

CHRISTOPHER NONDE LUSHINGA

v

THE PEOPLE

SUPREME COURT

SAKALA, C.J., CHIBESAKUNDA, AND PHIRI, JJS.,

2nd NOVEMBER, 2010 and 12th JULY, 2011.

(S.C.Z Judgment No. 15 of 2011)

[1] Criminal Law - Corroboration - Children of tender years - Both giving unsworn evidence - Whether capable of corroborating one another.

[2] Criminal Law - Corroboration - Accomplice's corroborated testimony- Whether conviction safe.

[3] Criminal Law - Corroboration - Meaning of the word "corroboration" and the phrase "something more."

The appellant was convicted on two counts of a defilement of child contrary to section 138(1) of the Penal Code. On committal to the High Court for sentence, the appellant was sentenced to 25 years imprisonment on each count, ordered to run concurrently. The appellant appealed against both conviction and sentence.

Held:

1. Two children of tender years giving their unsworn evidence cannot as a matter of law corroborate one another.

2. Section 122(1) of the Juveniles Act, requires that the evidence by the prosecution given by a child of tender years requires corroboration whether that was sworn or unsworn.

3. Although the trial magistrate did not make specific reference to the proviso to section 122(1) of the Juveniles Act, the trial magistrate was mindful of the need for corroboration evidence in sexual offences.

4. The trial magistrate did not specifically use the word "corroboration". There is no magical meaning in the word "corroboration". It simply means evidence which confirms the commission of the offence, and the identity of the perpetrator of that offence. Put differently, corroboration means supporting or confirming evidence.

5. The Supreme Court was satisfied that the trial magistrate discussed "corroboration" and "something more" which justified the conviction of the appellant.

6. Although the trial magistrate did not warn herself of the fact that the prosecution witnesses were witnesses, who had their own interest to serve. There was corroborative evidence, or “something more” to exclude the danger of false implication.

Cases referred to:

1. Director of Public Prosecutions v Hester [1972] 3 ALL E.R. 1056.
2. Ndakala v The People (1974) Z.R. 19.
3. Phiri and Others v The People (1978) Z.R. 79.
4. Mwewa v The People (1978) Z.R. 277.
5. Nyampande and Another v The People (1988-1989) Z.R. 163
6. Kaunda v The People (1990-1992) Z.R. 215.

Legislation referred to:

1. Penal Code cap. 87, as amended by Act Number 15 of 2005 s. 138(1).

N. Nhari of Messrs Nhari Mushemi and Associates for the appellant.

P. Mukuka, Senior State advocate in the Director of Public Prosecutions Chambers.

SAKALA, C.J.: delivered judgment of the Court. The appellant was convicted on two counts of defilement of a child contrary to section 138 (1) of the Penal Code, chapter 87 of the laws of Zambia as read with Act No. 15 of 2005.

The Particulars of offence on the first count were that the appellant, on a date unknown, but between 1st January, and April, 2006, at Ndola, in the Ndola District of the Copperbelt of the Republic of Zambia, jointly and whilst acting together with another person unknown, had unlawful carnal knowledge of a girl under the age of 16 years, namely; Fridah Kapembwa.

On the second count, the Particulars of offence were the same as in the first count, but that he had unlawful carnal knowledge of a girl, namely; Bathsheba Chimpale.

On committal to the High Court for sentence, the appellant was sentenced to 25 years Imprisonment with hard labour on each count, ordered to run concurrently with effect from 27th October, 2006, the date when he was arrested.

The case for the prosecution centred on the evidence of three witnesses; PW1, Fridah Kapembwa, the prosecutrix in count one, PW2, Bathsheba Chimpale, the prosecutrix in count two, and PW3, the sister to PW1, and the step mother to PW2.

The evidence of PW1, the prosecutrix in count one, given on oath, after the Court had conducted a Voire dire, was that she knew the appellant as Christopher Nonde; that they were staying together for one year as her elder sister, PW3, is married to the appellant's uncle.

She explained that sometime in January,, 2006, on a date she could not remember, her brother-in-law, the husband to PW3, had gone to Lusaka. They remained in the house, six of them namely; herself, PW2, PW3, Kent, Bwalya and the appellant; that they were all sleeping in the same house. PW3 was sleeping alone in one bedroom, whilst herself and the others were sleeping in the other bedroom. The appellant was sleeping in the sitting room with another person.

PW1 further explained that the appellant used to follow them in their bed room in the night. That he used to come to her without wearing anything and could tell her to take off her pants; that if she refused, he could slap her; and that the lights were never switched off.

PW1 also explained that when the appellant came in to the room, he would climb on the bed and sleep on top of her; that he was naked and she was also naked; that he inserted his penis into her vagina; that she felt pain in her private parts; but she never shouted; that while the others were fast asleep, PW2 woke up and saw what was happening; that appellant did this several times from the time her brother-in-law left.

PW1 testified that she never shouted because he used to say that if she told anyone, he would beat her. She also testified that her private part was injured. She used to notice whitish stuff on the vagina after the appellant had slept with her.

PW1 further testified that she told her friend Karen that the appellant was coming every night to sleep with her and that she was feeling pain; that it was Karen who reported the matter to PW3, her elder sister.

According to PW1, later, PW3 asked her and PW2 to explain everything that happened to them; that she explained everything. By this time her brother-in-law had come back from Lusaka. The appellant was called and asked in her presence, but he refused. The appellant and herself were then taken to the Police. She was interviewed at the Police and taken to Arthur Davison Hospital, where they were examined. At the Police, they were given a paper to take to the hospital. According to PW1, the appellant used to exchange with his friend Justine in sleeping with them.

PW2, the prosecutrix in count two, also gave evidence on oath after the Court had conducted a voire dire. Her evidence, which was the same as that of PW1, was that she too used to sleep in the same bedroom with PW1; that in the night the appellant would come in their bed room and tell them to take off their pants; that the appellant used to tell PW1 to take off her pants; while Justine used to tell her take off her pants; that if she refused, Justine would remove the pants himself; that when they wanted to shout they threatened them.

PW2 also testified that the appellant once came alone naked, and undressed her; that light was on, he climbed on top of her; he removed a big thing and put it in her vagina; that he was doing "stupid things" when he placed his penis into her vagina; and that at that time, PW1 was sleeping; but could see when she woke up.

PW2 testified that when they wanted to tell their mother, the appellant threatened them. She explained that she used to feel pain, her vagina was paining; that she could not shout as the appellant held her mouth; that the appellant had carnal knowledge with her several times on different nights that she could not count; that he started when her father left home for Lusaka and stopped when he returned.

According to PW2, the appellant used to exchange with Justine. Sometimes Justine would come and defile her, on other times it was the appellant; that the appellant used to buy them sweets.

PW2 testified that she could see whitish stuff on her vagina, coming from the appellant's penis. She developed sores. She told Mary, a friend, about it; that her mother overheard when the friends were talking about it and asked them; that she checked them and were later taken to the Police, who referred them to the hospital; that they were given two papers. PW2 testified that the appellant defiled her several times.

The evidence of PW3, the sister to PW1, and mother to PW2, was that she had known the appellant, the nephew to her husband, for eight years; that they used to stay with him. She recalled that on 25th October, 2007, around 1700 hours, she was at her home, when she heard a story from her daughter's friend that the appellant used to go into her daughter's bedroom to have carnal knowledge with her. She just overheard this story.

Following the overhearing of the story, she called the two girls, PW1 and PW2. She also called her Aunt Chimpale; Mr. Chimpale and the appellant. According to PW3, the two girls reported that the appellant had been going to their bedroom to have carnal knowledge with them. She asked the appellant, but he denied. PW3 testified that she took the two girls in the house to check their private parts. She found that both of them had been injured.

When she asked the girls how many times that had happened; they said that it was uncounted times. PW3 further testified that her house has two bedrooms, a kitchen and sitting room. She said the girls were sleeping in the other bedroom. The appellant was sleeping in the sitting room with Justine.

According to PW3, the girls stated that the appellant and Justine were exchanging in having carnal knowledge with them. This was said in the presence of the appellant. She then decided to report the matter to the Police. At the Police, she was issued with two Medical Reports. She took the girls to Arthur Davison hospital, where they were examined and treated.

PW3 further testified that when the appellant heard that she had reported the matter to the Police, he decided to kill himself by drinking poison; but his uncle grabbed it from him. The Police later apprehended him. According to PW3, Justine ran away; but was recently apprehended.

PW4, a Police Officer, testified that he apprehended the appellant and brought him to the Police Station; that the appellant tried to run

away, but he apprehended him.

The appellant, in his evidence on oath, told the Court that he differed with PW3 and that is how she brought up the issue of defilement and reported the matter to the Police. In cross - examination, he testified that he did not differ with PW1 and PW2. He denied defiling the girls.

The learned trial magistrate reviewed the evidence. She was satisfied that the two girls were less than 16 years old and were defiled. She found that the appellant was well known that his identity could not be mistaken.

The Court found that the Medical reports confirmed that the two girls were defiled. The Court posed the question that; if the appellant was innocent, why then did he want to commit suicide or run away? The Court concluded that this showed that the appellant knew what he did. The Court rejected the appellant's denial and found the appellant guilty as charged and convicted him accordingly.

On committal to the High Court for sentence, the appellant was sentenced to 25 years imprisonment with hard labour, hence the appeal to this Court against both conviction and sentence.

On behalf of the appellant, Mr. Nhari filed two grounds of appeal namely; that the trial Court erred in law and fact when it convicted the appellant in the absence of corroboration evidence; and that the trial Court erred and misdirected itself when it failed to warn itself of the fact that the prosecution witnesses were witnesses who had an interest of their own to serve.

Counsel filed written heads of arguments based on the two grounds. The summary of the written heads of arguments on ground one is that from the record of proceedings, the Court rightly observed that PW1 and PW2 were children of tender years and thus conducted a *voire dire* in accordance with section 122 (1) of the Juveniles Act, chapter 53 of the laws of Zambia; but that on the strength of section 122 (1) of the Juveniles Act, cap 53, there was, in the instant case, no corroborating evidence to have warranted the conviction of the appellant, a fact observed by the High Court judge when the matter came up for sentencing.

It was submitted that the evidence of PW1 and PW2 required corroboration as they could not corroborate each other. The gist of the written heads of arguments on ground two, relating to the Court's failure to warn itself of the fact that the prosecution witnesses were witnesses who had their own interest to serve, is that it was not in dispute that, PW1, PW2, PW3, are members of one household, and thus had their own interest to serve; that the three witnesses May, have had every reason to falsely testify against the appellant, especially PW3, who differed with him, prior to the matter being reported to the Police. The case of *Kaunda v The People (6)*, was cited in support of this argument where this Court held:-

“Prosecution witnesses who are friends or relatives of the prosecutrix May, have a possible interest of their own to serve and should be treated as suspect witnesses. The Court should therefore warn itself against the danger of false implication of the accused, and go further to ensure that the

danger has been excluded”

The case of Nyampande and Another v The People (5), was also cited in which this Court held:-

“In the case where the witnesses are not necessarily accomplices, the critical considerations is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, it may, have had a motive to give false evidence. Where it is possible to recognize this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe. Once this is a reasonable possibility the evidence falls to be approached on the same footing as for accomplices”.

It was pointed out that there was nothing to suggest, on the record, that the trial Court warned itself of the dangers of false implication of the appellant in this matter; that in fact, the prosecution evidence showed that it was highly possible that the appellant might have been falsely implicated in the matter; that whilst it was alleged that the alleged defilement took place between 1st January, 2006, to April, 2006, the matter was not reported to the Police until 25th October, 2006, that it boggles ones' mind as to how in October, 2006, PW1 and PW2, could still have injuries on their vagina and how the same could be swollen as alleged by PW3.

It was submitted that the delay in reporting the alleged defilement to the Police can only buttress the appellant's argument that there was false implication by the prosecution witnesses.

The case of Ndakala v The People (2), was cited in support of the submission, where the Supreme Court held:-

“The corollary to the principle that evidence of early complaint is admissible to show consistency is that the failure to make an early complaint must be weighed in the scales against the prosecution's case”.

On behalf of the State, Mr. Mukuka, Senior State advocate, supported the convictions on both counts. In his brief oral arguments, he pointed out that section 122 of our Juveniles Act is a reproduction of section 38 of the English Children and Young Persons Act of 1933. It was submitted that the unsworn evidence of one victim can be corroborated by the sworn evidence of one child. The case of D.P.P. v Hester (1), and the case of Mwewa v The People (4), were cited in support of the submission.

It was pointed out that in Hester (1) case, the Court held that there was no general rule against mutual corroboration and that unsworn evidence of a child can be corroborated by sworn evidence.

It was argued and submitted that PW1 and PW2 gave sworn evidence which was accepted, and that the evidence that needed to be corroborated could be corroborated by sworn evidence which needed to be corroborated.

It was pointed out that the appellant was also a member of the same household; that

defilement was not in dispute; that dates of commission were irrelevant; that the fact that the appellant attempted to poison himself amounted to “something more”.

In his short reply, Mr. Nhari pointed out that in the Hester (1) case, the sworn victim was not a child; while in the instant case PW1 and PW2 were both children, and their evidence needed corroboration by sworn evidence of an adult. He submitted that as long as there was no corroboration of the evidence of PW1 and PW2, by an adult, the commission of the offence was not proved; more so that there was another person, also alleged to have committed the same offence.

At this juncture, we must hasten to put the issue of corroboration evidence in its proper perspective. First, the law in Zambia, as per decided cases, is that two children of tender years giving their evidence unsworn cannot as a matter of law corroborate one another. This is one of the holdings in Mwewa's (4) case, cited by Mr. Mukuka. The Mwewa (4) case followed the Hester (1) case, again cited by Mr. Mukuka. Secondly, section 122 (1) of cap 53, requires that the evidence by the prosecution given by a child of tender years requires corroboration whether that was sworn or unsworn.

This is the law in Zambia on corroboration of evidence of a child of tender years. Turning to the case at hand, we have very carefully considered the evidence on record, the judgment of the trial Court, and the submissions by both learned counsel. ground one of appeal raises the issue of a conviction of the appellant based on the evidence of PW1 and PW2, children of tender years in the absence of corroboration evidence as required in sexual offences.

The arguments in support of ground one of appeal were based on section 122 (1) of the Juveniles Act cap 53 of the laws of Zambia; the relevant portion being the proviso.

To understand and appreciate the whole argument, it is necessary to set out the whole section 122 (1) which reads:

“122. (1) where, in any proceedings against any person for any offence or in any civil proceedings, any child of tender years called as a witness does not, in the opinion of the Court, understand the nature of an oath, his evidence may, be received though not on oath, if, in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth; and his evidence though not given on oath but otherwise taken and reduced into writing so as to comply with the requirements of any law in force for the time being, shall be deemed to be a deposition within the meaning of any law so in force:

Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

The submission was that on the strength of the above provision of the law, there was, in the present case, no corroboration evidence to warrant the conviction of the appellant. It was pointed out

that this fact was noted by the High Court judge, when the matter was before the High Court for sentencing.

It was further submitted that the evidence of both PW1 and PW2 required corroboration in terms of section 122 of the Juveniles Act cap 53 of the laws of Zambia, and that the evidence of PW1 which required corroboration could not corroborate the evidence of PW2 because it also required corroboration.

On the other hand, Mr. Mukuka, on behalf of the State argued that our section 122 of the Juveniles Act is a reproduction, word for word, of section 38 of the English Children and Young Persons Act of 1933.

He contended that the unsworn evidence of one victim can be corroborated by the sworn evidence of a child.

Before the trial magistrate reviewed the evidence in her judgment, she had this to say:-
“The Court is also mindful of the need for corroboration in sexual offences such as this one”

We are satisfied that, although the trial magistrate did not make specific reference to the proviso to section 122 (1) of the Juveniles Act, she was mindful of the need for corroboration evidence in sexual offences like the one that was before her.

The question we must resolve in ground one is, whether there was, in this case, absence of corroboration evidence as required in sexual offences not to have warranted the conviction of the appellant.

According to the trial magistrate, she considered the evidence carefully and was satisfied that the two girls, PW1, and PW2, were defiled and that the two girls were less than 16 years of age.

According to the trial magistrate, the only question she had to answer was who defiled the two girls?

In answering the question posed, the trial magistrate had this to say:

“Firstly, the accused person in this case is a well known person to the victim such that his identity cannot be mistaken. He was a person they regarded as a parent and so it is true that they feared to disclose what was happening to their mother. However, their action of telling their friend showed that they were distressed about the whole issue. The medical reports for both victims confirm that they both were defiled. The accused only makes a general denial in his defence. He claims that he differed with his aunt that is why she brought up the story, however the story did not start with his aunt, but with the two girls. The question is if he was innocent why did he attempt to commit suicide and to run away? This just shows that he knew what he was doing. I do not see any reason why the two girls will lie against their relative”.

It is correct that the trial magistrate did not specially use the word “corroboration”. But she was alive to the fact that the prosecution had to establish the identity of the perpetrator of the two offences, and that the offences had been committed. There is no magical meaning in the word “corroboration”. It simply means evidence which confirms the commission of the offence and the identity of the perpetrator of that offence. Put differently; corroboration means supporting or confirming evidence.

In the instant case, the trial magistrate, on the evidence on record, accepted that the appellant was a well known person to the victim, and a relative, as such that his identity could not be mistaken.

On the commission of the offences, the Court accepted that the Medical reports confirmed that both PW1 and PW2 were defiled. The Court also accepted the evidence that when the matter was reported to the Police, the appellant attempted to commit suicide and to run away. The magistrate found this to be inconsistent with innocence. We agree.

In our view, this amounted to “something more,” or supporting evidence or circumstances falling short of strict corroboration as we put it in the case of Phiri and Others v The People (3). We are, therefore, satisfied that although the trial magistrate did not specifically use the word “corroboration” she was, as indicated at the beginning of her judgment, “mindful of the need for corroboration in sexual offences such as this one”.

Above all, from her findings and conclusion, we are satisfied that she discussed “corroboration,” or “something more,” when she alluded to issues of identity, medical reports and the attempt by the appellant to commit suicide and to run away.

We, therefore, hold that there was corroborative evidence, or at least “something more” which justified the conviction of the appellant. We, accordingly, dismiss ground one of appeal as lacking in merit.

The contention in ground two is that the trial Court erred and misdirected itself when it failed to warn itself of the fact that the prosecution witnesses were witnesses who had their own interest to serve. The submission was that PW1, PW2, and PW3, were members of one household, and hence with their own interest to serve; that the three witnesses may, have had every reason to falsely testify against the appellant especially PW3, who had differed with him, prior to the matter being reported to the Police.

While it is true that PW1, PW2, and PW3, were members of the same household, it is equally true that the appellant, from the evidence on record, was also a member of the same household. The evidence was that the appellant was the nephew of PW3's husband. In point of fact, the evidence was that PW1, PW2, PW3, and the appellant himself lived in the same house.

We note, however, that the issue of the appellant differing with PW3 was only raised when the appellant was giving his evidence in defence. We also note that PW3 was never cross examined on the issue of differing. As rightly observed by the trial magistrate, the story of defilement did not start with PW3, but with PW1, and PW2.

We are prepared to accept that PW1, PW2, and PW3, although not necessarily accomplices, the critical consideration must not be whether they did in fact have interests or purposes of their own to serve, but whether, as we said in the Chola 2 case, they were witnesses who, because of the category into which they fall or because of the particular circumstances of the case, may, have had a motive to give false evidence. In the instant case, this was a reasonable possibility. Thus, PW1, PW2, and PW3's, evidence fell to be approached on the same footing as for accomplices; namely; that the evidence needed corroboration.

However, although the trial magistrate did not warn herself of the fact that the prosecution witnesses were witnesses, who had their own interest to serve, from our conclusion in ground one that there was corroborative evidence, or "something more," in this case, we are satisfied that the danger of false implication was excluded.

In the circumstances, we also dismiss ground two of appeal. Accordingly, the appeal against conviction and sentence is dismissed.

Appeal dismissed.