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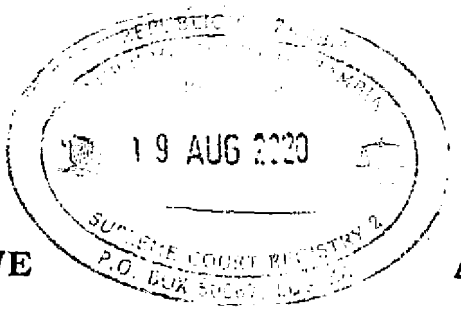
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 59/2019**
HOLDEN AT KABWE
(Criminal Jurisdiction)



BETWEEN:

CHARLES CHIPANDWE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
on the 7th April, 2020 and 19th August, 2020

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

For the Respondent: Mrs. C. Mbewe-Hambayi, Deputy Chief 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. **Sakala vs. The People (1972) Z.R. 35**
2. **Edgar Kamanga vs. The People SCZ Judgment No. 120 of 2008**
3. **Phiri (Macheka) vs. The People (1973) Z.R. 145**
4. **Gift Mulonda vs. The People (2004) Z.R. 135**
5. **The Minister of Home Affairs, The Attorney General vs. Lee Habasonda Suing on His own Behalf and on Behalf of The Southern African Centre for The Constructive Resolution of Disputes (2007) Z.R. 207**
6. **Muvuma Kambanja Situna vs. The People (1982) Z.R. 115**

7. **Joseph Mulenga and Another vs. The People (2008) Z.R. 1 Vol 2**
8. **Lesley Mutale vs. The People SCZ Judgment No. 187/2017**
9. **Chanda Nkole, Francis Kaluba and Zanta Kabangabanga vs. The People SCZ Judgment No. 8 of 2019**
10. **Muyunda Muziba and Sitali Ilutumbi vs. The People (2012) Z.R. 539 Vol. 3**
11. **Philip Mungala Mwanamubi vs. The People SCZ Judgment No. 9 of 2013**
12. **Zulu vs. The People (1973) Z.R. 326**
13. **Ernest Yoombwe vs. The People SCZ Judgment No. 15 of 2019**
14. **Emmanuel Phiri vs. The People (1982) Z.R. 77**
15. **Ivess Mukonde vs. The People S.C.Z. Judgment No. 11 of 2011**
16. **Machipisa Kombe vs. The People (2009) Z.R. 282**
17. **Kenneth Chisanga vs. The People (2004) Z.R. 93**

The appellant was convicted of the offence of defilement by the Subordinate Court sitting at Kasama and was sentenced in the High Court to 40 years imprisonment with hard labour by the late Mr. Justice M.E. Wanki.

The facts established by the prosecution are that on the 24th June, 2004 around 18:00 hours the prosecutrix aged 12 years was coming from the market where she had gone to sell ice blocks for her elder sister (PW2). The prosecutrix was in the company of PW3 a young boy also aged 12 years, who had been sent to buy cigarettes by his father. On the way home, the duo passed through a football field where they found the appellant, a polygamous man

known to both of them. The appellant unleashed his dog on the duo and grabbed the bucket of ice-blocks from the prosecutrix. PW3 managed to run away leaving the prosecutrix struggling with the appellant to get her bucket. The appellant defiled the prosecutrix and later released her. The prosecutrix got her bucket and headed home where she immediately reported to PW2 who observed that the prosecutrix had a blood-stained underwear and was still bleeding from the private part. The prosecutrix also revealed that this was the second time the appellant defiled her. The matter was reported to the police and the appellant was apprehended. There was evidence that the prosecutrix was admitted in hospital for three days due to bleeding from her private part. Medical examination confirmed that the prosecutrix was defiled.

In his defence, the appellant gave unsworn testimony. He denied defiling the prosecutrix. According to the appellant, on the material day and time, the prosecutrix and her friends passed through the football ground while he was playing football with his friends. Her friends ran away as they were afraid of his dog however, he bought an ice-block from her.

The trial court found that the prosecution had proved its case beyond reasonable doubt and the learned sentencing judge in the High Court imposed the sentence of 40 years imprisonment with hard labour with effect from 30th June, 2004.

The appellant has now appealed to this court against conviction and advanced two grounds of appeal namely:

1. **The trial court erred in law and fact when she found that the appellant was guilty of the offence of defilement contrary to section 138 of the Penal Code Chapter 87 of the laws of Zambia.**

2. **The trial court misdirected herself in law when she delivered a judgment which fell short of the standard as there was no review of the evidence, the reasoning of the Court on the facts and the application of the law and authorities.**

On behalf of the appellant, Mrs. Liswaniso filed heads of argument which she relied on. It was submitted in ground one that the *voire dire* conducted by the trial court in respect of PW1 (the prosecutrix) and PW3 was defective in that the court merely recorded answers and omitted to record the questions. Counsel contended that this omission rendered the said *voire dire* defective. In support of this argument Counsel relied on the case of **Sakala vs. The People**[1] in which the Court of Appeal, the forerunner to

this court guided that when conducting a voire dire, trial courts should record both questions and answers to enable the appellate court to be satisfied that the trial court has carried out its duty. We were also referred to the case of **Edgar Kamanga vs. The People**[2] in which we cited the holding in the **Sakala**[1] case.

On the age of the prosecutrix, Counsel relied on the cases of **Phiri (Macheka) vs. The People**[3] and **Gift Mulonda vs. The People**[4] in which this Court gave guidance that the age of the victim in defilement cases is crucial and a very essential ingredient of the charge.

In the case in *casu*, Counsel lamented that no under-five card or sworn affidavit was produced to prove the age of the prosecutrix. It was submitted that the evidence on this aspect given by PW2 the elder sister to the prosecutrix was unsatisfactory.

In ground two, it was submitted that the judgment of the trial court fell short of the required standard as it lacked reasoning on the facts; there was no review of the evidence and no law or authorities were applied. Counsel reproduced an excerpt from the trial court's judgment which she opined was a holistic analysis of

the case. We will produce the excerpt as we deal with the issue in this judgment.

In support of this argument, Counsel relied on the case of **The Minister of Home Affairs, The Attorney General vs. Lee Habasonda Suing on His own Behalf and on Behalf of The Southern African Centre for The Constructive Resolution of Disputes**[5] in which we held, *inter alia*, that:

> **(4) Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts.**

Further, Counsel referred us to the case of **Muvuma Kambanja Situna vs. The People**[6] in which we held, *inter alia*, that:

> **(iv) The judgment of the trial court must show on its face that adequate consideration has been given to all relevant material that has been placed before it, otherwise an acquittal may result where it is not merited.**

It was submitted that the judgment of the trial court did not show adequate consideration of the relevant material placed before

the court. Counsel prayed that the appeal be allowed, and that the appellant be acquitted forthwith.

Mrs. Mbewe-Hambayi, the learned Deputy Chief State Advocate also filed heads of argument which she relied on. However, in her response, we note that Mrs. Mbewe-Hambayi failed to respond to the issue raised by Mrs. Liswaniso in ground one of the appeal namely that the *voire dire* was defective as the magistrate did not record the questions. Instead, Counsel for the State took another route and submitted that the *voire dire* was defective as the two child witnesses did not understand the nature of an oath and the duty to tell the truth as provided under Section 122 of the Juveniles Act. These arguments are misplaced and we will not consider them as the same have not been raised in this appeal.

On the age of the prosecutrix which Ms. Liswaniso argued within ground one, Counsel for the State submitted that PW2, the elder sister to the prosecutrix, who was 26 years old at the time she gave her testimony, was old enough to prove the prosecutrix's age. It was contended that PW2's evidence on the age of the prosecutrix

provided the best evidence available thereby satisfying the guidance laid down in the case of **Macheka Phiri vs. The People**.[3] Counsel contended that at no time during trial did the appellant challenge PW2's evidence on the age of the prosecutrix. Therefore, Counsel argued that the issue of age should have been raised during trial and not before this court. Counsel relied on the cases of **Joseph Mulenga and Another vs. The People**[7] and **Lesley Mutale vs. The People**.[8] In **Joseph Mulenga**[7] we held that:

> **During trial, parties have the opportunity to challenge evidence by cross examining witnesses, cross examination must be done on every material particular of the case. When the prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed.**

And that in the **Lesley Mutale**[8] case, we stated that:

> **"It is trite that an accused person must lay his defence from the commencement of the trial up to his defence. It is not the duty of the court to establish the defence raised by an accused person."**

It was submitted that in the case in *casu*, the appellant did not rely on the proviso which raises a defence on the age of the prosecutrix, therefore, he cannot raise it as a defence on appeal.

Turning to ground two, Counsel for the State conceded that the judgment of the trial court lacked substance and clarity on how the evidence was analysed and how the decision to convict the appellant was arrived at. It was submitted that, however, the record of proceedings reveals that PW2 and PW4's evidence connects the appellant to the offence and it was not challenged by the appellant. Counsel referred us to the case of **Chanda Nkole, Francis Kaluba and Zanta Kabangabanga vs. The People**[9] in which this Court had occasion to consider a poorly written judgment. According to Counsel, in that case, we stated that it is ideally not our duty to rectify the shortcomings of the trial court, however, we still went ahead to consider the evidence on record and proceeded to uphold the conviction. Counsel invited us to analyse the evidence especially that of PW2 and PW4 and make our own finding. It was contended that the shortcomings of the judgment of the trial Court should not lead to an acquittal as there is evidence on record which supports the conviction. Counsel also relied on the case of **Muyunda Muziba and Sitali Ilutumbi vs. The People**[10] where we stated that:

Where a judgment of the trial Court goes missing, technically there will be nothing to show, on its face that the trial Court adequately considered all the relevant material that was placed before it. It is this failure which deprives the appellate Court from assessing the merits of the case. This, in no way, should be taken to mean that when the judgment of a trial Court is poor or goes missing on appeal, the appeal must succeed, and the appellant be acquitted.

Counsel for the State implored us to dismiss ground two of the appeal and uphold the appellant's conviction.

Coming to the question of sentence, it was submitted that the offence of defilement is a serious offence and that the 40 year sentence should not come to us with a sense of shock. Counsel relied on the case of **Mwanamubi vs. The People**[11] in which we stated that:

"...We consider defilement of girls, just like rape of women, a very serious offence and defilement is a prevalent offence.

We would add that those who choose to defile under age children, need to be caged for reasonably long periods, to put them out of circulation, for the safety of children. ..."

We were urged to dismiss the appeal for lack of merit.

We have considered the judgment of the court below and the submissions by Counsel for the parties. In the first ground of appeal, we are being called upon to determine the effect of the

omission by the trial magistrate to record the questions put to the prosecutrix during the conduct of the *voire dire*.

Mrs. Liswaniso relied heavily on the case of **Sakala vs. The People**[1] where we held that:

> **It is essential with regard to a juvenile of tender years that the trial court not only conduct a voire dire but also record the questions and answers and the trial court's conclusion to enable the appellate court to be satisfied that the trial court has carried out its duty.....** (Emphasis ours)

Further, in the case of **Zulu vs. The People**[12] we stated that:

> **"...We stress again, as we did in Sakala's case, that not only must the record show that a voire dire has been conducted, but also the questions asked, the answers received and the conclusions reached by the court. ..."**

In the case of **Edgar Kamanga vs. The People**[2] we referred once again to the above holding in the **Sakala case**.[1] It is important for us to state that our holding in the **Sakala**[1] case must not be understood out of context. The holding must be read as a whole. In the **Sakala case**[1] we did not state that if questions are not recorded, the *voire dire* is defective. Rather, we emphasized that questions and answers should be recorded "to enable the appellate

court to be satisfied that the trial court has carried out its duty". And we repeated the same pronouncement in the case of **Zulu vs. The People.**[12] Looking at the *voire dire* conducted by the trial court, it is very easy for us to discern, and for anyone for that matter, the questions that the trial magistrate put to the child witness. Mrs. Liswaniso's argument on this limb cannot succeed.

Mrs. Liswaniso also raised the issue of proof of the age of the prosecutrix arguing that because no under-five card was produced or a sworn affidavit, the same was not proved. We do not agree with Mrs. Mbewe-Hambayi's argument that the issue of the age of the prosecutrix should not have been raised in this court. In the case of **Phiri (Macheka) vs. The People**[3] we gave guidance that where the age of a person is an essential ingredient of a charge, that age must be strictly proved. That being the case, a trial court must be alive to this issue as much as the appellate court. We, therefore, find nothing wrong with the issue of age being raised in the appeal before us. In the case of **Phiri (Macheka) vs. The People** the court of appeal the forerunner to this Court held that:

(ii) **it is not acceptable simply for a prosecutrix to state her age; this can be no more than a statement as to her belief as to her age. Age should be proved by one of the parents or by whatever other best evidence is available.** (Emphasis ours)

In this case, the evidence as to the age of the prosecutrix came from PW2 the elder sister aged 26 years and we agree with Counsel for the State that she was qualified to give evidence on the age of the prosecutrix. The argument by Counsel for the appellant on the proof of the age of the prosecutrix cannot be sustained. Ground one fails.

In the second ground, the question is whether the judgment delivered by the trial court was so defective as to entitle the appellant to an acquittal.

According to Counsel for the appellant: the judgment is below the required standard, lacked reasoning on the facts and no authorities were applied. Counsel cited the relevant portion of the trial court's judgment which states as follows:

"...I have no doubt in my mind as to what happened between the accused and the girl when they remained in the bush at 18 hours on the 24th June, 2004. The facts are that the accused had sex with the girl and that his denial of the charge was not true. I have been

satisfied that the accused committed the offence charged. I therefore, without hesitation find that the accused is guilty of the offence of defilement contrary to section 138 of the Penal Code, Chapter 87 of the Laws of Zambia. ..."

Section 169 of the Criminal Procedure Code has provided guidelines to trial courts as to what a judgment should contain. It states as follows:

> **(1) The judgment in every trial in any court shall, except as otherwise expressly provided by this Code, be prepared by the presiding officer of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**

In our recent decision in **Ernest Yoombwe vs. The People**[13] Counsel argued that the judgment delivered by the High Court was defective and demanded for a retrial. We agreed that the judgment was defective and stated the following:

> **"...Earlier, we had noted that there was no flaw in the trial proceedings. What is flawed as shown by the discussion above is the judgment. The question in terms of the proviso to Section 15 of the Supreme Court Act Cap 25 is whether, if the lapses in the judgment had not occurred, the trial court would on a proper consideration of the evidence in the case, have still arrived at the same conclusion. To determine this question, we have to look at the evidence on record. ..."**

We are obviously faced with the same situation in this appeal and in line with what we stated in **Ernest Yoombwe**[13] we will now examine the evidence before the trial court.

It is not in dispute that the prosecutrix was defiled on the material day. We have stated in the case of **Emmanuel Phiri vs. The People**[14] that there must be corroboration as to the commission of the offence and the identity of the offender. There is evidence on record that after the gruesome ordeal: the prosecutrix went home where she immediately reported the incident to PW2 her elder sister; she named the appellant as the person who attacked her; PW2 examined her and observed that her underwear was soiled, and she was bleeding from her private part; PW2 reported the appellant to the police and he was apprehended; the prosecutrix was examined by a medical doctor who also confirmed that she was defiled. Therefore, there was corroboration as to the commission of the offence.

Coming to the question of corroboration as to the identity of the offender, we have already stated herein that there is no dispute that the prosecutrix was defiled. According to PW2, the prosecutrix

named the appellant as the defiler. The appellant was reported to the police and was apprehended almost immediately. According to PW2, the appellant admitted that he defiled the girl and apologized. The record shows that this evidence was not challenged by the appellant.

Further, in his unsworn statement given in his defence, the appellant confirmed that he was at the football ground around 18:00 hours, the same time that the prosecutrix was returning home and alleged she was attacked by the appellant. According to the appellant, he bought an ice block from the prosecutrix whom he knew prior to the incident. However, her friends ran away for fear of his dog. In short, he placed himself at the scene of crime.

In the case of **Ivess Mukonde vs. The People**,[15] it was held, *inter alia*, that:

> **2. Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of a particular case. The circumstances and the locality of the opportunity may be such that in themselves amount to corroboration.**
>
> **3. The circumstances and the locality of the opportunity in the instant case amounted to corroboration of the commission of the offences.**

Further, we held in **Machipisa Kombe vs. The People**[16] that opportunity amounts to corroboration. The appellants' own story shows that he had the opportunity to defile the prosecutrix as he stated that her friends ran away and it follows that she remained with him and he bought an ice-block from her. It was too much of a coincidence that the person whom the prosecutrix reported to PW2 that he defiled her is the same person who confirmed his presence at the football ground at the same time she was returning home from the market.

Having considered all the evidence on record, we have no doubt that had the trial magistrate properly addressed her mind to the evidence before her, she would have arrived at the inevitable conclusion that the appellant was guilty as charged.

We invoke our powers in Section 15 (3) of the Supreme Court Act and we uphold the conviction.

Coming to the sentence, we take the view that it was excessive. In the case of **Kenneth Chisanga vs. The People**[17] we held, *inter alia*, that:

An appellate Court will not interfere with a sentence as being too high unless the sentence comes to the appellate Court with a sense of shock. Equally it will not interfere with a sentence as being too low unless it is of the opinion that it is totally inadequate to meet the circumstances of the particular offence.

Looking at the circumstances of this case and the fact that the appellant is a first offender, we consider the sentence to be excessive. It has come to us with a sense of shock. We set it aside and impose a sentence of 20 years imprisonment. To that extent the appeal against sentence succeeds.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE