

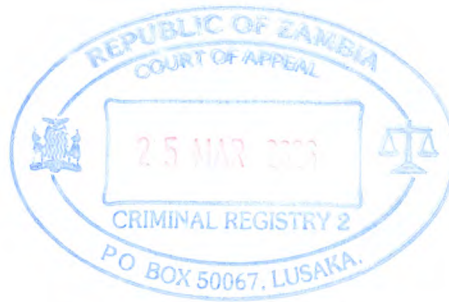
IN THE COURT OF APPEAL OF ZAMBIA APPEAL No.95/2024
HOLDEN AT LUSAKA AND NDOLA
(CRIMINAL JURISDICTION)

BETWEEN:

SANDRA MWALE

AND

THE PEOPLE



APPELLANT

RESPONDENT

Coram: Mchenga DJP, Majula and Muzenga JJA

On 17th February 2026 and 25th March, 2026

**For the Appellant: Mrs. M.N.E Zulu-Gondwe, National Legal Aid
Clinic for Women**

**for the Respondent: Mrs. S. Simwaka, Deputy Chief State
Advocate, National Prosecution Authority**

J U D G M E N T

Mchenga DJP, delivered the judgment of the court

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Children's Code Act, No 12 of 2022

Cases referred to:

1. Emmanuel Phiri v. The People [1982] Z.R. 77
2. Dorothy Mutale and Another v. The People [1995–1997] Z.R.

102

3. David Zulu v. The People (1977) Z.R. 151
4. Christopher Nonde Lushinga v. The People S.C.Z Judgment No. 15 of 2011

1.0. INTRODUCTION

- 1.1. The appellant appeared before the Subordinate Court (Hon. Sikwangala), charged with the offence of defilement of a child, contrary to **Section 138(1) of the Penal Code**.
- 1.2. She denied the charge and the matter proceed to trial.
- 1.3. At the end of the trial, she was found guilty of committing the offence and committed to the High Court for sentencing.
- 1.4. In the High Court (Mulwanda, J.), she was sentenced to 16 years, simple imprisonment.
- 1.5. She has appealed against the conviction.

2.0. CASE BEFORE THE TRIAL COURT

- 2.1. On 14th June 2022, a 7 years old boy returned from school, to a house in Ndola's Lubuto Compound, where he lived with his aunt and grandmother.
- 2.2. Although he should have returned home around 12:00 hours, he only showed up at about 16:00 hours. When his aunt asked him why he had returned late, the boy initially claimed that he had been playing at a nearby field. But when he was told that

his grandmother had been to the field looking for him and not seen him, he went mute.

- 2.3.** The boy was made to remain outside the house until 19:00 hours, because he refused to say where he had been.
- 2.4.** When he was called into the house, the boy asked for food, but his aunt told him that he was not going to be given any food until he disclosed where he had been. The boy did not say anything.
- 2.5.** He only revealed where he had been after being caned by his aunt.
- 2.6.** He told her and his grandmother, that he had been at the appellant's house and that whilst there, she took him into her bedroom. She undressed him, and caused him to have sexual intercourse with her.
- 2.7.** When they checked the boy's penis, the foreskin was pulled back and 'reddish in colour'. The boy told them that he was experiencing pain when urinating.
- 2.8.** A report was lodged with the police, on the same night and the boy led the police to the appellant's house. The appellant was apprehended and detained.

- 2.9.** The following day, at about 12:00 hours, the boy was taken to the hospital. He was examined by a doctor who observed a loose foreskin on the boy's penis and discolouration of its tip. There was also a 'minimal' discharge at the base of the tip.
- 2.10.** The doctor opined that there several possible causes for the condition, which could include sexual intercourse.
- 2.11.** In her defence, the appellant denied having sexual intercourse with the boy. She said the boy, who was her son's friend, had visited the house on two occasions. On both occasions her husband was home.
- 2.12.** The appellant called her husband, a person with mobility impairment, as her witness. The husband confirmed the boy's visit on the day the offence is alleged to have been committed. He said the boy did not go into the bedroom because he was watching TV in the sitting room and he would have seen him.
- 2.13.** The court moved to the house and it was observed that the doors to the two bedrooms, opened from the sitting room.
- 2.14.** The appellant also called her son, the boy's friend. He told the trial Magistrate that his friend came home on the material day, but they did not enter his parents' bedroom. He also told the trial Magistrate that at some point that day, they played (him

and the boy) with their private parts, inserting them in a metal rod.

3.0. FINDINGS BY THE TRIAL MAGISTRATE

- 3.1.** The trial Magistrate took the view that the case against the appellant was circumstantial because no one saw her commit the offence.
- 3.2.** The trial Magistrate found that the boy's behaviour during the trial, was a pointer to the fact that he had been sexually abused; he did not want to testify in the presence of the appellant, and he would fall asleep while giving evidence.
- 3.3.** She accepted the boy's evidence, that he was taken into the appellant's bedroom, after finding inconsistencies in the evidence of the appellant and her husband, on what transpired when the boy visited their house.
- 3.4.** On the other hand, the boy had been consistent on the incident to her aunt, grandmother and the police. The consistency extended to the colour of the pants that the appellant was wearing at the time the offence was committed.
- 3.5.** The trial Magistrate concluded that the boy's evidence required corroboration. She found that it was competent for her to convict the appellant on the uncorroborated evidence of the boy

because she found that there was no reason why the boy could have falsely implicated her.

4.0. SENTENCING

4.1. In the High Court, a sentence of 16 years imprisonment was imposed on the appellant, after the sentencing Judge noted that she was a first offender.

5.0. GROUND OF APPEAL AND ARGUMENTS

5.1. Although four grounds have been advanced in support of the appeal, it is our view that the issue raised by this appeal is one of corroboration; was the evidence by the boy, claiming that he had been defiled by the appellant, corroborated?

5.2. On behalf of the appellant, Mrs. Gondwe Zulu, referred to cases including the case of **Emmanuel Phiri v. The People**¹ and submitted that defilement being a sexual offence, the boy's evidence that he was defiled, and his evidence incriminating the appellant, required corroboration.

5.3. She submitted that the conviction cannot stand because that evidence not corroborated.

5.4. She also referred to the case **Dorothy Mutale and Another v. The People**² and pointed out the medical evidence was not corroborative because there was a possibility that the injures

observed on the boy may been as a result of something other than sexual intercourse.

5.5. Mr. Simwaka's response was that the medical report was corroborative of the sexual act. As for the identity of the offender, he submitted that the conviction should stand because the trial Magistrate ruled out the danger of false incrimination.

6.0. CONSIDERATION OF APPEAL AND DECISION OF THE COURT

6.1. Before we deal with the issue raised by this appeal, it is necessary that we say something about the trial Magistrate's finding that the case against the appellant was founded on circumstantial evidence.

6.2. In the case of **David Zulu v. The People**³, the Supreme Court set out what amounts to circumstantial evidence, in the following manner:

It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.

- 6.3.** From this decision, it is clear that a case of defilement is anchored on circumstantial evidence where the child does not identify the person who defiled him, or no eye witness testifies to having seen the offender defile the child.
- 6.4.** In this case, the child the appellant is alleged to have defiled, identified the appellant in court as the person who made him have sexual intercourse with her and that evidence was accepted by the trial Magistrate.
- 6.5.** That being the case, the trial Magistrate erred when she found that the case against the appellant was founded on circumstantial evidence, because there was direct evidence.
- 6.6.** Reverting to the question of corroboration, the starting point is **Section 78(9) of the Children's Code Act**. It provides that the evidence of a child may require corroboration because of the circumstances of the case or because of the nature of the offence.
- 6.7. Section 140 of the Penal Code** makes it an offence for any person to procure a child or any other person for the purposes of prostitution. That provision goes on to state that a person

cannot be convicted on the evidence of one witness unless it is corroborated.

- 6.8.** In the case of defilement, there is no statutory requirement for corroboration, but it has been the practice to look out for corroborative evidence because it is a sexual offence.
- 6.9.** Our understanding of **Section 78(9) of the Children's Code Act**, is that it has not changed the law where there is a statutory requirement for corroboration, as is the case for the offence of procurement under **Section 140 of the Penal Code** or corroboration is required as a matter of practice, as in the case of defilement.
- 6.10.** What that provision has changed, is the 'automatic' requirement for corroboration where the witness is a child.
- 6.11.** In other words, the court should not look for corroboration merely because the witness is a child, it is the circumstances of the case that should determine whether the evidence of a particular child witness should be corroborated.
- 6.12.** It follows, that where a court is considering the evidence of a child in a defilement case, it must first consider the question whether the evidence of that child requires corroboration

because of the circumstances in which the offence was committed.

- 6.13.** In our view, where the court finds that the evidence does not require corroboration, it is sufficient, to indicate that the evidence does not require corroboration because it was clear and credible; or because it was not shaken in cross-examination.
- 6.14.** Thereafter, the court must consider the requirement of corroboration since defilement is a sexual offence.
- 6.15.** Where a court finds that the evidence of a child requires corroboration because of the circumstances of the case, the court cannot then proceed to exclude the requirement for corroboration on the basis that there is no motive for the child to falsely incriminate.
- 6.16.** In this case, the trial Magistrate opined that the boy's evidence required corroboration without ascribing a reason. Notwithstanding, it is our view that had the trial Magistrate properly assessed the circumstances in which the boy incriminated the appellant, she would still have come to the conclusion that his evidence required corroboration.

6.17. The boy only named the appellant after being beaten. He had earlier refused to say anything even after being kept outside the house for hours and being denied food. These circumstances 'compromised' his evidence and made it necessary that it corroborated.

6.18. Having found that corroborative evidence was required, the question that follows is whether the boy's evidence was corroborated.

6.19. In the case of **Christopher Nonde Lushinga v. The People⁴**, corroboration was described as follows:

It simply means evidence which confirms the commission of the offence and the identity of the perpetrator of that offence. Put differently, corroboration means supporting or confirming evidence.

6.20. Since corroborative evidence is supportive or confirming evidence, it need not independently prove an issue. This being the case, it is our view that the medical report was corroborative of the sexual act. It confirmed the fact that the boy's penis was exposed to some 'activity', be it unknown, which could have included sexual activity.

6.21. The principle in the case of **Dorothy Mutale and Another v. The People²** is not applicable to this case because proof of the

sexual act was not only based on inferences drawn on the evidence, but direct evidence from a child.

6.22. We will now deal with corroboration of the identity of the appellant.

6.23. Our examination of the record of proceedings does not point at any corroborative evidence.

6.24. The trial Magistrate accepted the boy's evidence after finding that it was consistent and that there was no reason why he could falsely incriminate the appellant.

6.25. The fact that a witness' evidence has been consistent cannot be corroborative, however, it may enhance the credibility of a witness' evidence. As it turned out, the appellant who was apprehended on the day the offence is alleged to have been committed, was not checked to confirm the colour of pants she was wearing.

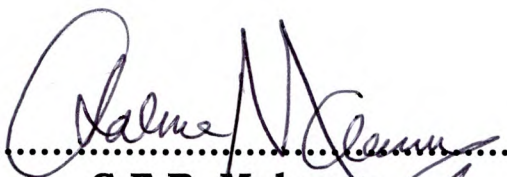
6.26. In any case, as we pointed out earlier, where a court finds that the evidence of a child requires corroboration because of the circumstances of the case, the court cannot then proceed to rule

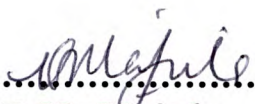
out the requirement because of there being no danger of false incrimination.

7.0. VERDICT

7.1. In the absence of evidence corroborating the boy's evidence identifying the appellant as the offender, we find that the appellant's conviction is not safe.

7.2. We set aside the conviction and acquit the appellant.


.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


.....
B.M. Majula
COURT OF APPEAL JUDGE


.....
K. Muzenga
COURT OF APPEAL JUDGE