IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 106/2022
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

MOSES PHIRI **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Ngulube and Muzenga, JJA
On 22nd February, 2023 and 10th October, 2023.

For the Appellant: Mr. B. Banda, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. Gilbert. A. Phiri, SC, Director of Public Prosecutions, National Prosecution Authority

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JUDGMENT

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Emmanuel Phiri v. The People (1982) ZR 77 (SC)**
2. **Dennis Nkhoma v. The People – SCZ Appeal No. 52 of 2015**
3. **Ivess Mukonde v. The People – SCZ Judgment No. 11 of 2011**
4. **Saidi Phiri v. The People – SCZ Appeal No. 30 of 2015**

Legislation referred to:

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

1.0 INTRODUCTION

1.1 The appellant was charged with one count of the offence of defilement contrary to **Section 138(1) of the Penal Code**, as read together with **Act No. 2 of 2011**.

1.2 The particulars of offence alleged that the appellant on the 19th of November, 2019 at Ndola in the Copperbelt Province of the Republic of Zambia had unlawful carnal knowledge of a girl under the age of 16. The appellant was subsequently convicted and sentenced to 30 years imprisonment with hard labour by Mulanda, J.

1.3 He has appealed against the conviction and sentence on the basis that the trial court convicted him on insufficient and uncorroborated evidence.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The appellant's conviction was secured by the evidence of three prosecution witnesses. The evidence implicating the appellant was profiled by PW1, the mother to the prosecutrix. A summary of PW1's

evidence was that on 19th November, 2019, while in the company of her 21-month-old daughter, she hired the appellant who was operating a taxi. They visited a number of places and when they got to Jacaranda Mall, PW1 left the baby in the vehicle with the appellant and went to buy a feeding bottle from Pep Stores. The baby was seated in the back seat.

2.2 When she returned 30 minutes later, she found the baby on the appellant's laps. When she got the baby, her trousers were open and the diaper was open on both ends. She panicked and wondered what had happened to her. They left Jacaranda Mall and when they got to some shops, she sent the appellant to go and buy talk time for her. When the appellant left, she checked the baby's vagina and found blood and semen.

2.3 When the appellant came back, she told him to take her home. PW1 explained that being a woman, she was afraid to confront the appellant. When she got home, she paid the appellant and he left. She then proceeded to inform the father of the victim and the same day they reported the matter to the police. PW2, a medical doctor, confirmed defilement after examining the victim.

2.4 PW3, a police officer, told the trial court that after interviewing the appellant, PW1, and after going through the medical report, he made up his mind to charge the appellant with the subject offence.

2.5 This marked the end of the prosecution case. The appellant was found with a case to answer, and he was put on this defence. The appellant opted to give sworn evidence and called no other witnesses.

3.0 THE DEFENCE

3.1 In his defence, his narration of how the events unfolded on the fateful day, in summary, was similar to that of PW1 and the only difference was that at Jacaranda Mall, when PW1 left the car she left the baby in the back seat and that is where she found her when she got back. He denied defiling the child and told the trial court that when they reached PW1's house the baby ran into the yard like any other healthy child does.

3.2 This marked the end of the defence case.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 After careful consideration of the evidence before her, the learned trial court found that the appellant was the driver who drove PW1 and the victim on the fateful day. The trial court also found that

when PW1 went to buy the feeding bottle she left the victim with the appellant. Further, the trial court found that the prosecution had proved its case beyond all reasonable doubt and concluded that on the totality of the evidence on the record, the appellant defiled the victim. Accordingly, the appellant was convicted and sentenced to 30 years imprisonment with hard labour.

5.0 GROUNDS OF APPEAL

5.1 Resentful of the conviction and sentence, the appellant filed two grounds of appeal couched as follows:

(1) **The learned trial court erred and misdirected herself both in law and fact in convicting the appellant on insufficient evidence of opportunity to commit the offence of defilement.**

(2) **The learned trial court misdirected itself when it found that there was both corroboration of the commission of the offence of defilement and the identity of the appellant.**

6.0 THE APPELLANT'S ARGUMENTS

6.1 In support of the appeal, the two grounds of appeal were argued together. It was contended that there was no direct evidence from the prosecutrix to confirm penetration of a male organ of the appellant

into her vagina and that the prosecution evidence did not point to the fact that the victim was found in a distressed state peculiar to sexually abused children, especially those involving children of tender ages like the victim.

6.2 It was further contended that the lack of corroboration as to the commission of defilement was further exacerbated by the failure of the prosecution to tender material evidence of sperm and diaper found on the prosecutrix on the date of the alleged defilement.

6.3 We were urged to allow the appeal and set aside the conviction as there was no corroboration of the commission and identity of the offender.

7.0 RESPONDENT'S ARGUMENT

7.1 On behalf of the respondent, it was submitted that the trial court properly directed itself when it stated that the danger of falsely implicating the accused was not present in this case. The appellant has not demonstrated any existential reason to falsely implicate him by PW1 or any other witness.

7.2 It was contended that the marker laid down by the Supreme Court in the case of **Emmanuel Phiri v. The People**[1] has been ably met. In this case, 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. Failure by the court to do so is a misdirection."**

7.3 On the issue of the appellant's identity, it was contended that there was never a doubt on the identity of the appellant, as he was hired by the prosecutrix's father to drive them and PW1 left the baby with the appellant in the car.

7.4 According to counsel, the evidence of PW2, the medical doctor corroborated the defilement as was held in the case of **Dennis Nkhoma v. The People.**[2] It was further contended that the appellant had the opportunity to commit the subject offence and given the circumstances of this case where the appellant was left with the infant who was then found in a state of partial undress and suffered vaginal trauma is sufficient evidence of opportunity which amounts to corroboration. In support of this, we were referred to the case of **Ivess Mukonde v. The People**[3], 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."**

7.5 In conclusion, we were urged to dismiss the appeal as it lacked merit.

8.0 HEARING OF APPEAL AND ARGUMENTS CANVASSED

8.1 At the hearing of the appeal, learned counsel for the appellant, Mr. Banda placed full reliance on the documents filed. On behalf of the State, the learned Director of Public Prosecutions, Mr. Phiri, SC informed the court that the State would equally rely on the heads of argument filed before the court.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have considered the evidence led in the court below, the trial judge's judgment and the submissions advanced by the parties.

9.2 The issue in this appeal is whether the evidence was sufficient to support the conviction.

9.3 We wish to note on the onset that there was no eye witness to the alleged defilement in this matter. The evidence against the appellant is thus circumstantial. We note, however, that the trial court did not state clearly in its judgment that the evidence it considered was

circumstantial. The law relating to the circumstantial evidence in this country is well settled. For a conviction based on circumstantial evidence to stand, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of the accused's guilt.

9.4 In the case of **Saidi Phiri v. The People[4]**, the Supreme Court guided that:

> **"Where the prosecution's case depends wholly or in part on circumstantial evidence, the court is, in effect, being called upon to reason in a staged approach. The court must first find that the prosecution evidence has established certain basic facts. Those facts do not have to be proved beyond all reasonable doubt. Taken by themselves, those facts cannot, therefore, prove the guilt of the accused person. The court should then infer or conclude from a combination of those established facts that a further fact or facts exist. The court must then be satisfied that, those further facts implicate the accused in a manner that points to nothing else but his guilt. Drawing conclusions from one set of established facts to find that another fact or facts are proved, clearly involves a logical and rational process of reasoning. It is not a matter of casting any onus on the accused, but a conclusion of guilt a court is entitled to draw from the weight of circumstantial evidence adduced before it."**

9.5 The circumstantial evidence in this case is largely that the appellant was left in his vehicle which he operated as a taxi with an infant aged 21 months old by the mother (PW1) who went in one of the shops at the mall to buy a feeding bottle. She left the infant at the back seat and upon her return about 30 minutes later, found the infant on the appellant's laps in the driver's seat. She got the baby and immediately realised that the infant's trousers were open and the diaper was open on both sides. Upon the baby being checked thoroughly, after the appellant was deliberately sent out to buy talk time, she saw blood mixed with semen. The medical examination confirmed the commission of the offence.

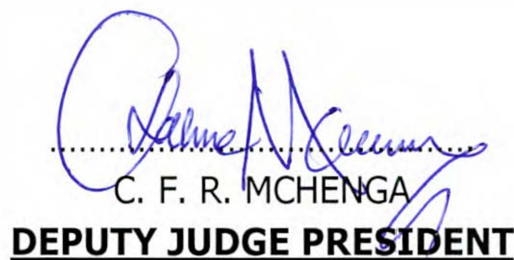
9.6 The question therefore is who could be said to have had sexual intercourse of the infant in the circumstances of this case? The appellant did not dispute having been left with the infant. He disputed having defiled her. The question therefore is: can an inference that the appellant defiled the infant be the only inference which could reasonably be drawn from the facts? We hold the view that in the circumstances, it is the only inference

which could reasonably be drawn from the facts. It would have been different if the infant's custody was taken over by other people or where the open trousers, diaper and semen soiled with blood were discovered long after the appellant had left.

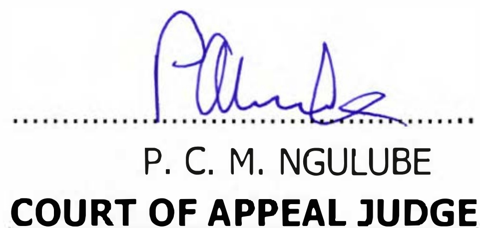
9.7 Had the learned trial court been alive to the fact that the evidence herein was circumstantial, it would no doubt have reached the same conclusion. We agree with the learned Director of Public Prosecutions that the evidence against the appellant was overwhelming. We thus find the appeal to be bereft of merit.

10.0 CONCLUSION

10.1 Having found no merit in the sole ground of appeal, we dismiss it. The conviction and sentence is upheld.



C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT



P. C. M. NGULUBE
COURT OF APPEAL JUDGE

K. MUZENGA
COURT OF APPEAL JUDGE