

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

Appeal No. 110/2024

BETWEEN:

JOSIAS MTONGA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga, DJP, Majula and Muzenga JJA
On 17th March 2026 and 25th March 2026

For the Appellant: Mrs. C. Nalungwe-Makodza, Legal Aid Counsel,
Legal Aid Board

For the Respondent: Mr. L. Kasungu State Advocate, National
Prosecution Authority

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Emmanuel Phiri v. The People (1982) ZR 77**
- 2. Ivess Mukonde v. The People – SCZ Judgment No. 11 of 2011**
- 3. George Misupi v. The People (1978) ZR 271**
- 4. Yokoniya Mwale v. The People – SCZ Appeal No. 285 of 2014**
- 5. Nalumino Nalungwana v. The People (1986) ZR 28 (SC)**
- 6. Nsofu v. The People (1977) ZR 77**

7. **Davis Chiyengwa Magoma v. The People – SCZ Judgment No. 217 of 2015**
8. **Matthews Mumba v. The People – CAZ Appeal No. 163 of 2017**
9. **Andrew Mwenya v. The People – SCZ Judgment No. 640 of 2014**

Statutes Referred to:

1. **Penal Code, Chapter 87 of the Laws of Zambia.**
2. **Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 The appellant was charged with one count of the offence of defilement contrary to **Section 138(1) of the Penal Code Chapter 87 of the Laws of Zambia**. He was subsequently sentenced to 25 years imprisonment with hard labour by Limbani, J.

1.2 The particulars of the offence alleged that the appellant on the 5th day of November 2023 at Kapiri Mposhi in the Kapiri Mposhi District of the Central Province of the Republic of Zambia, had unlawful carnal knowledge of a child under the age of sixteen (16) years.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The evidence of five (5) prosecution witnesses secured the appellant's conviction. The prosecution evidence summarised that PW1 who had three children, the oldest being the prosecutrix aged

nine (9), got married to the appellant in October 2023 who also had a male child, aged five (5). The marital bliss only lasted for about two weeks as by 28th October 2023, PW1 left the appellant when he took lobola to his first wife. According PW1, when she and her children left the appellant's house on the 28th October 2023, after being angered by the appellant reconciling with his first wife, they never returned to his home. According to the prosecutrix, on the 5th November 2023, two of the prosecutrix's siblings were sleeping on the couch while the prosecutrix also slept in another room in the evening. The appellant woke the prosecutrix's siblings and sent them to go and buy jiggies. He then went to the prosecutrix and removed his trousers and underwear and the prosecutrix's underwear, after which he put his manhood where she urinates from (the vagina).

- 2.2 The prosecutrix was in pain and shouted but the appellant held her mouth and threatened to kill her and told her he would continue sleeping with her whenever her mother is away. When she checked herself, she saw blood and whitish things on her private parts which she washed off and went to sleep.
- 2.3 On 15th November 2023, around 07:00 hours, PW1 was washing clothes for the children when she noticed blood and whitish stuff on

the prosecutrix's underwear. When asked, the prosecutrix said that she had sores on her vagina. She took the prosecutrix to her landlady who examined the prosecutrix's private parts and found sores to which the prosecutrix told her that it was her father, the appellant who had carnal knowledge with her when PW1 was at the market around 19:00 hours and threatened to kill her if she told anyone. The matter was reported to the police where a medical report was issued which they took to the clinic.

- 2.4 A medical examination conducted by PW4, a registered nurse on 16th November 2023, showed that there was penetration and many pus cells on the PW2's vagina. A test of the pus sample revealed that there was a sexually transmitted disease. The medical report revealed a perforated hymen, a finding consistent with the allegations against the appellant and the absence of syphilis.
- 2.5 All the other witnesses largely repeated what PW1 (wife to the appellant) and PW2 (prosecutrix) said.
- 2.6 This marked the end of the prosecution evidence. The appellant was found with a case to answer and put on his defence.

3.0 THE DEFENCE

- 3.1 In his defence, the appellant called two witnesses, he told the court that he married PW1 on 5th September 2023 and five days after

marrying her, he discovered that the children had sores and PW2 had them on her legs and he told their landlord about it. He discovered that they were not staying well with PW1 so he went back to his former wife whom he had differed with. On 28th October 2023, PW1 was annoyed that the appellant was going back to his former wife, she went and collected her things in the night, insulted the appellant and threatened to kill him and take him to court for wanting charms from her child. After PW1 left, the appellant did not see her until on 16th November 2023 when people went to his work place telling him that they needed to discuss issues of marriage. He was taken to the police on allegations of defiling a child.

- 3.2 The gist of DW3's evidence (the appellant's landlord) was that the appellant was his tenant for 7 months and that in the 6th month, he had differences with his wife, who then left. 2 weeks later the appellant informed him that he had found another wife (PW1). Between 15th to 20th October 2023 the new wife (PW1) came with three children. Sometime around 20th October 2023 PW1 approached him saying she had discovered that the appellant still goes to his former wife. On the 28th October 2023 PW1 and her family got the property from the house and left. Two days later,

the first wife returned to the appellant's house. He stated that PW1 at the time of leaving never said that her daughter had been defiled.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 After careful consideration of the evidence, the trial court found that the appellant had carnal knowledge of the child and that throughout the proceedings there was no evidence suggesting otherwise, other than the appellant being the person who committed the offence. The trial court found corroboration in the presence of blood and white stuff on the pant and the medical evidence proffered by the nurse (PW4). The trial court found that the State had successfully discharged its burden of proving the appellant's guilt.

5.0 GROUNDS OF APPEAL

5.1 Disconsolate with the conviction, the appellant launched the present appeal fronting three grounds structured as follows:

- 1) The learned trial court erred in law and in fact in convicting the appellant in the absence of corroborative evidence to exclude the danger of false complaint and false implication.**
- 2) The learned trial court erred in law and in fact when it failed to make a finding into PW1's evidence to exclude the dangers of false implication.**

3) The honourable trial court misdirected herself when she declared DW2 an incompetent witness for being the appellant's spouse.

6.0 APPELLANT'S ARGUMENTS

- 6.1 In ground one, learned counsel for the appellant Mrs. Nalungwe-Makodza submitted that in sexual offences corroboration was required to prove both the commission of the offence and the identity of the offender as settled in **Emmanuel Phiri v. The People**.¹ It was argued that there being no independent witness who saw the prosecutrix being defiled, the identity of the offender rested on her word against the appellant's.
- 6.2 Referring to the case of **Ivess Mukonde v. The People**,² she submitted that the circumstances said to establish the corroboration of opportunity show nothing odd about the appellant being home with the prosecutrix, his step daughter and that more evidence was required to corroborate that he sent away the siblings to go and buy jiggies.
- 6.3 It was argued that the prosecution evidence did not adequately make the opportunity in this case suspicious and corroborative and the conviction should thus be overturned for being unsafe.

6.4 In ground two, it was argued that the accusations against the appellant were because he got back with his ex-wife and that the evidence was clear that PW1 and her father made threats to the appellant for deciding to go back to his ex-wife. That this gives PW1 a motive to falsely implicate the appellant, raising duty for the court to satisfy itself that the possibility of the appellant being falsely implicated was ruled out. We were referred to the case of **George Misupi v. The People**³ and **Yokoniya Mwale v. The People**.⁴

6.5 It was contended that the trial court's reliance on PW1's evidence to corroborate the prosecutrix's evidence was therefore a misdirection.

6.6 In ground three, counsel referred to **Section 151(1) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia** which provides for the competence of spouses charged with an offence as follows:

“(1) In any inquiry or trial, the wife or husband of the person charged shall be a competent witness for the prosecution or defence without the consent of such person

(a) in any case where the wife or husband of a person charged may, under any law in force for the time being, be called as a witness without the consent of such person;

- (b) in any case where such person is charged with an offence under Chapter XV of the Penal Code or with bigamy;
- (c) in any case where such person is charged in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them.”

6.7 Further relying on the case of **Nalumino Nalungwana v. The People**⁶ where the apex court held that evidence of an appellant’s wife is not admissible against him on a criminal charge, it was submitted that the trial court misinterpreted the facts of this case and DW2 having given evidence in favour of the appellant makes her a competent witness for the defence.

6.8 We were urged to uphold the appeal.

7.0 RESPONDENT’S ARGUMENTS

7.1 The respondent argued grounds one and two together. Learned counsel for the respondent, Mr. Kasungu referred us to the case of **Emmanuel Phiri v. The People** *supra* and **Nsofu v. The People**⁷ in arguing that contrary to the appellant’s argument that there was no corroborative evidence that removed the danger of false implication, the appellant going home, leaving PW1 at the market,

coupled with sending the siblings to the prosecutrix to buy jiggies, were such that the two amounted to corroboration. It was submitted that this evidence corroborated that of PW2 ensuring that the dangers of false implication against the appellant were excluded.

- 7.2 It was argued that the evidence as highlighted revealed that **"something more,"** which is that no other than the appellant could have had the opportunity to commit the offence. He referred to the case of **Davis Chiyengwa Magoma v. The People⁸** and **Matthews Mumba v. The People⁹** for this proposition.
- 7.3 Learned counsel referred us to the case of **Andrew Mwenya v. The People¹⁰** where it was held that relationships do not automatically create an interest to serve on the part of the witness without establishing particular circumstances which could have motivated such a witness. Further relying on **Yokoniya Mwale supra**, it was contended that the evidence did not disclose any motive, bias or interest of her own to serve on the part of PW1 and that the argument by counsel for the appellant on this aspect was unsustainable. It was contended that the trial court eliminated the dangers of false complaint and implication by warning itself on pages 15 to 17 of the record of appeal and was on firm ground to convict the appellant and sentence him to 25 years imprisonment.

- 7.4 In ground three, counsel for the respondent adverted to the case of **George Msupi** *supra* in arguing that the evidence was clear that DW2 did not witness the incidence and that she did not know what happened and when she reconciled with the appellant, she was ready to do anything to defend him, rendering her to be a witness with interest of her own to serve.
- 7.5 Counsel however conceded to the appellant's argument that the trial court erred when it declared DW2 an incompetent witness for being an appellant's spouse and on the basis that she was a witness with interest of her own to serve.
- 7.6 Mr. Kasungu submitted that the appellant's argument that PW2 could have been defiled by someone else other than the appellant when she left was misplaced, as it was not backed by any evidence on the record of appeal. It was contended that if this court was to consider DW2's evidence, less weight should be attached to it as she did not witness the incidence and was a witness with interest of her own to serve.
- 7.7 In sum, we were urged to dismiss the appeal and uphold the lower court's conviction and sentence.

8.0 THE HEARING

8.1 At the hearing of the appeal, the learned counsel for the appellant, Mrs. Nalungwe-Makodza, placed full reliance on the documents filed. On behalf of the State, Mr. Kasungu, informed the Court that the State would equally rely on the heads of argument filed before the Court.

9.0 DECISION OF THE COURT

9.1 We have carefully considered the record of appeal and the written and oral submissions made by counsel on both sides and the impugned judgment of the court below. As we see it, the core issue in this appeal, brought out in ground one, assails the conviction of the appellant in the absence of corroborative evidence to exclude the danger of false implication. We shall thus consider it first.

9.2 The undisputable evidence is that the prosecutrix's mother, PW1 left the appellant's house on the 28th October 2023 with her children, who included the prosecutrix, after being angry with the appellant for going back to his wife. The evidence is that from the time they left, they never returned. The defilement is alleged to have occurred on the 5th November 2023 and the blood-stained pant with sperms was discovered on the 15th November 2023. The medical examination as conducted by PW4 revealed it was probable that the

prosecutrix had a sexual encounter about seven days before the date the examination was conducted. The findings were consistent with the allegation. Whilst this evidence corroborates the commission of the offence, the same cannot be said as to the identity of the offender.

9.3 The only evidence as to the identity of the offender is that given by the prosecutrix. There is lack of evidence of any opportunity or something more to rule out the possibility of false implication as envisaged in **Nsofu v. The People** *supra*. As already alluded to, the uncontroverted evidence is that after PW1 learnt of the appellant's attempts to reconcile with his first wife and payment of her bride price, she left the home of the appellant with her children on 28th October 2023 and never returned. Even at the time the defilement is alleged to have occurred on 5th November, PW1 and the prosecutrix were not staying with the appellant. We are alive to the fact that mere opportunity of itself is not sufficient, in this case, the appellant never had even mere opportunity to commit the crime.

9.4 We do not agree with the argument by the State that PW1's evidence provided corroboration because her evidence was largely

based on what she was told by the prosecutrix. Therefore, this cannot legally provide corroboration.

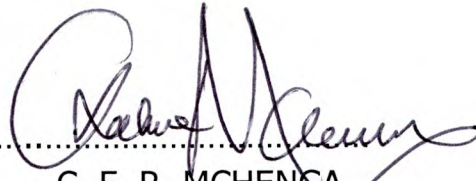
- 9.5 We note that according to the medical examination, the prosecutrix was found with many pus cells indicative of a sexually transmitted disease whereas the sample for the appellant's urine was found with abnormal pus cells, an indication of bacterial infection. The amount of pus cells in the appellant's urine sample indicates presence of bacteria and possible bacterial infection which infection may be sexually transmitted or urinary tract infection. The test did not go further to clarify which bacterial infection was present in the urine sample.
- 9.6 We hold the view that the medical examination therefore fell short and was not conclusive enough to draw an inference that the infection the prosecutrix was found with is the same infection that the appellant had. In the circumstances, the medical evidence is not helpful to the case for the prosecution. We agree with learned counsel for the appellant that there was no corroboration as to the identity of the offender.
- 9.7 We find, therefore, that there was no corroboration as to the identity of the offender to effectively rule out the danger of false implication. Consequently, we find merit in the appeal. Had the learned trial

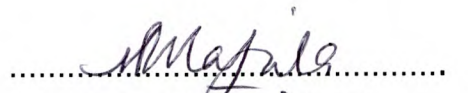
court properly directed itself, it would no doubt have reached the verdict as ours.

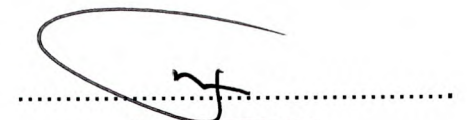
9.8 We find it unnecessary to consider grounds two and three.

10.0 CONCLUSION

10.1 Having found merit in the appeal, we allow it. The conviction and sentence are quashed. The appellant is acquitted and set at liberty forthwith.


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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


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B. M. MAJULA
COURT OF APPEAL JUDGE


.....
K. MUZENGA
COURT OF APPEAL JUDGE