

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

Appeal No. 27/2022

BETWEEN:

**LENNY MATA MWIYA**

AND

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

**CORAM: Mchenga DJP, Chishimba and Muzenga JJA**  
**On 20 September, 2022 and 15<sup>th</sup> December, 2022**

For the Appellant: Mr. H. M. Mweemba – Acting Director, Legal Aid Board

For the Respondent: Ms. M. I. Mwala – Senior State Advocate, National  
Prosecution Authority

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**J U D G M E N T**

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**MUZENGA JA, delivered the Judgment of the Court.**

Cases referred to:

1. Nsofu v. The People (1973) ZR 287
2. Chibwe v. The People (1973) ZR 239 (CA)
3. Dalitso Comfort Ngoma v. The People – CAZ Appeal No. 94 of 2021
4. Wina and Wina v. The People – SCZ Judgment No. 8 of 1996
5. Ives Mukonde v. The People – SCZ Judgment No. 11 of 2011
6. Sakala v. The People (1972) ZR 42
7. Gift Chipunde v. The People – CAZ Appeal No. 109 of 2021

Legislation referred to:

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

**1.0 INTRODUCTION**

- 1.1 The appellant was charged with the offence of defilement contrary to **Section 138(1) of the Penal Code<sup>1</sup> as amended by the Penal Code (Amendment) Act No. 15 of 2005 and Act No. 2 of 2011.**

The particulars of offence were that the appellant on a date unknown but between the 28<sup>th</sup> and the 31<sup>st</sup> of October, 2020 at Mumbwa had unlawful carnal knowledge of the prosecutrix, a girl under the age of sixteen years. The appellant was subsequently convicted and sentenced to 35 years imprisonment with hard labour. (Before Mr. Justice I. Kamwendo).

**2.0 EVIDENCE IN THE COURT BELOW**

- 2.1 The appellant's conviction was secured by the evidence of five prosecution witnesses. The first witness was the prosecutrix. She told the trial court that on her way from school she passed by the appellant's house which was on her way to her grandparent's house. The appellant took her into his house, undressed her, and had carnal

knowledge of her. She narrated that she felt pain and that the appellant told her that he would kill her if she shouted or told anyone of what had happened.

2.2 It was the prosecutrix's further evidence that on another day when she was going to draw water, she found the appellant making pots at his home. She stated that the appellant gave her 5 Kwacha to go and buy soya pieces for him. She obliged and when she returned, the appellant took her into his house and defiled her again. She told the trial court that she felt pain as the appellant was defiling her but could not shout as he told her that he would kill her and throw her in the middle of the tarred road.

2.3 She narrated that due to the pain she suffered, she couldn't walk properly and when her grandmother inquired why she was walking with her legs apart, she told her that it was due to friction. She narrated that when her brother-in-law threatened to beat her if she did not tell the truth she opened up to him and told him that the appellant had defiled her.

2.4 In cross-examination, she stated that the road which passed near the appellant's house was a shortcut and it was the road everyone was



using. When asked to describe the appellant, she stated that the appellant's penis was the size of her hand.

2.5 In re-examination she retaliated that the appellant defiled her.

2.6 The second prosecution witness was Crispin Mkangala, the brother-in-law to the prosecutrix. He narrated that on a date he could not recall but in the month of November 2020, he received a call from his wife around 16:00 hours who informed her that the prosecutrix was not walking well. He averred that when he went home, he saw that the prosecutrix was walking with her legs apart. He asked the prosecutrix what was wrong with her and she told him that it was due to friction.

2.7 He narrated further that after further interrogation, she told him that the appellant had defiled her and that she had sustained some injuries on her vagina. PW2 told the trial court that he asked her how many times the appellant had defiled her and the prosecutrix answered that she was defiled three times and that she did not say anything because the appellant had threatened to kill her.

2.8 In his further testimony, PW2 told the trial court that he told his wife what the prosecutrix had told him and they immediately rushed her to the hospital where it was indeed confirmed that she had been defiled.

Later they reported the matter to the police. At the police, they were issued with a medical report form which they took back to the hospital.

2.9 In cross-examination, he stated that he could not recall the exact date the prosecutrix was defiled but it was in the month of November.

2.10 Kings Tafeni, the father to the prosecutrix testified as PW3. He led evidence with respect to the prosecutrix's age. He told the trial court that the prosecutrix was born on 9<sup>th</sup> February, 2010 and that she was 10 years at the time she was defiled. He tendered into evidence, the school register as evidence of her daughter's age.

2.11 The fourth prosecution witness was Mutete Lolozhi, the arresting officer. She told the trial court that she was allocated a docket of defilement on the 15<sup>th</sup> of November, 2020. She proceeded to interview the prosecutrix who informed her that the appellant had defiled her on three occasions. She further told the trial court that she also interviewed the appellant and after the appellant failed to give her a satisfactory answer, she made up her mind and charged him with the subject offence. Under a warning and caution statement administered in Nyanja language, the appellant denied the charge and he proceeded to detain the appellant awaiting court process.

- 2.12 In cross-examination, she told the court that the prosecutrix mentioned to her that the appellant threatened to kill her if she told anyone of her ordeal.
- 2.13 Enessy Mapulanga, the prosecutrix's grandmother, testified as PW5. Her testimony was similar to that of PW2 except that she stated that the appellant was his neighbour as her house was about 200 metres from the appellant's house. She averred that her granddaughter used the road that passed by the appellant's house as it was the road everyone used when going to the main road.
- 2.14 Under cross-examination, she stated that the prosecutrix told the truth as she was a 10-year-old child and did not know why the appellant would leave older women to defile her.
- 2.15 This marked the end of the prosecution case.
- 2.16 After considering the evidence of the prosecution witnesses, the trial court found the appellant with a *prima facie* case and was placed on his defence. He opted to give evidence on oath and called no witnesses.

### **3.0 DEFENCE**

- 3.1 In his defence, the appellant stated that he was a business man who moved around a lot to do his businesses. He told the trial court that on 4<sup>th</sup> November, 2020, he received people at his residence who he thought came to buy some of his products, only to be informed that he had allegedly defiled the prosecutrix. He basically denied having defiled the prosecutrix and stated that on the alleged dates, he was not around as he was moving up and down purchasing metals.
- 3.2 Under cross-examination, he told the trial court that on the alleged dates he was not sure he was at home. He averred that he did not recall if anyone came to his house on those dates and that he lived alone. He denied having committed the offence, as well as knowing the prosecutrix. However, he acknowledged the fact that his house was along a road which was frequently used.

### **4.0 FINDINGS AND DECISION OF THE LOWER COURT**

- 4.1 The trial court considered the evidence on record and found that indeed the prosecutrix had been defiled as supported by the medical report which indicated in detail that she had suffered multiple genital injuries. It also found that there was overwhelming evidence that the

appellant is the person who defiled the prosecutrix as he had the opportunity to do so. On the strength of the evidence on record and the cases of **Nsofu v. The People<sup>1</sup>**, the trial court concluded that the state had proved its case beyond all reasonable doubt. In the end, the trial court found the appellant guilty of the offence of defilement. Subsequently, the appellant was sentenced to 35 years imprisonment with hard labour.

## **5.0 GROUNDS OF APPEAL**

5.1 Disconsolate with the conviction, the appellant filed two grounds of appeal couched as follows:

- (1) The learned trial court erred in law and in fact by convicting the appellant on the evidence emanating from a defective *voire dire* of PW1.**
- (2) The learned trial court erred when it convicted the appellant in the absence of corroboration of the identity of the offender.**

## **6.0 APPELLANT'S ARGUMENTS**

6.1 At the hearing of this appeal on 20<sup>th</sup> September, 2022, learned counsel for the appellant Mr. Mweemba informed the Court that he will rely on the filed heads of arguments.



6.2 In support of ground one of the appeal, learned counsel contended that the *voire dire* conducted by the trial court found on page five of the record of the appeal is defective as it does not conform to a proper *voire dire*. It was contended that it is clear from the record that the learned trial magistrate only indicated the answers given by the prosecutrix when by requirement, the questions asked should have been indicated. In support of this argument, we were referred to the case of **Chibwe v. The People**<sup>2</sup> where it was held that:

**"The record should show not only that the *voire dire* was conducted but also the actual questions put to the juvenile, the answers received and the conclusions reached by the court."**

6.3 It was contended further that as a defective *voire dire* would lead to an order for a re-trial, in counsel's view there is no sufficient evidence on the record hence making this case not a proper case to send for retrial.

6.4 In support of ground two of the appeal, it was contended that there is no corroboration of the evidence of the prosecutrix on the identity of the appellant as required by the law. We were referred to our judgment in the case of **Dalitso Comfort Ngoma v. The People**<sup>3</sup> in

which we guided on what amounts to opportunity which can corroborate the evidence of the prosecutrix.

6.5 It was submitted that in sexual offences it is mandatory that there is corroboration of the commission of the offence as well as the identity of the offender. It was submitted that in this case, the prosecutrix was only 10 years which mandates corroboration of the identity of the offender as a matter of law. According to counsel, the circumstances and the existence of the opportunity, in the present case do not amount to any corroboration.

6.6 In summation, it was submitted that the evidence of PW1 should be expunged from the record as the *voire dire* was defective. And that there being no evidence to corroborate the identity of the appellant, the court should allow this appeal.

## **7.0 RESPONDENT'S ARGUMENTS**

7.1 On behalf of the respondent, learned counsel Ms. Mwala indicated that the state agrees with the appellant that the *voire dire* conducted was defective. However, she contended that the Supreme Court guided in the case of **Wina and Wina v. The People**<sup>4</sup> that a re-trial could be ordered if the first trial was flawed on a technical defect or if there

were good reasons for subjecting the appellant to a second trial in the interest of justice.

- 7.2 It was submitted that the failure by the trial court to record the questions put to the prosecutrix during the *voire dire* in issue is a technical defect and the interest of justice requires that there be a new trial to make good the said technical defect.
- 7.3 In responding to ground two of the appeal, it was submitted that it is trite that in sexual offences, 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 complaints and false implications. It was contended that the trial court was on firm ground when it held that the appellant had the opportunity to commit the subject offence and that this corroborated the evidence of identification from the prosecutrix.
- 7.4 We were referred to the case of **Ives Mukonde v. The People**<sup>5</sup> where it was held that:

**"Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of a particular case. The circumstances, and the locality of the opportunity may, be such that in themselves amount to corroboration. The circumstances and the locality of the opportunity in the instant case amounted to corroboration of the commission of the offences."**

7.5 It was further contended that there is no motive for the prosecutrix to falsely implicate the appellant in this matter.

7.6 In conclusion, counsel for the state stated that this is a proper case in which we can order a re-trial as no prejudice will be occasioned to the appellant.

8.0 **CONSIDERATION AND DECISION OF THE COURT**

8.1 We have ploddingly considered the evidence on the record, the arguments by both parties and the Judgment under attack.

8.2 We shall consider both grounds of appeal together as they are interconnected. The issue seems to be whether the *voire dire* conducted is defected and if so, whether a retrial is appropriate in the circumstances.

8.3 It is well settled that whenever a court conducts a *voire dire*, both questions and answers must be recorded, including the conclusions or ruling rendered by the trial court (See the cases of **Chibwe *supra*** and **Sakala v. The People<sup>6</sup>**). Once a trial court abdicates this duty, the *voire dire* automatically becomes defective and the evidence so received must be discounted entirely.



- 8.4 As argued by learned counsel for the appellant, and rightly conceded by learned counsel for the state, the trial court having not recorded the questions asked to the witness, the *voire dire* is defective. We thus expunge the evidence of PW2, the prosecutrix, from the record.
- 8.5 The question that now arises is whether there is any other evidence on which the conviction can be anchored. We note that the rest of the witnesses' evidence is based on what the prosecutrix told them. This is basically inadmissible hearsay.
- 8.6 In an ordinary situation, where a *voire dire* is found to be defective, a re-trial would be an appropriate order, as correctly argued by the state. In the case of **Gift Chipunde v. The People**<sup>7</sup> we considered the possibility of a re-trial after expunging the prosecutrix's evidence, which was received after defective *voire dire*. This is what we said:

**"Upon discounting the evidence of the prosecutrix, there remains insufficient evidence to warrant a re-trial. This is therefore, not a proper case in which we can order a re-trial."**


- 8.7 The state have argued that the appellant had opportunity to commit the offence. We have failed to find any evidence on the record that supports that proposition as espoused by case law. The fact the

appellant's house is located on the road leading to the main road, which is used by several people cannot amount to opportunity.

8.8 We therefore find no other evidence on the record to justify subjecting the appellant to a second trial. We find merit in the appeal and allow it.

9.0 **CONCLUSION**

9.1 Having allowed the appeal, we quash the conviction, set aside the sentence, acquit the appellant and set him at liberty.



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C. F. R. MCHENGA  
**DEPUTY JUDGE PRESIDENT**



.....  
F. M. CHISHIMBA  
**COURT OF APPEAL JUDGE**



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