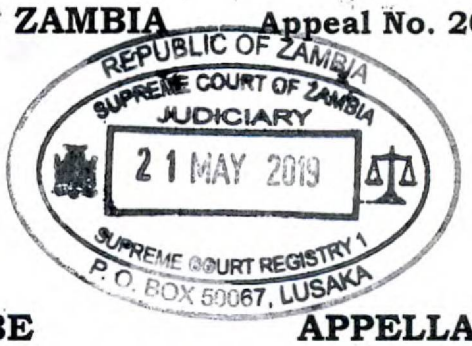
IN THE SUPREME COURT OF ZAMBIA **Appeal No. 200/2017**
HOLDEN AT NDOLA
(Criminal Jurisdiction)



B E T W E E N:

AKABONDO SIUMBWANYAMBE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Muyovwe, Malila and Chinyama, JJS**
on 5th February, 2019 and 21st May, 2019

For the Appellant: Mr. M. Mankinka, Legal Aid Counsel

For the Respondent: Mrs. M. Tembo-Weza, Acting Senior State Advocate

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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) ZR. 77**
2. **Mwansa Mushala and Others vs. The People (1978) Z.R. 58**
3. **Mwasumbe vs. The People (1978) Z.R. 354**
4. **Chipulu vs. The People (1986) Z.R. 73**
5. **Iven Mukonde vs. The People SCZ No. 11 of 2011**
6. **Katebe vs. The People (1975) Z.R. 13**
7. **Christopher Nonde Lushinga vs. The People (S.C.Z Judgment No. 15 of 2011)**

The appellant was convicted of the offence of rape and sentenced to 20 years imprisonment with hard labour.

It was established that on the day in question, the appellant met the prosecutrix as she was returning from the field. He threatened her with death while reminding her that he was a satanist. He assaulted her and squeezed her neck and blocked her nose and mouth and then raped her. After raping her, he beat her up severely until she fell into unconsciousness. She was only discovered the following morning by a passerby. The appellant was known by the prosecutrix from childhood as they lived in the same neighbourhood and the two never had any differences. The matter was reported to the police where the prosecutrix told the police that she was raped by the appellant.

The appellant in his defence stated that at the time of the incident, he was at home in a drunken stupor. He explained that he had gone to the prosecutrix's village on the evening in question to drink with his friend but denied raping the prosecutrix.

The trial magistrate, after considering the evidence from both sides, noted that although the appellant denied raping the prosecutrix, he had visited her village on the material day and that they knew each other very well. That in his evidence he conceded

that the prosecutrix clearly identified him as the rapist. And medical evidence confirmed that the prosecutrix was raped. The trial magistrate found that the prosecution proved its case beyond reasonable doubt.

Unhappy with the outcome of the trial, the appellant appealed to this court on a sole ground namely that the trial court convicted him in the absence of corroboration as to the identity of the offender.

Mr. Mankinka, learned Counsel for the appellant, relied on his filed heads of argument. Counsel began by citing 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. Counsel based his argument on the fact that in her evidence, the prosecutrix aged 64 years stated in cross-examination that:

"it was dark. I was able to recognise the accused from his voice".

According to Mr. Mankinka, there was a possibility of mistaken identity in view of the fact that the attack occurred at night. On this

argument he relied on the cases of **Mwansa Mushala and Others vs. The People,**[2] **Mwasumbe vs. The People**[3] and **Chipulu vs. The People.**[4] It was submitted that the trial court took a casual approach to the issue of the possibility of an honest mistake. It was pointed out that PW4, the investigations, officer had stated that the attack happened at 21:00 hours and coupled with the stress and trauma of the circumstances, the opportunity for reliable observation was absent. In support of this argument Counsel relied on the case of **Love Chipulu vs. The People** where we stated at Page 76 that:

> **"Although the complainant testified that he had known his assailants for about nine months prior to the robbery, this does not help the prosecution's case because the offence was committed in traumatic circumstances and the opportunities for observation were poor."**

According to Counsel, the complainant did not even give a description of her assailant; how long the attack took, leading to the conclusion that the possibility of an honest mistake was not eliminated. He contended that there was no connecting link between the appellant and the offence. That not even the medical evidence could assist in providing the link as the medical examination was only conducted a week after the incident. In Counsel's own words "the appellant's assertion that he was clearly and properly identified

by the prosecutrix was his own opinion which was seriously countered by other evidence on record suggesting that the identity of the offender was not proved beyond reasonable doubt. We were urged to allow the appeal, set aside the conviction and set the appellant at liberty.

On behalf of the respondent, Mrs. Tembo-Weza submitted, *inter alia,* that there was sufficient evidence from the prosecutrix and indeed from the appellant which pointed to the fact that it was the appellant who had raped her. She submitted that the appellant admitted that the complainant knew him very well and he confirmed in his own evidence that she clearly identified him as the person who raped her. She relied on the case of **Iven Mukonde vs. The People.**[5] Counsel opined that there can be no better evidence than the evidence of the appellant with regard to the identity of the offender. It was submitted that apart from recognising the appellant through his voice, there was moonlight enabling the complainant to identify the appellant. In any case, as they conversed before the attack, the complainant had the opportunity to identify her attacker. Further, the appellant confirmed visiting the complainant's village giving him

the opportunity to commit the offence. Mrs. Tembo-Weza again referred us to the case of **Ives Mukonde vs. The People** to buttress her argument. That the complainant was not shaken during cross-examination and she had no motive to falsely implicate the appellant and that there are special and compelling grounds to accept the evidence of the complainant. We were urged to uphold the conviction of the trial court and dismiss the appeal.

We have considered the arguments advanced by Counsel on the sole ground of appeal. The issue before us, in this appeal, is whether there was evidence as to the identity of the offender in line with decided cases cited by both learned Counsel for the parties.

Mr. Mankinka's argument is that the trial court did not sufficiently address its mind to the issue of the identity of the offender. We were referred to the complainant's evidence where she stated that:

> **"I went to the field early in the morning and returned in the evening. As the moon had appeared in the sky. It was dark. I was able to recognise the accused from his voice."**

Mr. Mankinka's argument is that this should have cast doubts in the mind of the trial court. We have stated time and again that

the evidence in any given case must be considered holistically. According to the complainant, there was moonlight at the time of the attack. In other words, although it was dark there was moonlight. There was also evidence that the complainant knew the appellant from childhood and he admitted that they knew each other. There was undisputed evidence that the two had a conversation before the appellant sexually assaulted her and in the conversation he threatened her with death and carried out his threat by severely physically assaulting her and left her in a state of unconsciousness. The appellant admitted having gone to the complainant's village on the night in question and this could not be ignored by the trial court. Clearly, this shows that the appellant had the opportunity to commit the offence which amounts to corroboration of the evidence of the complainant in line with our holding in **Ives Mukonde vs. The People.**

Further, in the case of **Katebe vs. The People**[6] we held that:

> **(iii) Where there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against an accused, and the case is in practice no different from any others in which the conviction depends on the reliability of her evidence as to the identity of the culprit, this is a "special and compelling ground" which would justify a conviction on uncorroborated testimony.**

In this case, the complainant had known the appellant from childhood and he gave no reason why she should falsely accuse him of such a heinous act. Instead, the appellant revealed that he was the culprit when in cross-examination he said:

> **"PW1 knows me very well and I know her well. There are so many people in the village. PW1 clearly and properly identified me as the person who raped her. She clearly saw me raping her."**

The appellant placed himself at the scene and admitted on oath that he was the perpetrator of the crime. Should the court have disregarded that evidence? We do not think so. And we do not agree with the submission by Counsel for the appellant that the appellant's own admission that he was clearly and properly identified by the prosecutrix was his opinion. In our view, the appellant's admission amounts to evidence which the court was entitled to take into account. In the case of **Christopher Nonde Lushinga vs. The People (S.C.Z Judgment No. 15 of 2011)** we held, *inter alia*, that:

> **...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 case in *casu*, other than the evidence from the prosecution witnesses which proves the identity of the offender, the appellant freely gave his evidence which supported it and we cannot fault the trial magistrate for taking it into account. In fact, the record shows that the appellant was represented by Counsel during trial and if there was any need for clarity, his own Counsel would have cleared issues in re-examination and there was none as pointed out by Mrs. Tembo-Weza.

We take the view that the trial magistrate was on firm ground when he found the appellant guilty as charged and convicted him for the subject offence.

We, therefore, agree with Mrs. Tembo-Weza that the conviction was not solely based on the fact that the complainant recognised the voice of the appellant but on other available evidence which strengthened the victim's evidence of identification of the perpetrator. The conviction was proper and we uphold it.

Turning to the sentence, we find that it comes to us with a sense of shock. The victim was an elderly woman who was brutally

assaulted in the course of the commission of the crime and was left for dead by the appellant. These, in our view, are aggravating circumstances which the sentencing judge ought to have taken into account. Notably, the learned judge gave no reasons for the sentence he imposed. We implore lower courts to reveal their minds as they mete out sentences in cases before them to avoid eyebrows being raised by appellate courts. We find the sentence of 20 years totally inappropriate under the circumstances. We set it aside and instead we impose a sentence of 35 years imprisonment with hard labour with effect from the date of arrest.

Appeal dismissed.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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M. MALILA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE