the

appellant by PW1 and PW2 as the evidence was poor. It is contended that the evidence about the identity of the appellant raises doubt. PW2's evidence on identification cannot be said to corroborate that of PW1. Counsel for the appellant raises two questions:

1. Why would it take PW1 to explain to PW2 in order for PW2 to know by name a person that she herself saw with her eyes running away?
2. Why would the complainant fail to know the appellant by name if, according to her mother in law, they lived in the same village?

13] Counsel's contention is that the identification evidence of PW1 and PW2 do not corroborate. Reliance is placed on **PHIRI V. THE PEOPLE,**[1] where we reiterated that in sexual offences, there must be corroboration of both the commission of the offence and the identity of the offender in order to eliminate the dangers of false implication.

14] It is submitted that the trial magistrate did not warn himself against the danger of false implication, nor was this danger

eliminated. It is argued that had PW1 known the appellant as the person she had seen earlier in the day, she would not have stated in her evidence that she knew the appellant as a result of this case.

15] Counsel highlights what he views as discrepancies in the evidence of PW1 and PW3 concerning the injuries that both PW1 and the appellant sustained. It is argued that whereas PW1 testified that she bit the appellant on the arm, PW3 said that it was his face that was swollen. The case of **WILSON MWENYA V. THE PEOPLE**[2] is enlisted in this regard, where we said,

> **"Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. It may be evidence which implicates him, that is, which confirms in some material particular not only that the crime has been committed but also that the prisoner committed it."**

16] It is submitted that the evidence of PW1 and PW2 taken together, does not lead to the conclusion that it is the appellant who committed the offence. No evidence corroborates the identity of the appellant as offender as a result. The case of **MACHIPISA KOMBE V. THE PEOPLE**[3] is equally relied upon for this argument.

17] It is argued that there was need for the police to hold an identification parade as opposed to taking the appellant to PW1 and PW2 after his apprehension. Learned counsel has referred to the case of **DILHUKU V. THE REPUBLIC**[4] where the requirement to hold an identification parade was discussed.

18] Counsel argues that an identification parade provides good and acceptable corroborative evidence. To buttress this point, he relies on **NYAMBE V. THE PEOPLE**[5] where we stated the following:

> **The question is not one of credibility in the sense of truthfulness but of reliability... it is not enough for the witness to simply say that the accused is the person who committed the offence... greatest care must be taken to test the identification. The witness should be asked for instance, by what features or unusual marks, if any, he alleges to recognize the accused, what was his build, what clothes he was wearing, and so on; and the circumstances in which the accused was observed - the state of light, the opportunity for observation, the stress of the moment - should be carefully canvassed.**

19] With respect to ground two, it is argued that the trial magistrate erred when he found as a fact that the appellant knew that PW1's husband was not home. It is submitted that there is no evidence on record that suggests that the appellant had inquired about

the whereabouts of PW1's husband earlier that day. Reference is made to **MUSHEMI V. THE PEOPLE,**[6] where we held that a conviction which is based on a finding of fact which is in direct conflict with the overwhelming balance of the evidence, that evidence having been glossed over, cannot be upheld. Counsel argues that had the trial court not made this erroneous finding, it would not have convicted the appellant.

20] The argument under ground three is that the trial court shifted the burden of proof when he questioned the whereabouts of the appellant at around 02:00 hours on the 31st of December, 2011. Counsel's contention is that the trial court's view was that the appellant was at the crime scene because he had failed to disclose his whereabouts at the material time. Counsel points out that the appellant was unrepresented and perhaps did not understand the essence of that piece of evidence. Citing **MWEWA MURONO V. THE PEOPLE**[7] counsel argues that the legal burden of proving every element of the offense charged, and consequently the guilt of the accused lies, from beginning to end, on the prosecution. The standard of proof must be beyond all reasonable doubt. We are urged to allow the appeal on account of

the prosecution's failure to prove the case to the required standard.

THE RESPONDENT'S ARGUMENT

21] The appeal was opposed orally. Mr. Waluzimba submitted that as the appeal could be resolved on the first ground, he would direct his arguments to ground one only. Learned counsel argued that PW1 testified that the light was on when the appellant entered the house, and she saw the person who came in, until he switched off the light. Outside, the ordeal took about 8 minutes. Counsel argues that there was sufficient time for PW1 to observe the appellant. PW2 testified that she knew the appellant before the incident as they resided in the same village. When she went outside, she saw him within a distance of five metres. Counsel submitted that there was sufficient evidence of identification on record.

DECISION OF THE COURT

22] We have considered the grounds of appeal, the record on which the appeal arises, the judgment and the submissions tendered for and against the appeal.

23] The conviction of the appellant for the offence of rape was based on the identification evidence of both the prosecutrix, and that of PW2. According to PW1, the culprit entered the house and she saw him. She said:

> **"...He entered. He came inside and there light in the house. I did identify as the person who had come during the day and had asked for someone who did not live there. I blew off the light and came to where I was on the bed. It is a bulb that he put off. We use a battery for lighting."**

24] There is obviously something wrong with the interpretation of the language used by the witness here. The sense however one gets from the testimony is that PW1's assailant switched off the light after kicking the door open. She claims she saw and identified him.

25] One other piece of evidence she gave was that she bit her assailant on the left arm. PW3, the arresting officer said in cross-examination that he saw bruises on the appellants arm, but only saw the swelling on the right side of the forehead. It is noteworthy that PW1 did not state that when she bit her assailant, his arm swelled. She merely said she bit him on the arm. PW3 confirmed seeing bruises on his arm. We are unable to

discern the discrepancy learned counsel says arises on the evidence. Our view is that the presence of bruises on the arm confirms that the arm had at some point suffered trauma.

26] Learned counsel also appears to conflate PW1's testimony. After she had testified that she saw her assailant in the morning in question, she also made this statement:

> **'when the accused came in the morning that day he was seen by my mother and when I explained to her she knew him by name.'**

27] We do not understand this statement to be referring to the incident at night. Rather, PW1 was narrating what had transpired in the morning. When, according to PW1, the assailant had gone to her home in the morning, he was seen by her mother. When PW1 explained to her mother, obviously about the visitor, the mother knew the caller by name.

28] We are unable to discern how this conversation can be brought into what transpired at night. PW2 testified that she heard her daughter in law, PW1, crying. She did not even dress up, but rushed outside. She saw Mabvuto who ran into the bush. She said,

"it was my first time to see him. I have known him for a long time. He used to come for my daughter. If I saw him, I would identify him. We live in the same village.....I did identify him. There was moonlight. I did see. I saw him during the daytime. He came to my house. He came to ask about someone who used to live in Nagoli. When he came he had gone."

29] And when cross-examined by the appellant, she said,

"I saw you. Even during the daytime you had come. You were five meters away when I came out.....you ran away into the bush."

30] The evidence before the trial court was that PW2 had known the appellant for a long time. He had been interested in her daughter. She saw his face with the aid of moonlight. She had also seen him during the day, when he had gone to ask about someone. This testimony confirmed that of PW1, who said her mother saw the appellant when he went to her place to ask about someone who did not live there. Quite clearly, the evidence relating to the visit during the day was separate from that concerning the rape.

31] The trial magistrate accepted the evidence that the two witnesses saw the appellant. The identification evidence was not by one individual. Concerning single identification evidence this court, (Ngulube D.C.J, Gardner and Muwo JJS) held in **SITUNA V. THE**

PEOPLE[8] that the evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and the basis upon which the witness claims to recognize the accused. If the opportunity for a positive and reliable identification is poor then it follows that the possibility of an honest mistake has not been ruled out unless there is come other connecting link between the accused and the offence which would render a mistaken identification too much of an odd coincidence.

32] In **LUKOLONGO AND OTHERS V. THE PEOPLE**[9] this court reiterated the caution given in the Situna case:

> **"According to the principle formulated in the case of R v. Turnbull and another, the evidence of identification ought to be treated with caution before it can be relied on as founding a criminal conviction. If the quality is not good, there is need to look for supporting evidence to rule out the possibility of honest mistake in identification."**

33] The question that fell to be addressed by the trial magistrate therefore was whether the evidence of identification was reliable. According to the applicable jurisprudence, the trial magistrate

should have looked for the features by which PW1 had identified the appellant, or unusual marks by which she recognized him. His build, the clothes he wore and the circumstances in which she observed him, the state of the light, the opportunity for observation and the stress of the moment should have been examined by the trial magistrate.

34] The judgment does not reveal that he took this elaborate route to arrive at his conclusion. He appears to have relied on the assertion, which he accepted, that the appellant had been to their premises in the morning of the previous day to ask for someone who was not known to them. By so doing, he dealt with the case as one of recognition, and not one of identification of a person previously unseen or unknown by a witness.

35] This court has guided in cases such as **CHIMBO & OTHERS V. THE PEOPLE**[10] that although recognition is accepted to be stronger, it is the duty of the court to warn itself of the need to exclude the possibility of an honest mistake. To similar effect was this court's decision in **MUSHALA AND OTHERS V. THE PEOPLE**[11], where it was held as follows:

'Although recognition may be more reliable than identification of a stranger, even when the witness is purporting to recognize someone whom he knows the trial judge should remind himself that mistakes in recognition of close relatives and friends are sometimes made, and of the need to exclude the possibility of honest mistake; the poorer the opportunity for observation, the greater the possibility becomes.'

36] Turning to the present case, the trial magistrate, in his brief judgment, did not warn himself of the need to exclude the possibility of an honest mistake. This was a misdirection. The conviction of the appellant can only stand if we can apply the proviso. Before doing so, we wish to advert to the complaint that an identification parade was not held. Instead, the appellant, upon apprehension, was shown to both PW1 and PW2. This was most undesirable.

37] This factor rendered the identification evidence poor. In these circumstances, the conviction can only stand if there is other evidence which linked the appellant to the offence.

38] PW1 said she had seen the appellant earlier in the day. PW2 testified that she saw the assailant because of the moonlight, and that he was a person she knew before the incident. He had been going for her daughter. PW1 said she bit her assailant on the arm. The arresting officer said he saw bruises on the appellant's

arm and a swelling on the forehead. We note that the presence of bruises on the arm was not explained away by the appellant. It was an odd coincidence that PW2 said she recognized the culprit as Mabvuto, and the said Mabvuto turned up with bruises on the arm, confirming that something had happened to his arm. Moreover, he did not explain how he sustained the bruises on his arm. These bruises confirmed that it was the appellant who raped PW1, was bitten on the arm in the process, and recognized by PW2, who knew him from before. The weak identification evidence was corroborated by the bruises on the arm, which confirmed the bite.

39] While the burden of proof in criminal cases lies on the prosecution to prove a case to the required standard, an accused person who is brought into the picture by a piece of evidence that connects him to the commission of a crime is expected to give an explanation that could be reasonably true. In the absence of such an explanation, an appellate court would be hard pressed to set aside a conviction made in those circumstances.

40] On the foregoing discussion, we hold the view that PW1 was raped by the appellant. Corroboration of the commission of the offence, as well as the identity is revealed on the evidence. While

the finding that the appellant knew that PW1's spouse was not at home is unsupported by the evidence, the evidence established that the appellant was satisfactorily connected to the offence by the evidence of both PW1 and PW2. The arguments to the contrary cannot prevail. The appeal is accordingly dismissed.

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E. M. Hamaundu

SUPREME COURT JUDGE

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J. K. Kabuka

SUPREME COURT JUDGE

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F. M. Chisanga

SUPREME COURT JUDGE