IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.226/2012**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

ISAAC BWALYA MBULO **APPELLANT**

V

THE PEOPLE **RESPONDENT**

Coram: Phiri, Wanki and Hamaundu, JJS
On 5th March, 2013 and 13th August, 2020

For the Appellants : Ms G.N. Mukulwamutiyo, Legal Aid Counsel

For the State : Ms F. Nyirenda, State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Katebe v The People (1975) ZR13**
2. **Lubinda v The People (1988-89) ZR 110**
3. **Kalebu Banda v The People (1977) ZR 169**

When we heard this appeal, we sat with Mr Justice Wanki who has since retired. This judgment is therefore by majority.

This appeal is against conviction. The appellant was tried by the subordinate court at Chingola for the offence of defilement of a child contrary to **section 138(1)** of the **Penal Code, Chapter 87** of the **Laws of Zambia**. The prosecution called only two witnesses; the victim and the arresting officer. The victim told the court on oath, after a *voire dire*, that on the material day, around noon, the appellant (who was her maternal grandfather) ambushed her as she was going to school. The appellant dragged her to his house where she found a female cousin of hers, who gagged her mouth and blind-folded her with some cloth. From there, she was certain that it was the appellant who climbed on top of her, inserted his penis in her vagina and proceed to defile her. When the act was over, and the cloth was untied, she saw the appellant putting on his trousers. Then she was allowed to go. The victim said that she reported the sexual assault to her aunt, who told her to inform her mother immediately; this she did, and eventually the appellant was arrested. The victim told the court that the appellant had defiled her on several previous occasions when she used to live with him.

The medical report that was presented to the trial court did confirm the absence of the hymen on the victim, and that the observations were consistent with her allegation of defilement.

The appellant denied the allegation. He told the court that the victim and his mother had framed him for the offence because he had chastised the victim for being found at bars. He gave the court an account of how he was arrested, in the process of which he raised an alibi.

The trial magistrate dismissed the appellant's plea of alibi on the ground that there was no evidence suggesting that the appellant had told the police about his alibi at the time of his arrest. Applying the case of **Katebe v The People**[1] the magistrate found no motive for the victim to deliberately and dishonestly make a false allegation against her grandfather and said that, like in the *Katebe* case, this case was no different from any other in which the conviction depended on the reliability of the evidence of the complainant. The appellant was, consequently, convicted of defilement. Upon committal to the High Court, the appellant was sentenced to 20 years imprisonment.

This appeal is on two grounds; First, that the trial magistrate erred in law and in fact in convicting the appellant in the absence of corroborative evidence. Secondly, that the trial magistrate erred in law and in fact in convicting the appellant in the absence of proof beyond reasonable doubt.

In the first ground, Ms Mukulwamutiyo, counsel for the appellant, raised three points in her submissions. She pointed out that the alleged defilement occurred on 3rd March, 2008, while medical examination was conducted four days later. She further pointed out that, other than stating that the hymen was absent, the medical report did not reveal any signs of recent sexual intercourse; such as traces of semen, swelling, bruises or lacerations. According to counsel, had the alleged defilement occurred four days prior to the medical examination, as was being suggested by the evidence, these signs ought to have been present. She submitted, therefore, that, in the circumstances, the inference which the trial court should have drawn is that there had been no recent sexual intercourse.

We must dismiss this argument because what counsel submits is a medical opinion which ought to have been expressed

by an expert in that field. There is no evidence to that effect on the record. So, we do not know on what authority counsel bases that submission.

In the second point, Ms Mukulwamutiyo submitted that there was no evidence to corroborate the victim's allegation that it was the appellant who defiled her since, during the whole ordeal, she was blindfolded.

This argument does not help the appellant at all. Even if we were to accept the argument that he may not have been the one who actually defiled the victim, he is still caught up by **Section 21** of the **Penal Code** as a principal offender. This is because he was the one who ambushed the victim and dragged her to his house where he directed his other grandchild to lock the room. In this case, however, we are satisfied that the trial magistrate correctly relied on the victim's testimony that, not only did she feel the penetration of a male organ, she also heard the appellant talking whilst on top of her. The fact that he was seen dressing up after the act only went to further support her contention that it was the appellant who defiled her. We dismiss this argument too.

The third argument, or point, in this ground, was that the failure by the prosecution to bring some witnesses should have raised an inference favourable to the appellant. Counsel pointed out that in this case the prosecution failed to bring the following: Mwaba, the victim's cousin who blindfolded her; the victim's aunt; and the victim's mother, both of whom she made the complaint to. Counsel then argued that, in the circumstances, a presumption ought to have been made that had these witnesses been brought to court their testimony would have been in favour of the appellant. The case of **Lubinda v The People**[2] was relied upon for this submission.

The holding in that case stemmed from an argument made by defence counsel relying on our holding in **Kalebu Banda v The People**[3]. In the *Kalebu Banda* case, not only did we explain the effect of the presumption, and the meaning of *"available"*, we also explained when a presumption favourable to an accused must be made. Hence, we held:

> **"(4) The first question is whether the failure to obtain the evidence was dereliction of duty on the part of the police which may have prejudiced the accused. When evidence has**

not been obtained in circumstances where there was a duty to do so– and a fortiori when it was obtained and not laid before the court– and possible prejudice has resulted, then an assumption favourable to the accused must be made"

In this case, the victim's mother and aunt were the ones who pushed for the appellant to be arrested for the offence. Their testimony was most likely to be detrimental to his case. We therefore do not see what possible prejudice has resulted to the appellant by their not being brought to testify. So, we dismiss this argument as well.

We can only, however, say that the trial magistrate did find a special and compelling ground in the form of lack of motive for the victim to falsely and dishonestly implicate the appellant – following the *Katebe case*. This supported the victim's testimony.

We therefore find no merit in the first ground.

In the second ground, counsel attacked the trial magistrate's finding that there was no motive for the victim to falsely implicate the appellant. Ms Mukulwamutiyo pointed out that the trial magistrate totally ignored the account given by the appellant. Our attention was drawn to the appellant's story that he had chastised

the victim for being found at a bar and his contention that that was the motivation for the victim's mother to falsely implicate him. Our attention was also drawn to the alibi that arose from the appellant's account.

The trial magistrate did address the alibi raised by the appellant. The magistrate noted that the appellant did not tell the police about the alibi at the time of his arrest. The magistrate found, therefore, that there was no dereliction of duty on the part of the police for not investigating it.

As for the motive suggested by the appellant, we agree that the trial magistrate did not specifically address it. However, we wish to say that inferences must be reasonable: In this case the appellant suggests an inference that he was falsely accused of the offence because he had chastised his grand-daughter for being found at a bar. We cannot imagine any grand-child who can falsely accuse her grandfather of such a serious, and even culturally embarrassing, offence just for being corrected. Similarly, we do not see any child, such as the victim's mother in this case, who can falsely accuse her father of such a crime just because her father has chastised her child. There ought to have been more evidence of a very strained

relationship between the appellant and his daughter, the victim's mother, for that suggestion to have been reasonably possible.

We, therefore, find no merit in the second ground either. This appeal stands dismissed.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE