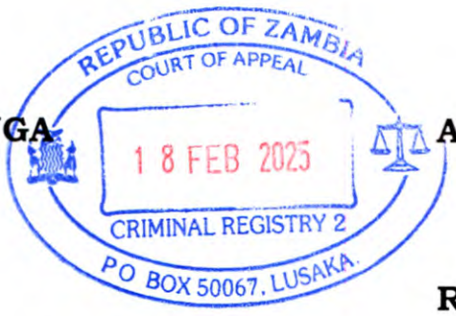
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 32/2024**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:



STARFORD CHIMANGA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: ***MCHENGA, DJP, NGULUBE AND CHEMBE, JJA.***

On 13th January and 18th February, 2025.

For the Appellant : *Ms. M. K. Liswaniso, Deputy Chief Legal Aid Counsel, Legal Aid Board*

For the Respondent : *Mrs. R. Malibata Jackson, 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. *Emmanuel Phiri vs The People (1982) Z.R. 77 (S.C.)*
2. *Bernard Chisha vs The People (1980) Z.R. 36*
3. *Alubisho vs The People (1976) Z.R. 11*
4. *Goba vs The People (1966) Z.R. 113*
5. *Daka vs The People SCZ Appeal No. 333 of 2013*
6. *Jutronich, Schutte and Lukin vs The People (1965) Z.R. 9*

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 The appellant appeared before the Subordinate Court of the first Class, sitting at Lusaka on a charge of four counts of unnatural offences contrary to ***Section 155(a) of the Penal Code, Chapter 87 of the Laws of Zambia***. The particulars of the offence were that the appellant, on dates unknown but between 1st April, 2021 and 31st May, 2021 at Lusaka had unlawful carnal knowledge of Misheck Mbewe, Dickson Mwanza, Clever Chigwere and Emmanuel Chibamba against the order of nature.

1.2 The appellant was subsequently convicted and sentenced to 35 years imprisonment with hard labour (by Lady Justice C. Lombe Phiri).

2.0 EVIDENCE IN THE LOWER COURT

2.1 The appellant's conviction was secured by the evidence of eleven (11) prosecution witnesses. PW1 was Misheck Mbewe, a minor and the victim in count one. His evidence was that

on a date he could not recall but between April 2021 and May 2021, he was playing football with Dickson Mwanza (PW3 and the victim in count two) and Clever Chigwere (PW5 and the victim in count three), when the appellant invited them to his house. He stated that the trio accompanied the appellant to his house where he made them sit outside and invited them into the house one by one.

2.2 PW1 stated that when he was invited into the appellant's house, the appellant told him to take off his clothes and lie on the bed face down. He stated that while he lay on the bed naked, the appellant also took off his clothes, lay on top of him and inserted his penis on his buttocks. Afterwards, the appellant gave him K20.00 and warned him not to tell anyone about what had happened.

2.3 PW1 stated that one of his friends Mumbi reported to his mother about what the appellant did and the mother then reported the matter to the Police. He stated that he was taken to the hospital where he was examined.

2.4 In cross examination, he stated that the appellant had carnal knowledge of him several times before the matter was reported to the Police.

2.5 PW2 was PW1's mother, Beatrice Sikabembe. Her testimony was that between 1st April 2021 and 31st May, 2021 when she was at home, PW10 in company of his mother approached her and informed her that the appellant sodomised PW1 and other young boys. PW2 called PW1 who confirmed the allegation. She reported the matter to the Police and PW1 was issued with a medical report at the hospital which confirmed that he was sodomised.

2.6 PW3 was Dickson Mwanza, the victim in count two. His evidence was that he and his friends (PW1, PW5 and PW6) met the appellant at the football field. He invited them to his house and told them to wait outside. He called them into his house one by one and sodomised them one after the other. PW3 stated that he was the first one to be called in while his friends waited outside the appellant's house.

2.7 He stated that once he was inside, the appellant told him to take off his clothes and lie down on the bed. The appellant took off his clothes and had sexual intercourse with him from the anus. Afterwards, the appellant gave him K20 and told him not to disclose what transpired. When PW3 went out, the appellant called PW5 to go inside. After PW5 came out, PW6 was also called in.

2.8 PW3 stated that they did not disclose to their parents what transpired but that their parents came to learn of their ordeal through PW10. That his parents asked him to confirm if he was sodomised and he told them that the allegations were true. He stated that all the boys who were sodomised and their parents confronted the appellant who begged them not to report the matter to the Police. Their mothers proceeded to report the matter the Police and PW3 was issued with a medical report which showed that he had injuries on his anus.

2.9 PW4 was Annie Moonga PW1's grandmother. She stated that on 27th April, 2021, Natron Mweenda called her to find out if her grandson (PW3) and his friends had been sodomised. Her grandson confirmed the incident and the victims led her to the appellant's house where they identified the appellant as the perpetrator of the offence. The appellant pleaded for forgiveness so that the matter could be settled amicably but it was reported to the neighbourhood watch and the Police. PW4 was later taken to the hospital where he was examined and issued with a medical report which confirmed that he had injuries consistent with the report.

2.10 PW5 was Clever Chigwere, the appellant's nephew. He told the Court that he stayed with the appellant at the material time. He used to sleep in the same room with the appellant but he slept on the floor while the appellant slept on the bed. He stated that for two weeks while he was there, the appellant sodomised him. He could not stand the abuse and ran away back to his mother's house.

2.11 PW5 reported to his mother about the appellant's deeds and that he assisted in leading his mother and PW3's mother to the appellant's house. He disclosed in the presence of the appellant, that he used to sodomise him.

2.12 PW6 stated that on a date he could not recall but in April 2021, the appellant asked him, PW1 and PW5 to go and pick scrap metal from a certain farm within the area and take it to his house. That after picking the scrap metal, the appellant invited them into his house where he sodomised them one after the other. He gave them a K20 each and told them not to disclose what occurred. His mother came to learn about what transpired and took him to the hospital where he was issued with a medical report which confirmed that he was sodomised.

2.13 PW7's evidence was that on 26th May, 2021 her son (PW10) returned home panting. He informed her that the appellant who was also known to her attempted to sodomise him but he managed to get away. The following day before she could confront the appellant, he called her asking if PW10 was her son. The appellant told her that he heard that she was planning to report him to the Police and he pleaded with her not report the matter to the Police because what PW10 told her was a lie. She stated that she informed the mothers to PW3, PW5 and PW6 and they confronted the appellant. He admitted having sodomised with the children with the exception of PW10 and pleaded to settle the matter without involving the Police. He was taken to the Police by the neighbourhood watch members.

2.14 PW8, was the mother to PW5 and the appellant's sister in law. She stated that PW5 was living with the appellant but left the appellant's place without disclosing what had transpired. She testified that PW7 reported that her son had been sodomised. That PW5 explained to her what the appellant did to him and his friends. She and PW7 in the company of PW5 confronted the appellant about the incident and later reported the matter

to the Police. PW5 was issued with a medical report consistent with the incidence of sodomy.

2.15 PW9 was the mother to PW6. She testified that on 27th May, 2021, she met with PW7 (the mother to PW10). She informed her that the appellant had been sodomizing her son so they confronted the appellant. He admitted to having committed the offence but pleaded with them not to report the matter to the Police. According to PW9 her son (PW6) confirmed that the appellant sodomised him. That she and the other mothers to the victims reported the matter to the Police and her son was issued with a medical report. The report showed that the findings were consistent with the report of sodomy.

2.16 PW10's evidence was that on 26th May, 2021, he was passing by the appellant's house when the appellant called him so that he could send him. He told him to enter the house. Once they were in the house he told him to take off his clothes and told that he would give him K20 if he allowed him to have sexual intercourse with him. PW10 asked the appellant if he could go and urinate. When he was allowed, he went out and ran home. He told his sister what the appellant intended to do. They later went to PW6's house and reported the matter to the Police.

2.17 PW11's evidence was that she received four complaints relating to the subject offence from four parents who complained on behalf of the victims. She interviewed the minor victims and the appellant whom they identified as the perpetrator. She interviewed the appellant under warn and caution and he gave a free and voluntary reply denying the allegations. The appellant was later charged with the subject offence.

2.18 In his defence, the appellant denied having committed the subject offence. He stated that the victims went to his house between April 2021 and May 2021 because they were his customers as a scrap metal dealer. He refused to buy scrap from them when they were sent by their mothers. He stated that in April 2021, the victims went back and offered to sell him iron sheets but he refused. When he realized that he had dropped his money, he asked the victims if they had picked it but they refused. He reported the victims to the neighbourhood watch and banned them from going to his house. On 26th May 2021 when he returned home, he found a group of people who accused him of having committed the subject offence. He was apprehended and taken to the Police.

3.0 CONSIDERATION OF THE MATTER AND VERDICT OF THE SUBORDINATE COURT

3.1 The learned trial Magistrate found the appellant guilty of unnatural offences in all the counts. The trial Court found that the accused did not deny that the victims were at his house during the material period. The court opined the evidence of the victims was consistent with the medical reports and the identity of the appellant was proper. He was accordingly convicted of the subject offences.

3.2 The appellant was sentenced to 35 years imprisonment with Hard Labour by Lady Justice Lombe Phiri.

4.0 THE APPEAL

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

1. ***The learned trial Court erred in law and fact when it convicted the appellant on uncorroborated evidence of identity.***
2. ***The learned trial Court erred in law and fact when it sentenced the appellant to 35 years imprisonment despite being a first offender.***
3. ***The learned trial Court erred when it accepted and considered the evidence of PW3 being a child of tender age, whose evidence was accepted after a defective voire dire.***

5.0 APPELLANT'S HEADS OF ARGUMENT

5.1 In support of ground one, Counsel for the appellant submitted that there was no corroboration of the identity of the appellant as the perpetrator of the offences in order to eliminate the dangers of false implication. That since PW1, PW3, PW5 and PW6 were children of tender age, their evidence ought to have been corroborated. For this position, Counsel relied on the cases of ***Emmanuel Phiri vs The People***[1] and ***Bernard Chisha vs The People.***[2]

5.2 It was submitted in support of ground two that the sentence of 35 years imprisonment with hard labour was harsh because the appellant was a first offender who was entitled to leniency. In relying on the case of ***Alubisho vs The People,***[3] it was submitted that the sentence should come to this Court with a sense of shock.

5.3 In support of ground three, it was submitted that the *voire dires* that were conducted in respect of PW1, PW3, PW5 and PW6 who were children of tender years, were defective. It was argued that the ***Juveniles Act*** provides that in its Ruling on the *voire dire*, a Court must indicate that the child witness is possessed of sufficient intelligence and understands the duty of speaking the truth. That in the present case, the trial Court

simply found that the child witnesses understood the significance of telling the truth and possessed sufficient intelligence to be accorded the opportunity to give evidence. In relying on the case of ***Goba vs The People,***[4] it was submitted that the evidence of the child witnesses should be discounted. Counsel argued that since the prosecution evidence rested on this evidence, the conviction cannot be upheld. We were urged to allow the appeal and quash the convictions.

6.0 RESPONDENT'S HEADS OF ARGUMENT

6.1 The respondent filed heads of argument on 9 January, 2025.

6.2 Responding to ground one, it was submitted that there was evidence that PW1 knew the appellant and that the evidence of PW1 to the effect that he was sodomised was corroborated by the medical report, in which the doctor found that PW1 had healed lacerations at 6 O'clock, which proved that PW1 was sodomised.

6.3 The evidence of PW2 was that he was sodomised by the appellant and he went on to identify him. The evidence of PW3 was that he, in the company of his friends PW1, PW5 and PW6 went to the appellant's house at his invitation and that

he was sodomised by the appellant. It was submitted that the evidence of PW3 was supported by the medical report, P2, which shows that he was sodomised.

6.4 The evidence of PW5 was that he was sodomised repeatedly for over two weeks as he shared a bedroom with the appellant during that period. It was submitted that the evidence of PW5 was corroborated by the medical report exhibit P3 which showed that PW5 was sodomised.

6.5 The evidence of PW6 was that he was sodomised by the appellant at his house and that he gave him K20 afterwards. It was submitted that the evidence of PW6 was corroborated by the medical report P4. It was argued that the appellant admitted that he sodomised PW3 and PW5 when he was questioned by the neighbourhood watch members.

6.6 It was contended that PW1, PW3, PW5 and PW6 properly identified the appellant, a person that they knew well as he was also PW5's uncle and they sold scrap metal to him. We were urged to dismiss the first ground of appeal for lack of merit.

6.7 Responding to ground two, it was submitted that the lower court was on firm ground when it sentenced the appellant to thirty five years imprisonment with hard labour, taking into

account the ages of PW1, PW3, PW5 and PW6 who he sodomised. It was argued that the appellant betrayed the trust that was accorded to him especially in the case of PW5 who was living with him at the time when he was sodomised. We were urged to dismiss the second ground of appeal for lack of merit.

6.8 Responding to ground three, it was submitted that the *voire dires* that were conducted were properly done and were not defective. It was argued that the requirement of the law regarding the manner in which *voire dires* are conducted was met. We were urged to dismiss the appeal for lack of merit.

7.0 CONSIDERATION OF THE APPEAL 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 and the respondent.

7.2 This appeal raises the following three issues: firstly, whether the evidence of the child witnesses ought to be discounted following a defective Ruling on the *voire dire;* secondly, whether the appellant was convicted on uncorroborated evidence of identity; and thirdly whether the sentence imposed on the appellant was appropriate.

7.3 We will consider ground three first. On the issue whether the evidence of the child witnesses should be discounted because of the defective Ruling on the *voire dire* conducted by the trial Court, Section 122 of the repealed ***Juveniles Act Chapter 53 of the Laws of Zambia*** which was applicable at the material time provided that the Court shall receive the evidence of a child if it is satisfied that the child possesses sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

7.4 In the case of ***Daka vs The People,***[5] the Supreme held as follows in relation to ***Section 122 of the Juveniles Act:***

> ***"In the instant case, the voire dire in contention is found at pages 10 and 11 of the record of proceedings. 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."***

7.5 The Supreme Court guided that the Court ought to specifically state that the child has *sufficient intelligence* and *understands the duty of speaking the truth.*

7.6 We have perused the Ruling made by the trial Court on the *voire dires* at pages 5, 9, 15, 20 and 29 of the record of appeal. The trial Court found that the child witnesses possessed "*enough intelligence to be accorded reception to give evidence on oath and understood the significance of telling the truth*"

7.7 It is our considered view that having enough intelligence is synonymous with having sufficient intelligence. Further, the trial Court specifically stated that the child witnesses understood the significance of telling the truth. This is synonymous with understanding the importance of telling the truth. We are of the view that the *voire dires* were properly conducted. We are of the view that ground three lacks merit and it fails.

7.8 The second issue, in ground one, whether the appellant was convicted on uncorroborated evidence of identity. It is trite law 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 complaint and false implication. This was held in the case of ***Emmanuel Phiri vs The People (supra).***

7.9 The other evidence linking the appellant to the commission of the offence came from PW2, PW4, PW7, PW8 and PW9.

According to these witnesses they all confronted the appellant concerning the allegations and he admitted having had sexual intercourse with the victims but denied having had sexual intercourse with PW10. Further, the evidence of PW7 was that her son (PW10) arrived home panting after having escaped the appellant who tried to sodomise him and his friends. She stated further that the appellant called her the following day and informed her that he was aware that she intended to report him to the Police. That he pleaded with her not to report the matter to the Police. PW7 informed the mothers of PW5, PW6 and PW3 (the other victims) and they confronted the appellant. He did not rebut this evidence either during cross examination or when he proffered his defence.

7.10 It is therefore our considered view that the evidence of the identity of the appellant was sufficiently corroborated by the unchallenged evidence that the appellant admitted sodomising the four boys.

7.11 With regard to the third issue, in ground two, the appellant contends that the sentence of 35 years imprisonment imposed on him was too harsh. The case of ***Jutronich, Schutte and Lukin vs The People***[6] guides that-

"In dealing with appeals against sentence the appellate court should ask itself these three questions:

(1) Is the sentence wrong in principle?

(2) Is the sentence so manifestly excessive as to induce state of shock?

(3) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?"

7.12 It is our considered view that a sentence of 35 years imprisonment relating to four counts of unnatural offences does not induce a state of shock.

7.13 The appellant lured the four boys on the pretext of buying scrap metal from them. The number of boys he sodomised is an aggravating factor that warranted the imposition of a severe sentence.

7.14 The ground of appeal against sentence therefore fails.

7.15 The appeal is accordingly dismissed and the sentences are upheld.

C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

P. C. M. NGULUBE
COURT OF APPEAL JUDGE

Y. CHEMBE
COURT OF APPEAL JUDGE