

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(CRIMINAL JURISDICTION)

HKSE/03/2012

BETWEEN:

THE PEOPLE
VS
SUNDAY MUGALA

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 10th day of January, 2012.

For the State: Mr. M.C. Hamachila - State Advocate

For the Accused: Mr. I Chongwe - Senior Legal Aid Counsel

JUDGMENT ON REVIEW

Cases referred to;

- 1. *Machipisha Kombe v. The People (2009) Z.R. 282***
- 2. *Kalimukwa v. The People (1971) Z.R. 85***
- 3. *Katebe v. The People (1975) Z.R. 13***

Legislation referred to;

- 1. *Penal Code, Chapter 87 of the Laws of Zambia***
- 2. *Penal Code (Amendment) Act, No. 1 of 2011***

The Accused was charged with one count of rape contrary to Sections 132 and 133 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence alleged that the Accused, on the 29th day of June, 2011 at Chingola in the Chingola District of the Copperbelt Province of the Republic of Zambia, had unlawful carnal knowledge of TIMALE NKHATA without her consent.

The Accused denied the charge. However, after the trial during which the prosecution called five witnesses, and after considering the evidence of the Accused which was given on oath, the trial magistrate found the Accused guilty and convicted him of the subject offence. The case was then remitted to the High Court for sentencing as per Section 217 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia.

Before I pass any sentence on an accused person in a case referred to the High Court for that purpose, I must satisfy myself that the relevant legal and procedural provisions were observed by the trial Court.

In this regard I have perused the record of the proceedings from the Court below to confirm such observance.

Section 132 of the Penal Code under which the Accused was charged provides:

“Any person who has unlawful carnal knowledge of a woman or girl without her consent, or with her consent, if the consent is obtained by force or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a felony termed “rape”.

PW1 was 18 year old TIMALE NKHATA herself who testified that on 29th June, 2011 in the evening she had left home to go and meet her boyfriend NCHIMUNYA MUZOKA along KUFWANA ROAD. After chatting with her boyfriend for some time, the two parted company and she started off to go home via a play ground. As she was going she heard someone from behind telling her to stop. After she stopped a man grabbed her and said her father wanted her at the nearby police station. As the man dragged her along he changed course and started going with her into the bush. She asked that man why he was taking her into the bush, to which the man said she had no respect and proceeded to squeeze her throat and to threaten to kill her. He then pushed her to the ground and started tearing off her leggings and the two pants she was wearing.

In the process her dress also got torn on one side. He lay her face up and then took off his blue work suit and proceeded to insert his penis in her vagina. She said the man continued to have sex with her continuously for some one-and-a-half hours before he let her off. During the ordeal she felt a lot of pain and bled from her private parts. PW1 said that she had been able to see her assailant clearly because there was plenty of light at the place where he had grabbed her. After her release she proceeded home in pain and in tears, fell on the mat and narrated the incident to her mother and siblings. She described to her mother the man's appearance and clothes he was wearing at the time. At the trial PW1 identified her dress which had been torn on the side, the black pant and leggings, as well as the white pant which was blood stained. She said that at the time of the incident she had not been menstruating. The matter was reported that night to the Police Station where she was given a Medical Report Form which she took to the hospital where it was completed by the Medical Doctor who examined her.

In the evening the following day she saw a man coming out of Candle Light Bar who looked like the man who had raped her the night before. However, before PW1 and her mother could catch up with him, the man disappeared. Later that same night she came to see the same man at the Police Station where he had been taken by members of the public after they had apprehended him in connection with another incident. She immediately identified him to the Police Officers as her assailant of the night before. The man was wearing the same blue work suit and head sock he had worn on the night of the incident. She identified that man in Court as the Accused.

Under cross examination by the Accused, PW1 admitted that she had hugged her boyfriend but denied that she had had sex with him that night. She said when Accused first grabbed her she did not resist because he had said he was taking her to her father at the Police Station. She denied having given him K20,000=00 to stop him reporting her to her father. She said she did not shout for help because Accused had squeezed her neck. She said the dress and pants got torn because of the force Accused used.

PW2 was CATHERINE MWEWA NKHATA, the mother of PW1. She said on 29th June, 2011 PW1 arrived back home at 22:00 hours dirty and in tears. PW1 then proceeded to tell her mother what had just happened to her and described the man who had raped her as dark in complexion as well as the clothes he had been wearing, a blue work suit. The matter was later reported to the Police Station.

PW2 said that on 30th June, 2011 PW1 spotted the man whom she said had raped her. But before PW2 could see him the man disappeared. That same night PW2's son, EZEKE, phoned his mother to ask her and PW1 to go over to the Police Station. The two women, mother and daughter, rushed over to the Police Station where PW1 immediately identified the Accused as the man who had raped her the night before. The Accused was wearing a blue work suit and a head sock when they found him at the Police station.

PW3 was CLIFFORD MUZOKA NCHIMUNYA, PW1's boy friend. He said he met with PW1 on 29th June, 2011 at about 20:00 hours for about 10 to 15 minutes at the Netball Court between the Police Camp and the Police Station. He said he did not have sex with PW1 but admitted to only having hugged her.

PW4 was EZEKE NKHATA, the brother to PW1. He said he was present when his sister returned home in tears on 29th June, 2011 at 22:00 hours and when she narrated her ordeal to their mother. He said she described the man who had raped her and that he had been wearing a blue work suit and a head sock.

PW4 said that on 30th June, 2011 in the evening he was escorting his girlfriend NANCY who had just knocked off from school. After they briefly parted company, PW4 reversed and followed his girlfriend only to see her with a man alongside her. As he got near, PW4 saw the man holding NANCY. He then asked NANCY what was happening and NANCY said the man had been querying her as to why she and PW4 had wanted to have sex on the road. PW4 then looked closer at the man and recognized him, from PW1's description, as the man who had raped his sister.

As PW4 was talking to the man, PW4's aunt and uncle arrived at the scene and together they apprehended the man, now Accused, and took him to the Police Station where PW1 later arrived and identified the suspect as her rapist.

Cross Examined by the Accused, PW4 said he recognized the Accused from the description earlier given by his sister, PW4. He also said he recognized the Accused from the clothes he was wearing, namely, a blue work suit and head sock, by his walk as well as his looks.

The last prosecution witness was PW5, DETECTIVE SERGEANT MUFWAYA ABIYA, who was the investigating officer in the case. PW5 interviewed the Accused whom he said was wearing a blue work suit and head sock when he was apprehended and taken to the Police Station. PW5 received the Medical Report Form duly compiled by the Medical Doctor who had examined PW1. He produced that Medical Report together with PW1's clothes which she had been wearing at the time of the incident as part of the evidence. PW5 said he visited the scene and observed signs of a struggle. He then arrested and charged the accused with the subject offence, which the Accused denied after being warned and cautioned.

Upon being found with a case to answer and put on his defence, the Accused elected to give sworn evidence and called no witnesses. His evidence was that on 29th June, 2011 at about 20:30 hours he left CANDLE LIGHT SHOPPING COMPLEX to go and see a friend at Kamba. He used a foot path. As he was walking along the path he heard the voices of a man and a woman, with the woman complaining about the man having taken too long in having sex with her while she was menstruating. He left the path and went in the direction of those voices where he indeed found the couple in the act of sexual intercourse. He said he advised the couple to desist from having sex by the paths which people use. He told the girl, PW1, that he was going to take her to her parents. As they were going the two PW1 and PW4, started pleading with the Accused to let them go and offered him K20,000=00 as a bribe. He accepted the money and let them go but with a warning to stop their misconduct. He then proceeded to Kamba.

He further said that the following day at about 19:00 hours he went to CANDLE LIGHT COMPLEX to buy some lolly pops. When he started going home after passing the Police Station, he caught up with a young lady whom he started talking to. As he was talking to that young lady, the Accused heard a young man challenging him as to why he was talking to her. A small scuffle ensued between the Accused and that young man in the course of which more people arrived at the scene. Among the people who arrived there, according to the Accused, was PW1 who identified the Accused as the person who had raped her the previous night. Accused also recognized PW1 as the girl whom he had found having sex with her boyfriend by the foot path. He said he was then taken to the Police Station where he was charged with rape. He denied having raped PW1.

Under cross examination, the Accused said that he met PW1 and her boyfriend for the first time when he found them having sex by the foot path. He said she recognized him and he also recognized her the following day. He said on 29th June, 2011 PW1 had been wearing the green dress which was exhibited in Court but that he did not know how it got torn because there was no struggle between him and her. He said he was apprehended by PW4 and that PW1 came to identify him as the person who had raped her.

That in summary is the evidence upon which the trial magistrate found the Accused guilty and convicted him of rape.

I have perused the judgment of the trial magistrate and his approach to the said evidence. He found as a fact that PW1 had been raped on the day in question. This finding was supported by the evidence on the record to the effect that her clothes, particularly her pants and dress, had been torn and that she bled from her private parts following some 90 minutes of continuous sex on her. The bleeding was evidenced by the stains on the white pant she had been wearing at the time. She arrived at home in a distressed condition, crying and in pain from the ordeal. The learned trial magistrate concluded that PW1 could not have arrived at home in a dirty and distressed condition if she had not been raped; nor could her dress or pants been torn and stained with blood

if there had been no struggle between her and the person who had sex with her. Following the Supreme Court decision in **KALIMUKWA v. The People (1971) Z.R. 85** he found that PW1's stressed condition soon after the alleged incident amounted to corroboration. The trial magistrate concluded that PW1 could not have been that distressed if indeed she had had sex with her boyfriend (PW3) freely; **"She would have been in a jovial mood having enjoyed every bit of the sexual encounter"**, he said.

In addition, the Medical Report revealed some excoriations, or damage to or removal of the fourchette or skin of the vulva. This in itself suggests some violence during the sexual act. The medical report also revealed some sperm cells in the swab after laboratory examination. Added to the foregoing, a visit by PW5, the investigating officer, revealed signs of a struggle at the scene of the incident. On the totality of the evidence, he said, PW1 could not be doubted that someone had carnal knowledge of her using force. Her neck was squeezed and she was pushed to the ground and threatened if she shouted for help.

In my view those findings of fact cannot be faulted because they were supported by the evidence before the trial magistrate.

The next question that was considered was the identity of the rapist.

The trial magistrate found that PW1 had properly identified the Accused as the person who had raped her. In this respect one has to look at the fact that there was light at the place where the Accused first grabbed PW1. The Accused himself recognized PW1 when she went to identify him shortly after he had been apprehended. This was within 24 hours after the rape had occurred. The previous night, PW1 had described the suspect's features and attire sufficiently, in the court's view, to enable her brother, PW4, to identify the Accused the following evening when he was about to pounce on PW4's girlfriend, NANCY. Accused's conduct on the evening of 30th June, 2011 is, in my considered opinion, further corroboration of his pattern of behaviour, especially that it occurred in the same area where PW1 had been assaulted. The Accused had admitted,

in his evidence, that PW1 had been wearing a green dress on 29th June, 2011, the one that was produced in Court, although he professed not to know how it had been torn.

In my view, PW1 had ample opportunity to observe her attacker and was able to give a detailed description of him and his attire later. I do not think it was a mere coincidence that he was spotted and recognized the following night in the same area. The sexual act had taken about 90 minutes, which I believe was more than sufficient time in which to register Accused's features.

The Supreme Court, in its decision in the case of **MACHIPISHA KOMBE v. THE PEOPLE (2009) Z.R. 282** held that:

“Corroboration is independent evidence which tends to confirm that the witness is telling the truth when he or she says that the offence was committed and that it was the accused who committed it”.

Further in the same case, the Court said that:

“There need not now be a technical approach to corroboration. (it is) evidence of something more, which, though not constituting corroboration as a matter of strict law, yet satisfies the Court that the danger of false implication has been excluded, and (that) it is safe to rely on the evidence (of the complainant) implicating the Accused”.

The trial magistrate was alive to the danger of PW1 falsely implicating the accused to the offence. He addressed himself to the Supreme Court's guidelines in its holding in the case of **KATEBE v. THE PEOPLE (1975) Z.R. 13**, viz

“Where there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against an accused, the case is in practice no different from any other 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 could justify a conviction.”

The trial magistrate found PW1 to be a truthful witness whose evidence was also admitted in many respects by the Accused. On the totality of the evidence before him, I find the finding of guilty and the conviction to have been anchored on firm ground.

The conviction is accordingly upheld.

I now, therefore, proceed to consider what should be an appropriate sentence for the offender.

Following his conviction, the offender made a submission in the Court below in mitigation of sentence. This was to the effect that he was a married person with two children; that he was the only one who provided support to the family and that the family would suffer since he had even lost employment. He also said he suffered from a liver problem.

I have indeed considered that submission. I also assume that he is a first offender since no record of a previous conviction was tendered before me. In principle, first offenders deserve to be treated with leniency, of course depending on the circumstances of their case.

The facts are that the offence was committed with quite some force which left the 18 year old victim quite traumatized. It took some 90 minutes of continuous sex which left the victim, a well behaved child according to her mother, bleeding, in pain and in tears. It also appears to me that the offender could have committed another sexual assault on another female had he not been disturbed through the efforts of PW4. That is a trend which ought to be arrested.

At the time of the commission of the offence in this case the punishment for rape under section 133 of the Penal Code had been amended by way of the Penal Code (Amendment) Act No. 1 of 2011 thus:

“Any person who commits the offence of rape is liable, upon conviction, to imprisonment for a period of not less than fifteen years and may be liable to imprisonment for life.”

In the circumstances of this case, and in the hope that when he is released the offender will have learnt to enjoy his sex in a more civilized way, and as my contribution to the campaign against gender based violence, I hereby sentence the offender to Twenty five (25) years imprisonment with hard labour, said sentence to be with effect from the date of arrest which is 4th July, 2011.

Informed of right of appeal.

Delivered in Open Court at Kitwe this **10th** day of **January**, 2012

I.C.T. Chali
JUDGE
