IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 49/2023
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

SAMSON KAYUWA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Muzenga and Chembe, JJA
On 26th March 2024 and 12th April 2024.

For the Appellant: Mrs. S. Chibuye-Lukwesa, Chief Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. K. Sifali, Senior State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Phiri and Others v. The People (1973) ZR 47**
2. **John Banda v. The People – SCZ Appeal No. 183 of 2013**
3. **Boniface Chanda Chola and Others v. The People (1988 – 1989) ZR 163**
4. **Joseph Mulenga and Another v. The People (2008) Vol. 2 ZR 1**
5. **Christopher Nonde Lushinga v. The People – SCZ Judgment No. 15 of 2011**
6. **Ives Mukonde v. The People (2011) Vol. 2 ZR 134**

7. **Phillip Mungala Mwanamubi v. The People – SCZ Judgment No. 9 of 2013**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **The Juveniles Act, Chapter 53 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 The appellant was convicted of the offence of defilement contrary to **Section 138 of the Penal Code, Chapter 87 of the Laws of Zambia** and sentenced to 25 years imprisonment with hard labour.

1.2 The particulars of offence alleged that the appellant on unknown date but between 8th and 9th February 2022, at Lusaka in the Lusaka Province of the Republic of Zambia unlawfully had carnal knowledge of the prosecutrix a girl below the age of sixteen years.

2.0 PROSECUTION EVIDENCE

2.1 The prosecution case was that on 8th February 2022 the prosecutrix was dropped at her school at St. Monica's Secondary School in Matero by her father, PW1, where she was doing her Grade 9. She never returned home. Two days later, PW2 (the mother to the prosecutrix)

received a phone call, from a lady at 10 miles who told her that her daughter was at a bar looking for employment.

2.2 PW1 and PW2, then went to collect her and the following day they went to Kabangwe Police (in the area where they stay), where the prosecutrix was interviewed and she disclosed that she was defiled by a man from 10 miles. She then led the police and her parents to the appellant's house as the place where the appellant stays. He was subsequently apprehended.

2.3 The prosecutrix narrated that after knocking off from school around 12:20 hours, she decided to visit her friend who stays in 6 miles by the name of Regina. Regina stays alone. She decided to spend a night there and the following day she went to 10 miles to visit another friend called Gift. According to her, she never found that friend and on the way she met the appellant who was with 2 of his friends around 06:00 hours, who took her to his place. At this time she was wearing a chitenge and a T-shirt. He then had sex with her, after which he left for work saying he would find her.

2.4 She then left and went to the bar where she met the woman who called her mother. The appellant was found with a case to answer, opted to give unsworn evidence and called two witnesses.

3.0 DEFENCE EVIDENCE

3.1 The appellant gave unsworn evidence in which he denied defiling the prosecutrix. He agreed having met the girl at 10 miles at 06:00 hours. He decided to take her to his house, showed her around and asked her to rest since she was tired. He was with 3 of his friends and they left for work that same morning. When they returned at 17:00 hours they found she had left. They later met her at the bar sitting next to a man and drinking black label. When he called her she refused to come. A week later he was apprehended.

3.2 The appellant's first witness (DW2) stated that he lived with the appellant for 3 months prior to the incident. He narrated that on the material date, the appellant came back with a girl around 06:00 hours with another man. He told the girl to feel at home and then DW2, the appellant and the other person left home. When the appellant, DW2 and a person by the name of Maumbe returned home around 17:00

hours, they found the girl had left. They found her at the bar drinking black label with two men.

3.3 DW3's account was that the appellant left DW2 and himself at home so that he could get a motor vehicle and find them at 10 miles. As they were about to leave home, the appellant returned with a girl and his friend. They all left home going for work, leaving the girl alone. Around 17:00 hours they came back home after knocking off but did not find the girl. When they went to the market, they found her in a bar drinking beer with 2 men.

4.0 DECISION OF THE COURT

4.1 The trial court considered the evidence and found that the prosecution had established the case beyond all reasonable doubt. The court found that the accused had opportunity to commit the offence.

5.0 GROUNDS OF APPEAL

5.1 Embittered with the conviction, the appellant lodged an appeal to this court fronting three grounds couched in the following terms:

1. **The court below erred in law and in fact when it went against the evidence before it to hold and proceed on the pretext that the appellant did not seem to dispute having carnal knowledge of the prosecutrix but merely questioned her dressing at the time they met.**

2. **The court below erred in law and in fact when it reversed the burden of proof by expecting the appellant to challenge each and every item of the prosecution evidence and holding purportedly unchallenged averments by the prosecution as facts.**

3. **The court below erred in law and in fact when it convicted the appellant of a sexual offence upon uncorroborated evidence of a child witness, which corroboration was mandatory for both commission of the offence and the identity of the offender.**

6.0 APPELLANT'S ARGUMENT

6.1 In support of ground one, learned counsel for the appellant took issue with the statement by the trial court to the effect that the appellant did not seem to dispute having had carnal knowledge of the prosecutrix. Counsel contended that throughout the proceedings, right from plea to the end, the appellant disputed having had carnal knowledge of the prosecutrix. It was learned counsel's submission that courts are not supposed to fill in gaps in the evidence with their own findings or inferences. Reliance for this submission was placed, among other cases, on the case of **Phiri and Others v. The People**[1].

6.2 Learned counsel argued that by coming up with an admission of some kind, the court below went contrary to the evidence before it,

misapplied the facts and thereby fell into error. We were urged to allow this ground of appeal.

6.3 In support of the second ground of appeal, learned counsel argued that the learned court below erred when it reversed the burden of proof by requiring the appellant to traverse each and every item of the prosecution evidence. Reliance was placed on the Supreme Court decision in the case of **John Banda v. The People**[2] in which the Apex Court stated that:

> **"There is no obligation on the part of the defence to prove as false, every allegation in the prosecution's case. Were this to be the case, it would reverse that golden thread that runs through our criminal justice system, namely, that the burden of proof rests through out on the prosecution to prove their case against the accused person beyond all reasonable doubt. The accused is entitled to bring up any issue relevant for his defence. And in our considered view, the appropriate time to do so is when it is his turn to give evidence in his defence."**

6.4 It was learned counsel's submission that the appellant was consistent in his evidence at all times and it is surprising how the court below dismissed it as an afterthought. Counsel contended that on the other hand, the prosecutrix could not be trusted as she went to school with a change of clothes, slept at her friend's house, turned up at a bar

looking for employment and so on. Counsel submitted that it cannot be said that the appellant was the only one with an opportunity to commit the offence.

6.5 In support of ground three, learned counsel argued that there was no corroboration of the prosecutrix evidence that it was the appellant who defiled her. Counsel submitted that the medical report showed that the prosecutrix was defiled but does not establish at what point or when and by who. We were referred to the proviso to **Section 122 of the Juveniles Act (now repealed)**, which required corroboration as a matter of law.

6.6 It was learned counsel's contention that the prosecutrix had a motive to cover up her conduct of absconding from home, by hiding the true culprit or divert attention of the parents. Referring to the case of **Boniface Chanda Chola and Others v. The People[3],** learned counsel submitted that the trial court should have eliminated the dangers of false implication before convicting the appellant.

6.7 Counsel argued that in the facts of this case, reliance on opportunity by the trial court as corroboration was a misdirection as the same had been negatived by DW2 and DW3 as the appellant had no time to have

sex with her as he left for work shortly after they reached his home, leaving her behind. It was further argued that in the circumstances of this case, other men had opportunity to defile the prosecutrix.

6.8 All in all, we were urged to allow the appeal and acquit the appellant.

7.0 RESPONDENT'S ARGUMENTS

7.1 In opposing ground one, learned counsel submitted that the trial court was on firm ground in holding as it did because the appellant only asked the prosecutrix two questions which related to her dressing on the material date. It was contended that the appellant did not dispute the fact that he had carnal knowledge of her during cross examination and as such, the trial court was right when it held that the appellant did not dispute having carnal knowledge of the prosecutrix.

7.2 In respect to ground two, learned counsel argued that the learned trial court did not reverse the burden of proof as it clearly indicated in its judgment that there is no onus on the accused to prove his innocence but that the onus was on the prosecution to prove the case beyond all reasonable doubt. Learned counsel contended that, in his defence, the appellant gave mere denial and as such the court below was entitled to convict on the evidence adduced by the prosecution.

Learned counsel referred us to the case of **Joseph Mulenga and Another v. The People**[4] where the Supreme Stated that:

> **"When prosecution witnesses are narrating actual occurrences, the accused person must challenge these facts which are disputed. Leaving assertions which are incriminating to go unchallenged, diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial."**

7.3 It was counsel's submission that the trial court did not misdirect itself as it relied on the evidence to the effect that the appellant defiled the prosecutrix. Counsel prayed that this ground too must fail.

7.4 In response to ground three, learned counsel submitted that the trial court rightly recognized the requirement for corroboration, analysed the facts before him and found corroborative evidence. We were referred to the case of **Christopher Nonde Lushinga v. The People**[5], where it was held that:

> **"There is no magical meaning in the word "corroboration." It simply means evidence which confirms the commission of the offence and the identity of the perpetrator of that offence. Put differently, corroboration means supporting or confirming evidence."**

7.5 Learned counsel referred us to a number of authorities among them the cases of **Ives Mukonde v. The People**[6] and **Phillip Mungala Mwanamubi v. The People**[7], in arguing that, in the present case, by taking the prosecutrix to his house, the appellant had an opportunity to defile her. Counsel therefore contended that there was sufficient evidence of something more supporting the identity of the offender as he had opportunity to commit the crime. We were urged to dismiss this ground as well.

8.0 THE HEARING

8.1 At the hearing of this appeal, learned counsel for the appellant, Mrs. Chibuye-Lukwesa informed the Court that she would rely on the filed arguments. Learned counsel for the respondent, Mr. Zimba equally informed us that he would rely on their arguments.

9.0 DECISION OF THE COURT

9.1 We have pedantically considered the evidence on the record, the arguments by the parties and the judgment under attack. We shall consider the grounds in the order in which they were argued.

9.2 In support of ground one, learned counsel for the appellant argued that the trial court erred when he stated that the appellant did not

seem to dispute having carnal knowledge of the prosecutrix. Counsel contended that the appellant from plea right through to his defence disputed having defiled the prosecutrix. Learned counsel for the respondent on the other hand argued that the trial court was on very firm ground when it found that the appellant did not dispute having carnal knowledge of the prosecutrix as his cross examination was only based on what the prosecutrix was wearing on the material day.

9.3 We have had sight of the evidence on the record and it is true that the appellant's cross examination of the prosecutrix was mainly about what the prosecutrix was wearing. This however does not imply that the appellant did not dispute having sex with the prosecutrix. On the contrary, a holistic perusal of the record clearly reveals that the appellant disputed having had sexual intercourse with the prosecutrix. In any case, even though the questions put to the prosecutrix are not indicated on the record, the answer of the prosecutrix recorded at page 11 in lines 24 to 25 touches on the issue of sexual intercourse in the following terms:

> **"I slept at my friend's place Regina I was at your place and had sex with him."**

9.4 In the circumstances, we find the sentiments by the trial court to the effect that the appellant does not dispute having carnal knowledge not to be supported by the evidence and we thus set it aside. Consequently, we find ground one to be meritorious and we allow it.

9.4 In support of ground two, learned counsel for the appellant argued that the trial court reversed the burden of proof by requiring the appellant to traverse each and every item of the prosecution evidence. On the other hand, learned counsel for the respondent argued that the trial court did not reverse the burden of proof as it clearly indicated in its judgment that there is no onus on the accused to prove his innocence but that the onus was on the prosecution to prove the case beyond all reasonable doubt.

9.5 We agree with learned counsel for the appellant that an accused person bears no burden to prove his innocence and as rightly stated in the case of **John Banda** *supra,* there is no obligation on the part of the defence to prove as false, every allegation in the prosecution's case. We however note that learned counsel for the appellant has not specifically referred us to the portions of the judgment which offends the principle above. We have, however, taken the liberty to examine

the judgment and we have not found a portion where the trial court can be said to have shifted the burden of proof. We therefore find no merit in ground two and we dismiss it.

9.6 Turning to ground three, learned counsel for the appellant contends that there is no corroboration as to the identity of the offender and as such the conviction is not safe. It has been argued with equal force by learned counsel for the respondent that there is corroboration.

9.7 We have no doubt in our mind that the prosecutrix seemed to be a problematic girl. She never returned home after being dropped at school by her father (PW2), spent nights or night with a purported female friend without her parents knowing, she is found at the bar in 10 miles purportedly looking for employment in the bar around 19:00 hours. However, it does not matter how problematic the girl is as that does not justify or excuse anyone who decides to have sex with her since she is below the age of 16.

9.8 There is no dispute that the prosecutrix was defiled as the medical report confirms her evidence. The issue is on the identity of the offender. The trial court relied on opportunity as corroboration. In the case of **Ives Mukonde** *supra* the Supreme Court held that:

"Whether evidence of opportunity is sufficient to amount to corroboration must depend on all the circumstances of a particular case. The circumstances and the opportunity may be such that in themselves amount to corroboration."

9.9 It has been argued by counsel for the appellant that there are other men who had opportunity to defile the prosecutrix since she spent a night away from home and the appellant only met her on the next day in the morning. We are of the considered view that it does not matter if other men equally had opportunity to defile the prosecutrix. What matters is whether the appellant did have an opportunity to do so.

9.10 The undisputed evidence is that the appellant met the prosecutrix at 06:00 hours, took her to his house, showed her around the house, told her to feel at home, asked her to rest and then left for work. It has equally been argued that the appellant had no sufficient time to have sex with the prosecutrix as he left shortly for work. We do not know how much time may be considered adequate for sexual intercourse. By taking a girl he did not know (only met her on the material date) to his house presented a perfect opportunity to defile her. The prosecutrix stated that he had sex with her and the medical evidence

confirms the commission. Therefore, in the circumstances, we cannot fault the trial court for finding opportunity to be corroboration as to the identity of the offender especially that the appellant does not dispute having met the prosecutrix and took her to his home.

9.11 We, in the circumstances, find no merit in ground three and we accordingly dismiss it.

9.12 The matter does not end there. We have taken the liberty to look at the sentence of 25 years which was imposed on the appellant. We hold the view that the circumstances of this case do not show any aggravating circumstances to warrant the imposition of the within sentence. Therefore, the sentence of 25 years imprisonment comes to us with a sense of shock as being excessive. We therefore set it aside and in its place we impose a sentence of 15 years imprisonment with hard labour.

10.0 CONCLUSION

10.1 The net result is that the appeal substantially fails. The appellant's conviction is upheld.

10.2 We quash the sentence of 25 years imprisonment and in its place we impose a sentence of 15 years imprisonment with hard labour with effect from 27th July 2022.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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K. MUZENGA
COURT OF APPEAL JUDGE

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Y. CHEMBE
COURT OF APPEAL JUDGE