IN THE SUPREME COURT OF ZAMBIA **Appeal No. 44/2017**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

B E T W E E N:

LEONARD MULENGA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe and Chinyama, JJS**
on 5th December, 2017 and 11th December, 2017

For the appellant: Ms. E.I. Banda, Senior Legal Aid Counsel, Legal Aid Board

For the respondent: Mr. M. Mulenga, Senior State Advocate, National Prosecutions Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Emmanuel Phiri vs. The People (1982) Z.R. 77**
2. **Musupi vs. The People (1978) Z.R. 271**
3. **Mwambona vs. The People (1973) Z.R.28**
4. **Yokoniya Mwale vs. The People SCZ Appeal No. 285/2014**
5. **Kambarage Kaunda vs. The People (1990-1992) Z.R. 215**
6. **Phiri and Others vs. The People (1973) Z.R. 47**
7. **Nsofu vs. The People (1973) Z.R. 287**
8. **Christopher Nonde Lushinga vs. The People SCZ Judgment No. 15 of 2011**

9. **Anayawa and Sinjambi vs. The People SCZ Appeal No. 143, 144/2011**
10. **Webster Kayi Lumbwe vs. The People (1986) Z.R. 93**
11. **GDC Hauliers Zambia Limited V Trans - Carriers Limited (SCZ Judgment No. 7 of 2001)**
12. **Mwewa Murono vs. The People (2004) Z.R. 207**

The appellant was convicted by the Subordinate Court at Chingola of one count of defilement contrary to Section 138(1) of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of the offence alleged that on 18th February, 2015 at Chingola in the Chingola District of the Copperbelt Province of the Republic of Zambia, he wilfully and unlawfully had carnal knowledge of a girl under the age of 16 years.

It is common cause that on the material day the appellant gave a lift to the prosecutrix and PW4, both strangers to him, from Watson Stadium in Chingola into town. The prosecutrix was dressed in her school uniform. Apparently, the prosecutrix, a footballer had gone to the stadium to attend football practice in the company of PW4. According to the two girls, both 15 years old, they requested the appellant to drop them at Pick n Pay but the appellant refused and they ended up driving around with him in his

car and he promised to take them home. The appellant bought the girls an alcoholic drink called Spin which on discovering that it was an alcoholic drink, they spilt it on the ground without the knowledge of the appellant. He made several stoppages, and each time he would leave his phones on the prosecutrix's laps as she had sat on the front passenger seat. The appellant passed through various places with the girls and when they reached town at Zanaco near Shoprite he sent PW4 to buy more Spin. It was at this point that the appellant left PW4 and drove away with the prosecutrix to a place called Cassy where he defiled her behind the building as it was dark. He drove back to pick up PW4 and instead of taking the route home, the appellant took the wrong route and when PW4 asked him where he was taking them he insulted her and threatened to kill them without trace. When the appellant drove on to a bad road and moved slowly, PW4 jumped out of the vehicle taking with her two of the appellant's phones in case her friend suffered harm at the hands of the appellant. The prosecutrix also grabbed the opportunity and fled in another direction while the appellant gave chase shouting 'thief thief' after he noticed that PW4 had taken his phones. PW4 was apprehended by a passerby and

was taken to the police where the appellant reported the theft and PW4 was detained in police cells.

The following morning, the prosecutrix was informed that PW4 was in police custody in connection with the theft of phones and she went to the police station where she was also put in cells together with PW4. The prosecutrix was interviewed and she revealed that the appellant had defiled her the previous night. She was taken for medical examination and Dr. Kabamba confirmed that she was defiled. The tables then turned against the appellant who was first in reporting the theft of his phones by the girls and he was charged with defilement.

In his defence, the appellant admitted that he was in the company of the two girls but that they refused to leave his vehicle and this is how he drove to places with them. He denied being alone with the prosecutrix and defiling her as alleged. According to the appellant, the place where the defilement is alleged to have taken place is a public place making it impossible for such an offence to be committed. He insisted that the defilement case was

hatched up by the two girls because he reported them for stealing his phones.

In his judgment, the trial magistrate after analysing the evidence from the prosecution and defence believed the evidence of the prosecutrix and PW4 against that of the appellant. He rejected the appellant's explanation that the prosecutrix and PW4 refused to leave his vehicle especially that they were total strangers. The trial magistrate found that the appellant gave the two girls alcohol in order to find the opportunity to take advantage of them which he eventually managed by taking the prosecutrix alone to an isolated place where he defiled her. His story that the two stole his phones was totally rejected by the trial court which convicted the appellant and committed him to the High Court at Kitwe for sentencing. The learned sentencing judge sentenced the appellant to 18 years imprisonment with hard labour. The appellant has appealed against conviction.

In arguing the appeal against conviction, Ms. Banda advanced three grounds of appeal couched in the following terms:

1. **The learned trial court erred in law and in fact in convicting the appellant in the absence or corroborative evidence or evidence of something more to exclude the danger of false complaint and false implication.**

2. **The learned court below misdirected itself in law and fact when it concluded that the evidence of PW2 was corroborated by the evidence of PW5 and PW6.**

3. **The learned court below erred in law and fact when it relied on information not before court in its analysis of the case.**

4. **The learned court below erred in law and fact when it shifted the burden of proof to the appellant thereby going against the laid down principles of criminal law.**

In her heads of argument filed herein, Ms. Banda basically argued ground one and two together. She also made a brief augmentation of her submissions. It was submitted that the only evidence that the appellant committed this offence came from the prosecutrix. She submitted that she was alive to the celebrated case of **Emmanuel Phiri vs. The People**[1] where we held that:

> **In sexual offences there must be corroboration of both the 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 warn itself is a misdirection.**

Ms. Banda's argument is that there was only corroboration as to the commission of the offence but not to the identity of the offender. She submitted that although the court acknowledged the principles laid down in the **Emmanuel Phiri case,**[1] he misapplied the principles and ended up misdirecting himself. Counsel took the view that it was wrong for the court to look to PW4 for corroboration of the prosecutrix's evidence because she was a friend and an accomplice in the case of theft. According to Counsel, PW4 was a witness with an interest to serve and she referred us to the cases of **Musupi vs. The People,**[2] **Mwambona vs. The People**[3] and **Yokoniya Mwale vs. The People**[4] where we have pronounced ourselves on how trial courts should address the issue of witnesses with an interest to serve. Counsel's argument is that the failure by the court to warn itself of the dangers of relying on evidence of PW4 was a serious misdirection to the detriment of the appellant. This is because the prosecutrix and PW4 were alleged to have stolen the appellant's mobile phones. Counsel pointed out that after PW4 was apprehended after she bolted with the appellant's phones on the pretext that the appellant could be traced in case something happened to the prosecutrix, she did not disclose to the police that

the appellant had threatened to murder them. Neither did she tell the person who helped the appellant to apprehend her. That the prosecutrix and PW4 spent about three hours in the police cells before the prosecutrix revealed that she had been defiled by the appellant the previous night. It was submitted that this is the more reason the trial court should have warned itself of the danger of false implication and thereafter ensure that the danger had been excluded. In support of this argument she relied on the case of **Kambarage Kaunda vs. The People**[5] where we held, *inter alia,* that:

> **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 danger has been excluded.**

It was submitted that the trial court should have looked for independent evidence to corroborate the evidence of the prosecutrix and PW4 as by law, they could not corroborate each other. It has been strongly argued that if the evidence of the prosecutrix is removed or discounted there is nothing on record to justify a conviction. Ms. Banda submitted that, therefore, the identity of the

offender has not been established in this case and the prosecution failed to prove its case beyond reasonable doubt given the nature and quality of evidence presented by the prosecution.

In ground three, the gist of Ms. Banda's argument is that the court gave consideration to information that was not before it. Specifically this was in relation to the alleged acquittal of the prosecutrix and her friend PW4 of the charge of theft lodged against them by the appellant. It was submitted that the acquittal of the duo did not amount to confirmation that they were not lying about the events of the day. Ms. Banda also attacked the trial court's own conclusion that the hymen was broken at 7 o'clock due to forced penetration when PW5 did not state this in his evidence. In support of this argument Counsel relied on the case of **Phiri and Others vs. The People.**[6]

In ground four, the issue raised before us is that the trial court shifted the burden of proof to the appellant when it stated in its judgment that:

> **"... I do not see the reason why he should fail to call that material witness even knowing that it is the duty of the prosecution to prove the case against him.....the only reasonable finding I make is that**

that lady called Christabel Mwape may not have been even related to the accused at all but a mere customer who could have spoken the truth as given by the prosecutrix and PW4....."

It was pointed out that the trial court also stated that the appellant should have called the good Samaritans who helped him to apprehend PW4. It was submitted that the trial court seemed to suggest that the failure by the appellant to bring the named witnesses meant that his version of the events could not be believed. Counsel took the view that had the witnesses been called they would not have added any value to the appellant's case as it was not in dispute that the appellant had dropped off a lady before proceeding with the prosecutrix and PW4 and also that PW4 was apprehended and taken to the police by the appellant with the help of two good Samaritans. It was submitted that the trial court misdirected itself as it shifted the burden of proof to the appellant. Counsel argued that the conviction was unsafe and it should be quashed, the sentence set aside and the appellant set at liberty.

Mr. Mulenga the learned Senior State Advocate filed heads of argument in response. With regard to ground one and two, he submitted, *inter alia,* that the appellant did not dispute that he was

in the company of the two young girls. Relying on the case of **Nsofu vs. The People**[7] he argued that the appellant had the opportunity to commit the offence and that this amounted to corroboration.

It was submitted that there was sufficient evidence to warrant the conviction of the appellant as there was corroborating evidence as to the commission of the offence and the identity of the offender, the appellant herein. This is in line with the guidelines given by this Court in the case of **Emmanuel Phiri vs. The People**.[1] Counsel contended that PW5 the doctor who examined the prosecutrix confirmed that the appellant had been defiled. It was argued that the fact that the prosecutrix had been defiled was also confirmed by PW4 who noticed that her friend appeared weak.

In relation to the issue of PW1 and PW4 being witnesses with an interest to serve, Counsel relied, *inter alia,* on the case of **Christopher Nonde Lushinga vs. The People**[8] where we held that:

> **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.**

Counsel submitted that 'something more' is found in the opportunity that the appellant had to commit the offence. That the circumstances of this case left no doubt in the mind of the trial court as to the identity of the offender. Further, that the prosecutrix and PW4 were cross-examined at length and their evidence was not shaken. That the prosecutrix told the trial court that she had never had any sexual intercourse apart from the sexual assault by the appellant.

In conclusion, Counsel submitted that the evidence presented before the trial court disclosed material particulars which proved the ingredients of the offence. That in the premises, the trial court was on firm ground when it convicted the appellant as charged. He urged us to dismiss ground one and two.

Turning to ground three and four, Mr. Mulenga conceded during the hearing of the appeal that it was improper for the trial court to comment on the acquittal of the prosecutrix and PW4 of the charge of theft as this evidence was not on record. He argued, relying on the case of **Anayawa and Sinjambi vs. The People**[9] that the burden of proof was not shifted to the appellant when the trial

court stated that the appellant could have brought witnesses to support his defence. Counsel emphasized that the appellant's conviction was based on the evidence before the trial court. He urged us to dismiss the appeal for lack of merit.

We have considered the arguments by the parties.

It is common cause that on the material day, the appellant and the two girls spent time together as the appellant drove from place to place. The appellant, however, denied that he drove the prosecutrix to a place called Cassy where she alleged he defiled her in the vehicle. According to the appellant, Cassy is a place patronised by a lot of people and it was not possible that he would have defiled her in such an environment.

In dealing with ground one and two of the appeal, the issue before us, is whether there was corroboration as to the identity of the appellant as the offender in line with laid down principles in a plethora of authorities including the celebrated case of **Emmanuel Phiri vs. The People**[1] cited by learned Counsel. Ms. Banda has strongly argued that there was no corroboration as to the identity of the offender especially that the evidence of the prosecutrix and her

friend PW4 needed corroboration. We agree that the evidence of the prosecutrix and PW4 needed corroboration. We must point out from the outset that this case relies heavily on the credibility of the witnesses. In the case of **Webster Kayi Lumbwe vs. The People**[10], we held, *inter alia*, that:

> **(i) An appeal court will not interfere with a trial court finding of fact, on the issue of credibility unless it is clearly shown that the finding was erroneous.**

Further, in the case of **GDC Hauliers Zambia Limited vs. Trans - Carriers Limited,**[11] we held, *inter alia*, that:

> **(i) Findings of credibility are not to be interfered with by an appellate court which did not see and hear the witnesses at first hand.**

In this case, the prosecutrix and PW4 went to great length and detail to explain how they moved on the material day and as conceded by Ms. Banda, their evidence was not shaken in cross-examination. The prosecutrix explained in great detail what happened when the appellant took her to a secluded and dark place and defiled her in his car. The appellant denied this and stated that the two girls came up with this fabricated story following his report to the police that they had stolen his phones. Considering

the evidence before the trial court, we agree with Mr. Mulenga that there was 'something more' in this case. In the case of **Nsofu vs. The People**[7] cited by Mr. Mulenga it was held that:

> **Mere opportunity alone does not amount to corroboration but the opportunity may be of such a character as to bring the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves amount to corroboration.**

In this case, the trial magistrate stated thus:

> **"The question as to why the accused gave the juveniles alcohol can only reasonably be inferred after considering all other aspects of the case. After doing that the only reasonable inference that can be drawn is that the accused gave PW2 and PW4 alcohol so that they get drunk and their mind impaired to make it easier for him to execute his intention of abusing either of them. He kept on driving around with them with a false promise that he will take them home, just to buy time and allow the alcohol to take effect on the girls. It was deliberate that he kept on putting and picking up phones from the prosecutrix's thighs to sexually arouse her especially with the combination of the alcohol he thought they drunk. Seeing no desired reaction he opted to separate the girls and then used force."**

The trial magistrate continued:

> **"The prosecutrix and PW4 gave evidence that was unchallenged that they did not know the accused before the material day. After all that time he spent with them, there is no evidence showing that they had anything against him except waiting for the fulfilment of**

the promise to take them home. I have not found anything on record that suggests there could be any such basis of a potential danger of false implication. I have throughout this trial guarded against that, there is no such a thing herein as false implication the witnesses are credible and their evidence was duly tested in cross-examination." (Emphasis ours)

Ms. Banda submitted that although the trial magistrate stated in his judgment that he "guarded" against the appellant being falsely accused, he misapplied the principles laid down in a plethora of cases. To the contrary, it is clear in the judgment that the trial magistrate was alive to the dangers of false implication hence the reason that he put himself on guard in order not to prejudice the appellant. We take the view that the circumstances of this case show that the appellant was in the process of grooming the prosecutrix as he moved around with her and PW4 in his vehicle. Clearly, when he failed to groom the prosecutrix, he simply forced himself on her. Further, the evidence of the arresting officer that the appellant admitted to buying alcohol for the girls remained unchallenged. The question is, why should an adult buy alcohol for the two young girls, one of whom was clearly a school girl (the prosecutrix) who was in a school uniform? The appellant did not know these girls but he kept them in his car and bought them

alcohol - this only shows he had a sinister motive from the beginning and we cannot agree more with the trial magistrate when he found him guilty as charged.

One aspect that Ms. Banda strongly argued is the fact that when PW4 jumped out of the vehicle, it was allegedly because of the impending danger of death at the hands of the appellant. That strangely, PW4 did not tell the person who apprehended her for stealing the appellant's phones that she was running away from danger and neither did she report the matter to the police. We have perused the record thoroughly with regard to this issue. According to PW4, after she was apprehended she was taken to the police and was put in the cells. The appellant confirmed that this is what happened. There is no evidence either from the prosecution or defence that PW4 was interviewed upon arrival at the police station before being taken into the cells. Perhaps had the police officer who was stationed at the Inquiries Office at the time been called as a witness, he would have shed light as to what transpired that night.

The crux of the matter is that the appellant had an opportunity to commit the offence. The issue that has been raised

by Ms. Banda is that the two girls could have hatched this story against the appellant after they spent time together in the police cell the following morning. We do not agree. It is interesting to note that the prosecutrix willingly made her way to the police station after hearing that her friend PW4 was in police custody. In fact, during trial there was no evidence to show that the prosecutrix had taken any phone from the appellant's vehicle although there was evidence that the two were jointly charged

We find that we cannot fault the trial magistrate as he considered the evidence before him and arrived at the inescapable conclusion that the appellant was a defiler as alleged in the particulars of the offence and the overwhelming evidence adduced by the prosecution. Ground one and two must fail.

Turning to ground three, Mr. Mulenga graciously conceded that the trial magistrate went overboard when he mentioned the acquittal of the prosecutrix and PW4 on the charge of theft. We are also in agreement with Mr. Mulenga that the issue of the acquittal though erroneously mentioned was not the basis of the conviction. We must indeed admonish trial courts to desist from discussing or

considering evidence which is not on record as this may, in appropriate cases result in an acquittal if it is found that the accused was prejudiced. Ground three succeeds to that extent.

With regard to ground four, the gist is that the trial magistrate shifted the burden of proof to the appellant when the trial magistrate in considering the appellant's defence wondered why he had not called certain witnesses mentioned in his defence. When the case is at defence stage, we gave guidance in the case of **Mwewa Murono vs. The People**[12] in which we held, *inter alia,* that:

> **4. The accused bears the burden of adducing evidence in support of any defence after he has been found with a case to answer.**

And in the case of **Anayawa and Sinjambi vs. The People**[9] which Mr. Mulenga referred us to, we pronounced ourselves on the scenario where the second appellant in that case stated in his defence that he was with his wife but he did not call her as a witness. The trial court in that case wondered why he did not call the wife as a witness to support his defence. On appeal, it was argued that the trial court had shifted the burden of proof. We stated, *inter alia,* in the **Anayawa**[9] case that the learned judge was

entitled to make the observation in view of the seriousness of the charge faced by the second appellant. And as we stated in the **Murono**[12] case, an accused should not take the prosecution onslaught lying down without adducing any evidence in his defence. That is suicidal. In any case as argued by Ms. Banda had those witnesses been called they would not have assisted the appellant as their evidence was not in contention. We, therefore, do not agree that the trial magistrate shifted the burden of proof to the appellant. Ground four also fails.

In conclusion, we find that the trial magistrate gave due consideration to the evidence presented by the parties and the appellant was properly convicted. We dismiss the appeal for lack of merit.

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