SCZ JUDGMENT NO. 22 OF 2014

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE **Appeal No. 157/2009**
(Criminal Jurisdiction)

BETWEEN:

TOBIAS KAMBENJA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Chirwa, Chibomba and Phiri, JJJS
On the 7th of December, 2010 and 4th June, 2014.

For the Appellant: **Mr. K. Muzenga, Senior Legal Aid Counsel of Legal Aid Board**

For the Respondent: **Mrs. R.M. Khuzwayo, Deputy Chief State Advocate.**

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **David Dimuna -v- The People (1988-89) ZR 199**
2. **Emmanuel Phiri -v- The People (1982) ZR 77 (S.C.)**
3. **Kambarage Mpundu Kaunda -v- The People (1990/1992) ZR 215**
4. **Simutenda -v- The People (1975) ZR 294**
5. **George Musupi –v- The People (1978) ZR 271**

6. Benson Phiri and Sanny Mwanza –v- The People (2002) ZR 107

When we heard this appeal, the Honorable Mr. Justice D.K. Chirwa was part of the Court. He has since retired. This is therefore, the majority Judgment.

The Appellant appealed against the conviction by the Subordinate Court of the First Class for the Ndola District, on the charge of defilement of a girl under the age of 16 years, contrary to Section 138(1) of the Penal Code, Cap 87 of the Laws of Zambia. As the offence carried a mandatory minimum sentence of 15 years imprisonment with hard labour, the Subordinate Court had no jurisdiction to sentence the Appellant. The case record was remitted to the High Court which sentenced him to Twenty-Five (25) years imprisonment with hard labor, with effect from the 17th day of September 2007; being the date of his arrest.

The particulars of the offence were that the Appellant, on the 12th day of September, 2007 at Ndola, in the Ndola District of the Copperbelt Province of the Republic of Zambia, did have canal knowledge of a girl under the age of 16 years.

At the Appellant's trial the Prosecution relied on the evidence of five (5) witnesses, whose collective evidence was that on the 12th of September, 2007 a housewife named Helen Chimbalanga (PW2), was attending lessons at school until she received a report to the effect that her four-year old daughter had been defiled by the Appellant. She immediately proceeded home and later went to Pamodzi Police Post where she found her daughter, who was the victim (PW5). PW2 was given a Police Medical Report form and proceeded with the victim to Arthur Davison Hospital where the victim was examined by Dr. Mbalungisa Frolia who was PW1 in the proceedings. According to PW2, the victim was aged 4 years, and the Appellant was a neighbour and was well known to her.

Dr. Mbalungisa Frolia (PW1) testified that his findings after examining the victim were that the hymen was absent; the vagina hole was reddish, and the vulva was also reddish. He also testified that the HIV test which he performed on the victim resulted negative. His conclusion was that the girl suffered trauma on her private parts, more particularly, he concluded that something entered through the child's vagina.

PW3 was Mary Chimbalanga who testified that on the material day around 18 hours, she was sweeping at her house until she received a report from her young brother Martin Kayombo (PW4) to the effect that the victim, who was her younger sister, was being defiled at the garden. She rushed there and found the victim naked and in the company of the Appellant who was half naked; without a shirt and in the process of putting on his shoes. She knew the Appellant very well and had known him for 1 year.

PW3's further evidence was that upon seeing her, the Appellant ran away from the scene and went to hide in the bananas.

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PW4 was a juvenile witness aged 8 years who gave unsworn evidence after an unsuccessful voire dire test. **PW4** implicated the Appellant in his unsworn statement. He told the court that when he went to the toilet which was at the garden, he found the Appellant on top of the victim and they were both naked.

The victim (PW5) also gave unsworn evidence after an unsuccessful voire dire test, and implicated the Appellant. According to the victim, the Appellant was known to her as Tobias. He took her into the banana plantation at the garden and made her undress and lie down; and he inserted what she called a big insect in her private parts following which she felt severe pain. She identified the Appellant in court.

When found with a case to answer, and put on his defence, the Appellant elected to remain silent. The learned trial Magistrate summarized the evidence on record and after analyzing it, found that the unsworn statements of PW4 and

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PW5 were corroborated by PW3's evidence; that PW3 knew the Appellant very well. She found him naked with the victim. More importantly, the court found that when confronted, the Appellant ran away from the scene of crime. The trial court further found that in the midist of all these allegations, the Appellant had opted to remain silent, which was an indication that what the witnesses told the court was truthful. On that basis the Appellant was convicted as charged.

On behalf of the Appellant Mr. Muzenga filed five grounds of appeal as follows:-

1. **The learned trial court misdirected itself in convicting the Appellant in the absence of corroborative evidence.**
2. **The learned trial court misdirected itself in law and in fact when it failed to treat the evidence of PW3 and PW4 with caution as they may properly be considered as witnesses with a possible interest to serve.**

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3. **The learned trial court erred in law and in fact in making an adverse finding against the Appellant on account of his election to employ his right to remain silent.**
4. **The learned trial court erred in law and in fact in receiving the evidence of PW4 and PW5 in the light of its rulings after the voire dire.**
5. **In the alternative to the above grounds, the sentence of 25 years imprisonment with hard labor imposed on the appellant is excessive and does not clearly disclose the leniency of the court.**

Grounds 1 and 2 were argued together. Mr. Muzenga argued that the trial court did not clearly direct its mind to the need

to look for corroborative evidence or evidence of something more in support of the evidence of PW4 and PW5 who were juvenile witnesses; that PW3 and PW4 were siblings of the victim (PW5) and were therefore in the category of witnesses with possible interest of their own to serve. It was also argued that the trial court should have treated their evidence with

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caution before accepting it. Mr. Muzenga cited the case of **Emmanuel Phiri -v- The People**[2] where we held as follows:

> ***"In a sexual offence there must be corroboration of both commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Failure by the court to warn itself is a misdirection."***

Mr. Muzenga argued that the evidence of the victim ought to have been corroborated by that of PW3 and PW4. However, these witnesses were her siblings. PW3 is the elder sister

while PW4 is the elder brother. As such, their evidence ordinarily ought to have been treated with caution; which the trial court failed to do. It was also argued that evidence which of itself requires corroboration and evidence of something more, cannot corroborate other evidence which is lacking corroboration. In Mr. Muzenga's view, evidence of PW3 and PW4 should be discounted; which left no other evidence on the record upon which the conviction and sentence could be sustained.

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In support of Ground 3 Mr. Muzenga criticized the comments made by the trial court to the effect that the Appellant's silence when called upon to give his evidence, was an indication that the witnesses told the truth. It was suggested that the trial court's comments were prejudicial to the Appellant. Mr. Muzenga cited our decision in the case of ***David Dimuna -v- The People***[1] in which we held as follows:

"***Whilst a court must not hold the fact that an accused remains silent against him there is no impropriety in a comment that only the Prosecution evidence was available to the court.***"

Mr. Muzenga also cited our decision in the case of **Simutenda -v- The People**[4] where we held as follows:

"There is no obligation on an accused person to give evidence, but where an accused person does not give evidence the court will not speculate as to possible explanations for the event in question; the court's duty is to draw the proper inference from the evidence it has before it."

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It was learned Counsel's contention that the view taken by the trial court in this case that the Appellant's silence confirmed his being guilty, was heavily prejudiced.

In support of Ground 4, Mr. Muzenga submitted that there was variance in the rulings of the trial court at the conclusion of the voire dire in respect of PW4 and PW5 who were

juvenile witnesses. In respect of PW4, the court made the following ruling:-

> "***I am satisfied that the child does not understand the seriousness and solemnity of the action and special duty to tell the truth on this occassion. However, I am satisfied that the child has sufficient intelligence and understanding to warrant the reception of his unsworn evidence."***

Whereas in respect of PW5, the trial court made the following ruling after conducting the voire dire:

> ***"The child does not understand the solemnity of taking the oath but does understand and has sufficient intelligence to warrant the importance of her unsworn evidence."***

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According to Mr. Muzenga, the two rulings are clearly at variance with the provisions of Section 122(1) of the Juveniles Act, Cap 53 of the Laws of Zambia. It was his view that the evidence of PW4 and PW5 should not have been received at all because according to Section 122(1) of the Juveniles Act, it is not enough to conclude that the child possesses sufficient intelligence, but the child must also

understand the duty of stating the truth. It was Mr. Muzenga's contention therefore that the evidence of PW4 and PW5 was irregularly and/or wrongly received by the court, and it should be discounted entirely.

In support of Ground 5, Mr. Muzenga criticized the sentence of 25 years imprisonment with hard labour handed down to the Appellant, after the trial court found that as a first offender he deserved lenience. His contention is that the sentencing court should have exhibited its lenience in the sentence.

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In response to the Appellant's 5 Grounds of appeal, Mrs. Khuzwayo, Deputy Chief State Advocate, conceded to Grounds 3 and 4 and did not wish to address this court on Ground 5 which criticized the sentencing court for not exhibiting lenience in the choice of the sentence, on account of the Appellant's being a first offender.

In response to Grounds 1 and 2, Mrs. Khuzwayo submitted that the Appellant had opportunity to commit the offence against the victim, as he was found in a hidden place in the company of the victim, both naked, and the Appellant fled the scene upon being seen by PW3. Mrs. Khuzwayo further argued that the evidence of PW3 was, on its own, sufficient to secure a conviction provided the court warned itself of the dangers of convicting on the evidence of a single identifying witness. It was Mrs. Khuzwayo's contention that the Appellant did not show any reason why PW3's evidence should be doubted; and he did not dispute PW3's assession that he was a well known neighbour. He also did not dispute the evidence

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of PW6, the Police Officer who visited the scene of crime and confirmed to the trial court, that it was a secluded place and there was no one else who could have defiled the victim.

We have considered the grounds of appeal; the written heads of argument and submissions before us. We have also considered the judgment of the trial court and the High Court Judge's notes which sentenced the Appellant. We shall consider the grounds in the order they were argued by Mr. Muzenga.

With regard to Grounds 1 and 2, the Prosecution's collective evidence was mainly from PW3, PW4, PW5 and PW6 the Police Officer who visited the scene of crime. The evidence is also supported by PW2, the victim's mother who testified, in summary, that the victim was aged 4 years and confirmed the results of the medical examination conducted by PW1 on the victim. The evidence that was before the trial court, and now before this court, is that the offence of defilement was

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committed in broad day light, around 18 hours; at the premises bordering the victim's family and the Appellant's house. The premises included the garden where PW4 went to the toilet, and the banana plantation. The Appellant was

well known to the key prosecution witnesses who testified. According to PW3, she found the Appellant half naked, without a shirt and in the process of putting on his shoes. The Appellant was in the company of the victim who was naked, and when she confronted the Appellant, he took to his heels and ran to hide in the banana plantation.

Mr. Muzenga attacked the findings of the trial court, that the unsworn statements of PW4 and PW5 were not corroborated by PW3's evidence. We were invited to discount the evidence of PW4 and PW5 for lacking corroboration. We do unreservedly agree that the evidence of PW4 and PW5 require corroboration, in any event as a matter of Law, by the very fact that they are juvenile witnesses of tender age. The questions Mr. Muzenga raised are two fold; first, that the unsworn

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evidence of PW4 and PW5 should be discounted altogether because of the inappropriate Rulings made by the learned trial Magistrate at the conclusion of the two voire dire tests;

second, that PW3 had a possible interest of her own to serve and therefore, should not have been considered as having provided the required corroboration. In order to adequately deal with these two questions, we propose to consider Grounds 1; 2 and 4 together; beginning with Ground 4 which casts doubts on the evidence of PW4 and the juvenile victim (PW5).

Mrs. Khuzwayo conceded, correctly so, to Ground 4 of this appeal which relates to the variance in the two Rulings made by the trial court at the conclusion of the voire dire tests in respect of PW4 and PW5, before their unsworn evidence was received and placed on record. However, she insisted that the evidence against the Appellant was overwhelming.

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What strikes us about Mr. Muzenga's argument, is that he does not point out any part or parts of the questions and answers that were inappropriate in the voire dire tests

conducted by the trial court. It serves little purpose to criticize a Ruling in a voire dire test, without criticizing the propriety or otherwise of how the voire dire test itself was conducted and recorded. What should be of material substance is whether or not a voire dire test was correctly conducted on a witness of tender age. We have looked at the record of appeal in respect of the voire dire tests conducted before PW4 and PW5 gave their unsworn evidence. There is no suggestion to us that the conduct of the tests was incorrect in either form or substance or to suggest violation of the provisions of Section 122 of the Juveniles Act Cap 53, as it existed before the Juveniles (Amendment) Act No. 3 of 2011. In addition, Mr. Muzenga has not raised any complaint before us to the effect that the two voire dire tests had been incorrectly or incompetently conducted. We find no legal basis for Mr. Muzenga's complaint in Ground 4. From the recorded questions and

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answers, the trial court conducted the correct tests in both form and substance before arriving at the conclusions to

receive unsworn evidence from PW4 and PW5. We find no merit in Ground 4.

Grounds 1 and 2 alleged that the trial court did not clearly direct its mind to the need to look for corroboration or something more. By so saying, Mr. Muzenga suggests that the victim's evidence was not corroborated by some other independent evidence, from an independent source, other than that of PW3 who had a possible interest of her own to serve.

The law relating to evidence from such a witness as PW3, is very well settled; and on many occasions we have stated that when considering such evidence, courts should not lose sight of the real issue. In the case of **George Musupi –v- The People**[5], we stated as follows:

> ***"The tendency to use the expression 'witness with a possible interest to serve' carries with it a danger of losing sight of the real issue … The critical***

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consideration is not whether the witness does in fact have interest or a purpose of his own to serve, but whether he is a witness who because of the category in which he falls or because of the particular circumstances of the case, may have a motive to give false evidence."

In the present case, the trial court did note that the Appellant was a neighbour to the victim's family and he was well known to the victim and to PW3. There is no suggestion from the record of proceedings suggesting the presence of particular circumstances which could have motivated PW3 to give false evidence; and, there is no evidence suggesting poor neighbourly relations between PW3, the rest of the victim's family on one hand, and the Appellant on the other. We therefore, do not find any reason to fault the trial court's acceptance of the evidence of PW3, as providing the necessary corroboration to the evidence of PW4 and PW5, the victim.

It is also worthy to note that the trial court did not restrict its analysis of evidence to PW3's testimony. The record clearly

shows that the court took into account all the evidence on record, including the medical evidence, which was obtained not long after PW3 found the victim naked at the scene of crime in the company of the Appellant, half naked. As already stated, the offence was committed in broad day light. PW3 had ample opportunity to observe and she did recognize the Appellant as a neighbour. These facts established good opportunity on the part of the Appellant, of the type which amounts to corroboration. We accept that mere opportunity does not amount to corroboration, but where the opportunity may be of such character as to bring in the element of suspicion, it will amount to corroboration. In the present case, the circumstances in which both the Appellant and the victim were found; namely, half naked and naked respectively, and the isolated locality of the opportunity in the neighbourhood; namely the garden and banana plantation, are facts which in themselves, amount to corroboration. When such opportunity and locality supports

the clear evidence of a single identifying witness, that evidence must be adequate to

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support a conviction. See **Benson Phiri and Sanny Mwanza –v- The People[6].** We find no merit in Grounds 1 and 2.

In Ground 3, Mr. Muzenga's argument targeted the trial court's comment on the Appellant's choice to remain silent when put on his defence. We find this argument to be peripheral and of no consequence in the face of the overwhelming evidence and corroboration before the trial court and now, this court. We see the trial court's comment on the Appellant's silence no more than saying that the Appellant did not challenge the evidence of PW3, PW4 and PW5 to the effect that they recognized the Appellant. This was an important consideration because recognition is accepted to be more reliable than identification of a stranger. We find no merit in Ground 3.

Ground 4 was presented as an alternative to the rest of the grounds of appeal. In this ground Mr. Muzenga complains of the severity of the sentence of 25 years imprisonment with hard labour imposed by the High Court on the Appellant, after

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accepting the fact that the Appellant was a first offender. We have considered this ground and we must state that the sentence does not come to us with a sense of shock in the circumstances of this case where the Appellant, then aged 25 years, defiled the victim, a baby girl; only aged 4 years. The minimum sentence for this offence is 15 years; and the maximum is life imprisonment. A 25 year sentence in the circumstances of this case appears to us to be well settled in between the minimum and maximum sentence available for this offence.

The net result is that we find no merit in the appeal. We dismiss it and uphold both the conviction and sentence.

(RETIRED)
D.K. CHIRWA

SUPREME COURT JUDGE

H. CHIBOMBA
SUPREME COURT JUDGE

G.S. PHIRI
SUPREME COURT JUDGE