IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 181/2020
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

EMMA KAINGA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Mchenga, DJP, Majula and Muzenga, JJA
On 19th May, 2021 and 16th November, 2021.

For the Appellant: Mrs. L. Z. Musonda, Legal Aid Counsel – Legal Aid Board

For the Respondent: Ms P. Nyangu, Senior State Advocate – National Prosecution Authority

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J U D G M E N T

MUZENGA, JA delivered the Judgment of the Court.

Cases referred to:

1. **Macheka Phiri v The People (1973) ZR (SC)**
2. **Dorothy Mutale v The People (1997) ZR 51**
3. **Emmanuel Phiri v The People (1982) ZR 177**
4. **Subramaniam v Public Prosecutor (1956) WLR 965**
5. **Nsofu v The People (1973) ZR (SC)**

6. **Justus Simwinga v The People – Selected Judgment No. 20 of 2018**
7. **Gift Mulonda v The People (2004) ZR 135**
8. **Sipalo Chibozu and Chibozu v The People (1981) ZR 28**

Statutes referred to:

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

The appellant was convicted of defilement contrary to **section 138(1) of the Penal Code Chapter 87 of the Laws of Zambia,** by the Subordinate Court of the first class presided over by a Resident Magistrate at Lusaka. He was subsequently committed to the High Court for sentencing and was sentenced to 30 years imprisonment with hard labour by Yangailo, J.

The particulars of offence alleged that the appellant, between the 3rd August, 2018 and the 17th August, 2018 in the Lusaka District of the Lusaka Province of the Republic of Zambia had unlawful carnal knowledge of Ruth Mulele a girl under the age of 16 years.

The prosecution called a total of four witnesses.

PW1 was the prosecutrix, who according to what she told the trial court was fourteen (14) years old. She narrated that she was staying in Bauleni Compound with her aunt and uncle. She stated that sometime in the

month of August 2018, she was home with her uncle as the aunt had gone out in the morning. That the uncle attempted to have sexual intercourse with her. She declined and bit the uncle on the hand, unlocked the house and went to the neighbour's place. She narrated her encounter to the neighbour who sympathised with her and promised to report to her aunt when she returns. Upon the aunt's return, the neighbour narrated what transpired. The aunt appeared to understand and went with the prosecutrix to the bedroom upon which she whipped her and threw her out of the house in the night. The prosecutrix walked from Bauleni up to Woodlands Stadium where she was picked up by the appellant and took her to his house in Kanyama. They arrived at his house in the morning. The appellant subsequently took off his clothes and her clothes and had sexual intercourse with her. She was limping because her vagina was sore. In the morning the appellant went for work and he locked her in the house. When he came back in the evening, he removed his clothes and her clothes and had sexual intercourse with her. This went on for a few days until the neighbours and the landlady got concerned. PW4 organised her grandchildren to apprehend the appellant and the prosecutrix and took them to the police.

PW2 was a medical doctor who examined the prosecutrix and her findings were consistent with penile vaginal penetration. She also opined that the girl was in tanner stage 3 with normal mental stage. PW2 in her evidence did not explain what the foregoing meant and its implications if any.

PW3 was the arresting officer who merely gave evidence of arrest and produced the medical report into evidence and it was marked **"P1."**

PW4 was an 84 year old lady, the appellant's landlady. She told the trial court that upon receiving information from the appellant's neighbour that he had defiled a minor, she instructed her grandsons to apprehend the appellant and he was taken to the police.

That generally marked the prosecution evidence. The appellant was found with a case to answer and was placed on his defence. He opted to give evidence on oath and opted not to call any witness.

The appellant told the trial court that on the 8th August 2018, he was on duty at Woodlands Stadium where there were overnight prayers. He found a girl around the area crying around 02:00 hours. She narrated to him how she was chased from home in Bauleni and that 02:00 hours was too late. He offered to take her back but she declined. She asked for shelter but the appellant advised her to go to Woodlands Stadium where there were overnight prayers and she left. Around 05:00 hours after overnight prayers, he spotted the prosecutrix. He told her to leave the stadium but she said she had nowhere to go as she was chased. She opted to go to Kanyama where her sister stayed. They went together using a church vehicle since the appellant equally stayed in Kanyama. When he reached his home, he directed her to the area or street in which PW1 alleged the sister stayed. The appellant went to his house and only

got to see PW1 on the 16th August, 2018 when she came to his house. This time he was preparing to go for work. He started off with her leaving his house. She ran away when they reached Kanyama police. On the 17th August 2018, he was off duty and arrived home around 19:00 hours. He found 2 young men with PW1. The young men beat him, accused him of stealing a girl and took him to the police. This generally marked the close of his defence.

The learned trial court found that the prosecutrix was sexually abused and this was confirmed by medical evidence **("P1").** The trial court was also satisfied that it was indeed the appellant who perpetrated the act as he used to lock the PW1 in his house and she was found in his house and they were taken to the police together. The trial court conceded however that there was no evidence proving age apart from what PW1 herself said. She relied heavily on what PW2 stated that PW1 was in tanner stage 3 which meant, according to the trial court, that she was aged between 13 to 16 years. The trial court also placed reliance on her observation of PW1 and came to a conclusion that she was between 13 and 15 years old. For this, the trial court relied on section 118 of the Juveniles Act. The appellant was convicted and committed to the High Court for sentence. A sentence of 30 years imprisonment with hard labour was imposed.

Dissatisfied with both conviction and sentence, the appellant appealed to this Court on two grounds of appeal as follows:

1. **The learned trial court erred in law and in fact when she convicted the appellant for the offence of defilement in the absence of proof of age of the prosecutrix.**

2. **The learned trial judge erred in law and in fact when she convicted the appellant for the offence of defilement on uncorroborated evidence as to the identity of the appellant as the offender.**

At the hearing of this appeal on the 19th May, 2021, learned Counsel for the appellant Mrs. L. Z. Musonda informed the Court that she will rely on the filed heads of arguments.

In support of ground one, learned Counsel for the appellant contended that the age of the prosecutrix in this matter ought to have been proved specifically by either the parent/guardian or by production of the birth record or certificate of birth, especially for a fact that the alleged age is across the bordline age. Reliance was placed on the case of **Macheka Phiri v The People[1].**

It was further contended that the absence of age of the prosecutrix raises doubt as to how old the prosecutrix was, which doubt should be resolved in favour of the appellant as guided by the case of **Dorothy Mutale v The People[2].** Counsel urged us to allow the appeal on this ground.

On behalf of the respondent, learned Counsel Ms P. Nyangu argued that the doctor's observations stated in the Medical Report, **"P1",** to the effect that the prosecutrix was a tanner stage 3 adolescent, and the trial court's

observations that she was between the ages of 13 and 15 years and her subsequent reliance on **section 118 of the Juveniles Act,** including PW4's observation that the prosecutrix was a minor, was sufficient basis for the trial court to find that the prosecutrix was below 16 years of age. Learned Counsel urged us to dismiss the appeal on this ground.

In respect of ground two, learned Counsel for the appellant contended that there was no corroboration as to the identity of the officer. Reliance was placed on the case of **Emmanuel Phiri v The People[3].** It was contended further that in addition to the rule of practice, **section 122 of the Juveniles Act, Chapter 53 of the Laws of Zambia** imposes a statutory requirement for corroboration. It was argued that what PW4 said that she was told by the appellant's neighbour that the appellant defiled PW1 was inadmissible hearsay as the said neighbour was not called as a witness. For this argument, reliance was placed on the case of **Subramaniam v Public Prosecutor[4].** We were urged to allow the appeal on this ground.

In response to ground two Ms Nyangu argued that the prosecutrix was found in the appellant's house and PW4's evidence was independent evidence which confirmed that the prosecutrix was telling the truth that she was defiled and that the appellant was the offender. Reliance for this argument was placed on **Nsofu v The People[5].** We were urged to dismiss the appeal on this ground for lack of merit.

We have carefully considered the evidence on record, the judgment of the trial court and the arguments by Counsel for the parties.

The major issue in ground one relates to the age of PW1. She gave her age as 14 years. A perusal of the record shows that the learned trial magistrate did not make an order to have PW1 examined in order to determine her possible age. No explanation was given by the prosecution for their failure to call the guardians to PW1 who at the time were reported as residing in Bauleni Compound in Lusaka or indeed the parents to PW1 in order to establish the age of the prosecutrix.

To begin with, we wish to note that when PW1 was called by the State to testify, the trial court asked PW1 how old she was and after giving her age as 14, she was allowed to take oath and her evidence was received. This was a misdirection. The Supreme Court in the case of **Justus Simwinga v The People**[6] gave guidance to trial courts at page J9 as follows:

> **"It is trite law that s. 122 states that a child below the age of 14 years who is possessed of sufficient intelligence and understands the duty of speaking the truth shall give evidence on oath. In our view, it is desirable that at trial the prosecution first calls the parent or guardian to establish the age of the child before calling the child to the stand. The child cannot prove his/her own age. Trial courts must guard against making wrong conclusions as to the age of the prosecutrix without direct evidence."**

Clearly, the age of the prosecutrix is cardinal in terms of whether or not the evidence will be received without *viore dire* or only after *voire dire.* We therefore urge trial courts to adhere to the guidance above.

We now move to the issue of the age of the prosecutrix.

The Supreme Court in the case of **Phiri Macheka** *supra*, held that:

> **"(i) Where the age of a person is an essential ingredient of a charge, that age must be strictly proved.**
>
> **(ii) It is not acceptable simply for a prosecutrix to state her age; this can be no more than a statement as to her belief as to her age. Age should be proved by one of the parents or by whatever other best evidence available."**

Further, the Supreme Court in the case of **Gift Mulonda v The People**[7] held *inter alia* that:

> **"the age of a victim in defilement cases is crucial and a very essential ingredient of the charge."**

The learned trial court having conceded that there was no evidence as to age apart from the prosecutrix herself, sought to rely on the medical report to the effect that the prosecutrix was in tanner stage 3 and her own observation of PW1. This is what the trial court said:

> **"Though no one has given evidence as to the exact age of the prosecutrix apart from the prosecutrix herself, I find from the doctor's report who examined the prosecutrix to be stage 3 which means the prosecutrix is between 13 years to 16 years. I also observed the prosecutrix when giving**

> **evidence that the prosecutrix is between the age of 13 and 15 years. I base my observation under section 118 of the Juveniles Act."**

The medical Doctor was PW2 in the Court below. A perusal of her evidence does not show that she explained what tanner 3 translates into in terms of age and whether this system could effectively be used for ascertaining age, and the accuracy of such examination. We find such an approach or reliance on medical information without full explanation to be unreliable as it may lead to incorrect conclusions. The Supreme Court in the case of **Sipalo Chibozu and Chibozu v The People[8],** underscored the importance of medical evidence and the explanation of medical terminologies when they held that:

> **"Medical reports usually require explanation not only of the terms used but also of the conclusions to be drawn from the facts and opinions stated in the report. It is therefore highly desirable for the person who carried out the examination in question and prepared the report to give verbal evidence."**

In *casu,* the Doctor was called but the aim appeared to be in order to establish sexual intercourse or penetration. He was not asked to explain the medical terms.

We have checked the provisions of **section 118 of the Juveniles Act Chapter 53 of the Laws of Zambia** which the learned trial court sought to rely on. This provision is not applicable to a person called to court as a

witness. It was thus misapplied. It appears what the trial court sought to rely on was her ocular observation as to the possible age hence placing it between 13 and 15 years. The Supreme Court in the **Simwinga** case *supra* at page J10 states as follows:

> **"We agree ..... that the trial magistrate fell in grave error when he relied on his ocular observation to determine the age of the prosecutrix. Of course, there are exceptions to this rule in cases involving small children but not in bordline cases such as the present case where the prosecutrix put her own age at 14."**

Age, therefore, being an essential ingredient of the offence of defilement, must specifically be proved, otherwise the offence of defilement has no legs to stand on. This requirement cannot be satisfied by ocular observation by a court unless in small children like toddlers.

We find force in the arguments advanced by learned Counsel for the appellant in ground one. We thus allow this ground of appeal.

Coming to ground two, we hold the view that the learned trial court cannot be faulted in finding that the appellant had carnal knowledge of PW1. There is ample evidence to the effect that the appellant went to his home with PW1 who he stayed with from the 8th August, 2018 until the day they were both taken to the police on the 17th August, 2018. There is also medical evidence **("P1")** supporting PW1's evidence confirming sexual intercourse. The appellant certainly had opportunity to commit the offence in question.

The danger of false implication cannot be said to exist. The second ground of appeal is bound to fail. Ground two is thus dismissed.

In sum total, the appeal having succeeded on ground one, we quash the conviction, set aside the sentence and acquit the appellant.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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B. M. MAJULA
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE