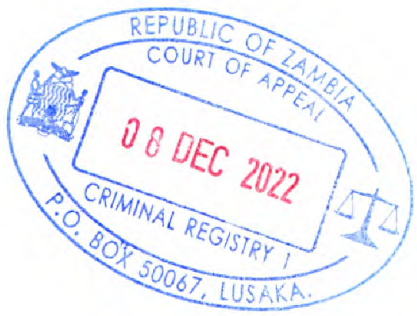
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No.15/2021**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:



DUBE SIAMUJABU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Mchenga, DJP, Kondolo, SC, and Banda-Bobo JJA
On 20th October, 2021 and 8th December, 2002.

For the Appellant: Mrs. M. M. Banda – Legal Aid Counsel – Legal Aid Board

For the Respondent: Mr. B. Mwewa, Senior State Advocate – National Prosecution Authority

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JUDGMENT

Banda-Bobo, JA, delivered the Judgment of the Court.

Cases referred to:-

1. Machipisha Kombe v. The People SCZ Judgment No. 27/2009
2. Goba v. The People (1966) ZR 11 3
3. Emmanuel Phiri v. The People (1982) ZR 77
4. Christopher Nonde Lushinga v. The People SCZ Judgment No. 15 of 2011
5. Darius Sinyinza v. The People SCZ Judgment No. 2 of 2009
6. Kambarange Mpundu Kaunda v. The People (1990/1992) ZR 215
7. Sipalo Chibozu and Chibozu v. The People SCZ Judgment No. 2 of 1981
8. Green Nikutisha and Another v. The People (1979) ZR 261
9. Gilbert Chileya v. The People (1981) ZR 33 (SC)
10. Major Isaac Masonga v. The People (SCZ Judgment No. 24 of 2009)
11. Tapisha v. The People (1973) ZR 222
12. Philip Mungala Mwanamubi v. The People (SCZ Judgment No. 9/2013)
13. Andrew Tembo v. The People SCZ Judgment No. 13 of 2011

14. Davies Chiyengwa Mangoma v. The People (SCZ 217/2015)
15. Mathews Mumba v. The People (2017/CAZ 163)
16. Aswell Banda v. The People (CAZ/14/2018)
17. Benjamin Gift Mate v. The People (Appeal No. 231/2020)
18. Yokonia Mwale v. The People (App No. 28 of 2014)
19. Abel Banda v The People (1986) ZR 105
20. Aphet Mondoloka v. The People (App No. 113/2021)
21. Mbomena Moola v. The People (SCZ Judgment No. 35/2000)

Legislation & Others Works referred to:

- The Penal Code Chapter 87 of the Laws of Zambia
- Juveniles Act No. 3 of 2011 of the Laws of Zambia

1.0. INTRODUCTION

1.1. The Appellant was arraigned before the Magistrate Court at Choma for the offence of Indecent Assault on a female, contrary to **Section 137(1) of the Penal Code, Cap 87**[1] and was subsequently convicted and later sentenced to 20 years imprisonment. It was alleged that he indecently assaulted a female below the age of 16, a charge that he denied.

1.2. The State's case rested on the evidence of four witnesses.

2.0. Evidence in the Court below

2.1 The main witness was the prosecutrix, a nine-year-old girl. Prior to receiving her evidence, the Court conducted a *voire dire* to ascertain whether the witness understood the duty of speaking the truth and was possessed of sufficient intelligence to justify the reception of her evidence. The Court determined that she did and proceeded to receive her

evidence on Oath. Though she initially said she did not know why she was before Court, she narrated how the Appellant grabbed her and took her into the bush near her house, that he put his penis in her vagina, while they both were standing up. It was her narrative that it was while in that position that her father found them, and the Appellant then ran away. Further, that her father reported the matter to Lazaro and her grandfather. That when the Appellant appeared before these people, he confessed and thereafter the matter was reported to the Police.

2.2 **PW2,** the **father to the prosecutrix** narrated that on the material date around 15:00 hours, he found the accused raping PW1 while standing. That when he saw the Appellant, his penis was hard. He had been at a distance of 30 metres; and at an open space. He confirmed that upon seeing him, the Appellant ran away. The rest of the evidence tallied with that of PW1, after he found the two. That when the Appellant was accosted at a meeting later, he confessed and asked for forgiveness. That this confession was done without coercion. However, the witness later recanted and said the Appellant had infact not raped the child at the time he found them.

2.3 **PW3** was the one to whom the case was reported and before whom the Appellant allegedly confessed to the commission of the crime. He too said the Appellant had freely confessed and asked for forgiveness over what he had done.

2.4 **PW4** investigated the matter after receipt of the Report of indecent assault. He visited the Scene of Crime, which he described. Further that the Appellant denied the offence, though he arrested him for it.

2.5 The Appellant when put on his defense, opted to give unsworn evidence. In his evidence, he maintained his innocence. He did admit to being with the prosecutrix near her house, on the material date but that he was forced to discuss the matter of the defilement at home so he could pay them. That he was merely implicated to force him to pay. That he had been found standing with the child because she wanted to be paid for the work she had done for him, and that is how her father found them. He denied ever admitting to anything as he had denied everything they all said.

3.0. **Decision of the Lower Court**

3.1 After due consideration of the evidence before her, the lower court recognized the need for corroboration of the evidence

adduced in sexual offences. The case of **Machipisha Kombe v. The People**[1] was relied upon. The court found that PW2 and PW4 corroborated PW1's evidence. That the Appellant had been placed at the scene and had had physical contact with the prosecutrix as he attempted to insert his penis in her vagina. The court considered that to be indecent assault and therefore unlawful.

3.2 Ultimately the trial court found that all the ingredients of the offence had been proven and convicted the Appellant accordingly.

3.3 The record was remitted to the High Court for Sentence and Mulife J, sentenced him to twenty years imprisonment with hard labour.

4.0. **The Appeal**

4.1 The Appellant was aggrieved by the judgment and launched an appeal, citing two grounds; vis-:

(i) The learned trial court erred in law and in fact when the court considered the evidence of PW1, a child of tender years, whose evidence was accepted after a defective *voire dire;*

(ii) The learned trial judge erred in law and in fact, when the court convicted the Appellant based on the uncorroborated and insufficient evidence

5.0. **Heads of Arguments**

5.1 Both parties filed arguments in support of their respective cases.

5.2 The Appellant's heads of argument were filed on 13th October, 2021. In arguing ground one, the Appellant faults the Court for receiving and relying on the evidence of PW1, a child of tender years, after a defective *voire dire*. It was submitted that PW1 did not possess sufficient intelligence to warrant the reception of her evidence, as she had failed to provide answers to specific questions. That her responses to the specific questions put to her by the Court clearly suggested that she did not have sufficient intelligence, and therefore her evidence should not have been accepted.

5.3 We were pointed to **Section 122 of the Juveniles (Amendment) Act No. 3 of 2011**[2] on the procedure for conducting a *voire dire*. The Appellant submitted that it was clear from the record that the trial court did not comply with the procedure set out in the above cited Section. That having not enquired from PW1 whether she understood the nature

of an Oath, made the *voire dire* defective. To buttress further, the case of **Goba v. The People**[2] was adverted to, where it was held that:-

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

It was submitted that in *casu*, the evidence of PW1 ought to have been discounted entirely as the trial court misapplied Section 122 of the Juvenile Act[2], and therefore the conviction cannot be upheld.

5.4 In ground two, the argument was that the Appellant was convicted on insufficient and uncorroborated evidence. In support, the case of **Emmanuel Phiri v. The People**[3] was cited for the principle 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 complaint and false implication. Failure by the court to warn itself is a misdirection".**

5.5 **Section 122 of the Juvenile's Act**[2] was again adverted to on the requirement for corroboration before an accused person can be convicted of a sexual offence. The case of **Christopher Nonde Lushinga v. The People**[4] was cited on

the meaning of the word corroboration. As regards the issue that victims of defilement are suspect witnesses and whose evidence must always be corroborated, we were referred to the case of **Darius Sinyinza v. The People[5].**

5.6 It was argued that the Appellant was convicted on the evidence of PW1, a child of tender age and PW2, who was a witness with a possible interest to serve. Regarding a witness with an interest to serve, the Appellant relied on the case of **Kambarange Mpundu Kaunda v. The People[6].**

5.7 Further, it was submitted that PW2's evidence had been marred with inconsistencies, which should have been resolved in the Appellant's favour. In furtherance of this argument, the case of **Sipalo Chibozu and Chibozu v. The People[7]** was cited, where the court held that:-

> **"the inconsistence in the prosecution evidence constitutes a serious misdirection."**

It was further argued that the evidence of PW2 relating to the place and time of commission of the offence were not confirmed by an independent witness, hence there was dereliction of duty by the prosecution. To support, the cases of **Green Nikutisha and Another v. The People[8]** and **Gilbert Chileya v. The People[9]** were cited. That though they called

PW3, this witness was not helpful to their case as he did not witness the commission of the offence and could not corroborate the evidence of PW1 as regards the commission of the offence and identity of the perpetrator.

5.8 Submitting further, the Appellant attacked the reception of the confession to the crime by the accused, as stated by PW1, PW2 and PW3; claiming that the same was not given freely and voluntarily. Reliance was placed on the case of **Major Isaac Masonga v. The People[10].** That the court did not enquire into the voluntariness of the confession statement, as indicated by PW4 in his evidence, when he said that both the accused and victim confirmed the place of occurrence of the crime. That the court ought to have conducted a trial-within-a trial, as guided in the case of **Tapisha v. The People[11].** We were urged to uphold the appeal.

5.9 The Respondent filed their heads of argument in opposition to the appeal on 20th October, 2021.

5.10 In arguing ground one, the Respondent acknowledged that gauging the responses given by PW1 to the questions from court, it was possible that the victim did not fully understand the duty of telling the truth. However, they contended that the case of **Philip Mungala Mwanamubi v. The People[12]**

gave them direction, where a *voire dire* was defective, as the court therein held that:-

> **"As to the identity of the offender, we agree with Mr. Mchenga that despite the voire dire being defective, there was some other evidence on record, warranting the conviction to stand. In the first place, there is evidence from PW3 that at the police station, the appellant admitted that the prosecutrix had been to his house and that he was there when she came. His own admission put him at the scene of the crime when it was committed. Therefore he had an opportunity to defile the prosecutrix. In an appropriate case, opportunity can constitute corroboration as to identity of the offender."**

It was contended that there was overwhelming evidence against the accused even if the *voire dire* is deemed defective.

5.11 In arguing ground 2, the Respondent placed reliance on PW2's evidence, which, it was contended, was overwhelming and descriptive eyewitness testimony. That this testimony is one which cannot be faulted as held in the case of **Andrew Tembo v. The People**[13] that:-

> **"We cannot fault the judge in the court below for reaching such a conclusion in the face of strong eyewitness evidence."**

That this evidence was corroborated by PW3 who confirmed the contemporaneous reporting by PW2 and the admission by the accused. Submitting further, it was argued that the Appellant had opportunity to commit the crime as he had been with the victim according to the sworn statement of PW1, PW2 and himself. To buttress, we were referred to the case of **Davies Chiyengwa Mangoma v. The People**[14] where the Supreme Court stated that:-

> **"We have stated before that, opportunity may, under certain circumstances, such as the present case, where the appellant is the only adult male person in the house where the offence was committed, amount to corroboration."**

The case of **Mathews Mumba v. The People**[15], a defilement case was also adverted to, to highlight the issue of opportunity to commit a crime, where the Appellant was convicted. We were urged to adopt a similar approach, as the evidence of opportunity corroborates both the identity and the commission of the offence.

5.12 As regards the question of corroboration, our attention was drawn to the case of **Machipisha Kombe v. The People**[1]. It was submitted that in the event that PW1's evidence is discounted, the eye witness account of PW2 is sufficient in

proving the commission of the offence. On the other hand, if the *voire dire* is upheld, then the evidence of PW1 is wholesomely corroborated by PW2, PW3 and PW4. We were urged to find that the assault was indecent in line with the case of **Aswell Banda v. The People[16].**

6.0. **Hearing**

6.1 At the hearing, both Mrs. Banda, counsel for the Appellant and Mr. Mwewa, counsel for the Respondent relied on their filed heads of argument.

7.0 **Analysis and Decision**

7.1 We will consider the two grounds together as they are interrelated. We have carefully analysed the record of appeal and the skeleton arguments for and against the appeal. We have noted the provisions of **Section 122 of the Juveniles Act[2].** We have looked at the conduct of the voire *dire* by the learned trial court. We are left in no doubt that the *voire dire* was not conducted in line with the provisions of the law and settled authorities. The *voire dire* was therefore defective. In the case of **Goba v. The People[2]**, cited to us, it clearly states that:-

> **"When no proper voire dire is carried out, the evidence of the witness should be discounted entirely"**

Having found that the *voire dire* was defective, it means that the evidence of PW1, a child of tender years should have been discounted entirely.

7.2 The vexing question is whether, having discounted the evidence of PW1, there was sufficient evidence before court on which the Appellant could still have been convicted. We would answer in the affirmative.

7.3 The matter before the trial court related to a sexual offence, and the law is settled that in such cases, which include indecent assault, the evidence incriminating the offender must be corroborated. The case of **Emmanuel Phiri v. The People**[3] guides that corroboration must be both to the commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Mrs. Banda argued that PW2 was a witness with an interest to serve and could thus not corroborate the evidence of PW1, as he was her father, and thus witness with an interest to serve. Kondolo, SC, JA, in the case of **Benjamin Gift Mate v. The People**[17], at page J13 had this to say on the issue of a witness with an interest to serve:-

"various defence counsel continue to raise this issue without addressing their minds to the several authorities which have clarified that merely being a friend or a relative of the complainant does not automatically consign such a person into the category of suspect witness."

In the case of **Yokonia Mwale v. The People**[18], it was held that:-

"A conviction will thus be safe if it is based on the uncorroborated evidence of witnesses who are friends and relatives of the deceased or victim, provided that on the evidence before it, those witnesses could not be said to have a bias or motive to falsely implicate the accused or any other interest of their own to serve. That what was key was for the court to satisfy itself that there was no danger of false implication."

7.4 In *casu,* there is no evidence that that PW2 could have had a motive to falsely implicate the Appellant or that he had a bias towards the Appellant. We therefore agree with Mr. Mwewa, on the guidance given in the case of **Philip Mungala Mwanamubi**[12], that despite the *voire dire* being defective, the evidence of PW2 was sufficient to warrant the conviction to stand. Further we agree that PW2's evidence was

overwhelming and a descriptive eye witness testimony, and the type that cannot be faulted.

7.5 We are confirmed in our view, as the evidence by PW3 corroborated that of PW2. PW2, after the Appellant ran away from the scene, took the child to where the Appellant used to stay. He however did not find him and the Appellant's guardian told him to come later. From there and with the child in tow, he reported the matter to PW3. It was PW3 who told Edmon, the neighbourhood watch person to go and call the accused. In the circumstances, PW3 in his evidence did indeed confirm that the matter had been reported to him immediately. PW3 also told court, as did PW2 that when questioned, the Appellant herein admitted the offence. We find that there was **something more** as guided in the case of **Machipisha Kombe v. The People[1].**

7.6 We also agree with the Respondent that there was opportunity for the Appellant herein to commit the offence as he admitted that he had been with the **child** near her home, where he was discussing with her. That they had been found by PW2 in PW2's yard, where the victim was asking him for her money so she could buy sugar, but that when he told her he did not have money, she insisted that she would go with

him if he did not give her money. That it was then that PW2 found them. Having placed himself on the scene and admitting that he had been alone with the child, afforded him the opportunity to commit the crime.

7.7 Mrs. Banda contends that the Court, faced with a confession, ought to have conducted a trial-within-a trial; so as to ensure that there was no self-incrimination. It was PW2 and PW3 who intimated in their evidence that the Appellant admitted the offence when quizzed about it, and in the presence of Edmon, the neighbourhood watch person. This was at PW3's place and before the police were involved. In the case of **Abel Banda v The People[19],** guidance was given that whenever a suspect was being interrogated by a person whose normal duties concern investigating a crime, the suspect should be warned and cautioned before being questioned. The evidence in this case does not show that PW3's normal work related to investigating crimes. PW2 went to him because that was his father. Consequently, there is no expectation that he could administer a warn and caution statement prior to questioning the suspect. In the case of **Aphet Mondoloka v. The People[20]** the court at J6, para 6.6 held that:-

"However the evidence in this case is that at the time the CCPU member was interviewing the appellant, he was in police custody ... It is apparent that the interview took place in the presence of police officers or with their knowledge."

Since the admission was obtained under the watch of the police, it is our view that it should not have been admitted into evidence without the prosecutor proving that the appellant was cautioned and that he made it freely and voluntarily."

7.8 In the case of **Mbomena Moola v. The People**[21] it was held that:-

"(ii) judges rules do not contemplate, as persons who should administer the warn and caution to suspect persons like village headmen, because it is not their normal responsibility to investigate criminal cases."

7.9 In the matter before us, the confession statement was made to PW2 and PW3, whose normal duties had nothing to do with investigating a crime. It was therefore not necessary for the trial court to hold a trial-within-a trial. Further, PW3 was not cross examined; and so his evidence went unchallenged. There is nothing on record to suggest that the interview where he made the admission was unfair. The Appellant herein gave unsworn testimony, which it was his right to do, but this

denied the prosecution an opportunity to interrogate him on his own evidence.

8.0 Having considered all the circumstances of the case, we find no merit in the appeal; as in our view the conviction was safe. That despite PW1's evidence being discounted, there was sufficient evidence on which the Appellant could be convicted. The appeal fails.

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C. F. R MCHENGA
DEPUTY JUDGE PRESIDENT

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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE