

IN THE SUPREME COURT OF ZAMBIA

Appeal No. 107/ 2021

HOLDEN AT LUSAKA

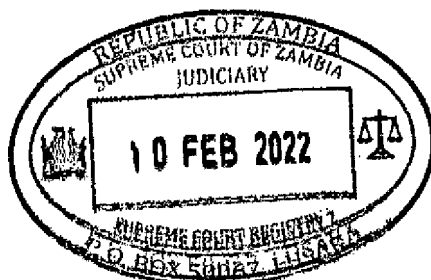
(Criminal Jurisdiction)

BETWEEN:

ABEL CHIPEMBA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Hamaundu, Kabuka and Chinyama, JJS

On 2nd December, 2021 and 10th February, 2022.

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

For the Respondent: Mr. S. Muwamba, Acting Chief State
Advocate.

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Cases referred to:

1. Gift Mulonda v The People (2004) ZR 135 (SC)
2. Macheka Phiri v The People (1973) ZR 145 (SC)
3. Nsofu v The People (1973) ZR 287(SC)
4. David Zulu v The People (1977) ZR 151(SC)
5. Emmanuel Phiri v The People (1982) ZR 71 (SC)
6. Bernard Chisha v The People (1980) ZR 36 (SC)
7. Ndakala v The People (1974) ZR 19 (SC)

8. Machipisha Kombe v The People (2009) ZR 282 (SC)

Legislation referred to:

1. The Penal Code Cap.87 S. 138 (1)
2. The Juveniles Act Cap.53 S.122
3. The Juveniles (Amendment) Act No. 3 of 2011

Introduction

- 1) The appellant was convicted for the offence of defilement contrary to section 138 (1) of the Penal Code Cap. 87 of the Laws of Zambia and was sentenced to thirty-five years imprisonment with hard labour. He has now come to this Court on appeal against his conviction, advancing two grounds.
- 2) The first ground of appeal questions whether evidence given on oath by a fourteen year old child witness pursuant to **section 122 of the Juveniles Act Cap. 53 of the Laws of Zambia as amended by Act No. 3 of 2011** ("**section 122 of the Juveniles Act**") requires corroboration as a matter of law.
- 3) The issue raised in the second ground of appeal is whether, on the particular facts of this case,

circumstantial evidence was properly used as the basis for convicting the appellant.

Background and Proceedings before the Trial Court

- 4) The history to the case is that in 2009, the appellant divorced his wife of 15 years with whom he had five children. The ex-wife who testified as the first prosecution witness (PW1) at the trial of the matter, left the matrimonial home soon after the divorce and took with her all their five children. Sometime in early 2010, the appellant followed up PW1 to a village in Mungwi District, in the Northern Province of Zambia, where she had relocated and from all their five children, forcibly retrieved their twelve year old second born daughter (PW2).
- 5) The sworn evidence of (PW2), the prosecutrix, who was fourteen years old at the time of trial in 2012, was that after the appellant got her from her mother, he took her to his house where she was alone with him. The appellant then started to forcibly have carnal knowledge of her whenever he came home drunk and during the sexual

assaults, threatened to hack her to death if she dared to scream. As a result of the injuries sustained on her private parts she failed to walk properly and even stopped going to school.

- 6) PW3, wife to the appellant's older brother who lived in the neighbourhood, in her evidence recalled how in the month of September 2010, she observed that the prosecutrix was walking with difficulty and with her legs wide apart. A physical examination of the prosecutrix revealed stained underwear, sores on her private parts and a discharge of mixed blood and semen. PW3 said the prosecutrix informed her that the injuries were inflicted on her by the appellant two days previously and she assisted the prosecutrix in tending to her injuries for about one week. PW3 further said she confronted the appellant on the prosecutrix injuries, but his furious reaction constrained her from pursuing the issue further. The appellant's sister, in the presence of PW3, also threatened the child with elimination of her entire family if she disclosed her circumstances to her mother's relatives.

- 7) The arresting officer, (PW4)'s evidence was that, after the matter was reported to the police by the prosecutrix's mother in 2012, he was amongst the officers who went to the appellant's house to arrest him, but the appellant escaped through a window. When they went back, they found appellant lying unconscious on the floor, following consumption of some poisonous substance.
- 8) The appellant's own evidence in defence was a bare denial of the defilement allegation. He claimed that he never collected the prosecutrix from her mother. The appellant contended that the allegations were motivated by his refusal to reconcile with his said ex-wife. On the evidence given by PW3, his sister-in-law, the appellant claimed that they were not in good terms and she thus had a motive to falsely incriminate him. The appellant also claimed he was HIV positive while the medical report form 'P1', that was produced in evidence, disclosed that the prosecutrix was HIV negative. He, accordingly, applied for and was granted an order, that he be subjected to an HIV test but failed to produce the negative result in his

evidence. He was now claiming he had syphilis at the time the defilement was allegedly committed.

Determination of the matter by the trial court

- 9) On the evidence, substantively, as recounted at paragraphs 3-8 the trial magistrate proceeded to deal with whether, the ingredients of the offence had been established, specifically: (i) the age of the victim being below 16 years; (ii) the identity of the offender; (iii) commission of the offence; and (iv) corroboration of both the commission of the offence and the identity of the offender.
- 10) Regarding the age of the prosecutrix, the trial court relied on the cases of **Gift Mulonda v The People**¹ and **Macheka Phiri v The People**² as authority for accepting evidence of the mother (PW1), that the prosecutrix was born on 25th January 1998, and was 12 years old when the offence was committed in 2010.
- 11) On commission of the offence, the trial court accepted the prosecutrix own sworn evidence that she was defiled by

her father. The court noted that, under **section 122 of the Juveniles Act**, a child aged fourteen years and above is by law competent to give sworn evidence and that such evidence does not require corroboration. That corroboration was only required in sexual offences, as a matter of practice, to guard against the danger of false complaint and false incrimination of an accused. On the evidence adduced, the finding was that commission of the offence was supported by medical evidence.

- 12) As to the identity of the defiler, the trial court accepted the prosecutrix identification of the appellant who was her father. It found the said evidence was, in any event, not contested by the appellant and was further corroborated by the evidence of PW3.
- 13) According to the trial court, the question that required its' determination was whether it was really the appellant who had unlawful carnal knowledge of the prosecutrix? Relying on the case of **Nsofu v The People**³ the court found evidence of unlawful carnal knowledge that was given on oath by the prosecutrix, was corroborated by the

suspicious opportunity created by appellant being with her alone in the house.

- 14) The trial court rejected the appellant's defence that since the prosecutrix HIV test result was negative, as a person who was HIV positive himself, the appellant could not have defiled the prosecutrix without infecting her. The court reasoned that the appellant at his own instance, requested for an HIV test to aid his intended defence. When the test came out negative, he changed positions and in his defence, was now contending that he had Sexually Transmitted Disease (STD) at the material time and as the prosecutrix tested negative even for STDs, he could not have defiled her without passing on the STD. The trial court found the appellant by this contradictory evidence was merely fishing for a defence.
- 15) The trial court, however, veered away from all those findings of fact on the basis that there was no eyewitness to the defilement. It proceeded to resolve the matter on circumstantial evidence and found the only inference to be drawn from it was that it is the appellant who

committed the offence. The appellant was accordingly convicted and upon committal to the High Court for sentencing, he was given a 35 years' imprisonment term, with hard labour.

Grounds of appeal to this Court and Arguments

16) The appellant has launched an appeal against his conviction to this Court, on two grounds, which fault the trial court for having:

- 1. convicted him in the absence of corroborative evidence.**
- 2. convicted him on circumstantial evidence that did not in any way connect him to the commission of the offence.**

17) On ground one of the appeal, learned counsel for the appellant Ms. Banda, in her written heads of arguments filed on record, which were briefly augmented orally at the hearing of the appeal, referred to the general rule of practice in sexual offences requiring that there be corroborative evidence of both the commission of the offence and the identity of the offender. She submitted that 'something more' would ordinarily suffice and the

case of **Emmanuel Phiri v The People**⁵ was cited as authority in which this Court, held that:

“ ‘something more’ must be circumstances which..... satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the accomplice implicating the accused. This is what is meant by ‘special and compelling grounds’”

- 18) Ms. Banda contended that where the evidence in issue is from a child witness, the requirement for corroboration is in fact statutory and provided for in **section 122 of the Juveniles Act**. Her submission was that evidence of ‘something more’ cannot satisfy the statutory requirement for corroboration and the record in this appeal, in any event, reveals no evidence of ‘something more’.
- 19) Counsel went on to argue that the trial court misdirected itself when it found as credible, evidence of PW3 that she tended to the prosecutrix for a week after the alleged defilement, as that evidence does not speak to the identity of the offender. The case of **Bernard Chisha v The People**⁶ was cited as authority for the submission that, due to immaturity of mind, a child is susceptible to the

influence by third persons and as such, their evidence requires to be corroborated.

- 20) Counsel submitted that, there were in this case no special or compelling grounds to rule out the inherent dangers of false implication by a child witness. That the absence of corroborative evidence of both the commission of the offence and identity of the offender creates a doubt which must be resolved in favour of the appellant.
- 21) On medical evidence revealing the prosecutrix had 'habitual penetration with a penis', counsel argued that this evidence in fact indicates the possibility that it was not the appellant who had sexual intercourse with her on the dates in question.
- 22) Counsel further referred to evidence on record showing that the alleged defilement took place between September, 2010-2011 but the prosecutrix, through her mother, only reported the matter after June 2012. Relying on **Ndakala v The People**⁷ the submission was that, failure by the prosecutrix to make an early report tilts the balance of the evidence against the prosecution case.

- 23) On ground two of the appeal, counsel argued that the prosecution failed to discharge its burden in criminal matters, to prove its case beyond reasonable doubt. The circumstantial evidence against the appellant as identified by the trial court was simply that the appellant had an opportunity to commit the defilement, upon which it came to the conclusion that the only inference to be drawn from the said evidence was that he in fact committed it. Her submission was that the conviction of the appellant is unsafe as the totality of the circumstantial evidence did not take the case outside the realm of conjecture and fell short of the test espoused in the case of **David Zulu v The People**⁵.
- 24) Learned counsel for the respondent in their written arguments in response, on the import of **section 122 of the Juveniles Act** asserted that, in terms of that statutory provision, there was in fact no need for corroboration of the evidence of the prosecutrix as she was fourteen years old when she gave her testimony in the year 2012. The only corroboration required as held in

Emmanuel Phiri v The People,⁵ was as a matter of practice, in sexual offences.

- 25) In addressing the issue of corroboration of the commission of the offence, learned counsel for the respondent referred to the medical report admitted in evidence as 'P1' and oral testimony from the medical doctor (PW5) who examined the prosecutrix and found that the hymen was absent and the vaginal orifice was admitting fingers without difficulty, an indication that she had habitual penetration with a penis. Counsel also referred to the evidence of PW3 that in September 2010, she observed that the prosecutrix was not walking properly. A physical examination undertaken revealed blood stains on the prosecutrix underwear as well as a mixture of blood and semen coming out of her vagina.
- 26) On corroboration of the identity of the offender, learned counsel conceded the appellant's argument that the trial court erroneously relied on evidence of PW3. The case of **Machipisha Kombe v The People**⁸ was cited as authority for the submission that, the evidence adduced at the trial

(which was highlighted) in fact revealed a number of odd coincidences corroborating the prosecutrix evidence that it is the appellant who defiled her.

- 27) In response to the submission that failure to make an early report tilted the balance against the prosecution evidence, learned counsel relied on the trial court's finding that the delay in reporting the offence was on account of PW1's absence from the village at the material time and the threats issued by the sister to the appellant if such a complaint was made. That PW3 was also discouraged by the appellant's furious reaction when she confronted him over the defilement allegations, and she decided to keep the peace.
- 28) Finally, on ground two of the appeal, the respondent's argument was simply that the prosecutrix was a victim. As witness to her own defilement the nature of evidence she gave was direct and not circumstantial. That the issue would have been different if the prosecutrix was a toddler and could not talk.

Consideration of the Appeal and decision of this Court

29) We have considered the grounds of appeal, skeleton arguments and submissions from learned counsel for the parties. We are of the view that the two grounds of appeal are inter-related in the sense that, determination of ground one will effectively, also dispose of the grievance in ground two of the appeal.

30) In ground one of his appeal, the appellant faults the trial court for having convicted him without corroborative evidence, contrary to the practice in sexual offences that requires corroboration of both the commission of the offence and identity of the offender. The submission by learned counsel for the appellant was that as the prosecutrix was aged fourteen, at the time of trial, her sworn evidence required corroboration as a matter of law.

Section 122 of the Juveniles Act relied on for that proposition reads as follows:

“122. Where in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child if, in the opinion of the court, the child is

possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth:

Provided that:-

(a) if, in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and does not understand the duty of speaking the truth, the court shall not receive the evidence; and

(b) 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 the accused."
(underlining for emphasis supplied)

31) Contrary to counsel for the appellant's submissions, **section 122 of the Juveniles Act**, in very clear terms states that, it is the sworn evidence of a child *below* fourteen years which in criminal matters, by law, requires to be corroborated if the court is to rely on it for purposes of securing a conviction against an accused. The section makes no reference whatsoever to children above that age. This means the sworn evidence of a child witness aged fourteen years and above does not require corroboration as a matter of law. The general rule that

sworn evidence given by one witness is sufficient, would apply to such evidence.

- 32) It is from that backdrop that we agree with counsel for the respondent that in this case, the prosecutrix direct evidence that was given on oath, to the effect that she was defiled and the person who defiled her was the appellant, did not, under **section 122 of the Juveniles Act** require corroboration as a matter of law. Nonetheless, the matter being a sexual offence, corroboration was required as a rule of practice, intended to guard against false complaint and false incrimination.
- 33) As to whether there was corroborative evidence adduced at the trial, suffice to re-iterate what we said in the case of **Emmanuel Phiri v The People**⁵ referred to by counsel on both sides, amongst many other past decisions, that odd coincidences can constitute corroboration. We, in that regard, again agree with learned counsel for the respondent, that there were in this case a number of odd coincidences that corroborate the prosecutrix evidence

when she said she was defiled, and the defiler was her father.

- 34) These odd coincidences become apparent from the sequence in which the events unfolded which reveal that: appellant first goes to collect the prosecutrix alone, from all his five children who were in his ex- wife's custody. He then takes her back to his house where they are the only occupants. A suspicious opportunity having been created, appellant proceeds to forcibly and repeatedly have carnal knowledge of the prosecutrix whenever he comes home drunk. The prosecutrix sustains injuries, as a result, which cause her to walk with legs wide apart. PW3 observes this abnormal 'swag' and is put on inquiry. She physically examines the prosecutrix and discovers sores on the child's private parts with a discharge of mixed blood and semen, consistent with the defilement allegation made to her by the prosecutrix. A medical examination conducted on the prosecutrix in 2012, confirms she had indeed engaged in frequent sexual activity. This evidence is further fortified by appellant's

guilty knowledge manifested in his running away on the first occasion, when police go to his house to arrest him and his attempting suicide, on the second occasion.

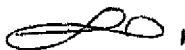
- 35) We are satisfied from that evidence which is on record, that the coincidences as highlighted at paragraph (34) are indeed 'odd' and go to corroborate the prosecutrix evidence, when she said the offence of defilement was repeatedly committed on her between September 2010-2011 and that the person responsible was none other than her own biological father, the appellant in this appeal. The evidence satisfies that 'something more' espoused in the case of **Emmanuel Phiri v The People**⁵ and constitutes 'special and compelling grounds' the trial court could have relied upon to convict the appellant. Ground one of the appeal fails for those reasons.
- 36) In the face of direct evidence from the victim detailing how the offence was committed on her and identifying the perpetrator as the appellant, it was a clear misdirection on the part of the trial court to have resolved the matter on circumstantial evidence. The case being a sexual

offence, all that was required as a matter of practice, was corroboration of that direct evidence and evidence of numerous odd coincidences on record, earlier at paragraph (34) alluded to, satisfies that requirement. Although ground two has merit to the extent that it faults the trial court for having relied on circumstantial evidence to convict the appellant, the conviction can still be sustained and we hereby uphold it, on the basis of direct evidence from the victim which was corroborated by various odd coincidences.

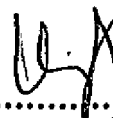
- 37) As both grounds of appeal have substantively failed, the appeal is dismissed.



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E. M. HAMAUNDU
SUPREME COURT JUDGE



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J.K. KABUKA
SUPREME COURT JUDGE



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J. CHINYAMA
SUPREME COURT JUDGE