

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

Appeal No 113/2021

BETWEEN:

APHET MONDOKA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Makungu and Muzenga, JJA

22nd March 2022 and 25th August 2022

For the Appellant: E.I. Banda, Legal Aid Counsel, Legal Aid Board

**For the Respondent: M. Chipanta-Mwansa, Deputy Chief State
Advocate, National Prosecution Authority**

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. Emmanuel Phiri v The People [1982] Z.R. 77
2. Bernard Chisha v The People [1980] Z.R. 36
3. Machipisha Kombe v The People [2009] Z.R. 282
4. Abel Banda v. The People [1986] Z.R. 105

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia

1. INTRODUCTION

- 1.1. The appellant appeared before the Subordinate Court (Hon. S. Magalashi), on a charge of defilement contrary to **section 138(1) of The Penal Code**.
- 1.2. He denied the charge and the matter proceeded to trial.
- 1.3. At the end of trial, he was convicted and committed to the High Court for sentencing.
- 1.4. In the High Court (Kamwendo, J.), he was sentenced to 35 years imprisonment.
- 1.5. He has appealed against the conviction and in the alternative, against the sentence.

2. CASE BEFORE THE TRIAL COURT

- 2.1. The evidence before the trial court was that in February 2020, the appellant's wife left home to take a child to school. The appellant's daughter, a friend to the prosecutrix, invited the prosecutrix to spend a night at their house.
- 2.2. The prosecutrix was aged 11 years, at the time.
- 2.3. Months later, in October 2020, the appellant was apprehended following a report by the prosecutrix

that he had sexual intercourse with her, when she spent a night in his house, in February 2020.

2.4. The prosecutrix reported the encounter after developing sores on her private parts. When she was medically examined, it was found that she had contracted syphilis after having sexual intercourse.

2.5. The appellant was also incriminated by evidence from a member of the Community Crime Prosecution Unit (CCPU). He told the trial magistrate that following his apprehension, the appellant admitted to having had sexual intercourse with the prosecutrix.

2.6. He was in the custody of the police, at a police station at the time he made the admission.

3. FINDINGS BY TRIAL MAGISTRATE

3.1. The trial magistrate found that the prosecutrix, who was below the age of 16 years, was defiled. She also accepted the prosecutrix's evidence that it was the appellant who committed the offence.

3.2. She recognised the fact that the prosecutrix's evidence required corroboration. She found that her evidence was corroborated by the CCPU member's

evidence that he admitted to committing the offence at the police station.

4. GROUNDS OF APPEAL AND ARGUMENTS IN SUPPORT

4.1. The thrust of the appellant's case is that he was convicted on the uncorroborated evidence of the prosecutrix.

4.2. Ms. Banda referred to the cases of **Emmanuel Phiri v The People**¹, **Bernard Chisha v The People**² and **Machipisha Kombe v The People**³, and submitted that defilement being a sexual offence, the prosecutrix's evidence required corroboration. She argued that the conviction should be set aside because the prosecutrix's evidence incriminating the appellant, was not corroborated.

5. ARGUMENT AGAINST THE APPEAL

5.1. On behalf of the respondent, Mrs. Chipanta-Mwansa indicated that she supported the conviction. She submitted that the prosecutrix's evidence incriminating the appellant was corroborated by his admission to the CCPU member, that he had sexual intercourse with the prosecutrix.

6. DECISION OF THE COURT

- 6.1. The cases **Emmanuel Phiri v The People**¹, **Bernard Chisha v The People**² and **Machipisha Kombe v The People**³, all settle the law that in a sexual offence, which includes defilement, a prosecutrix's evidence incriminating an offender, must be corroborated.
- 6.2. We agree with Mrs. Chipanta-Mwansa that an admission by an offender, that he had sexual intercourse with a prosecutrix, can be corroborative. However, in this case, the circumstances in which the appellant admitted committing the offence, require careful scrutiny.
- 6.3. The evidence of the CCPU member was that after he apprehended the appellant, he took him to the police station. It is at the police station that the appellant made the admission after being questioned.
- 6.4. In the case of **Abel Banda v. The People**⁴, it was pointed out that whenever a suspect is being interrogated by a person whose normal duties concern the investigation of crime, the suspect should be warned and cautioned before being questioned.

- 6.5. We acknowledge the fact that a CCPU member is not a person whose line of work ordinarily relates to the investigation of cases. He is therefore not expected to administer a warn and caution before questioning a suspect.
- 6.6. However, the evidence in this case is that at the time the CCPU member was interviewing the appellant, he was in police custody. Although there is no direct evidence, it is apparent that the interview took place in the presence of police officers or with their knowledge.
- 6.7. This is the case, because it is inconceivable that the CCPU member would have had access to the appellant without the knowledge of the police.
- 6.8. In our view, it is clear that the use of the CCPU member to produce the confession statement made at a police station, was intended to circumvent the rigorous test that must be met before a police officer can produce such a statement.
- 6.9. Had the police officers attempted to produce the confession statement, they would have been required to prove that they warned the appellant, and that he

gave the statement freely and voluntarily. Depending on the circumstances prevailing at the time the incriminating statement was made, it may have also required the trial magistrate to hold a trial within a trial, before the admitting the statement into evidence.

6.10. Since the admission was obtained under the "watch" of the police, it is our view that it should not have been admitted into evidence without the prosecutor proving that the appellant was cautioned, and that he made it freely and voluntarily.

6.11. It must be made clear that had the confession to the CCPU member been made before the appellant was placed in police custody, it would have been within the trial magistrate's right to admit it, without proof that the appellant was warned and cautioned before being interviewed.

6.12. Since the admission by the appellant to the CCPU member was not properly introduced into evidence, it must be excluded when considering the case against him.

6.13. When the appellant's admission that he had sexual intercourse with the prosecutrix is excluded, the prosecutrix's testimony against him is rendered uncorroborated.


6.14. This being the case, we find merit in the appellant's argument that he was convicted on the prosecutrix's uncorroborated evidence.

7. VERDICT


7.1. Having considered all the circumstances of this case, we find that the conviction is not safe.

7.2. We allow the appeal and set aside the conviction.

7.3. Having allowed the appeal against conviction, we find it otiose to consider his appeal against the sentence.



 C.F.R. Mchenga
 DEPUTY JUDGE PRESIDENT



 C.K. Makungu
 COURT OF APPEAL JUDGE



 K. Muzenga
 COURT OF APPEAL JUDGE