

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT KABWE AND NDOLA  
(Criminal Jurisdiction)

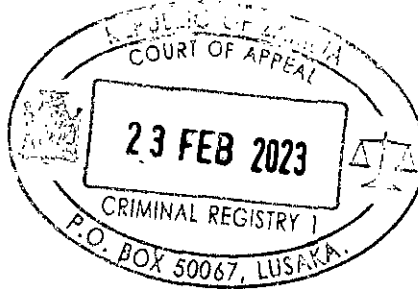
APPEAL NO. 38/2022

BETWEEN:

KAYOMBO KAKOMA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Muzenga, JJA

ON: 11<sup>th</sup> October 2022 and 23<sup>rd</sup> February 2023

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

For the Respondent: C. Mainza, State Advocate,  
National Prosecution Authority

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## J U D G M E N T

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Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. Mushoke v. The People, SCZ Appeal No. 148 of 2010
2. Matthews Kalaluka Mate, Charles Mwala Mbumwae and Christopher Mwala v. The People [1995-1997] Z.R. 135
3. Emmanuel Phiri v. The People [1982] Z.R. 77
4. Ernest Kabwita v The People, CZ Appeal No.345 of 2013
5. Green Musheke Kuyewa v. The People, SCZ Judgment No. 2 of 1996
6. Machipisha Kombe v. The People [2009] Z.R. 282.

**Legislation referred to:**

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

**1. INTRODUCTION**

1.1. The appellant appeared before the Subordinate Court (Honourable P. Mupemo), on a charge of indecent assault on a female, contrary to **Section 137(1) of The Penal Code.**

1.2. He denied the charge and the matter proceeded to trial. At the end of the trial, he was convicted and committed to the High Court for sentencing.

1.3. In the High Court (Maka-Phiri, J.), he was sentenced to 15 years imprisonment with hard labour.

1.4. He has appealed against the conviction.

**2. EVIDENCE BEFORE THE TRIAL COURT**

2.1. The evidence before the trial court was that on the 21<sup>st</sup> of January 2021, the appellant reported for work around 07:00 hours and at about 08:00 hours, he requested for permission to be excused.

2.2. He was allowed to leave and at around 10:00 hours, he turned up at the house where the

prosecutrix stayed in Choma's Humba Compound. She was 12 years old at the time.

2.3. The appellant informed the prosecutrix that he had been instructed by her father, to tell her to accompany him to collect unspecified items. The prosecutrix, in the company of her two young siblings, followed the appellant into Woodpark, a forested area.

2.4. While in that forest, the appellant undressed the prosecutrix. He also took off the brown short and the black underwear, he was wearing. He had sexual intercourse with her. When they were done, he informed them that he would take them back.

2.5. On the way back, they passed through the home of the prosecutrix's aunt. The appellant got to within a few meters of the prosecutrix's aunt. When the prosecutrix started narrating to her aunt what the appellant had done to her, he ran away.

2.6. The appellant returned to his work place around 13:30 hours.

2.7. The prosecutrix was taken to the hospital where she was examined by a doctor. According to the

medical report, the hymen appeared intact and there were no spermatozoa detected after a swab.

2.8. In court, the prosecutrix's aunt told the trial Magistrate that the next time she saw the appellant, after he had run away, was a week later, when he had been apprehended.

2.9. During the trial, the arresting officer gave evidence that on apprehension, the appellant admitted touching the prosecutrix's genitals. He also led evidence on the appellant being found wearing black underwear when he was apprehended.

2.10. In his defence the appellant denied committing the offence. He claimed that he spent the whole day at work that day.

2.11. The trial Magistrate found that the appellant's admission to the police that he only touched the prosecutrix's genitals, corroborated the prosecutrix's evidence identifying him as the offender.

3.  GROUNDS OF APPEAL

3.1. Two grounds have been advanced in support of the appeal.

3.2. The first ground of appeal is that the appellant's confession that he touched the prosecutrix's genitals was not properly admitted into evidence.

3.3. The second ground of appeal is that the appellant should not have been convicted on the prosecutrix's uncorroborated evidence identifying him as the offender.

4.  ARGUMENTS IN SUPPORT AND AGAINST THE 1<sup>ST</sup> GROUND OF APPEAL

4.1. In support of the first ground of appeal, Mr. Mweemba referred to the case of **Mushoke v. The People**<sup>1</sup> and submitted that since the appellant claimed that he was beaten before he confessed to touching the prosecutrix's genitals, a trial within a trial, should have been conducted before the admission of his confession into evidence.

4.2. In response, Mr. Mainza conceded that the appellant having indicated that he only confessed

after being beaten, a trial within a trial should have been conducted.

**5. COURT'S CONSIDERATION AND DECISION ON THE 1<sup>ST</sup> GROUND OF APPEAL**

5.1. During the trial, when the arresting officer sought to produce the appellant's confession, the appellant objected as follows:

**"I never said that. I was being beaten. I did not say that. I never said that"**

5.2. The trial Magistrate then ruled that:

**"The accused disputes having made that confession. A trial within a trial would have been necessary if he was admitting to the confession having been made involuntarily"**

5.3. In the case of **Matthews Kalaluka Mate and Others v. The People<sup>2</sup>**, deciding on whether a trial within a trial should be conducted where an offender denies making a confession after being assaulted, the Supreme Court held that:

**"An allegation that no statement was made despite beatings does not raise the issue of voluntariness, but raises a question of credibility as one of the general issues"**

5.4. This being the case, it is our view that the trial Magistrate's ruling was in line with the holding in the case of **Matthews Kalaluka Mate and**

**Others v. The People<sup>2</sup>**. The appellant alleged that he had been assaulted but denied making the confession.

5.5. In his defence, the appellant alleged that he was taken into the CID office, where he was beaten after which he was made to sign a piece of paper the arresting officer had read to him. He did not know its contents because it was read out in English.

5.6. We have examined the record of proceedings and there is no evidence that the "pre-written statement", the appellant alleged he was made to sign, was produced in evidence.

5.7. It is clear that when the trial Magistrate referred to the "appellant's confession", he was referring to the verbal confession the appellant made to the arresting officer.

5.8. As we have already indicated, there was no need to hold a trial within a trial for that confession because the appellant denied making it.

5.9. We therefore find no merit in the 1<sup>st</sup> ground of appeal and we dismiss it.



## 6. ARGUMENTS FOR AND AGAINST THE 2<sup>ND</sup> GROUND OF APPEAL

6.1. In support of the 2<sup>nd</sup> ground of appeal, Mr. Mweemba referred to the case of **Emmanuel Phiri v. The People**<sup>3</sup> and submitted that in that case, it was held that in sexual offences, evidence corroborating the prosecutrix's evidence of commission of the offence and the identity of the offender, is required.

6.2. Mr. Mweemba then submitted that the prosecutrix's evidence was not corroborated by any medical evidence or the testimony of her aunt. Neither did the fact that the appellant was found wearing black underwear corroborate the prosecutrix's testimony.

6.3. He also submitted that the contradiction between the doctor's finding and the prosecutrix's evidence raised doubt on the commission of the offence, which doubt, must be resolved in the appellant's favour.

6.4. In response to this ground of appeal, Mr. Mainza referred to the cases of **Ernest Kabwita v The People**<sup>4</sup> and **Green Musheke Kuyewa v. The People**<sup>5</sup> and submitted that the prosecutrix's aunt's evidence that she saw



the appellant run away was corroborative, as it amounted to "something more".

6.5. He acknowledged that this evidence was not considered, but submitted that had the trial Magistrate considered it, he would have found it to have corroborated the prosecutrix's evidence identifying the appellant as the offender.

7. COURT'S CONSIDERATION AND DECISION ON THE 2<sup>ND</sup> GROUND OF APPEAL

7.1. We will first deal with Mr. Mweemba's submission that the doctor's findings rendered questionable the prosecutrix's claims that the appellant had sexual intercourse with her.

7.2. Since the appellant was charged with the offence of indecent assault, an offence in which sexual intercourse is not an ingredient, the doctor's findings were of no significance.

7.3. In any case, the trial magistrate looked for corroborative evidence before convicting the appellant.

7.4. In the case of **Emmanuel Phiri v. The People**<sup>3</sup>, it was held that:

"In a sexual offence there must be corroboration of both commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication"

7.5. In this case, we have just pointed out that the confession by the appellant to the police, that he just touched the prosecutrix's genitals was properly admitted into evidence. That evidence corroborated the prosecutrix's testimony identifying the appellant as the person who sexually molested her.

7.6. The prosecutrix's testimony was also corroborated by evidence from her aunt, that when the prosecutrix started narrating what had happened in the bush, the appellant ran away.

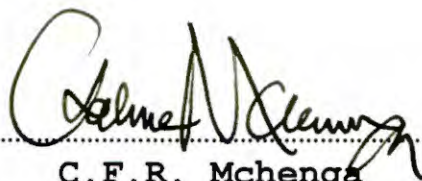
7.7. The act of running away, in our view, amounted to "something more", as set out in the case of **Machipisha Kombe v. The People**<sup>6</sup>.

7.8. This being the case, it cannot be said that the appellant was convicted on the uncorroborated evidence of the prosecutrix.

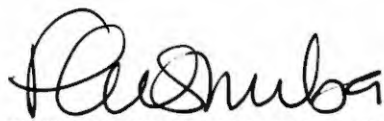
7.9. Consequently, we equally find no merit in the 2<sup>nd</sup> ground of appeal and we dismiss it.

8. VERDICT

8.1. Having dismissed both grounds of appeal, this appeal fails. We dismiss it and uphold the appellant's conviction of the offence of indecent assault on a female contrary to **section 137(1) of The Penal Code** and the 15 years sentence imposed on the appellant.



.....  
C.F.R. Mchenga  
DEPUTY JUDGE PRESIDENT



.....  
F.M. Chishimba  
COURT OF APPEAL JUDGE



.....  
K. Muzenga  
COURT OF APPEAL JUDGE