

IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT KITWE

HKSE/17/2021

(APPELLATE JURISDICTION)

BETWEEN:



The People

vs

Gift Musukwa

Before the Hon. Lady Justice Abha Patel, S.C.

For the Appellant: Mr. P. Chavula & Ms. M. Nzala
Messrs Legal Aid Board

For the Respondent: Mrs. G. Kashishi- Ngulube & Mr. B.Z. Tembo
Messrs National Prosecutions Authority

JUDGMENT

Legislation referred to:

- 1. The Penal Code, Chapter 87 of the Laws of Zambia**
- 2. Criminal Procedure Code, Chapter 88 of the Laws of Zambia**
- 3. The Juveniles (Amendment) Act No. 3 of 2011**

Cases referred to:

- 1. Phiri (Macheka) v The People (1973) Z.R 145**



2. **Emmanuel Phiri**(1982) ZR 77
3. **Machipisa Kombe v The People** SCZ Judgment No 27 of 2009
4. **Haonga and Others v The People** (1976) Z.R. 200 (S.C)
5. **Darius Sinyinza v The People** (SCZ Judgment 2 of 2009)
6. **Woolmington v Director of Public Prosecution** (1935)All ER 1
7. **Mwewa Murono v The People** (2004) Z.R. 207.
8. **Ndakala v The People** Appeal No. 176 of 1973(1974)
9. **Tembo v The People** (1966) Z.R. 126(H.C)
10. **Kalebu Banda v The People** (1977) Z.R 169. S.C

1. INTRODUCTION

- 1.1 The case comes before this Court pursuant to the provisions of section **217 (1) of the Criminal Procedure Code**, committed to the High Court for sentencing. It is trite that before imposing the sentence, I must satisfy myself that the conviction is proper as required **by section 218(3) of the Criminal Procedure Code**, which provides as follows:

"When any person is brought before the High Court in accordance with the provisions of subsection (2), the High Court shall proceed as if he had been convicted on trial by the High Court."

- 1.2 The Accused, **GIFT MUSUKWA**, was charged with one count of defilement contrary to section 138 (1) of the **Penal Code, Chapter 87 of the Laws of Zambia as amended by Act No. 15 of 2005 and Act No. 2 of 2011.**

2. PARTICULARS OF THE CHARGE

- 2.1 The particulars of the offence alleged that the Accused, on 27th September, 2020 at Chingola, in the Chingola District of the Copperbelt Province of the Republic of Zambia, had unlawful carnal knowledge of a child under the age of 16 years.

3. PROSECUTION EVIDENCE

The Accused denied the charge and the Prosecution called 5 witnesses.

- 3.1 **PW1** was Mark Katongo, a Medical Doctor at Nchanga North Hospital. He testified that he attended to the Prosecutrix in this matter on 29th September, 2020 around 14.00 hours with a complaint of sexual assault. Upon examining her, he noticed bruises on her right shoulder and her knees. The outside of her private parts was okay but her hymen was broken. He identified the medical report which he said he signed after examining the Prosecutrix.
- 3.2 **PW2** was the Prosecutrix. She testified that on 27th September, 2020 around 22.00 hours she had gone to the toilet which was outside, behind the house. As she was about to enter the house she saw Gift, the Accused herein, who called her saying that he wanted to ask for something from the shop. She said she was able to see him because there was enough light. But as she got near him he ordered her to follow him and threatened to kill her if she refused. She told him that she was going to call her mother but he

picked a cloth which he tied across her mouth. He then took her into unfinished house which was still under construction.

3.3 It was further her evidence that once inside the unfinished house, he asked her to undress but she refused, so he tied her hands and legs then took off her clothes. After that he took off his trousers, untied her legs and then inserted his penis into her vagina. She said that she felt pain. After he finished assaulting her, he tied her legs again and left her in the same unfinished house.

3.4 The following day on 28th September, 2020 he returned to the unfinished house around 05.00 hours to check on her. He left and went back again around 15.00 hours or 16.00 hours and he defiled her again. He left and went back again on 29th September, 2020 around 05.00 hours when he freed her and warned her not to tell anyone or else he would kill her.

3.5 She told the court that she did not go straight home because she was scared, instead she went and sat behind another unfinished house where her neighbour, **PW3**, found her. PW3 asked where she had come from but she did not say anything, prompting PW3 to call the Prosecutrix's mother, who came and took her home. Inside the house, she told her mother, in the presence of **PW3**, that she had been with Gift.

- 3.6 She was later taken to Kasompe Police Post where she was issued with a medical report which she took to Nchanga North General Hospital. She identified the Accused who she said she had known since January, 2020 as he used to buy goods from their shop. She also identified the medical report.
- 3.7 When cross-examined by the Accused, she stated that the house he took her to was uncomplete and not roofed and that there were no neighbours.
4. **PW3** was Saphila Ngosa. She testified that on 29th September, 2020, she was going to the Prosecutrix's parents house, but before she reached she saw the Prosecutrix seated in uncompleted house. Because she knew that the Prosecutrix had been missing since 27th September, 2020 she asked her where she has been and she responded that she hasn't been anywhere. It was further her evidence that she went and called the Prosecutrix's mother and together they took the Prosecutrix home.
- 4.1 When they interviewed her, she told them that she was taken by the Accused. Upon being told that, they took the Prosecutrix to Kasompe Police Post where they reported the matter. A medical report was issued which was taken to the hospital. The witness identified the Accused who she said she had been seeing around her place.

5. **PW4** was Esther Mwanza the mother to the Prosecutrix. She told the court that the Prosecutrix was born on 18th May, 2007. She testified that on 27th September, 2020 around 22.00 hours she left her daughter, the Prosecutrix, in her room while her husband was in the living room watching television. It was her evidence that her husband had told her that the Prosecutrix had asked for his phone to use for light as she went to the toilet and asked her to accompany her. She narrated that when she went to the toilet, she did not find her there. They checked at PW3's house but she was not there. She narrated that as their search proved futile, they went to sleep and the following day, they continued with the search but the Prosecutrix was not found, and hence they reported the matter to Kasompe Police Post.

5.1 On 29th September, 2020 around 06.00 hours, she testified that she, (**PW4**) was at home, when PW3 informed her that she had found the Prosecutrix in an unfinished house. PW4 narrated that she rushed to the said unfinished house, where she found the Prosecutrix, who she asked where she had been but the Prosecutrix did not respond. The Prosecutrix was taken home, where when interviewed again she revealed that she had been with the Accused. Upon hearing this, the matter was reported to the police station and later the Prosecutrix was taken to the Hospital. She identified the Accused who she said she knew very well as he was her regular customer at the shop.

6. The matter was investigated by **PW5**, Constable Miyambo Sikopo. She testified that she was allocated a docket in this matter on 5th October, 2020. The victim complained of vaginal pains. Acting on the medical report which was duly signed, PW5 interviewed the suspect who denied the allegations but she still charged him with the subject offence. She identified the medical report, under-five card and the affidavit sworn by PW4 and produced them as part of her evidence.

When the Prosecution closed its case, the Accused was found with a case to answer and was accordingly put on his defence. He elected to give sworn evidence and called one witness.

7. THE EVIDENCE OF THE ACCUSED

- 7.1 In his defence, the Accused denied having defiled the Prosecutrix. He testified that on 27th September, 2020 he was with his wife and that on 28th September, he went for work. He testified that on 29th September, 2020 he was having a bath at home when police officers went to his house. They asked him to identify himself which he did. Then they asked the Prosecutrix five times to identify him, but she never responded but PW5, the arresting officer insisted that the only Gift she knew was the Accused, and that is how he was apprehended.

7.2 When cross-examined, the Accused insisted that on 27th September, 2020 he spent the whole day with his wife at home.

7.3 **DW2** was Mable Mutambo, the Accused's wife. She testified that on 27th September, 2020 around 19.00 hours she was with the Accused at home and that she was still with him at 22:00 hours. On 29th September, 2020 she left the Accused bathing as she went to the market, when she returned she discovered that he had been apprehended.

During cross-examination, she insisted that on 27th September, 2020 she was home with the Accused.

When the matter came up for sentence, the State and the Defence indicated that they would file their respective submissions. The Defence filed their submissions on 7th May, 2021 while the State filed on 12th May, 2021.

8. SUBMISSIONS BY THE DEFENCE

8.1 Counsel for the Defence submitted that they did not support the conviction because the Prosecutrix's evidence was not corroborated as required by both statute and practice. Counsel also contended that since the Prosecutrix was 13 years old, she was a child of tender years, whose evidence needed corroboration before a conviction could be said to be safe and satisfactory as demanded by section **122 (1) of the Juveniles (Amendment) Act No. 3 of 2011.**

8.2 Counsel also submitted that the Prosecutrix was untruthful in her evidence as what the learned magistrate observed when he visited the uncompleted house, where the alleged defilement took place was contrary to her evidence. Thus the weight to be attached to her evidence should be reduced. This submission was supported by the case of **Haonga and Others v The People**, where it was held that:

“Where a witness has been found to be untruth on a material point, the weight to be attached to the remainder of his testimony is reduced.”

8.3 Counsel also submitted that it is a requirement of practice that before a conviction can be said to be safe and satisfactory in sexual offences, the evidence of the victim need to be corroborated in material particular as provided by the case of **Emmanuel Phiri v The People** and in **Darius Sinyinza v The People**, where the Supreme Court held inter alia that:

“Victims of defilement are suspect witness, and their evidence should always be corroborated.”

8.4 It was also contended that the evidence of PW1 which should have provided corroboration to the Prosecutrix's evidence was erroneously received as PW1 gave his purported expert opinion without the state eliciting his academic and professional background.

9. SUBMISSIONS BY THE PROSECUTION

9.1 In supporting the conviction, Counsel for the State submitted that the Prosecution had proved its case against the Accused beyond all reasonable doubt as guided by the cases of **Woolmington v Director of Public Prosecution** and **Mwewa Murono v The People**.

9.2 It was also submitted that the lower court did not convict the Accused on the uncorroborated evidence of the Prosecutrix, as her evidence was properly corroborated by the evidence of PW1, PW3 and PW4.

9.3 Counsel also contended that there was an early complaint by the Prosecutrix to PW3, who found her after she went missing, that she was carnally known by the Accused whom she mentioned by name. Counsel relied on the case of **Ndakala v The People** where it was held that:

"The corollary to the Principal that evidence of early complaint is admissible to show consistency is that the failure to make an early complaint must be weighed in the scales against the prosecution case"

10. REVIEW OF THE RECORD

10.1 The Accused is charged with defilement and **section 138(1)** of the Penal Code provides that:

"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.”

10.2 Having reviewed the record of proceedings, the written submissions by both parties as well as the Judgment from the Court below, I note the particular care and caution exercised by the learned trial magistrate in the conduct of the trial. The Prosecutrix's age was properly established by her mother and by the under-five card produced in court which indicated that she was born on 18th May, 2007. This was following the decision in **Phiri (Macheka) v The People** where it was held that;

“it is not acceptable simply for a prosecutrix to state her age; this can be no more than be 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.”

10.3 Therefore, since it is the mother who testified as to the age of the Prosecutrix, and in the absence of any evidence contrary to her evidence, I find no fault in the finding of the trial magistrate that the Prosecutrix was under the age of 16 years.

10.4 The fact that the Prosecutrix was defiled is also not in dispute as this was confirmed by the medical report which indicated that the allegations that she was defiled were true and the fact that she was found with syphilis indicated that she had had unprotected sex.

10.5 In this case however, I note with concern that the only evidence against the Convict was that of the Prosecutrix. The learned magistrate properly warned himself of the need for corroboration of both the commission of the offence and the identity of the offender in order to eliminate the dangers of false implications as per holding in the case of **Emmanuel Phiri vs The People** referred to by both parties.

However, the learned magistrate on page **J10** of the judgment found that the Accused was rightfully identified by the Prosecutrix and consequently convicted the Accused. I have scrutinised the Record and the Judgment on the need for corroboration of the identity of the accused. The relevant paragraph of the learned Magistrates Judgment at page **J10** reads as follows:

"...and on record, there is corroborative evidence already to prove that accused indeed he committed the offence. Besides corroborative evidence only serves to satisfy that the evidence adduced by the prosecutrix can be relied upon."

10.6 In my considered opinion, and upon serious reflection of the record of the Court below, I have difficulties agreeing with this conviction in the absence of corroborative evidence, especially that there are so many loose ends and which doubts, if the Court entertains them, should really lie in favour the accused.

I am alive to the holding in the case of **Tembo v The People** where it was held that:

"Caution should be exercised in trying all charges involving sexual offences where the only evidence against the Accused is the uncorroborated testimony of the complainant."

10.7 The alleged defilement is said to have happened on 27th September, 2020 around 22.00 hours. PW4, the mother to the Prosecutrix testified that she was told by her husband that the Prosecutrix had asked for his phone so that she could use the torch as she went to the toilet outside the house. This means that the Prosecutrix had a phone but there was no evidence to show what had happened to the phone or why no one thought of calling it when she went missing.

10.8 Further, the evidence of the Prosecutrix appears to have been rehearsed. When giving evidence, she said that on 28th September, 2020 the Accused returned to the unfinished house around 05.00 hours to check on her. He left and went back again around 15.00 hours or 16.00 hours and he defiled her again. He left and went back again on 29th September, 2020 around 05.00 hours when he freed her and warned her not to tell anyone or else he would kill her.

10.9 The Mother, PW4 also said that when she could not find the prosecutrix, she and her husband decided to go to sleep. There was no evidence as to the cell phone which no-one decided to call, nor was it used by the Prosecutrix to call for

help during the alleged period of her continuing ordeal at the hands of the accused. I also have doubts as to how the Prosecutrix was able to estimate the time? No evidence was led to help the court understand how she was able to do that.

10.10 I have also noticed that the Accused in his defence said that on 27th September, 2020 he was with his wife, and on 28th September 2020, he went for work. The Accused established an alibi which should have been investigated by the police. The police's failure to investigate if indeed the Accused was at work the whole day on 28th September, 2020, was dereliction of duty of the highest order and should be presumed in favour of the Accused.

In **Kalebu Banda v The People** the Supreme Court held that:

"where evidence has not been obtained in circumstances where there was a duty to do so, and possible prejudice has resulted, then an assumption favorable to the accused must be made."

11. FINDING OF THE COURT

11.1 In the case at hand, and on review of the Record and the Judgment of the Court below, the Court finds that there is corroboration as to the commission of the offence, but none as to the identity of the Accused. As submitted by the Defence, the Prosecutrix was a child of tender age hence falls under

section 122 of the Juveniles (Amendment) Act No. 3 of 2011 which provides as follows:

“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-

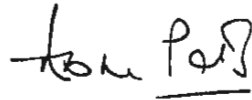
- (a) if, in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child’s evidence, on oath, and does not understand the duty of speaking the truth, the court shall not receive the evidence; and*
- (b) where evidence admitted by virtue of this 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.”*

11.2 Clearly, it is a requirement of law, that sworn evidence given by a child of tender years should be corroborated by some other material evidence for it to suffice for the purposes of conviction of the Accused.

11.3 In *casu*, there being no corroboration as to the identity of the accused, I find no special or compelling grounds to rule out inherent dangers of false implication; it is

obvious that identity having not been confirmed, I
therefore find that the conviction is unsafe, and I hereby
quash it.

Delivered in open Court at Kitwe, this 28th day of May, 2021



HON J. ABHA PATEL, S.C.

JUDGE

