IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 44/2017**
HOLDEN AT LUSAKA
(*Criminal Jurisdiction*)

BETWEEN:

ELIAS PHIRI	**APPELLANT**
AND	
THE PEOPLE	**RESPONDENT**

Coram: **Chisanga JP, Chishimba, Sichinga, JJA**

On the 9th day of August, 2017

For the Appellant: *Mr. S. Mweemba – Legal Aid Counsel*

For the Respondent: *Mrs. C.L. Phiri – Deputy Chief State Advocate*

J U D G M E N T

SICHINGA, JA, delivered the Judgment of the Court

Cases referred to:

1. *Mwaba v. The People (1974) ZR 333*
2. *Gift Mulonda v. The People (2004) ZR 135*
3. *Nsofu v. The People (1973) ZR 287*
4. *Emmanuel Phiri v. The People (1982) ZR 77*
5. *Peter Yotamu Haamenda v. The People (1977) ZR 184*
6. *Ilunga Kabala and Another v. The People (1981) ZR 102*
7. *Martin Nc'ube v. The People CAZ Appeal No. 22 of 2017*

Legislation referred to:

1. *The Penal Code Cap 87 of the Laws of Zambia*
2. *The Juveniles Act, Cap 53 of the Laws of Zambia*

The appellant was charged with, and convicted by the Subordinate Court of the First class on one count of defilement of a child Contrary to Section 138 (1) of the Penal Code, Chapter 87 of the Laws of Zambia, as read with Acts No. 15 of 2005 and No. 2 of 2011.

The particulars of the offence were that the appellant, on the 4th day of December, 2015 at Chisamba in the Chisamba District of the Central Province of the Republic of Zambia, had unlawful carnal knowledge of a child. The High Court then sentenced the appellant to twenty-five (25) years imprisonment with hard labour.

The appellant now appeals against conviction and sentence.

The case for the prosecution rested on the evidence of PW1, the mother to the prosecutrix; PW2, the sister to the prosecutrix; PW3, the prosecutrix; PW4, the medical doctor; and PW5, the arresting

officer. The facts, in brief, were that on 4th December, 2015 at Chisamba, the prosecutrix had been sent by PW1 to the local shops to buy washing soap. The prosecutrix had gone to buy soap and Elias called her to go and collect powder at his shop. The prosecutrix went to the appellant's shop, and there he defiled her. He then let her go using the back door of the shop. PW1 reported the matter to the police upon which a medical examination was conducted which revealed that the prosecutrix had been defiled.

Under warn and caution recorded by PW5, the appellant denied the charge. In his defence, the appellant admitted that the prosecutrix came to his shop on the material day and time. He said she left his shop after asking for change for her K10 note, and she used the back door of the shop.

Upon considering the evidence, the trial court found that the appellant had unlawful carnal knowledge of the prosecutrix. The court found that the prosecutrix had positively identified the appellant and the latter admitted that the prosecutrix came to his shop at the material time. The trial court found the prosecutrix's

evidence to have been corroborated by PW4, the medical doctor, who examined her and found traces of spermatozoa and bruises on her private parts which had been caused by a forceful penetration. The trial court also found PW1's evidence that she had examined the prosecutrix's private parts and found semen, to be corroborative of the charge. The trial magistrate stated that the appellant neither had an alibi to explain why he closed his shop after the prosecutrix was defiled, nor an explanation why he went into hiding if he had not committed the offence.

The appellant has advanced two grounds of appeal as follows:-

1. ***The trial court misdirected itself in law when it convicted the appellant for the offence of defilement without explaining to him the statutory defence under Section 138(1) of the Penal Code; and***
2. ***The trial court misdirected itself in law and in fact when it convicted the appellant on insufficient and uncorroborated evidence.***

Counsel relied on the written heads of argument.

In support of the first ground of appeal, it is submitted that it is a legal requirement that the proviso to Section 138(1) of the Penal Code must be explained to an accused person facing a charge of defilement at an early stage of the proceedings. He submitted that the statutory defence was not explained to the appellant who was unrepresented at all stages of the proceedings. It is submitted that this case was a borderline case in terms of age in which the statutory defence should have been explained so as to enable the appellant conduct his cross-examination properly. He stated that the record shows at page 8 of the proceedings that the appellant attempted to raise the issue of the prosecutrix's age when the appellant put it to her that she had given birth before and that she had aborted before. It is submitted that the failure to explain the proviso to the appellant was an irregularity on the part of the trial court which failure prejudiced the appellant. He pointed out that PW4 who examined the prosecutrix testified that her hymen was not broken recently, and it could therefore be safely concluded that the prosecutrix had had sexual intercourse previously. The case of ***Mwaba v. The People***[1] was brought to our attention with the following holdings -

"(i) It is a rule of practice that where it appears that an unrepresented accused person may be intending to plead guilty to a charge of defilement the proviso to section 138 of the penal code should be explained to him;

(ii) Even where an accused person pleads not guilty it is desirable that the proviso be explained before plea, but certainly at an early stage in the proceedings, so that the accused may have the opportunity to direct his cross-examination of the prosecution witnesses to the question of the girl's age;

(iii) In a borderline case in terms of age, the failure to explain the statutory defence to an accused person is an irregularity."

To emphasise the point, counsel also referred us to the case of ***Gift Mulonda v. The People***[2] where the Supreme Court held that:

"It is a rule of practice that the proviso to section 138 of the Penal code should be explained to an accused person. Failure to explain the proviso is fatal."

On behalf of the people, the learned Deputy Chief State Advocate, Mrs. Phiri supported the conviction and the sentence.

In her oral submissions, she submitted that the gist of the argument in ground one was that the trial court did not read the proviso under section 138(1) of the Penal Code. She argued that the case of ***Mulonda (supra)*** was such that the effect of the omission of the proviso is not absolute, and the same must be applied on a case by case basis. It is submitted that the test to be applied when an omission of the proviso occurs appears in the case of ***Mwaba (supra)*** and that is the consideration whether an accused person was prejudiced by such irregularity. Counsel submits that the test was premised on the case of ***Nsofu v. The People***[3] where the Supreme Court held that:

> ***"4. For a defence under the proviso to succeed, an accused must satisfy the court (a) that he had reasonable cause to believe that the girl was of or above the age of sixteen years and also (b) that he did in fact believe this. The magistrate having found as a fact from his***

observation of the girls that no one could think that any one of them could be over the age of sixteen years, the defence under the proviso could not have succeeded and the appellant had not been prejudiced by the failure to explain it to him."

In the instant case, counsel contends that the appellant could not have been prejudiced by the failure to read the proviso. She submits that the appellant, in his testimony, recognized the prosecutrix as a child as he testified to the effect that on the material day a child came to his shop. It is further contended by counsel that the trial court at page J7 of its judgment observed the child to be young and of tender age.

According to Mrs. Phiri, going by the guidance in the case of ***Nsofu (supra)*** regarding the belief by an accused person of the age or perceived age of a prosecutrix, and further observation by a trial court, no prejudice could have occasioned in this case even though the proviso had not been read. Counsel submitted that ground one should fail.

On ground two, it is submitted on behalf of the appellant that the court below took a casual approach when it convicted the accused on insufficient evidence on record. It is contended that the offence of defilement is a serious offence requiring a high degree of proof before a trial court could feel safe to convict.

It is argued that the prosecutrix's evidence was insufficient and uncorroborated to result in a conviction. Further, it was submitted that it is settled law that in sexual offences evidence of both the commission of the offence and the identity of the offender had to be corroborated, and that in the present case, only the prosecutrix gave evidence as to the identity of the accused. It was pointed out that the prosecutrix in her testimony did not talk of being grabbed and pushed to the ground, neither did she state that she was crying and her mouth was closed. Further, it is pointed out that she did not testify about experiencing pain on her anus as alleged by PW1, her mother. It is argued that PW1's evidence amounted to hearsay. It is further argued that in the face of these inconsistences in the evidence of PW1 and PW3 the trial court would not have arrived at a decision to convict the appellant for defilement.

We are further urged to consider that the prosecutrix was a suspect witness and as such the trial court ought to have considered her credibility. Had the complainant been considered a credible witness, then the court ought to have considered the issue of corroboration, which is a requirement as a matter of practice and law in sexual offences. The case of ***Emmanuel Phiri v. The People***[4] was cited where the Supreme Court held, inter alia, that:

> ***"In a sexual offence 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. Failure by the court to warn itself is a misdirection."***

It is submitted that the trial court did not consider that the prosecutrix was a suspect witness and as such her testimony required corroboration, and further that the failure by the court to warn itself was a misdirection.

It was also argued that the evidence of PW1 and PW2 could not corroborate the evidence of the prosecutrix as to the identity of the offender since they were merely told by PW3 and both are closely related to the prosecutrix. Therefore, they should be considered as witnesses who might have had a motive to serve. It is submitted that the failure to consider PW1, PW2 and PW3 as suspect witnesses was another misdirection on the part of the trial court.

It is contended that where corroboration is lacking as to the identity of the offender, the court could still convict provided there was '*something more*' (***Emmanuel Phiri (supra)*** refers). Counsel argues that on the facts of this case, it could not be said that there was '*something more*'.

It was submitted that the failure on the part of the prosecution to lead evidence of independent witnesses from the market place casts doubts on the prosecutrix's claim that she was defiled. That independent evidence of her distressed condition would have amounted to '*something more*'. Counsel contends that the failure on the part of the prosecution to bring independent witnesses

amounts to dereliction of duty. We are urged to consider the case of ***Peter Yotamu Haamenda v. The People***[5] whose holding is to the effect that a dereliction of duty will operate in favour of the accused person.

It is submitted that there was overwhelming evidence to offset the prejudice which arose from the dereliction of duty in this case and that the conviction was unsafe and should be quashed.

In response to the second ground of appeal, Mrs. Phiri invited us to consider the case of ***Nsofu v. The People (supra)*** and what amounts to corroboration.

It was pointed out that there was medical evidence pointing to the fact that there was forced intercourse with the prosecutrix, and further that the distressed state of the prosecutrix amounts to corroboration of the offence having been committed.

As regards the identity of the offender, counsel submits that there was unchallenged evidence, which was unprompted and freely given

by the appellant, that at a particular time he was with the prosecutrix at his shop. Further, that the appellant confirms that the prosecutrix left his shop through the back door. It is submitted that it was an odd coincidence that the appellant said the prosecutrix left through the back door. That this confirms what the prosecutrix had said.

Mrs. Phiri further argues that it was odd that the appellant found it convenient to lock up his shop soon after the alleged incident. She contends that standing on its own, the locking up would not have amounted into evidence. However, looking at the chain of events, this appeared an odd coincidence.

It is further argued that during trial, the appellant attempted to give some explanation that he locked up his shop because his rentals were overdue. It is submitted that his explanation was correctly dismissed as an afterthought. We are urged to consider his actions an odd coincidence and apply it as corroboration for his identity. In support of this submission, the case of ***Ilunga Kabala and another v. The People***[6] is cited.

It is submitted that there was sufficient evidence on the record which corroborated the commission of the offence and admission of the identity of the perpetrator.

In his brief response, Mr. Mweemba submitted that the test in a case where the proviso under Section 138(1) of the Penal Code had not been explained is not whether an accused believes a prosecutrix was above the age of sixteen (16), but whether it is a borderline case as held in the case of ***Mwaba v. The People(supra).*** He contended that the test as laid in ***Nsofu v. The People (supra)*** applies where the proviso has been explained and the accused has raised a defence under the proviso.

Counsel argued that the appellant had believed that the prosecutrix was older because he put it to her in cross-examination that she had given birth before or had a baby and aborted. He submitted that the appellant did not admit that the prosecutrix was of tender age.

In conclusion, Mr. Mweemba restated that this was a borderline case where the proviso to Section 138(1) of the Penal Code ought to

have been explained to the appellant to enable him conduct his cross-examination properly. We are urged to quash the conviction and set the appellant at liberty.

We have carefully considered the evidence on record, the impugned judgment and the submissions of counsel.

The arguments under ground one relate to the proper construction of the proviso to Section 138(1) of the Penal Code and the effect of failure by the trial court to explain the same to an accused person.

Section 138(1) of the Penal Code Cap 87 as amended by Act No. 15 of 2005 and Act No. 2 of 2011 of the Laws of Zambia provides as follows:

> ***"Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life.***

Provided that it shall be a defence for a person charged with an offence under this section to show that the person had reasonable cause to believe and did in fact believe, that the child against whom the offence was committed was of, or above, the age of sixteen."

The appellant's position as argued by counsel is premised on the decisions enunciated in the cases of ***Mwaba v. The People (supra)*** and ***Nsofu v. The People (supra).***

In ***Mwaba*** the appellant was convicted after trial of defilement and sentenced to three years imprisonment with hard labour. The record disclosed that the trial magistrate did not at any stage of the proceedings explain to him the statutory defence available to him under the proviso to Section 138 of the Penal Code. The holdings are as highlighted by the appellant's counsel. The effect of the trial magistrate's failure to explain the statutory defence was stated by Hughes, J.S as follows:

"the learned trial magistrate's failure in this case to explain the statutory defence to the appellant before his

plea was recorded, and certainly before he was put on his defence, was in our view an irregularity particularly as this was a borderline case in terms of age and in view of the complainant's sexual maturity. The question to be considered is whether the appellant was prejudiced by such irregularity. There can be no doubt that he committed perjury in the witness box and pursued a line of defence which was inconsistent with a defence under the proviso. On the other hand, his earlier conduct of his defence and his admissions to the police would have enabled him to raise the statutory defence if it had been explained to him. In the circumstances, we cannot say that he was not prejudiced by the omission to explain the defence available to him under the proviso."

In the case of ***Nsofu (supra),*** the appellant was convicted on three counts of defilement. The proviso to Section 138 of the Penal Code was not explained to him. The record revealed that there was some evidence which it was argued amounted to corroboration of the evidence of the three complainants, but which was not conclusive in

itself. The appellant appealed on the grounds (1) that the failure to explain the proviso to Section 138 resulted in the appellant being denied the opportunity to make out a defence which that proviso creates, and (2) that the evidence put forward as corroborative was not conclusive, and therefore could not be corroboration. The Supreme Court held that:

> ***"(1) In the case of a plea of not guilty the failure to explain to an accused the proviso to section 138 of the penal code is at best from his point of view an irregularity which may be cured if there has been no prejudice.***
>
> ***(2) It is a rule of practice that where it appears that an unrepresented accused may be intending to plead guilty to a charge of defilement the proviso to section 138 of the penal code should be explained to him.***
>
> ***(3) Even where an accused pleads not guilty it is desirable that the proviso be explained before plea,***

but certainly at some early stage in the proceedings, so that he may have the opportunity to direct his cross-examination of the prosecution witnesses to the question of the girls' age."

In ***Nsofu***, the Supreme Court noted that the trial magistrate in his judgment had specifically considered the question of the prosecutrixes' ages when he said *"...having seen the girls myself, I am satisfied that no one can think that any one of them could be over sixteen years."*

The Supreme Court's position was that even if the appellant himself had infact believed the girls to have been over the age of sixteen years, he would have satisfied the court that he had reasonable cause to believe they were. Therefore, the defence under the proviso could not have succeeded and the appellant was not prejudiced by the failure to explain the defence to him.

In the case of ***Mulonda (supra)***, relied upon by the appellant's counsel, the Supreme Court once again considered the facts where

the proviso under section 138 had not been explained to the appellant. In the circumstances of that case the appellant had pleaded guilty to the charge of defilement of a girl under the age of sixteen years. The Supreme Court held on appeal that the lower court's failure to explain the proviso was fatal. Once again the Supreme Court restated the following:

> ***"1. It is a rule of practice that the proviso to section 138 of the penal code should be explained to an accused person. Failure to explain the proviso is fatal.***
>
> ***2. The age of the victim in defilement cases is crucial and a very essential ingredient of the charge."***

The Supreme Court followed its earlier decision in ***Mwaba*** on the need to explain the proviso to an unrepresented person. The court took the view that the facts in that case revealed that the appellant had a meritorious statutory defence which was not explained as required by the rule of practice in such cases.

We followed this reasoning in our recent decision in the case of ***Martin Nc'ube v. The People***[7] where we said:

> ***"These words imply that the effect of failure to explain the proviso depends on the circumstances of a particular case. In some instances, the facts may not be so fatal as to militate against a retrial. The Supreme Court having endorsed the Chipendeka***[7] ***and Mwaba (supra) cases, it cannot be said that the view expressed in the Mulonda case does away with the principle that the failure to explain the statutory defence to an accused person is an irregularity which may be cured if no prejudice is visited on an accused person. We are therefore obliged to consider whether prejudice was inflicted on the appellant as a result of the failure to explain the proviso."***

Applying these principles to the instant case and the impugned judgment, it comes across to us that the proviso to Section 138 of the Penal Code was not explained to the appellant, who was unrepresented at trial. Following the decisions that we have

highlighted, the proviso to Section 138 of the Penal Code ought to have been explained to the appellant in this case, as failure to do so is considered fatal.

We accept Mr. Mweemba's submissions that this is a borderline case. The prosecutrix in this case was aged fifteen years. A perusal of the record reveals that she was familiar with the appellant. The evidence of PW4 was that he had examined the prosecutrix, and his findings were that the hymen was already broken, and not recently for that matter. The failure to accord him an explanation of the proviso to Section 138 of the Penal code was irregular. Although the trial court revealed in its judgment that it had stated that the child was of a very tender age and proceeded to conduct a voire dire, we are not persuaded that this observation negated the prejudice occasioned to the appellant by the failure to explain the proviso. We say so because in the ***Nsofu case***, the magistrate considered the question whether or not the accused had reasonable cause to believe that the girls defiled were above the age of sixteen. He said *"having seen the girls myself, I am satisfied that no one can think that any of them could be over sixteen years."*

In the present case, the magistrate's observation went only as far as stating that the child was of tender years. He did not pronounce himself on whether anyone could think she could be over sixteen years of age.

A perusal of the record, and the cross-examination of the prosecutrix by the appellant shows that he attempted to set up a defence availed by the proviso when he suggested that she had conceived a pregnancy before or was sexually active. We therefore consider that he was prejudiced by the failure to explain the proviso to him, which would have accorded him a defence. This ground succeeds.

In relation to ground two, we wish to state in passing that there was sufficient evidence corroborating the commission of the offence and the identity of the offender. We are, however, constrained to discuss this ground because of the view we have taken by reason of the failure to explain the proviso to him.

Given the position we have taken, we are satisfied that the appellant would not be prejudiced by an order for a retrial. We

therefore order a retrial of this matter before a court of competent jurisdiction.

.....

F.M. CHISANGA
JUDGE PRESIDENT

.....

F.M. CHISHIMBA
COURT OF APPEAL JUDGE

.....

D.Y. SICHINGA
COURT OF APPEAL JUDGE