

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

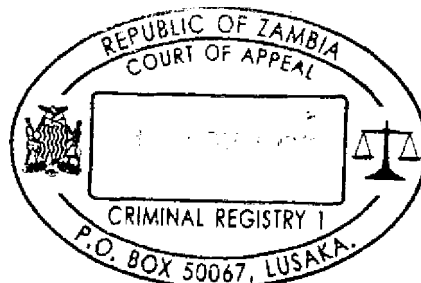
APPEAL NO. 234/2020

BETWEEN:

JUSTIN MUDENDA

And

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Kondolo, SC, Banda-Bobo and Muzenga and JJA
On the 22nd day of September, 2021 and 18th November, 2021.

For the Appellant: Mr. C. Siatwinda, Senior Legal Aid Counsel
Legal Aid Board

For the Respondent: Mr. G. Zimba, Deputy Chief State Advocate – National
Prosecutions Authority

JUDGMENT

BANDA-BOBO, JA, delivered the Judgment of the Court

Cases referred to:

1. Emmanuel Phiri v. The People (1982) ZR 77 (SC)
2. Bernard Chisha v. The People (1980) ZR 36 (SC)
3. Katebe v. The People (1975) ZR 13 (SC)
4. Sammy Kambilima Ngati Mumba, Chishimba Edward and Davy Musonda Chanda v. The People (SCZ Judgment No. 14 of 2003)
5. Muvuma Kambanja Situna v. The People (1982) ZR 115 (SC)
6. Chimbini v. The People (1982) ZR 115 SC
7. Machipisha Kombe v. The People (2009) ZR 184
8. Robson Chizike v. The People (App No. 94/2020)
9. Godfrey Chimfwembe v. The People (SCZ/9/145/2013)

Legislation referred to:

- Section 138(1) of the Penal Code Cap 87 of the Laws of Zambia
- Section 122 of the Juveniles Act, Cap. 53 of the Laws of Zambia

1.0 Introduction

- 1.1 This is an appeal against conviction.
- 1.2 The Appellant, Justin Mudenda was convicted of defilement contrary to Section 138(1) of the Penal Code Cap 87 of the Laws of Zambia by the Subordinate Court. He was subsequently committed for sentence to the High Court, where he was sentenced to twenty-five (25) years imprisonment with hard labour from 27th February, 2020, the date of arrest by Mulife, J.
- 1.3 The particulars of the offence are that the Appellant on 25th December, 2019 at Livingstone District in the Southern Province of the Republic of Zambia had unlawful carnal knowledge of Christiah Chiteyo, a girl under the age of 16 years.

2.0 Evidence in the Court below

- 2.1 The prosecution's evidence came from five witnesses, including the prosecutrix herself, after a *voire dire*.
- 2.2 The prosecutrix, who testified as PW1 and was thirteen at the material time, alleged that on that particular day, between

19:00 – 20:00 hours, she had been sent with her brother to go and collect a phone from her sister-in-law. It was her evidence that as they walked, a man who she had not known before, came and grabbed her from behind and dragged her into an unfinished building, threw her on the ground face down and had sex with her as she lay face down. Her brother ran away when the man was dragging her to the unfinished building. She told Court that he tore her pant, before sexually molesting her and stuffed a cloth in her mouth to gag her and stop her from screaming. After the ordeal, he offered to pay her K20, but she refused. She then went to tell her mother what transpired, and in the company of her mother and other people, they went to the building, the scene of the crime and later went to a nearby bar where she pointed at the Appellant as the person who had carnal knowledge of her.

- 2.3 She testified that she was seeing this man for the first time. That when he got hold of her hand, there was a light shining and that she could see him. That when she reported the matter to her mother, she told her mother that she could identify her assailant and she pointed at the Appellant who

she said she recognised and identified through the clothes he was wearing, namely a long sleeved black and white shirt.

2.4 The Appellant was taken to the police and again the prosecutrix identified him at a parade.

2.5 She was given a medical report which she took to Maramba Clinic and was later referred to the hospital where it was confirmed that she had been defiled. The torn red pant was admitted in evidence.

2.6 **PW2 was Doreen Kalaluka**, the prosecutrix's mother who stated that the prosecutrix had narrated her ordeal to her regarding the defilement. PW 2's evidence was basically the same as that of the prosecutrix. She confirmed that the prosecutrix was thirteen (13) years by producing an under five card.

2.7 **PW3 was Collins Chiteyo**, who upon being told by PW2 about what happened to PW1, went together with the prosecutrix, her mother and other people to the bar, where the Appellant was and helped to apprehend him after the prosecutrix pointed him out. It was his evidence that when they were taking him to the police, he offered them money so

they could drop the case, but that they refused. The rest of his evidence tallied with that of PW2.

2.8 **PW5**, a police officer interviewed the prosecutrix after receiving a docket of defilement; who narrated what transpired. He also interviewed the Appellant, who said he was nowhere near the scene of crime. The witness said he visited the scene of the crime, which was about 50 metres from the bar where the Appellant was apprehended. He thereafter made up his mind to arrest the Appellant, who under warn and caution, denied the charge. He testified that there was nobody present at the time the offence was alleged to have been committed in the unfinished building.

2.9 He tendered into evidence the medical report and the under-five card.

2.10 In his defence, the Appellant gave sworn evidence, denying the charge and called two witnesses in support of his case.

3.0 **Decision of the Lower Court**

3.1 After analysis of the evidence, the trial Magistrate made the following findings of fact:-

- 3.1.1 That the prosecutrix was a child below sixteen (16) years of age.
 - 3.1.2 That the prosecutrix was defiled as shown by the medical report.
 - 3.1.3 That the Appellant was the one who defiled the prosecutrix.
 - 3.1.4 That the Appellant had been identified by the prosecutrix.
 - 3.1.5 That the prosecutrix was defiled in Maramba, in an unfinished building and that the Appellant had been in Maramba when the incident happened.
- 3.2 The trial court concluded that the prosecution had proved its case beyond reasonable doubt and convicted the Appellant for the subject offence.

4.0 **Appeal to this Court**

- 4.1 Discomforted with the conviction, the Appellant has appealed to this Court, proffering two grounds namely:-
- 4.1.1 That the Court below erred in both law and fact by convicting the Appellant based on the evidence of PW1

when there is no corroboration as to the identity of the offender.

- 4.1.2 That the Court below erred in both law and fact when it failed to find that the evidence of PW1 relating to the identity of the offender was unreliable as there was no opportunity for a good observation.

5.0 **The arguments in Support**

- 5.1 Mr. Siatwinda, counsel for the Appellant filed heads of arguments in support on which he relied. He argued both grounds together as they were interrelated.

- 5.2 The gist of his argument in both grounds was that the evidence of PW1 was unreliable as regards the identity of the offender, because there was no opportunity for a good observation and that there was no corroboration as to the identity of the Appellant as the offender. He drew our attention to **Section 122 of the Juveniles Act, Cap. 53 of the Laws of Zambia**, where corroboration is mandatory for a child witness under the age of fourteen (14) years. He submitted that her evidence should have been treated at the same level as in the cases of a single identifying witness to

exclude an honest mistake. Counsel asserted that PW1 had no opportunity for a good observation. Counsel submitted that the peculiar circumstances of the case reinforced the need for strong evidence as to the identity of the offender before PW1's evidence could be relied upon.

5.3 Further that it was not sufficient for PW1 to simply state that the assailant was wearing a black and white long-sleeved shirt without giving any further peculiar and distinctive features of that shirt or without giving the descriptive features of the assailant such as his height, body build, or complexion. In pursuance of this argument on corroboration, we were referred to the case of **Emmanuel Phiri v. The People**¹ as well as the case of **Bernard Chisha v. The People**² where the Supreme Court set out the rationale for requiring corroboration for a child witness.

5.4 Counsel said the gist of his argument was that there were no special and compelling grounds that satisfied the lower Court that the danger of false implication and by extension, honest mistake were excluded.

5.5 Counsel submitted that he was alive to the holding in a number of cases, including that of **Katebe v. The People**³ to the effect that:-

“If there are special and compelling grounds, it is competent to convict on the uncorroborated testimony of the prosecutrix.”

5.6 Counsel submitted that in the circumstances of this case, the conviction is unsafe and unsatisfactory. He urged us to uphold both grounds and allow the appeal, the conviction be set aside and the Appellant be acquitted forthwith.

6.0 **Respondent’s Arguments**

6.1 In response, the Respondent’s counsel Mr. G. Zimba filed heads of argument on 22nd September, 2021. The gist of Mr. Zimba’s submissions were essentially that the Respondent did not support the conviction as they conceded that the Court below erred in law and fact when it convicted the Appellant on the unreliable identifying evidence of PW1. He also conceded that the prosecutrix’s evidence was not corroborated since she was a child below the age of fourteen (14) years. He submitted that the conviction based on the stated grounds was not safe; and urged us to so find.

7.0 **Hearing**

7.1 At the hearing, counsel for each party relied on their respective heads of arguments.

8.0 **Consideration of the Appeal and Decision**

8.1 We have carefully considered the evidence adduced during trial in the lower Court, the judgment sought to be impugned and submissions by counsel for each party.

7.2 As pointed out, the Appellant's counsel argued both grounds together. In the first limb, both Mr. Siatwinda and Mr. Zimba attacked PW1's evidence as appears on pages 4 – 6 of the Record. They both argued that PW1's evidence was unreliable with regard to the identity of the offender as there was no opportunity for a good observation and that there was no corroboration as to the identity of the Appellant as the offender.

7.3 The law allows a court to convict on the evidence of a single identifying witness provided the possibility of an honest mistaken identity has been eliminated. The case of **Sammy Kambilima Ngati Mumba, Chishimba Edward and Davy Musonda Chanda v. The People**⁴ guided that:-

“It is settled law that a court is competent to convict on a single identifying witness, provided that the possibility of an honest mistaken identity is eliminated.”

The case of **Muvuma Kambanja Situna v. The People**⁵ held that:-

- “(i) The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake, the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and the basis upon which the witness claims to recognise the accused.**
- (ii) If the opportunity for a positive and reliable identification is poor, then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identity too much of a coincidence.”**

The case of **Chimbini v. The People**⁶ is also on point.

7.4 The requirement for corroboration of the evidence of both the commission of the offence and the identity of the perpetrator was set out in the case of **Emmanuel Phiri**¹ where the Supreme Court said 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.”

In **Machipisha Kombe v. The People**⁷ case, it was held inter-alia that:-

“In criminal cases of a sexual nature, such as rape and defilement, corroboration is required as a matter of law before there can be conviction.”

7.5 We have critically analysed the record and we agree that the circumstances in which the offence occurred and the prevailing conditions at the time rendered the opportunity for a positive and reliable identification poor. The offence occurred at night. There is nothing on record to show that the trial Court subjected the witness to searching questions or that he took careful note of the prevailing conditions at the time the offence was committed. We deem that the opportunity for a positive and reliable identification was poor, thus the possibility of an honest mistaken identity was not ruled out. To merely identify a person by the shirt they were wearing without something more, especially that PW1 said she had not known the Appellant prior to the attack, is not sufficient. We agree with both the Appellant and the

Respondent that based on the above, the conviction was unsafe.


7.6 We also agree that PW1's evidence not having been corroborated, the conviction was unsafe for lack thereof. As earlier stated, the basis for convicting the Appellant was the evidence of PW1, a child below the age of fourteen (14) years. Her evidence was accepted after a *voire dire* was conducted. Her evidence therefore needed to be corroborated as a matter of law. We are fortified in our view by the provisions of **Section 122 of the Juveniles Act Cap 53 of the Laws of Zambia** and which Mr. Siatwinda brought to our attention. We affirmed this position in our decision in the case of **Robson Chizike v. The People**⁸ where we referred to the case of **Godfrey Chimfwembe v. The People**⁹ and said that the law requires the evidence of child witnesses to be corroborated.


7.7 Our scrutiny of the record from the lower Court did not bring out any evidence of corroboration by some other material evidence in support of PW1's evidence, that implicated the Appellant herein. There is nowhere in the record where the trial Court even alluded to the issue of corroboration as a *sine*

qua non before convicting the Appellant herein. Having not done so, we believe the lower Court erred and the conviction was thus unsafe.

7.8 This Appeal succeeds on both grounds and the conviction is quashed and the sentence is set aside.

7.9 We acquit the Appellant and set him at liberty forthwith.


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M. M. KONDOLO (SC)
COURT OF APPEAL JUDGE


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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE


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