

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(CRIMINAL JURISDICTION)

HKSE/39/2012

B E T W E E N:

WHITE CHIBUTA

VS.

THE PEOPLE

Before Honourable Mrs. Justice Judy Z. Mulongoti on the 5th day of
October, 2012

For the Appellant : Mr. C. Chali of Nkana Chambers

For the State : Mr. M.C. Hamachila, State Advocate

J U D G M E N T

CASES REFERRED TO:

1. *KOMBE VS. THE PEOPLE (2009) ZR 282*
2. *MWELWA VS. THE PEOPLE (1972) ZR 29*
3. *KALEBU BANDA VS. THE PEOPLE (1977)ZR 169*
4. *KATEBE VS. THE PEOPLE (1975)ZR 13*
5. *NZALA VS. THE PEOPLE (1976)ZR 221*
6. *NGATI & OTHERS VS. THE PEOPLE SCZ JUDGMENT NO 14 of 2003*
7. *CHIBOVU AND CHIBOVU VS. THE PEOPLE (1981) ZR 28*
8. *MWANZA VS. THE PEOPLE (1977)ZR 221*

The appellant was convicted of one count of defilement in violation of section 138 of the Penal Code as read with Act No. 15 of 2005.

The particulars of the offence were that on 2nd day of November 2009, at Kitwe the accused (appellant herein) had unlawful carnal knowledge of **Konia Munangi**, hereinafter PW1 a girl under the age of 16.

The facts of the case were that on the material date around 18:00 hours, PW1 a girl aged seven, was walking to her grandmother's home, which was in the same locality as her mother's place. Then she met the appellant who lifted her up and took her to his grocery. He got a sack which he spread on the floor and made her lie on it. Then he opened her legs, opened his trousers, removed his penis and inserted it into her vagina. PW1 further testified that she felt pain and blood came out. The man told her not to report to her mother because if she did, he would come at night and kill her.

PW2, the mother to PW1 testified that on 2nd November, 2009, when she got home around 17:00 hours, she was informed that Chola's mother was looking for her. She went to her friend's place but did not find her. Then a child told her that she was at the neighbourhood watch. PW2 rushed there and found PW1. She was informed what had happened. She checked PW1's private part. She saw some sores and that PW1 was bleeding.

PW3 was **Dorcias Mukuka** who testified that on 2nd November, 2009, around 14:00 hours, PW1 went to her house and informed her that blood was coming out of her vagina. PW3 checked and saw a big clot of blood inside the vagina. She called another person who also confirmed what she had seen. PW3 also observed that the hymen was broken. She took PW1 to the neighbourhood watch after she failed to find her mother

PW2. After interviews, PW1 disclosed that she was defiled by Dah's father.

PW4 was **Samson Mwape** a Crime Prevention officer (neighborhood watch) who testified that on 2nd November, 2009, he was on duty when two women brought a child who was looking very sad. The women reported that the child had been defiled. PW4 called for reinforcement from his colleagues. They went and picked up the appellant. An identification parade was conducted where nine men were lined up. PW1 was brought into the room and asked to identify the person who had defiled her. She identified the appellant as the perpetrator.

PW5 was **Detective Sergeant Joseph Musonda**, the arresting officer. He testified that PW1 showed him the point at which she met the accused. PW5 then took PW1 to the bar which had two compartments and to the unfinished building where she said she was defiled from. When interviewed, the appellant failed to give a proper answer and PW5 charged him. PW5 also produced in evidence the under-five-card, medical report and lab specimen form.

The appellant when called upon to defend himself, after being found with a case to answer, opted to give evidence on oath. He also called three witnesses. The appellant testified that on Monday 2nd November, 2011, he was with Goodson's father from 08:30 hours to 16:00 hours. He left Goodson's father's place around 16:30. He went home where he had a meal his wife had prepared. After eating, he left for Kawama to sort out a few issues. He left Kawama around 19:00 hours. When he got home, he found three neighbourhood officers. They took him to their offices where he was pointed at by a little girl saying he had defiled her. Later

he exchanged positions with Anthony and the girl came and pointed at him again.

DW2 was **Linda Kandeke**, the appellant's wife who testified that when she followed her husband at the neighbourhood watch, she found PW1 narrating how the appellant had defiled her. DW1 asked if she could check PW1's private parts. When she was allowed to check, she only saw a small scratch and a bit of blood.

In cross examination, PW5 testified that PW1 was cut with a razor blade by her grandmother.

DW3 was **Aggrey Bwalya** who testified that on 2nd November, 2009, he was with the appellant from 08:00 hours to 16:00. The appellant had gone to his work place following up a T.V. stand he was making for him.

The court accepted the evidence of the prosecution witnesses that PW1 had been defiled by the appellant. Further that he could convict on the single witness of PW1 if he believed her.

According to the trial court, the evidence of PW2, PW3 and PW4 corroborated each other. Further that the evidence was corroborated by the Medical Report. The court observed that the Medical Report revealed that the hymen was breached, the vulva was swollen and some blood clots were inside the vagina.

The court concluded that, the evidence of the prosecution witnesses was very overwhelming against the appellant and she convicted him accordingly.

The appellant has appealed against this conviction. The appellant's counsel Mr Chali has raised four grounds of appeal.

In relation to grounds one and four, Mr. Chali argued that the learned trial Magistrate fell into grave error when she convicted on the uncorroborated evidence of the prosecutrix. He cited the case of **KOMBE VS. THE PEOPLE (1)** as authority that in sexual offences, corroboration was a matter of law.

According to counsel there was no evidence on record to show that the appellant had carnal knowledge of the prosecutrix, PW1, herein. In addition that the court's reliance on the testimony of PW 2,3, and 4 plus the Medical Report did not aid the court because the evidence of the witnesses did not in any way show that the appellant had carnal knowledge of the prosecutrix. He contended that neither did the Medical Report which actually had a question mark as to whether or not the prosecutrix had been defiled.

It's Mr. Chali's submission that the evidence of the prosecution did not materially link the convict to the case at hand. The case of **MWELWA VS. THE PEOPLE (2)** was relied upon.

Regarding ground two, it was argued that the trial court misdirected itself both in law and fact when it purported to rely on the evidence of the Medical Doctor who did not testify after the High Court ordered a retrial.

It has been argued that this amounted to adding to, or fabricating evidence on the part of the court. Similarly, that it was a dereliction of duty on the part of the prosecution not to have called the Medical Doctor

at retrial. The case of **KALEBU BANDA VS. THE PEOPLE (3)** was relied upon.

In relation to ground three, it was submitted that the trial Magistrate misdirected herself both in law and fact when she disregarded the alibi advanced by the appellant and corroborated by DW2 and DW3. Further, that the prosecution did not make an attempt to negative the alibi. The case of **KATEBE VS. THE PEOPLE (4)** was cited in authority.

Mr. Chali contended, further, that the Magistrate also grossly misdirected herself when she held that the accused had not suggested who may have defiled the prosecutrix. This amounted to shifting blame from the prosecution to the accused. He urged the court to quash the conviction and acquit the appellant.

On behalf of the State, Mr. Hamachila, submitted in relation to grounds one and four that the trial court did not err as there was sufficient corroboration in the evidence provided by the prosecution.

PW2 observed injuries on PW1 which were corroborated by the Medical Report, which confirmed the presence of blood clots in the vagina and the breached hymen. Further, that PW4 testified to conducting an identification parade at which the appellant was identified. Thus, there was sufficient corroboration as to both identity and commission of the offence.

With regard to ground three, Mr. Hamachila conceded that the trial court wrongly referred to the evidence of the Medical Doctor which was not on record at retrial. However, he contended that the error did not go to the

root of the case, as to prejudice the appellant. There were other pieces of evidence which substantiate the case against the appellant.

Additionally, the fact that the doctor did not testify did not prejudice the appellant. The contents of the Medical Report were clear and the lower court confirmed its findings.

The learned State Advocate submitted in relation to the issue of alibi that there was no dereliction of duty as such duty never arose. He cited the case of **NZALA VS. THE PEOPLE (5)** as authority that the police can only investigate an alibi where the accused provides details as to witnesses who could support it. In the case in casu, at time of the arresting officer's testimony, the issue of alibi was not put to him nor were the details of the witnesses given.

Further, that the officer was not aware of an alibi. Accordingly, the learned Magistrate was on firm ground to hold that the alibi was a mere fabrication and an afterthought. He has urged the court to dismiss the appeal for lack of merit and the conviction upheld.

I have carefully considered the evidence on record, the judgment of the trial court and the arguments advanced by both learned counsel. The critical issue in this appeal is whether the appellant is the perpetrator of the crime against the prosecutrix.

The evidence linking the appellant to the crime was from PW1. She is thus a single identifying witness. It is trite that evidence of a single identifying witness can be relied upon provided the possibility of an honest mistaken identity is eliminated. As elucidated by the Supreme Court in **NGATI & OTHERS VS. THE PEOPLE (6)**.

PW1 alleged that she met the appellant around 18:00 hours. It is my considered view that at that time, visibility was good as it was not very dark. She told neighbourhood officers that she was defiled by Dah's father. The appellant was therefore known to her prior to the incident. She also described how he went about spreading a sack, at the grocery where he made her lie down, then removed his penis and inserted it in her vagina.

It is my considered view that although PW1 was a single identifying witness, the trial Magistrate properly relied on her evidence in this regard. I also agree with the Magistrate that PW1 identified the appellant at an identification parade. The issue of a mistaken identity was eliminated.

Admittedly, PW1 gave unsworn statement and her testimony needed corroboration as argued by Mr. Chali. The trial Magistrate held that PW1's testimony was corroborated by the Medical Report and the testimonies of PW2,3 and 4.

I have perused the Medical Report and do concur that it was corroborative of PW1's testimony.

The Supreme Court has elucidated in several cases including the Kombe case, supra, cited by Mr. Chali, **"that corroboration must not be equated with independent proof. It is not evidence which needs to be conclusive in itself. It is independent evidence which tends to confirm that the witness is telling the truth when he or she says**

that the offence was committed and it was the accused who committed ”.

Furthermore, that “the law is not static. It is developing. There need not now be a technical approach to corroboration.”

Going by this case, the Magistrate was on firm ground to hold that on the evidence on record, PW1’s testimony was corroborated.

Regarding the alibi, the Magistrate held that it was a mere fabrication and an afterthought. I am alive to the discrepancies in time by PW1, PW2 and PW4. Whereas PW1 alluded to 18:00 hours and PW2 was close, as she said after 17:00 hours. PW4 said it was around 14 hours.

I have noted that at the time of 18:00 hours, PW1 referred to visibility was good and she positively identified the appellant. It is also my considered view that it would be folly to expect PW1 a child aged seven years to recall the exact time of the incident. Furthermore, I opine that the discrepancies in time between the three are immaterial as to not affect the evidence of the identify of the appellant.

It is noteworthy also that the appellant called witnesses to testify as to his whereabouts between 08:00 to 16:00 hours. He neglected to do so for the time between 16:00 hours and 19:00 hours, stating only he had errands in Kawama without elaborating like he earlier said that he was waiting for his T.V. stand at DW3’s premises. The crucial time was between 16:00 hours to 19:00. Accordingly, I am of the view that the alibi did infact not affect the prosecution’s case as to identity. This notwithstanding, I also concur with Mr. Hamachila and authorities cited

that it was encumbered upon the appellant to provide details to the police to investigate the alibi.

Mr. Chali also argued that the Medical Report bore question marks and that the trial Magistrate misdirected herself in relying on the evidence of the Medical Doctor who never testified at time of retrial.

Admittedly, the Magistrate misdirected herself in relying on the Medical Doctor's testimony. However, as argued by Mr. Hamachila, the contents of the Medical Report revealed that the child was defiled. I am also unable to accept that failure to call the Medical doctor was fatal to the prosecution's case.

I am fortified by the Supreme Court decision in **CHIBOVU AND CHIBOVU VS. THE PEOPLE (7)**. Commenting on section 191A of the Criminal Procedure Code, on medical reports, the court held interalia, that **"all that the above provisions say is that the report of a medical officer....shall be admitted to prove the contents thereof"**.

In **MWANZA VS. THE PEOPLE (8)**, it was held that **"there maybe cases in which the Medical report will be sufficient to supply the information without it being necessary to call the doctor...."**.

I am of the view that this is one such case. The contents of the Medical Report were self explanatory and it was unnecessary to call the doctor. The prosecution were not at fault in failing to call the doctor as argued. There was no dereliction of duty. In any event, there was nothing to stop the appellant from calling the doctor if he so desired. Further, I agree

with the State Advocate that failure to call the doctor did not prejudice the appellant in any way.

For the foregoing, the appeal is unsuccessful and is accordingly dismissed. The conviction is upheld.

Delivered at Kitwe this 5th Day of October 2012

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Judy Z. Mulongoti
JUDGE