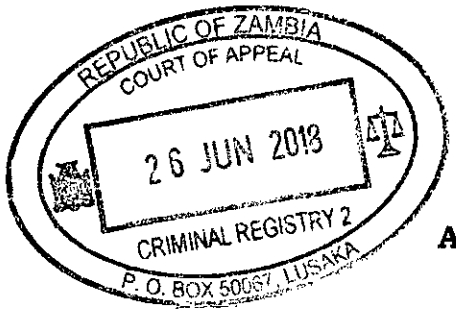
IN THE COURT OF APPEAL FOR ZAMBIA CAZ APPEAL NO. 191/2016

HOLDEN AT LUSAKA



(CRIMINAL JURISDICTION)

BETWEEN:

GIFT MUMBA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Chashi, Siavwapa, Ngulube, JJA

On 27th and 28th March, 2018 and 26th June 2018.

For the Appellant: O. Mudenda, Legal Aid Counsel, Legal Aid Board.

For the Respondent: M.M. Bah Matandala, Deputy Chief State Advocate, National Prosecution Authority.

JUDGMENT

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Jutronich Schulte and Lukair vs. The People (1965) ZR 12 (C.A)*
2. *Sikaonga vs. The People SCZ Number 20 of 2009*
3. *Partford Mwale vs. The People CAZ Appeal Number 8 of 2016*
4. *Richard Daka vs. The People SCZ Judgment Number 33 of 2013*
5. *Modester Mulala vs. The People Appeal Number 51 of 2013*
6. *Phillip Mungala Mwanamumbi vs. The People (2013) SCZ Judgment Number 9*
7. *Emmanuel Phiri vs. The People (1982) ZR 77(S.C)*
8. *Zulu vs. The People (1973) ZR 326 (S..C)*
9. *Sakala vs. The People (1980) ZR 205 (S.C)*

10. *Goba vs. The People (1966) ZR 113*
11. *Daka vs. The People*

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia.
2. The Juvenile Act, Chapter 53 of the Laws of Zambia.

The appellant was convicted of the offence of Indecent Assault on a female contrary to Section 137(1) of the Penal Code,[1] by the Subordinate Court sitting at Lusaka.

The particulars of the offence being that the accused (appellant) on the 3rd of November, 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia unlawfully and indecently assaulted the Prosecutrix. On committal to the High Court for sentencing the appellant was sentenced to twenty-two years imprisonment with hard labour with effect from the date of his arrest.

The case for the Prosecution centred on the evidence of five witnesses, PW1, the Prosecutrix, PW2 Michelle Chileshe, PW3, Queen Mwamba, PW4, Rebecca Sianga, the Prosecutrix mother and PW5, Mercy Kabwiko, Inspector, the arresting officer.

The evidence of PW1, was that on a date that she could not remember in 2015, she was playing at her aunt Queen's house where she always played when she was called by Uncle Gift, the accused who took her in the house and locked the door. PW1 testified that the accused took her to the bedroom where he covered her eyes with a cloth and took off her clothes. She stated that she felt something like a metal being inserted in her private parts and she screamed. PW1 stated that when she screamed, the accused stopped what he was doing and told her to get dressed. He also threatened to cut off her head if she told anyone what had happened.

PW1testified that after she left the accused's house, she was in pain but did not tell anyone about what happened for some time. Three days later, she told her Aunt Queen (PW3) what transpired and she was subsequently taken to the hospital where she was medically examined. PW1 identified the accused in the dock as the Uncle Gift that she had been referring to.

PW2, a child aged 8 years testified that one day, she was playing with her friend PW1 and Bridget when the accused sent Muzo to buy super dip. PW2 testified that the accused then took PW1 into Muzo's house and soon thereafter, she heard PW1 scream.

PW2 stated that she informed PW3 about it but her aunt told her to forget about PW1's scream.

PW3, aged 15 years testified that she noticed that PW1 was limping one day and she asked her what the problem was but PW1 stated that there was nothing. PW3 further testified that PW1 later told her that the accused had defiled her, but asked PW3 not to tell anyone about it because the accused had threatened to cut off her head. PW3 then informed the Prosecutrix's mother about what she had been told earlier and they proceeded to report the matter to the Police in Garden Compound. PW3 identified the accused in the dock as the person who PW1 stated had defiled her. She testified that before PW1 was taken to the hospital, she examined her private parts and found some bruises and something that looked like semen.

PW4, PW1's mother testified that when she returned home from work one day, she was informed by PW1 that the accused had taken her into the house and did "bad manners" to her. PW4 testified that she reported the matter to the Police and was issued with a medical report form. PW1 was subsequently examined by the doctor at the University Teaching Hospital and upon

obtaining a medical report, she took it to Emmasdale Police Station.

PW5, Mercy Kabwiko, Inspector, the arresting officer testified that she received a complaint from PW4 to the effect that her daughter had been defiled. She interviewed the accused, who was already in Police custody, charged and arrested him for the offence of Indecent Assault contrary to Section 137(1) of the Penal Code[1].

In his defence, the accused gave evidence on oath and denied indecently assaulting PW1. He stated that PW1 accused him of indecently assaulting her because he is known as Uncle Gift by many children in the area. The accused called Matias Mumba, DW2 to further his defence. DW2 testified that on the 27th of October, 2015, his brother, the accused herein had gone to the Copperbelt and he was asked to look after his brother's house. However the trial Magistrate rejected DW2's evidence and ruled that it be struck off the record, because it was allegedly full of inconsistencies.

The Learned trial Magistrate after reviewing the evidence, was satisfied that it had been established and proved that the accused indecently assaulted PW1. The court found that the

evidence of PW1 was corroborated by that of PW2, her friend. The court found that there was a clean thread of consistent evidence and further found that the medical report proved the case of indecent assault against the accused.

The court found that the accused did not tell the court the truth in his defence and concluded that the vital ingredients of the offence of indecent assault had been established and proved by the Prosecution. The court found that the testimony of PW1 was corroborated by that of PW2.

The court rejected the defence and the accused was found guilty as charged and convicted accordingly. On committal to the High Court for sentencing, the appellant was sentenced to twenty-two years Imprisonment with hard labour, hence the appeal to this Court against conviction and sentence.

On behalf of the appellant, Mr O. Mudenda, Legal Aid Counsel filed two grounds of appeal as follows –

1. The lower court erred in law and fact by sentencing the appellant to twenty-two years for the offence of indecent assault, which sentence is above the maximum sentence authorised by law.

2. The lower court erred in law and fact by not considering the fact that there was no evidence on record that proved that the Prosecutrix was indecently assaulted.

Counsel filed written heads of argument based on the two grounds. The summary of the said arguments on ground one is that the appellant was convicted of the offence of Indecent Assault on a female, contrary to Section 137(1) of **The Penal Code[1],** and was sentenced to twenty-two years Imprisonment with hard labour when Section 137(1) of **The Penal Code[1]** provides that the maximum sentence for the offence of indecent assault on a female is twenty years. The case of ***Jutronich Schulte and Lukair vs. The People[1]*** where the court of Appeal held that –

" In dealing with appeals against sentence, the appellate court should ask itself these questions –

1. *Is the sentence wrong in principle?*
2. *Is the sentence so manifestly excessive as to induce a sense of shock; and*
3. *Are there any exceptional circumstances which would render it an injustice if the sentence was not reduced?"*

The case of ***Sikaonga vs. The People***[2]***,*** *was cited* where the Supreme Court gave guidelines for the approach to be taken when imposing sentences in defilement cases as follows –

" an ordinary case of defilement will only attract the minimum sentence of 15 years imprisonment. However, where the accused is found to have infected the victim with a sexually transmitted disease, the sentence will certainly attract a more severe sentencing above the minimum sentence of 15 years."

The appellant's Counsel urged the court to exercise leniency and reduce the sentence from that of twenty-two years to a more appropriate sentence supported by the law.

In response to ground one, the Learned Deputy Chief State Advocate, Mrs Matandala on behalf of the People conceded that the sentence that the lower court imposed was above the mandatory maximum sentence and submitted that the sentence of twenty-two years is therefore wrong in principle. The Learned Deputy Chief State Advocate prayed that ground one be allowed because it has merit.

The arguments for the appellant on ground two are that there was no evidence to support the conviction. **The Learned Counsel**

submitted that the voire dires that was conducted prior to the receipt of the evidence of PW1 and PW2 individually were defective and further went on to state that this rendered the proceedings a nullity as there is no corroborative evidence connecting the appellant to the commission of the offence.

The Learned Counsel stated that the court, in relation to PW1 after purporting to conduct a voire dire stated that –

" very clear, alert and sharp little girl"

The Learned Legal Aid Counsel stated that there was no finding by the court in relation to the voire dire that was conducted in relation to PW2.

The case of ***Partford Mwale vs. The People***[3], was cited where the court stated that the trial court did not make a finding as to whether the witness understood the duty of speaking the truth. The case of ***Richard Daka vs The People***[4] in which the Court stated that the requirements of the law under the Juveniles (Amendment) Act, 2011 is that the court should provide a proper voire dire in relation to a case where the court finds that the child understands the importance of telling the truth. The Learned Counsel submitted that since the voire dire conducted

was defective, he urged the court to allow this ground of appeal. Learned Counsel cited the case of ***Philip Mungala Mwanamumbi***[6] where the court gave guidelines on how not to conduct a defective voire dire.

The Learned Counsel for the Appellant urged the Court to note that there were witnesses who have an interest to serve and further find that there were inconsistences in the manner in which the alleged assault was reported. Citing the case of **Modester Mulala vs. The People**[5], the court held that

"the motive to give false evidence on the part of the witnesses must be a reasonable possibility that PW3 had the motive to give false evidence and that her testimony does not corroborate that of the prosecutrix on the indecent assault."

The Learned Legal Aid Counsel submitted that since the voire dires that were conducted prior to the receipt of the evidence and PW2 were found to be defective, there is no evidence to prove that it was the appellant who indecently assaulted PW1. He submitted that the Prosecution failed to establish a link or identity of the person who allegedly indecently assaulted PW1 and submitted that there was no evidence on record to prove

beyond all reasonable doubt that the appellant indecently assaulted PW1. Counsel urged the Court to acquit the appellant accordingly.

On ground two, the Learned Deputy Chief State Advocate submitted that the evidence before the trial court proved that PW1 was indecently assaulted by the appellant. Counsel referred the Court to Section 122 of **The Juveniles (Amendment) Act Number 3 of 2011** which provides that –

"where in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence on oath, of the child if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence on oath, and understands the duty to speak the truth."

Provided that –

(b) where evidence admitted by virtue of this action is given on behalf of the Prosecutrix, the Accused shall not be liable to be convicted of the offence unless the evidence is corroborated by some other material evidence in support thereof implicating the accused"

The Learned Deputy Chief State Advocate submitted that the voire dire conducted in relation to the Prosecutrix was not defective as the lower court on page 6 of the record of appeal made a finding in accordance with the provisions of Section 122 of **The Juveniles Act,** as the court found that PW1 was-

"very clear, alert and sharp little girl."

The Learned Deputy Chief State Advocate urged the Court to accept the evidence of PW1 as the voire dire that the trial Magistrate conducted was not defective.

Counsel further submitted that the court did not make a finding in relation to the testimony of PW2 and concurred with the Learned Counsel for the appellant that the voire dire that was conducted in respect to PW2 was defective and that her evidence be disregarded as the voire dire that was conducted fell short of the standard provided for in Section 122 of **The Juveniles Act.** The Learned Deputy Chief State Advocate cited the case of **Philip Mungala Mwanamumbi vs. The People**[6] on the issue of the defective voire dire. The Learned Deputy Chief State Advocate submitted that the evidence of PW1, PW2, PW4 and PW5 is sufficient to prove a case against the appellant that there is no

evidence on record that shows that PW2 and PW4 were witnesses who could have had a motive to falsely implicate the appellant.

The Learned Deputy Chief State Advocate submitted that the evidence of PW3, PW4 and PW5 corroborates the evidence of PW1 on the commission of the offence and the identity of the offender. Counsel cited the case of **Emmanuel Phiri vs. The People**[7] where the Supreme Court held 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 danger of false implication."

The Learned Deputy Chief State Advocate submitted that there is evidence on record warranting the conviction of the appellant as the identity of the appellant was established by PW1, PW3 and PW4 to whom the early complaint was made. The respondent submitted that their duty had been discharged and urged the court to uphold the conviction as the second ground of appeal had failed.

We have carefully considered the evidence on record, the Judgment of the trial court and the submissions by both Learned Counsel.

Although the first ground of appeal was argued first, we intend to consider the second ground of appeal first for the reason that it is the evidence of PW1, the prosecutrix which is most crucial and needs to be corroborated.

The Learned Legal Aid Counsel's submissions in support of ground two were based on **The Juveniles (Amendment) Act Number 3 of 2011** which deals with the evidence of a child of tender years. Section 122 of Act Number 3 of 2011 provides that-

"122. Where in any criminal or case proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive evidence, on oath, of the child if, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception for the child's evidence on oath, and understands the duty of speaking the truth;

Provided that –

(a) If, in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence, on oath and does not understand the duty of

speaking the truth the court shall not receive the evidence, and

(b) Where evidence admitted by virtue of this Section is given on behalf of the Prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused."

The above-captioned section provides that a child of tender years is one that is below the age of fourteen years and can only give evidence on oath if the court is satisfied that the child is possessed of sufficient intelligence to justify the reception of the child's evidence. The child must, in the opinion of the court, understand the duty of speaking he truth. The evidence of a child of tender years also requires corroboration by some other material evidence in support thereof implicating the accused. The case of ***Zulu vs. The People***[8] is still good law on the issue of courts conducting a voire dire to the acceptable standard. The case sets out the correct procedure of how to conduct a voire dire. In the case of **Sakala vs. The People,** the Supreme Court stressed that not only must the record show that a voire dire has

been conducted but also the questions asked, the answers received and the conclusions reached by the court.

The means of arriving at a ruling in a voire dire and the conduction itself are important. In the case of **Goba vs. The People**[10], the Supreme held that –

"....Where no proper voire dire is carried out, the evidence of the witness should be discounted entirely."

In the present case, the Learned trial Magistrate did not record the questions when he conducted the voire dire in respect PW1. Further, the court omitted to state its full finding after conducting the voire dire.

The voire dire in this case is found at page 6 of the record of appeal. The court then stated that the child was –

" very clear alert and sharp little girl."

Clearly, the trial court did not make a finding as to whether PW1 understood the duty to speak the truth. In the case of **Richard Daka vs. The People**[11], the Supreme Court adequately addressed the amendment and we are satisfied that the voire dire that was conducted in this case was defective. It follows that the evidence

of PW1 was not evidence against the appellant. The evidence of PW1 shall be totally discounted because it was received without conducting a proper voire dire. The evidence of PW2 also a child was received after the court conducted a voire dire but did not indicate the questions nor the answers that were received during the conducting of the voire dire and no conclusion was arrived at.

Since the voire dire that was conducted is defective, PW2's evidence is also discounted and cannot corroborate that of PW1. The appellant was convicted based on the evidence of PW1 and that of PW2, another child witness. PW1 and PW2's evidence has been discounted and no other evidence was led which can secure a conviction in this matter. There being no evidence against the appellant, we allow ground two of the appeal.

On ground one, it is evident that the court that sentenced the appellant misdirected itself by sentencing the appellant to a sentence above the prescribed mandatory maximum sentence.

It is worth mentioning that the Learned High Court Judge in sentencing the appellant went beyond the maximum sentence for indecent assault which is twenty years imprisonment. with hard

labour which was wrong as it was above the maximum mandatory sentence for the said offence.

In conclusion, the appellant having succeeded on both grounds of the appeal, the total effect is that the entire appeal succeeds. The conviction is accordingly quashed and set aside and the appellant set him at liberty forthwith.

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J. CHASHI
COURT OF APPEAL JUDGE

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J.M. SIAVWAPA
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE