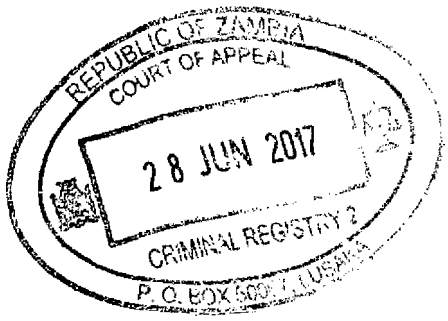
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

APPEAL No.60/2016



BETWEEN:

LEVISON SIAME **APPLICANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Mchenga, DJP, Chishimba and Kondolo, JJA

On 7th March 2017, 9th March 2017 and 28th June 2017

For the Appellant: R. Musumali, SLM Legal Practitioners
For the Respondent: C.L. Phiri, Deputy Chief State Advocate, National Prosecution Authority

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JUDGMENT

Mchenga, DJP, delivered the Judgment of the Court

Cases referred to:

1. **Kambafwile v The People [1972] Z.R. 242**
2. **Love Chipulu v The People [1986] Z.R. 73**
3. **Chimbini v The People [1973] Z.R 191**
4. **Champion Manex Mukwakwa v The People [1978] Z.R. 347**
5. **Mbavu and others v The People [1963-64] Z. AND N.R.L.R. 164**
6. **Imusho v The People [1972] Z.R. 77**
7. **Robert Kalimukwa v The People [1971] Z.R. 85**

8. **Emmanuel Phiri v The People [1982] Z.R. 77**
9. **Mwansa Mushala and Others v The People [1978] Z.R. 58**
10. **Machipisha Kombe v The People [2009] Z.R 282**
11. **David Zulu v The People [1977] Z.R. 151**
12. **Nkala v The People [1974] Z.R 19**
13. **Nsofu v The People [1973] Z.R. 287**
14. **Mwewa Murono v The People [2004] Z.R. 207**
15. **Katebe v The People [1975] Z.R.13**
16. **Bwalya v The People [1975] Z.R 125**
17. **Ilunga Kabala and John Masefu v The People [1981] Z.R. 102**
18. **Nzala v The People [1976] Z.R. 221**
19. **Silungwe v The People [2008] VOL. 3 123**
20. **Alubisho v The People [1976] Z.R. 11**

Legislation referred to:

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

Levison Siame, the appellant, appeared before the Subordinate Court sitting at Kafue charged with the offence of Rape contrary to **section 133 of the Penal Code.** The particulars of the offence alleged that on 17th October 2015, at Kafue, in the Kafue District of the Lusaka Province of the Republic of Zambia, he had unlawful carnal knowledge of Jane Zulu without her consent. He denied the charge and the matter proceeded to trial.

The evidence of Jane Zulu, the prosecutrix, was that on 17th October 2015, around 16:00 hours, she set out on a walk on Mongu Road in Kafue with her boyfriend, Emmanuel Machichi. They ended up in an area where there were fields and they sat under a tree. Just as they were settling down, they saw a man running towards them and he was carrying shoes in his hands. He wanted to beat her boyfriend but he managed to evade the assault and they started running away. Her boyfriend got away but she was apprehended. The man then took her into the bush and after walking for an hour, raped her.

She was released after being raped and she started walking home. On the way, she met her boyfriend and told him what had happened. They went to the police station and reported the incident but she was told to go back the following day because there were no female police officers. She went back the following day and she was given a medical report which she took to the hospital.

Emmanuel Machichi confirmed what his girlfriend said in court. He said between 16:00 and 17:00 hours, they sat down under a tree in the bush when the appellant charged and threw his shoes at them. The appellant was his neighbour and he had known him for 9 years. He managed to get away but the prosecutrix was apprehended. He alerted his friend Elias Tembo who joined him around 17:40. They looked for the prosecutrix but did not find her. When his friend left, he returned to the point where they had been attacked and the prosecutrix turned

up around 18:00 hours. Her clothes appeared dirty and she told him that she had been raped. They went to the police station and reported the incident.

According to Elias Tembo, on the material day, between 16:00 and 17:00 hours, Emmanuel Machichi contacted him and informed him that they had been caught by the appellant. He followed him to Mongu Road where they looked for the prosecutrix but failed to find her. He then left.

The prosecution's last witness was Sergeant Lungowe. His evidence was that on 19th October 2015, he was assigned to investigate the appellant for raping the prosecutrix. He collected a medical report from the hospital and interviewed him. After warning and cautioning him, the appellant denied committing the offence and said he was only at his field from dawn up to 05:00 hours.

After the close of the prosecution's case, the appellant was found with a case to answer and placed on his defence. He gave evidence on oath and called 4 witnesses. His evidence was that on the day in question, he went to his field around 05:30 hours and returned home around 08:00 hours. He then left his house around 11:00 hours to do some plumbing work. The fact that he was at home around 11:00 hours was confirmed by his daughter Ivy Nayamba. The appellant also told the court that he was in the area where he was carrying out the

plumbing works from 13:25 up to 16:50 hours. When he finished, he walked to a bottle store.

The appellant said he was at the bottle store from 17:40 to 18:00 hours. Ruth Banda, the proprietor of the bottle store, confirmed being with him from between 15:40 and 16:00 hours up to 17:45 hours. There was also evidence from George Tore, a bar patron, that he was with the appellant from 16:00 to 18:00 hours. Finally, the appellant said he left the bar for home at 17:45 hours and arrived at 19:57 hours.

After considering the evidence before her, the trial magistrate found that it was not in dispute that on 17th October 2015, the prosecutrix and her boyfriend went on a walk on Mongu Road around 16:00 hours. They separated after being confronted by a man who subsequently apprehended the prosecutrix and raped her. The fact that she was raped was corroborated by the medical reports. She found that what was in dispute was the identity of the rapist.

The trial magistrate also considered the appellant's alibi. She noted that the onus was on the prosecution to disprove such alibi. She also noted that there is a duty on the police to investigate any alibi which is raised by an accused person on arrest. She found that the appellant, did not, on arrest, raise any alibi and there was therefore no alibi to investigate.

She also found that the alibi raised in court was an afterthought and the testimony of the witnesses in its support, not to be credible in the light of the testimony of the prosecutrix and Emmanuel Machichi. She accepted the evidence of these two witnesses who identified the appellant as being the rapist. She also found that Emmanuel Machichi, a person who had known him for 9 years, identified him, in circumstances that were good, as the person who had attacked them and took away the prosecutrix shortly before she reported that she had been raped. Consequently, she ruled out the possibility of an honest but mistaken identification.

The appellant was convicted as charged and committed to the High Court for sentencing. The High Court sentenced him to 25 years imprisonment with hard labour after finding that there were aggravating factors. He was old enough to be the prosecutrix's father and the prosecutrix had been left traumatised by the attack. He has now appealed against both the conviction and the sentence.

Four grounds of appeal have been advanced and they are as follows:

i. **The trial court erred in law and in fact when she convicted the appellant without cogent and independent evidence linking the appellant to the commission of the alleged offence.**

ii. **The trial court erred in law and in fact when she held that the appellant had carnal knowledge of the prosecutrix without**

corroborative evidence supporting the prosecutrix's testimony of sexual intercourse with the appellant.

iii. **The trial court erred in law and in fact by turning out the appellant's evidence of alibi by holding that the failure by the appellant to give the investigations officer detailed information of his whereabouts at the time of the offence is an indication that his alibi was fabricated and an afterthought; and**

iv. **The learned High Court Judge erred in law and fact when she sentenced the appellant to 25 years imprisonment with hard labour.**

At the hearing, both parties relied on the written submissions they had earlier on filed into court. The appellant's written submissions were filed in on 30th December 2016, while those for the respondent were filed in on 9th March 2017.

In support of the 1st ground of appeal, Mr. Musumali referred to the case of **Kambafwile v The People (1)** and submitted that since the appellant denied the charge, there was an obligation on the prosecution, to prove beyond all reasonable doubt, that he had committed the offence. He also referred to the cases of **Love Chipulu v The People (2)** and **Chimbini v The People (3)** and submitted that the conviction cannot be sustained because the identification evidence against the appellant was of poor quality and unreliable. This was because the prosecutrix and Emmanuel Machichi's opportunity for identification

were short and traumatic. He then referred to the case of **Champion Manex Mukwakwa v The People (4)** and submitted that in the absence of some other evidence linking the appellant to the offence, it was not competent for the lower court to convict on it.

In addition, Mr. Musumali argued that the prosecution evidence was contradictory on when the attack took place. While the prosecutrix said she was raped around 17:00 hours and she went back home around 18:00 hours, her boyfriend said they were in the bush between 16:00 and 17:00hours, they separated around 17:30 hours and reunited at 18:00 hours. There was also evidence from their Elias Tembo that he was called between 16 and 17 hours and informed of the incident. He referred to the case of **Mbavu and Others v The People (5)** and submitted that in view of these material contradictions, we should find the evidence of these witnesses not to be credible.

Mr. Musumali then referred to the case **Imusho v The People (6)** and submitted that this court can interfere with the trial magistrate's finding of fact that the prosecutrix was with the appellant for an hour because it is not supported by the evidence. The evidence on which the court relied on to arrive at that finding is contradictory and not credible.

In response to the 1st ground of appeal, Mrs. Phiri submitted that the identity of the appellant as the rapist was proved beyond all reasonable doubt. He was identified by Emmanuel Machichi, a person who previously knew him and it was in broad day light. He also had sufficient opportunity to observe and identify the appellant. She referred to the case of **Robert Kalimukwa v The People (7)** and submitted that the disheveled appearance of the prosecutrix when she returned from the bush where the appellant had taken her, confirms or corroborates her story that she was raped.

Further, Mrs. Phiri submitted that since the possibility of an honest but mistaken identification was excluded, consideration must be given of the prosecution witnesses falsely implicating the appellant. She referred to the case of **Emmanuel Phiri v The People (8)** and submitted that since the prosecutrix did not know the appellant, there was no basis for her to falsely implicate him.

The first issue we will deal with under this ground of appeal is the question of there being a material contradiction in the evidence of the prosecution witnesses of when the attack took place. We find no material contradiction in the testimony of the witnesses on when the attack took place. Both the prosecutrix and her boyfriend are agreed that they got into the area where the attack took place around 16:00 hours and by 18:00 hours, they were heading back home. In the

case of Elias Tembo, he said he was informed of the incident between 16:00 and 17:00 hours.

The fact that the 3 witnesses are not agreed on the exact time, either 16:00, 17:00, 17:30 or 17:45 hours, as being the time when the prosecutrix was actually raped, in the circumstances of this case, is in our view immaterial. It is clear is that they were all giving estimated times and the attack was in the middle of that afternoon.

Coming to the submission that there was poor quality identification, in the case of **Mwansa Mushala and Others v The People (9)**, it was held, *inter alia*, that:

> **"Although recognition may be more reliable than identification of a stranger, even when the witness is purporting to recognise someone whom he knows the trial judge should remind himself that mistakes in recognition of close relatives and friends are sometimes made, and of the need to exclude the possibility of honest mistake; the poorer the opportunity for observation the greater that possibility becomes. The momentary glance at the inmates of the Fiat car when the car was in motion cannot be described as good opportunity for observation."**

In this case, the prosecutrix and Emmanuel Machichi were attacked between 16:00 hours and 17:00 hours when there was sufficient light. The appellant was known to Emmanuel Machichi and he recounted what he said before he threw

his shoes at him. We find that Emmanuel Machichi had the opportunity to have a good look at him. Though Mr. Musumali has submitted that the encounter was traumatic, we have not found any evidence to support the assertion; the "weapon" that the appellant had was a pair of shoes which he threw at the two witnesses.

We agree with Mrs. Phiri's submission that the trial magistrate cannot be faulted for ruling out the possibility of an honest but mistaken identification in this case. It was not a fleeting glance and as they looked at the appellant as he run towards them before running away. Neither can she be faulted for finding that the appellant was with the prosecutrix for an hour. It was the prosecutrix's evidence, which the trial magistrate accepted, that she was appellant from 17:00 until 18:00 hours when he released her. This ground of appeal fails.

Coming to the 2nd ground of appeal, Mr. Musumali referred to the case of **Machipisha Kombe v The People (10)** and submitted that since the appellant was charged with a sexual offence, the prosecutrix's evidence required corroboration of both the commission of the offence and by whom it was committed. He submitted that even though the prosecutrix evidence was not corroborated, the trial magistrate convicted her on circumstantial evidence.

He pointed out that in the case of **David Zulu v The People (11)**, it was held that a conviction can only be anchored on that kind of evidence if the only inference that can be drawn on it is one of guilt. He submitted that on the evidence before the trial court, it is possible that the prosecutrix and her boyfriend went to the bush to have sex and after being caught, they decided to fabricate evidence and implicate the appellant. The medical reports do not help the prosecution's case because anyone could have had sex with the prosecutrix. Finally, he referred to the case of **Nkala v The People (12)** and submitted that the failure by the prosecutrix to report the incident on time, weighed against the prosecution's case.

In response to this ground of appeal, Mrs. Phiri referred to the case of **Nsofu v The People (13)** and submitted that corroboration is not, independent conclusive evidence but independent evidence that supports the prosecutrix's testimony. She submitted that the medical report confirms that the prosecutrix was raped and although the examination did not take on the day she was attacked, the prosecutrix gave an explanation why that was the case. She pointed out that there was an early report and she was examined the following day.

We agree with Mr. Musumali's submission that a delay in reporting a case of rape, can, in certain circumstances, affect the credibility of the allegation. However, going by the facts of this case, we find that there was no delay at all. The report

appellant or someone, does not mean it is of no probative value. It must be considered in the light of the other evidence before the court.

Coming to the evidence corroborating the identity of the appellant, it was provided by Emmanuel Machichi. His evidence, which the court accepted, was that after the prosecutrix was apprehended by the appellant, she returned disheveled and reported that she had been raped by him. Having ruled out the possibility that Emmanuel Machichi could have mistakenly identified the appellant, we find no other reason for requiring that his evidence be corroborated. The fact that she returned disheveled also supported her evidence that she did not consent to the sexual intercourse. We find no merit in this ground of appeal and we dismiss it.

In support of the 3rd ground of appeal, Mr. Musumali referred to the case of **Mwewa Murono v The People (14)** and submitted that in criminal cases, the burden of proof rests on the prosecution and they must prove all the allegations against an accused person beyond all reasonable doubt. As regards the proof of an alibi, he referred to the case of **Katebe v The People (15)** and submitted that the appellant having raised an alibi, there was a duty on the police to investigate it. There was also an obligation on the prosecution to negative it.

Counsel pointed out that Sergeant Lungowe testified that on being interviewed, the appellant told him that he was at his field on the material day until 05:00 hours. The appellant also told the court that at the material time, he was in Kaseba. He submitted that this information should have put Sergeant Lungowe on guard that the appellant was going to raise an alibi but he failed to investigate it. He also referred the evidence of the appellant's witnesses, Ivy Nayamba, Ruth Banda and George Tore and submitted that though it exonerated him, the trial magistrate decided to accept that of the prosecutrix and her boyfriend. This evidence was not credible because the prosecutrix had a motive to falsely implicate the appellant because she was scared of her mother.

In response to this ground of appeal, Mrs. Phiri referred to the case of **Bwalya v The People (16)** and agreed that the onus of disproving an alibi lies on the prosecution. She also submitted that there was misdirection when the trial magistrate shifted the onus of proving the alibi on to the appellant. She then referred to the case of **Ilunga Kabala and John Masefu v The People (17)** and submitted that even if the alibi was not disproved, there was sufficient evidence to counteract it. There was identification evidence that placed the appellant at the scene.

The first issue we will deal with in connection with this ground of appeal is the question of the burden of proof when an alibi is raised. Both the appellant and

the respondent have taken the position that there was misdirection when the trial magistrate placed the burden of proving the alibi on the appellant.

We have looked at the record of appeal and find that it was not the case. In her Judgment, the trial magistrate referred to the case of **Ilunga Kabala and John Masefu v The People (17)** and correctly found that the burden was on the prosecution to negative the alibi. The evidence of the arresting officer shows that when the appellant was questioned, he only accounted for where he was in the morning. He said between dawn and 05:00 hours he was at his field. He did not say where he was between 16:00 and 18:00 hours, the time when the offence was committed. In the case of **Nzala v The People (18)**, it was held, *inter alia*, that:

> **Where an accused person on apprehension or on arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi, it is the duty of the police to investigate it.**

It follows, that while the burden of disproving the alibi is on the prosecution, the accused person must present the evidence on which such alibi is premised. In the absence of evidence suggesting that the suspect was elsewhere, there is nothing (no alibi) for the prosecution to negative. In this case, the issue of not investigating an alibi does not arise because none was raised when the appellant was interviewed by the arresting officer just before his arrest. No alibi was raised because he did not tell the police officer where he was between 16:00 and 18:00 hours.

Mr. Musumali has submitted that when the appellant explained that he was at his field in the morning, the police officer should have been on guard and he should have asked for where he was at the time the offence was committed. Since a suspect is not under an obligation to respond to a charge when questioned by the police, the police cannot be blamed for failing to press or persuade a suspect to provide information that may support an alibi. It is not the duty of the police to solicit for alibi evidence when interviewing a suspect, but for the suspect to raise it if they have one. In this case, it was sufficient that they informed him of the allegations against him and it was for him to raise the alibi if he had any. He did not.

The evidence in support of the alibi was first raised when the appellant was giving his defence. In the circumstances of this case, the trial magistrate cannot be faulted for finding that it was not credible and was an afterthought. We find that the position taken by the trial magistrate did not amount to placing the burden of proving the alibi on the appellant. This ground of appeal fails.

Coming to the 4th ground of appeal, Mr. Musumali referred to the case of **Silungwe v The People (19)** and submitted that since the appellant was a first offender aged 55 years, the court should have been lenient with him. He prayed that we find the

25 years sentence imposed on him to be harsh because he is a first offender and in its place we impose the mandatory minimum sentence of 15 years.

In response, Mrs. Phiri submitted that the sentence imposed on the appellant should not come to this court with a sense of shock because there were aggravating factors. The aggravating factors were the age difference between the appellant and the prosecutrix and the fact that the prosecutrix suffered trauma after the offence was committed.

In the case of **Alubisho v The People (20)**, it was held, *inter alia*, that:

(i) **With the exception of prescribed minimum or mandatory sentences a trial court has a discretion to select a sentence that seems appropriate in the circumstances of each individual case. An appellate court does not normally have such a discretion.**

(ii) **In dealing with an appeal against sentence the appellate court should ask itself three questions:**

  (1) **Is the sentence wrong in principle?**

  (2) **Is it manifestly excessive or so totally inadequate that it induces a sense of shock?**

  (3) **Are there any exceptional circumstances which would render it an injustice if the sentence were not reduced? Only if one or other of these questions can be answered in the affirmative should the appellate court interfere.**

(iii) **An appeal judge should not alter the sentence passed at a trial merely because he thinks he might have passed a different one.**

It is now settled that the very tender age of the prosecutrix or the very advanced age of the prosecutrix, can be an aggravating factor in a sexual offence. Even if the appellant was old enough to be the appellant's father, we find that the important issue when determining the appropriate sentence was the age of the prosecutrix at the time the offence was committed and not so much the difference in age between the two. The prosecutrix was 18 years old at the time the offence was committed and we do not find that this age could have aggravated the circumstances in which the offence was committed.

Further, it is common cause that victims of crimes, especially sexual offences, are usually traumatised by their experiences. We have examined the circumstances in which this rape was committed and unfortunate as it was, we have not found any evidence indicating or suggesting that the prosecutrix suffered more trauma than is ordinarily suffered by the victim of rape to warrant the imposition of a more severe sentence than would have ordinarily been imposed. Consequently, we find that the sentence imposed by the sentencing Judge was manifestly excessive and we will tamper with it.

Even if we have found that there were no aggravating factors, we find that the sentencing Judge was entitled to impose a sentence other than the mandatory minimum sentence. The increase in the number of cases involving sexual of sexual offences warrant the imposition of deterrent sentences. We set aside the sentence of 25 years and in its place we impose a sentence of 20 years imprisonment with hard labour. To that extent, the 4th ground of appeal succeeds.

The net effect is that the appeal against conviction is unsuccessful and it is dismissed. However, the appeal against the sentence is successful and the 25 years sentence imposed by the court below is set aside. In its place we impose a sentence of 20 years imprisonment with hard labour.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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F.M. Chishimba
COURT OF APPEAL JUDGE

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M.M. Kondolo SC
COURT OF APPEAL JUDGE