

**IN THE SUBORDINATE COURT OF THE
FIRST CLASS FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA**

2SPB/023/16

(CRIMINAL JURISDICTION)

BETWEEN:

**THE PEOPLE
V.
ACKSON MWALE**



Before : Mrs N.M Sakala - Chabala

For the State : Z. Sakala, Public Prosecutor

For the accused : In Person

JUDGMENT

Legislation referred to:

1. Penal Code, CAP 87 of the Laws of Zambia

Cases referred to:

1. Emmanuel Phiri V. The People (1982) ZR 77
2. Butembo V. The people (1976) ZR 193 (S.C)
3. Ndakala V. The People (1974) ZR 19
4. Gift Mulonda V. The People (2004) Z.R 135
5. Phiri (Macheka) V. The People (1973) ZR 143 (C.A)
6. Marks Mulepu (1931 – 1948) NRLR Vol.4, 240

In this case the accused person stands charged with one count of Defilement of a child contrary to Section 138(1) of the Penal Code Chapter 87 as read with Act No. 15 of 2005 of the Laws of Zambia.

It is alleged that ACKSON MWALE on unknown dates but between July 2015 and December 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, had unlawful carnal knowledge of Lillian Mumba a girl under the age of 16years.

When called upon to plead, he denied the charge.

The onus of proof is upon the prosecution and the standard is beyond all reasonable doubt. In the event of reasonable doubt, such doubt must be decided in favour of the accused person and he must accordingly be acquitted.

By the nature of this case, I warn myself as to the desirability for corroboration as to the occurrence of the offence and the identity of the accused person. This is in order to eliminate the dangers of false complaint and false implication per **Emmanuel Phiri V The People (1982) ZR 77 (S.C)**

The offence of defilement is created by section 138(1) of the Penal Code as Amended by Act No. 15 of 2005 and Act No. 2 of 2011 which is couched in the following language;

“Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life.

Provided that it shall be a defence for a person charged with the offence under this section to show that the person had reasonable cause to believe, and did in fact believe, the child against whom the offence was committed was of , or above, the age of sixteen”

The Zambian Penal Code does not define the phrase carnal knowledge.



However it is defined in Stroud's Judicial Dictionary 5th edition at p359 to mean the penetration to any slightest degree of the organ alleged to have been carnally known by the male organ of generation.

Further, the word 'child' for the purposes of this offence has been defined by section 131A of the penal code Amendment Act No. 15 of 2005 to mean; a person below the age of sixteen years

It follows from the foregoing that in order to prove the guilt of the accused person , the prosecution must establish all the ingredients of this offence. Suffice to state that the elements of the offence of defilement are the following:

- 1. The occurrence of unlawful carnal knowledge and in this case, slight penetration suffices**
- 2. Identity of the accused person**
- 3. That the prosecutrix is in fact under the age of 16years.**

In proving this case, the prosecution called four witnesses.

PW1 was **Lillian Zulu**, a business lady aged 44years and the mother of the prosecutrix. She told the court that on 10th December, 2015, her daughter by the name of Agness Mumba informed her that whenever the prosecutrix wanted to urinate, she would experience pain in her private parts. She narrated that Agness Mumba had wanted to buy medicine for the prosecutrix but she advised her to take the prosecutrix to the clinic.

She deposed that she checked the private parts of the prosecutrix and discovered that she had sores. The prosecutrix was later taken to the clinic by Agness Mumba. When they returned, the prosecutrix informed her that her step father had canal Knowledge of her five times.

She went on to state that when she asked the accused person, he admitted



having canal knowledge of the prosecutrix. She then took the prosecutrix to the University Teaching Hospital, Children's section. A document was issued to her by the police post at UTH. The prosecutrix was then examined and she was told to check for results after one week.

She further explained that she had been married to the accused person for 5 years and positively identified him. She went on to state that the accused person admitted having canal knowledge of the prosecutrix and he asked her for forgiveness.

When cross examined, she stated that the prosecutrix went to live with her elder sister Agness Mumba in the year 2015. The prosecutrix would visit her over the weekends, on school holidays or when she was unwell. She went on to state that she would live the prosecutrix with the accused person whenever she left home for business. When cross examined further, she stated that when the prosecutrix started experiencing pain in her private parts whenever she wanted to pass urine, she did not inform the accused person. She instead told her daughter Agness Mumba to take the prosecutrix to the clinic.

In re examination, she stated that she took the prosecutrix to live with her elder sister Agness Mumba in June 2015. In the period June 2015 to December 2015, the prosecutrix would go to her house to visit. She further stated that the prosecutrix had sores on her private parts when she was being taken to the hospital.

PW2 was **Lillian Mumba**, also the prosecutrix in this matter. She narrated to the court that the accused person, who is her step father would undress her and have canal knowledge of her and that the accused would tell her not to tell her mother. She narrated further that she told her mother and sister about what the accused person was doing to her. She was then taken to Chelstone Clinic and later to the university teaching hospital.

She positively identified the accused person and went on to state that each time



he had canal knowledge of her, it was painful. She further stated that the accused person would have canal knowledge of her in the afternoon when her mother was away selling clothes and in the night when her mother was fast asleep.

When cross examined, she stated that the accused person had canal knowledge of her each time she visited her mother. She stated that it was during the period they shifted to an area called Obama.

PW3 was **Agness Mumba**, a house wife aged 21years. She narrated that she has two sisters namely Mary Mumba and Lillian Mumba and that Lillian Mumba was 8years old having been born on 9th October 2007. She went on to state that she had an under five card for the prosecutrix and positively identified it.

She explained that her mother got married to the accused person and she stated living with the prosecutrix. The prosecutrix informed her that when passing urine, she would experience pain in her private parts.

She took the prosecutrix to the clinic where she was examined by the doctor. She further explained that the doctor put the prosecutrix on a bed and removed her underwear. The doctor then opened the legs of the prosecutrix and showed her cracks in her private parts. The doctor informed her that the prosecutrix had an infection because she had sexual intercourse with an elderly man. She was then given a document and referred to Levy Mwanawasa General Hospital.

When she left the clinic, the prosecutrix informed her that the accused person had canal knowledge of her. She then informed her mother. When they went to Levy Mwanawasa general hospital, the machines where down so they proceeded to the University Teaching Hospital. When they got to UTH, they found a police man who gave them three documents and directed them to another building where the prosecutrix could be examined. The prosecutrix was examined and



they were told to go back on a Wednesday to collect the results.

The matter was then reported at Kamanga Police Post. Her mother and the police went to an area called Obama and the accused person was apprehended. The accused then started crying and asking for forgiveness. She narrated that she saw the accused crying and he started calling out their names.

She positively identified the accused person and went on to state that she had known him since the year 2011.

When cross examined, she stated that the accused person had canal knowledge of the prosecutrix in 2015. She went on to state that the accused person asked her for forgiveness for what he had done to the prosecutrix. When cross examined further, she stated that the prosecutrix was at her house and complained about pain in her private parts. The prosecutrix was found with a sexually transmitted infection and she had cracks in her private parts.

There was no re examination.

PW4 was **woman constable Lillian Mwekela** aged 35years and stationed at Chelstone Police Station under the Victim Support Unit. She narrated that whilst on duty on 15th December 2015, she received a report from PW1 that the prosecutrix had been defiled by the accused person. She interviewed both PW1 and the prosecutrix. She further narrated that she went to apprehend the accused person. Immediately the accused person saw PW1 in the vehicle, he started begging for forgiveness stating that he had canal knowledge of the prosecutrix.

She later interviewed the accused person at the police station but he did not give a satisfactory reply. She charged and arrested him for the subject offence. Under warn and caution statement administered to him in Nyanja, a language he understood better, he gave a free and voluntary reply saying that he was advised by a witch doctor that if he has canal knowledge of a child, he would



get rich.

She positively identified the accused person and produced into court the Medical Report form, the Zambia Police Report of Medical Examination for Rape/Defilement and the prosecutrix's under five card.

When cross examined, she stated that she did not find the accused person having canal knowledge of the prosecutrix when she went to apprehend him. She stated that the prosecutrix told her that the accused person had canal knowledge of her and that when she went to apprehend him, he begged PW1 in her presence for forgiveness. She also stated that even in police custody, he begged for forgiveness.

In re examination, she stated that the medical results indicated that the prosecutrix was defiled.

A prima facie case was found against the accused person. He elected to give sworn evidence and did not call any witnesses.

In his defence, **Ackson Mwale**, a brick layer aged 42years, stated that on 14th December 2015, he left home at 07:00hours and went for work at a house in Obama. Whilst there, he saw a white car with three police officers. They removed handcuffs and apprehended him. He narrated that he asked the police the offence he had committed but they never told him. He was detained at Kamanga Police post and later moved to Chelston police. He was then moved from Chelstone police to court.

When cross examined, he stated that he was not told the offence he committed and that he only knew when he came to court. When cross examined further, he stated that when he first came to court he admitted the charge then he decided that he would deny the charge. He also stated that he did not cross examine PW4 in relation to him being detained because he did not want to ask. There was no re examination.



This was the evidence I heard in this matter.

It is a fact that when this matter came up for trial, the prosecutrix had a sexually transmitted infection. It is not in dispute that the accused person in this matter is a stepfather to the prosecutrix and he was charged with the offence of defilement and arrested.

The first question to be decided is whether or not the prosecutrix was unlawfully carnally known within the meaning of the law. The prosecutrix testified stating that the accused person, who is her step father would undress her and have canal knowledge of her and that it was painful. PW1 testified that when she checked the private parts of the prosecutrix, she discovered that there were sores. In her testimony, PW3 stated that the prosecutrix informed her that when passing urine, she would experience pain in her private parts. She took the prosecutrix to the clinic where the doctor informed her that she had a sexually transmitted infection.

I see no difficulty in finding that there was unlawful carnal knowledge described by the prosecutrix as having been painful. This is so as she stated that her stepfather would undress her and have canal knowledge of her and would tell her not to tell anyone. The evidence of the prosecutrix must be corroborated by some independent evidence.

In the case of **Butembo V The People (1976) ZR 193 (SC)**, the Supreme Court held:

“The test is: does there exist corroboration of such manifest cogency that the conclusion is not to be resisted that the court properly directed would certainly have arrived at the same conclusion”

The evidence that seems to corroborate the prosecutrix evidence is that she had



a sexually transmitted infection as a result of the unlawful carnal knowledge. The medical report and the Zambia Police Report of Medical Examination for rape/defilement produced into evidence clearly showed that the findings of the medical officer were consistent with the alleged circumstances as the prosecutrix had P.V Pus Discharge (Sexually Transmitted Infection) and hymen injuries showing lacerations at 3 and 6 O'clock positions.

I am satisfied that the presence of a sexually transmitted Infection in this case is sufficient to corroborate the occurrence of the sexual intercourse.

I come to this conclusion being fully mindful of the need for an early complaint and the decision of the Supreme Court in the case of **Ndakala V The People (1974) ZR 19**, that the failure to make an early complaint must be weighed in the scales against the prosecutrix case.

The prosecutrix did not make an early complaint to the police. The result of the said intercourse is clear, she had a sexually transmitted infection. I have also noted the fact that when she started experiencing pain in her private parts when passing urine, she informed her sister PW3 who took her to the clinic where she was examined.

The crucial question that arises at this point is as to the identity of the person who had unlawful carnal knowledge of the prosecutrix or simply put who had sexual intercourse with her.

The prosecution have alleged that the now accused person had unlawful carnal knowledge of the prosecutrix. In their endeavor to prove this, PW1 deposed that she was informed by the prosecutrix that her step father had carnal knowledge of her five times. She also stated that the accused person admitted having carnal knowledge of the prosecutrix and he asked her for forgiveness. The prosecutrix PW2, deposed that, the accused would undress her and have carnal knowledge of her and would then tell her not to tell anyone. She went on to state that it



was painful and the accused person would have carnal knowledge of her in the afternoon when her mother was away selling clothes and in the night when her mother was fast asleep. Further PW3 deposed that the prosecutrix informed her that the accused had carnal knowledge of her and that she was present when the accused was apprehended. The accused cried in her presence and asked for forgiveness and that the accused started calling out their names. Further PW4 deposed that when she went to apprehend the accused person, he begged PW1 in her presence for forgiveness and that he continued to beg for forgiveness when he was detained in police custody. PW4 deposed further that when the accused person was charged and arrested for the subject offence, he admitted committing the offence after a warn and caution statement was administered to him.

When the accused person testified, he stated that he did not know why he was apprehended. When he was cross examined by the prosecution, he stated that he decided not to ask PW4 any questions concerning why he was apprehended. The accused person also stated that he had earlier admitted the charge when the matter came up in court but he decided to deny the charge later.

I have satisfied myself beyond all reasonable doubt that the prosecution has proved the element of unlawful carnal knowledge against the accused person.

I now turn to the question of age.

It has been established by the Supreme Court in the case of **Gift Mulonda .v. The People (2004) Z.R 135** that the age of a victim in defilement cases is crucial and a very essential ingredient of the charge.

The foregoing is buttressed by the holding of the Court of Appeal the forerunner to the Supreme Court in Zambia in the case of **Phiri (Macheka) v The People (1973) Z.R. 145 (C.A.)**. It was held in that case that where the age of a person



is an essential ingredient of a charge, that age must be strictly proved.

Notwithstanding, in this same case the Court of Appeal provided guidance as to what may be deemed to be strict proof of age when it is in issue. It held that;

“It is not acceptable simply for a prosecutrix to state her age; this call 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.”

It follows therefore from the foregoing that evidence of one of the parents who was present when the child was born or probably any person who was present when the child was born is sufficient to establish the age of the prosecutrix as it provides direct evidence as to the date the prosecutrix was born or any other best evidence that may available.

Reverting to the evidence in this case, the mother to the prosecutrix who was PW1 stated that the prosecutrix was 8years old having been born in the 2007. The under five card of the prosecutrix was produced in court and it confirmed that the prosecutrix was born in the year 2007.

Further, in the case of Marks Mulepu (1931-1948) NRLR Vol. 4, 240 the court held that:

“If a person appears before a court, the court is entitled itself to judge the age of that person.”

The prosecutrix did appear to be under the age of 16years.

I must state here that besides explaining the proviso twice to the accused person contained in section 138(1) of the Penal Code, he did not attempt to put his statutory defence forward in this matter and as such it is clear to me that he did not apply his mind to the age of the prosecutrix at the time the offence was committed.



From the totality of evidence adduced in this matter, I am satisfied that the prosecution has proved its case beyond all reasonable doubt. I find the accused person ACKSON MWALE **guilty** as charged of Defilement of a child contrary to Section 138(1) of the Penal code chapter 87 as read with Act No. 15 of 2005 of the Laws of Zambia and I **Convict** him accordingly.

DELIVERED IN OPEN COURT THIS 21st DAY OF MARCH 2017


N.M SAKALA-CHABALA
RESIDENT MAGISTRATE

