

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

Appeal No. 142/2022

BETWEEN:

MAPULANGA JACKSON PHIRI



APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Mchenga DJP, Ngulube and Muzenga, JJA
On 16th May 2023 and 20th February 2024

For the Appellant: Mrs. M. K. Liswaniso, Principal Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. M. C. Chipawa, Senior State Advocate, National Prosecution Authority

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Gift Chipunde v. The People – CAZ Appeal No. 109 of 2021**
- 2. Richard Daka v. The People – SCZ Judgment No. 23 of 2023**
- 3. Emmanuel Phiri v. The People (1982) ZR 77**
- 4. Simon Zandala v. The People – CAZ Appeal No. 118 of 2019**
- 5. Gideon Mumba v. The People (2018) SC 43**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **Children's Code, Act No. 12 of 2022.**
3. **The Juveniles Act, Chapter 53 of the Laws of Zambia.**
4. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

1.0 INTRODUCTION

- 1.1 The appellant was tried and convicted by the Subordinate Court of one count of the offence of defilement contrary to **Section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia** as read with **Act No. 15 of 2005** and **Act No. 2 of 2011**, and committed to the High Court for sentence.
- 1.2 The particulars of the offence alleged that the appellant on the dates unknown but between January, 2021 and the 13th day of March 2021 at Chadiza District in the Eastern Province of the Republic of Zambia had unlawful carnal knowledge of XX a girl under the age of 16 years.
- 1.3 He was subsequently sentenced to 35 years imprisonment with hard labour by Makubalo J. He has appealed against the conviction and sentence on the basis that the trial court erred in law and fact when it

received unsworn evidence of PW1 contrary to the provisions of the **Juvenile Act Chapter 53 of the Laws of Zambia.**

2.0 EVIDENCE IN THE COURT BELOW

- 2.1 The evidence of seven prosecution witnesses secured the appellant's conviction. The prosecution evidence summarised that the appellant was found by his wife PW4 lying down on a mat in the bedroom and beside him, was the prosecutrix. According to her, the prosecutrix and the appellant wanted to have sex. They were both fully dressed. PW4 then started crying, and her neighbours came to see what had happened. According to the prosecutrix, the appellant had carnal knowledge of her when they went to the garden. PW5, a medical officer, produced the medical report in court and told the trial court that from the examination he conducted on the prosecutrix, he noticed she had a tear on the vagina and it was at 01:00 o'clock and had no bleeding thus concluded that it was an old tear. He further informed the trial court that the prosecutrix was found with an STI.
- 2.2 All the other witnesses largely repeated what PW4 (wife to the appellant) and PW1 (prosecutrix) said.

2.3 This marked the end of the prosecution evidence. The appellant was found with a case to answer and he was put on his defence.

3.0 THE DEFENCE

3.1 In his defence, the appellant opted to give sworn evidence and did not call any witnesses. The appellant denied having sex with PW1 and told the trial court that the only time he ever went to the garden with PW1 was the time he was accompanied by PW4. He however accepted having slept in the same room with PW1 and stated that he was drunk at the time.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 After careful consideration of the evidence, the learned trial court found that the facts in the matter were mainly not in dispute. The trial court found that the State had proved their case beyond all reasonable doubt and that the appellant's defence was a mere afterthought. The matter was committed to the High Court for sentencing where the appellant was sentenced to 35 years imprisonment with hard labour.

5.0 GROUNDS OF APPEAL

5.1 Disconsolate with the conviction and sentence, the appellant launched the present appeal fronting two grounds structured as follows:

- (1) **The learned trial court below erred in law and in fact when it received the unsworn evidence of PW1 contrary to the provision of the Juvenile Act Chapter 53 of the Laws of Zambia.**
- (2) **The trial court erred in law and in fact when it convicted the appellant in the absence of corroboration as to the offender's identity.**

6.0 THE APPELLANT'S ARGUMENTS

- 6.1 In support of the first ground of appeal, it was learned counsel's contention that in cases where a child is below the age of 14, as the prosecutrix was, corroboration is required as a matter of law. We were referred to the provisions of **Section 122 of the Juvenile Act, Chapter 53 of the Laws of Zambia**. According to learned counsel, the provisions of **Section 122** does not give an option of an unsworn statement. It is either evidence is given on oath or no statement is received by the court at all.
- 6.2 We were referred to our judgment in the case of **Gift Chipunde v. The People**¹ where we guided that there is no longer provision for a child of tender age to give unsworn evidence.
- 6.3 Counsel also submitted that the learned trial magistrate having only been satisfied that the child witness possessed sufficient intelligence,

it should not have received the evidence at all. Reliance was placed on the case of **Richard Daka v. The People.**²

6.4 In support of the second ground of appeal, it was contended that the evidence as to the identity of the appellant having been the person who had carnal knowledge with the prosecutrix needs to be corroborated as no one saw them. In support of this argument, we were referred to the case of **Emmanuel Phiri v. The People.**³ It was learned counsel's further contention that PW4 testified that he found the appellant sleeping next to the prosecutrix. They were both dressed up and there was space in between them. On the other hand, the prosecutrix told the trial court that the appellant undressed her and as he was trying to undress himself PW4 came in. According to counsel, the conclusion that can be drawn from this is that the prosecutrix seemed to have been influenced by other witnesses.

6.5 In précis, it was submitted that the prosecution failed to prove its case beyond reasonable doubt. We were urged to allow the appeal, set aside the conviction and sentence of the lower court and acquit the appellant.

7.0 RESPONDENT'S ARGUMENT

7.1 On behalf of the respondent, the learned counsel in responding to the first ground of appeal, conceded that the trial court erred when it decided, after conducting a *voire dire*, to receive unsworn evidence from PW1 which was a clear contravention of the **Juvenile Act**. It was further contended that a review of the questions put to the child during the *voire dire* indicates that the trial court misdirected itself as there was no need to ask the child if she understood what it meant to swear. We were referred to the case of **Simon Zandala v. The People**⁴ where we held that:

"It was therefore unnecessary for the learned magistrate to ask the question of whether the child knew what it meant to take an oath on the bible as there is no such requirement under Section 122 of the Juveniles' Act. The child should have been allowed to tender evidence on oath."

7.2 It was submitted further that the trial court after making a finding that the child possessed sufficient intelligence should have proceeded to receive the prosecutrix evidence on oath. It was contended that the error by the trial court falls within the realm of a technical defect on

the part of the court and we were asked to send back the matter for retrial.

7.3 In responding to the second ground of appeal, it was contended that the identity of the appellant was corroborated and that he had an opportunity to commit the offence. According to learned counsel, the medical evidence coupled with the opportunity that the accused had to commit the offence provides something more that corroborates the testimony of PW1. It was contended that no evidence was led by the defence to show that PW1 or any of the prosecution witnesses had any motive to falsely implicate the appellant.

7.4 According to learned counsel, the circumstances of this case constitute a special and compelling ground upon which a competent court can convict on uncorroborated evidence of a single identifying witness. We were referred to the case of **Gideon Mumba v. The People**⁵ where it was held that:

"It is competent for a court, on special and compelling grounds, to convict on uncorroborated evidence if it finds that the identification of the accused is reliable and the possibility of honest mistake has been ruled out...."

7.5 It was contended further that irrespective of the age of the prosecutrix, she should be deemed a competent witness and the weight and value of her evidence tested against the particular circumstances of this case as would be for adult witnesses.

7.6 In summation, we were urged to uphold the conviction.

8.0 THE HEARING

8.1 At the hearing of this appeal, the learned counsel for the appellant Mrs. Liswaniso informed the Court that she would rely on the filed heads of arguments and the learned counsel for the respondent, Mr. Chipawa, informed the Court that the State would equally rely on the filed arguments.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the arguments by counsel for the appellant and the judgment under attack.

9.2 As we see it, the issue in this appeal is whether the trial court was right in receiving the evidence of PW1 and PW4 in the circumstances of the case. Once this issue is resolved, the outcome of the appeal will become clear.

9.3 We are aware of the provisions of the **Children's Code Act No. 12 of 2022** and its provision in **Section 297** which repealed the **Juveniles Act**. We note that this matter was heard and concluded before the **Children's Code Act** came into effect and thus we shall refer to the law that was in force then.

9.4 The trial court after conducting a *voire dire* found that PW1 possessed sufficient intelligence only and as such ruled that she gives unsworn evidence. At this point, it became clear that the child witness had failed to pass the two tier test required under the **Juveniles Act. Section 122** which prescribes the law applicable to the evidence of a child provided that:

"122. Where, in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child if, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth."

9.5 According to this provision, the evidence of a child who is below the age of fourteen can only be received, on oath, if the trial court forms the opinion that two conditions had been satisfied, namely; **(i) that**

the child is possessed of sufficient intelligence to justify the reception of its evidence on oath; and (ii) that the child understands the duty of speaking the truth. Clearly, the trial court erred when it decided to receive unsworn evidence of the prosecutrix (PW1). The trial court further extended the misdirection by allowing PW1, who had given unsworn evidence to be cross examined. We agree with both counsel that the trial court fell into grave error when it received unsworn evidence of PW1. We therefore expunge the evidence given by PW1 in its totality.

9.6 We also note that PW4 testified against the appellant who is her husband, without his prior consent. **Section 151 (1) of the Criminal Procedure Code** provides as follows:

"In any inquiry or trial, the wife or husband of the person charged shall be a competent witness for the prosecution or defence without the consent of such person –

- (a) in any case where the wife or husband of a person charged may, under any law in force for the time being, be called as a witness without the consent of such person;**
- (b) in any case where such person is charged with an offence under Chapter XV of the Penal Code or with bigamy;**

(c) in any case where such person is charged in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them." (Emphasis ours).

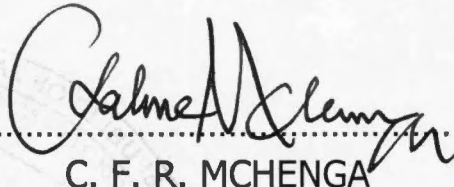
- 9.7 It is clear from **Section 151** that a spouse of an accused person is competent to testify against the accused person without the accused person's consent as long as the case falls within the exceptions in **Subsection 1(a), (b) or (c)**.
- 9.8 In this case, the appellant's wife was not competent to testify in this matter as the prosecutrix was not her child. We, therefore, hold that consent of the appellant ought to have been sought for PW4 to testify in court. Given the foregoing, we equally expunge the evidence of PW4 from the record.
- 9.9 In the absence of the evidence of PW1 and PW4, there is no evidence on the record implicating the appellant. Learned counsel for the respondent argued that the defect was technical and as such prayed that the matter be sent back for re-trial. We do not think this is an appropriate case in which to subject the appellant to a second trial as

the evidence on the record, even if the evidence of the prosecutrix was not expunged, cannot support a conviction.

9.10 In the circumstances, we find merit in the first ground of appeal and we allow it. We thus find it unnecessary to consider ground two.

10.0 **CONCLUSION**

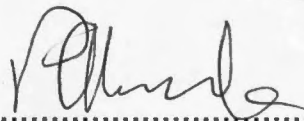
10.1 Having allowed the appeal, we set aside the appellant's conviction and sentence. We set him at liberty forthwith.



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C. F. R. MCHENGA

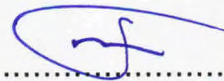
DEPUTY JUDGE PRESIDENT



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P. C. M. NGULUBE

COURT OF APPEAL JUDGE



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K. MUZENGA

COURT OF APPEAL JUDGE