

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 98/2023

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

MATHIAS YOWANI

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: NGULUBE, MUZENGA AND CHEMBE, JJA.

On 13th August, 2024 and 16th August, 2024.

For the Appellant: *Mr. J. K. Matende – Legal Aid Counsel, Legal Aid Board*

For the Respondent: *Mrs. Muyoba - Chizongo – Senior State Advocate,
National Prosecutions Authority*

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Machobane vs The People (1972) Z.R. 101 (C.A.)*
2. *Nsofu vs The People (1973) Z.R. 287*
3. *Nyambe vs The People (1973) Z.R. 228*
4. *Emmanuel Phiri vs The People (1982) Z.R. 77*
5. *Phiri & Others vs The People (1973) Z.R. 47 (CA)*
6. *Machipisha Kombe vs The People (2009) Z.R. 282*
7. *Barrow and Young vs The People (1966) Z.R. 43 (H.C)*

8. *Lameck Tembo vs The People - Appeal No. 39 of 2011.*
9. *Joseph Mulenga & Another vs The People (2008) Z.R. 1*
10. *Davis Chiyengwa Mangoma vs The People - SCZ Judgment No. 217/2015*
11. *Gideon Mumba vs The People – SCZ Judgment No. 50 of 2017*
12. *Phillip Mungala Mwanamubi vs The People – SCZ Judgment No. 9 of 2013*
13. *Machobane vs The People (1972) Z.R. 101 (C.A)*
14. *In Kambarange Mpundu Kaunda vs The People (1990/1992) Z.R. 533*
15. *Musupi vs The People (1978) Z.R. 271*
16. *Yokoniya Mwale vs The People SCZ Appeal No. 285/2014*

Legislation referred to

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

1.0 INTRODUCTION

- 1.1 The appellant was sentenced to 25 imprisonment by Makubalo J following a conviction of defilement by the Subordinate Court of the first Class, sitting at Chipata. He appealed against conviction and sentence on the basis that the prosecution did not prove their case beyond reasonable doubt.
- 1.2 The particulars of the offence were that on 3rd October, 2021 at Chipata in the Eastern Province of Zambia, the appellant had unlawful carnal knowledge of the prosecutrix, a child under the age of 16 years.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The evidence of the prosecution centred on six (6) witnesses. PW1 the prosecutrix's mother told the trial Court that on the material day the prosecutrix and her brother informed her that they had gone to watch football when they met the appellant. He told the prosecutrix and her brother to run into the bush and he scared them by stating that some traditional dancers, locally known as Nyau were approaching. After following them into the bush, the appellant defiled the prosecutrix while her brother stood nearby. Upon inspecting the prosecutrix, PW1 observed that she was injured on her private parts and semen dripped from her vagina onto her thighs. According to PW1, the prosecutrix and her brother indicated that the appellant was the perpetrator. She stated that although the appellant denied defiling her, he admitted seeing the prosecutrix and her brother on the material day.

2.2 PW2 was the prosecutrix. She narrated that she went to watch football with her brother Thomas where they met the appellant who invited them to go with him in to the bush on the pretext that traditional dancers were coming their way. He defiled her and punched her left eye while he made her brother stand and wait by a tree. She narrated the ordeal to her mother. She stated

that she saw her assailant for the first time on the material day and that he was the only person she met on her way.

2.3 PW3, the medical doctor, testified that he examined the prosecutrix and concluded that she had been defiled because she had injuries on the opening of her vagina and her hymen was broken. He authored the medical report which was produced in Court.

2.4 PW4 was the prosecutrix's father. He told the Court that when he returned home on the material day around 17:00 hours, he found the prosecutrix crying. PW1 told him that their daughter had been defiled and when confronted, the appellant admitted defiling the prosecutrix. PW4 took the prosecutrix to the hospital where it was confirmed that she was indeed defiled.

2.5 PW5's testimony was that he met PW4 who informed him that the prosecutrix had been defiled. That he also informed him that he had apprehended the appellant who was believed to have been the perpetrator. PW5 stated that he believed the prosecutrix when she said she had been defiled as she had a swollen eye. The witness stated that he asked the appellant if she had defiled the prosecutrix and he admitted doing so.

2.6 PW6 stated that she received a report from PW1 that the prosecutrix had been defiled. She issued a medical report form to the victim who was taken to the hospital. The findings on the medical report were consistent with the allegation of defilement. PW6 interviewed the prosecutrix who revealed that it was the appellant who defiled her.

2.7 The witness stated that she warned and cautioned the appellant for the subject offence but he gave a free and voluntary reply denying the charges.

2.8 In his defence, the appellant stated that he had arranged to go and watch football with his friend and they met on the way. The duo first went to see their boss who gave them K50.00. The appellant stated that he and his friend went to drink some beer and later returned home without watching football. The appellant denied having carnally known the prosecutrix. He stated that the prosecutrix and her brother denied that he was the one who defiled her.

3.0 CONSIDERATION OF THE MATTER AND VERDICT OF THE SUBORDINATE COURT

3.1 The learned trial Magistrate found the appellant guilty of defilement. The trial Court found that a sexual offence had been committed as shown by the medical report. That the prosecutrix

identified the appellant as the perpetrator and her evidence was corroborated by the fact that she narrated her ordeal to PW1. That further PW4 and PW5 stated that the appellant admitted having committed the offence.

4.0 THE APPEAL

4.1 Dissatisfied with the conviction and sentence, the appellant filed one ground of appeal couched as follows-

1. The Court below erred in law and fact when it convicted the appellant upon uncorroborated evidence of identification by a sole witness who was a child and victim in the sexual offence, contrary to the requirement of proper corroboration to exclude danger of false implication.

5.0 HEADS OF ARGUMENT

5.1 Counsel for the appellant submitted that the issue in this appeal is whether the appellant was the one who committed the subject offence. Counsel also submitted that the conviction of the appellant was unsafe because the prosecutrix's evidence of identification was not corroborated.

5.2 It was submitted that what the lower Court relied on as corroborating evidence was the demeanour of the prosecutrix, the appellant placing himself at the scene, the appellant being

pointed out as the offender out of all the men in the village and the prosecutrix being seen with bruises after the incident.

5.3 On the evidence of demeanour of the prosecutrix, it was submitted that it is a requirement for such evidence to be recorded in the same way that other forms of evidence are recorded to permit a Court to rely on it and draw conclusions on it. In making reference to the case of ***Machobane vs The People***,¹ it was argued that the record does not show the recording of the demeanor in the evidence of the prosecutrix. And as such, the conclusion of the lower Court with regard to the demeanor of the prosecutrix was not supported by evidence.

5.4 It was submitted further that corroborative evidence is independent evidence and the evidence of demeanour of a witness cannot be corroborative evidence because it is not independent evidence. To support the argument, Counsel made reference to the case of ***Nsofu vs The People***.²

5.5 It was submitted that the test the Court below should have applied to the evidence of PW2, a single identifying witness, is not credibility in the sense of truthfulness but reliability. For this argument, we were referred to the case of ***Nyambe vs The People***³ where it was held *inter alia* that there is no area where a greater danger of honest mistake exists than that of

- identification especially where the accused was not known to the witness prior to the occasion.
- 5.6 It was accordingly submitted that PW2 confirmed that she did not know the appellant previously and was the only witness on record who identified the appellant.
- 5.7 In relying on the cases of ***Emmanuel Phiri vs The People***,⁴ and ***Phiri & Others vs The People***,⁵ Counsel argued that in the absence of any evidence as to whether or not the prosecutrix had a reason to falsely implicate the appellant, the Court below should not have made a conclusion that the prosecutrix had no motive for false implication.
- 5.8 On whether the appellant had the opportunity to commit the offence, Counsel submitted that for mere opportunity to amount to corroboration, it must be suspicious in nature such that only the appellant should have had the opportunity. That therefore, it cannot be said that it was suspicious for the appellant to be in Koma village in the direction where the football match was, because there were other men in the village besides the appellant.
- 5.9 Further, it was submitted that the fact that the appellant was identified as the perpetrator cannot in itself amount to an odd

coincidence. For this argument, Counsel made reference to the case of ***Machipisha Kombe vs The People***.⁶

5.10 Counsel submitted that the fact that the prosecutrix was seen with bruises on her face cannot be used to deduce that it was the appellant who committed the offence. Further, Counsel submitted that in considering the admission allegedly made by the appellant, the Court below did not consider the contradictions in the evidence of the prosecution witnesses (PW1, PW4 and PW5). Counsel argued that these contradictions should have been resolved in favour of the appellant as was held in the case of ***Barrow and Young vs The People***⁷ and ***Lameck Tembo vs The People***.⁸

5.11 Lastly, Counsel submitted that the conviction of the appellant was not safe and urged this court to allow the appeal.

5.12 Counsel on behalf of the respondent submitted that the Court below was on firm ground when it convicted the appellant of the offence of defilement. She argued that the evidence of the prosecutrix was corroborated by PW4 and PW5 who both stated that the appellant admitted defiling the prosecutrix. That further PW4 stated that his neighbour saw the appellant get the child which led him to confront the appellant. That the appellant did not dispute this evidence in cross examination. She argued that

even though PW4's neighbour was not called as a witness, it is his evidence and that of the prosecutrix which led to the appellant's apprehension.

5.13 Counsel made reference to the case of **Joseph Mulenga & Another vs The People**⁹ where it was held that the failure to challenge incriminating assertions diminishes the efficacy of any ground of appeal based on the very assertions which were not challenged at trial. It was submitted that there was no objection to the evidence of admission to the effect that it was given under duress.

5.14 It was argued further that there was evidence of 'something more' in this case, which though not constituting corroboration as a matter of strict law satisfied the court that there was no danger of false implication. For this argument, Counsel referred us to the case of **Phiri & Others vs The People (supra)**.

5.15 It was submitted that the appellant had an opportunity which amounted to 'something more' and is a compelling ground for convicting him. We were referred to the case of **Davis Chiyengwa Mangoma vs The People**¹⁰ where the Supreme Court held that an opportunity may in certain circumstances amount to corroboration. Counsel argued that the prosecutrix's evidence was that she met the appellant on her way to watch

football and therefore he had an opportunity to commit the offence.

5.16 It was argued that there was also evidence of odd coincidence in this case which constitutes evidence of 'something more' in that the prosecutrix identified the appellant as the perpetrator and who was seen getting the child on the material day. For this argument, Counsel made reference to the case of ***Emmanuel Phiri vs The People (supra)***.

5.17 Relying to the cases of ***Gideon Mumba vs The People***¹¹ and ***Phillip Mungala Mwanamubi vs The People***,¹² Counsel argued that the Court can convict on the uncorroborated evidence of a witness provided it warns itself of the dangers of false implication.

5.18 Counsel submitted that although there was no recording of the demeanour of the prosecutrix, the trial Court had properly recorded its observations of the prosecutrix's evidence. Counsel placed reliance on the case of ***Machobane vs The People***¹³ where it was held that evidence whether heard or seen must appear either in the body of the record or atleast in the judgment.

5.19 Counsel maintained that there was no reason for PW2 or the other prosecution witnesses to falsely implicate the appellant.

6.0 THE HEARING

- 6.1 At the hearing of the appeal on 13th August 2024, learned Counsel for the appellant Mr. Matende and learned Counsel for the respondent Mrs. Chizongo informed the Court that they would rely on their respective heads of argument filed into court.
- 6.2 Counsel for the appellant made brief oral submissions in reply to the prosecution's arguments. He augmented that since PW4's neighbour was not called as a witness at the trial, his evidence that his neighbour saw the appellant pick up the child was mere hearsay.

7.0 CONSIDERATION AND DECISION OF THE COURT

- 7.1 We have carefully considered the evidence on record, the Judgment appealed against and arguments by Counsel for the appellant.
- 7.2 The main argument is that there was no corroboration to support the identity of the appellant as the perpetrator of the subject offence. The prosecution evidence which was key in identifying the appellant as the perpetrator of the offence was the testimony of the prosecutrix.
- 7.3 The Supreme Court in the case of ***Emmanuel Phiri vs The People (supra)*** guided 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.”

7.4 As to whether the prosecutrix was defiled is not an issue in this appeal. The contention is whether it is the appellant who defiled her. Apart from the evidence that came from the prosecutrix, the other evidence pointing to the guilt of the appellant was proffered by PW1, PW4 and PW5. PW1 is the mother to the prosecutrix while PW4 is her father. PW1 did not state that the appellant admitted to committing the offence but stated that the prosecutrix pointed at the appellant as the perpetrator. Both PW4 and PW5 stated that the appellant admitted committing the offence.

7.5 We are alive to the fact that being the parents to the prosecutrix, PW1 and PW4 may have had an interest of their own to serve. In the case of ***Kambarange Mpundu Kaunda vs The People***¹⁴ the Supreme Court stated that-

“Prosecution witnesses who are friends or relatives of the prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses. The Court should, therefore, warn itself against the danger of false implication of the accused

and go further to ensure that danger has been excluded.”

7.6 Further in the case of ***Musupi vs The People***¹⁵ the Supreme Court emphasized that-

“The tendency to use the expression 'witness with an interest (or purpose) of his own to serve' carries with it the danger of losing sight of the real issue. The critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case, may have a motive to give false evidence.”

7.7 We are also mindful of the case of ***Yokoniya Mwale vs The People***¹⁶ where the Supreme Court of Zambia once had the occasion to address the evidence of witnesses who are friends and relatives. It stressed that the authorities on this subject matter did not establish nor were they intended to cast in stone, a general proposition that friends and relatives of the victim are always to be treated as witnesses with an interest to serve and that their evidence routinely required corroboration. The Supreme Court went further to conclude that a conviction will be safe if it is based on the uncorroborated evidence of witnesses who are friends and relatives of the deceased or the victim

provided that on the evidence before it, those witnesses could not be said to have had a bias or motive to falsely implicate the accused.

7.8 PW1 stated that the prosecutrix informed her that it was the appellant who defiled her. Both PW4 and PW5 stated that the appellant admitted having carnally known the prosecutrix. Even if there was need for the evidence of PW4 to be corroborated. His evidence that the appellant admitted having committed the offence was corroborated by the evidence of PW5, who also stated that the appellant, when he was questioned, admitted committing the offence.

7.9 There was no evidence led to suggest why PW5 would want to falsely implicate the appellant. It is therefore our considered view that the conviction of the appellant was safe as the evidence of the prosecutrix was corroborated by the evidence of PW5 who was an independent witness. The fact that the prosecutrix reported the offence to PW1 at the earliest opportunity on the material day also shows that she knew her assailant as the ordeal was still fresh in her memory.

7.10 Further, during cross examination of the prosecutrix by the appellant, she stated that she met the appellant on the road leading to the football ground. In his defence, the appellant

admitted that there was a football match on the material day and that he met his friend on the way to the village where there was a football match. This evidence suggests that the appellant had the opportunity to commit the offence.

7.11 Therefore, the Learned Defence Counsel's position that the case should be decided in the appellant's favour by acquitting him since the prosecution witnesses' testimony was inconclusive regarding whether the appellant admitted committing the offence, cannot be of assistance to the appellant. This is because even if the trial Court was to accept only the evidence of PW5 who stated that the appellant admitted meeting the prosecutrix on the material day, it still shows that the appellant had the opportunity to commit the offence.

7.12 In the case of ***Nsofu vs The People (supra)*** the Supreme Court held that-

“Mere opportunity alone does not amount to corroboration but the opportunity may, be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may, be such as in themselves amount to corroboration.”

7.13 From the above authority, mere opportunity does not amount to corroboration but the circumstances and the locality of the

opportunity may amount to corroboration. The prosecutrix's evidence was that the appellant lured her into the bush. This created suspicion and fortifies the element of opportunity as corroboration.

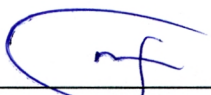
7.14 We are of the view that there was sufficient evidence to warrant the conviction of the appellant as the evidence of the prosecutrix was corroborated and it was therefore safe to convict the appellant.

8.0 CONCLUSION

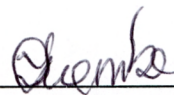
8.1 In light of the foregoing, we find no merit in the appeal and it is accordingly dismissed. The conviction and sentence of the lower Court are upheld.



P. C. M. NGULUBE
COURT OF APPEAL JUDGE



K. MUZENGA
COURT OF APPEAL JUDGE



Y. CHEMBE
COURT OF APPEAL JUDGE