IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL NO. 8 OF 2016**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

PARTFORD MWALE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Chisanga JP, Chashi and Mulongoti JJA

ON: 17th January and 17th March 2017

For the Appellant: *GN. Mukulwamutiyo (Ms) Senior Legal Aid Counsel, Legal Aid Board*

For the Respondent: *CM. Hambayi (Mrs), Deputy Chief State Advocate, National Prosecutions Authority*

JUDGMENT

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Emmanuel Phiri v The People (1982) ZR 77***
2. ***Bernard Chisha v The People (1980) ZR 36***
3. ***Mwambona v The People (1973) ZR 28***
4. ***Zulu v The People (1973) ZR 326***
5. ***Goba v The People (1966) ZR 113***
6. ***Nsofu v The People (1973) ZR 287***
7. ***Phiri v The People (2008) SCZ Judgment No. 33 of 2014***
8. ***Richard Daka v The People –SCZ Judgment No. 33 of 2013***
9. ***R. Baskerville (1916) 2 KB, 658***
10. ***R v Wilson (1914) 58 Cr APP R, 304***
11. ***Kambarage Kaunda v The People (1990 – 1992) ZR 215***
12. ***Chola Nyampande and Sichula v The People (1988/1989) ZR 163***
13. ***Yokoniya Mwale v The People – SCZ Appeal No. 285/2014***

Legislation referred to:

14. ***The Penal Code, Chapter 87 of the Laws of Zambia***
15. ***The Juveniles Act, Chapter 53 of The Laws of Zambia***

Other Works referred to:

16. ***Evidence: Text and Materials, 2nd edition, by Steve Uglow London, Sweet & Maxwell 2006***

The Appellant was convicted of the offence of Incest contrary to Section 159 (1) of ***The Penal Code[13]*** as read with Act Number 15 of 2005 by the Subordinate Court sitting at Katete.

The particulars of the offence being that the Appellant, on unknown dates but between 1st December 2013 and 31st January 2014 at Katete in the Katete District of the Eastern Province of the Republic of Zambia, had carnal knowledge of female person the Prosecutrix who to his knowledge is his biological daughter.

On committal to the High Court for sentence, the Appellant was sentenced to 40 years imprisonment with Hard Labour with effect from the date of his arrest.

The case for the Prosecution centered on the evidence of three witnesses; ***PW1 Tiwine Sakala***, the mother to the Prosecutrix, ***PW2, Sebe Mwale***, the grandmother to the Prosecutrix and ***PW3,*** , the Prosecutrix.

The evidence of PW1 in the main and of relevance to the case was that she got married to the Appellant in the year 2000 and later divorced in 2014. That during the marriage, she experienced many challenges. On the 23rd of December 2003, they were blessed with a baby girl (PW3) who after the divorce remained in the custody of the Appellant.

It was PW1's testimony that she was later visited by the Appellant who informed her that PW3 was sick. She subsequently learnt from PW3 that she had sores on her vagina, as a result she picked her up and asked PW2 to inspect her.

According to PW1, PW2 reported back to her, that she had seen the sores on the vagina and the size of the vagina was big, signifying that she was having sex with a man. As a result, PW1 reported the matter to St. Francis Police Post where they were issued with a medical report to enable PW3 be attended to at the Hospital.

When she asked PW3 who had defiled her, she revealed that it was the Appellant.

PW2, testified that PW3 complained of stomach pains and sores on the vagina. That she inspected PW3 and observed sores on her vagina and that the vagina was bigger for a girl her age.

According to PW2, PW3 revealed to her that the Appellant was having sex with her.

PW2 explained that the Appellant was living with PW3 and refused to release her nor even visit PW1 and PW2.

PW3, gave evidence on oath after the Court had conducted a ***Voire dire.*** Her evidence was that she lived with the Appellant in a one bed roomed house. That she used to sleep in the living room.

PW3 testified that on one occasion, whilst she was asleep, the Appellant went into the living room and started fondling her. He told her to lie on her back, removed her dress and pant and inserted his penis in her vagina and she felt pain.

PW3 explained that, after the Appellant had sex with her, she observed blood "oozing" from her vagina which clotted the following morning. That this was repeated by the Appellant on the second occasion. It was her evidence that she sustained cuts on her vagina which became sores.

That, thereafter she started experiencing pains in the vagina and stomach and she later complained to PW1 and PW2 who after inspecting her took her to the police and the hospital.

PW3 further, explained that the issue of taking her to the herbalist was different from the sex issue.

PW4 Porian Musesa, a Police Officer testified that he received a report of incest from PW1 at one stop centre at St. Francis in Katete, who reported that her daughter, PW3, aged 11 years had been defiled by the Appellant. The victim after being issued with a medical report was taken to the hospital for medical examination and the Appellant was subsequently apprehended.

PW4 confirmed that PW3 was born with a condition.

In his defence, the Appellant in his evidence on oath, told the Court that PW3 was born with a condition. She had growths on her genitals. That they had tried to correct the condition but failed. The Appellant denied having sex with PW3.

The Appellant alleged that PW3 was being kept by his mother and that he lived with four of his sons at the farm.

According to the Appellant, PW1 connived with PW3 to implicate him and that PW3 lied in her testimony to the Court.

The Appellant called ***Rachael Mwale, DW2***, to further his defence.

She testified that PW1 and the Appellant have had disputes over custody of PW3 for a long time, as PW1 refused to release custody of PW3 to the Appellant.

According to DW2, PW3 was born with a condition called "Sungu" as a result of which her urinary tract was blocked and had problems in passing urine. There were also sores on her vagina which were not healing.

That in January 2014, the Appellant and PW1 took PW3 to the hospital and they were advised to take her for traditional treatment as the doctors at the hospital found nothing wrong with her.

DW2 explained that "Sungu" is a condition of pimples on the vagina which itches and when scratched become sores.

According to DW2, PW1 and her family had warned them that there would be consequences for denying them custody of PW3. DW2 further went on to say that the Appellant lived with his mother, PW3 and four sons.

The learned trial Magistrate after reviewing the evidence was satisfied that it had been established and proved that the Appellant actually had sexual intercourse with PW3 on several occasions.

That PW3 correctly identified the man who sexually used to abuse her as the Appellant.

The Court found that the medical report confirmed that PW3 had some discharge in the vagina.

According to the Court, the Appellant lied in his evidence when he testified that PW3 lived with the grandmother. That this was an afterthought in order to suit the testimony of DW2 who had interest to serve. Further that the Appellant failed to challenge PW1 and PW2 when they stated that they were refused custody of PW3 by the Appellant.

The Court concluded that the vital ingredients of the offence had been established and proved by the Prosecution. That the testimonies of PW1 and PW2 had corroborated the testimony of PW3 and implicated the Appellant in a material particular that he actually committed the alleged offence.

The Court rejected the defence and the Appellant's denial and found the Appellant guilty as charged and convicted him accordingly.

On committal to the High Court for sentence, the Appellant was sentenced to 40 years imprisonment with Hard Labour, hence the appeal to this Court against conviction.

On behalf of the Appellant, Ms Mukulwamutiyo, filed two grounds of appeal as follows:

1. That the learned trial Judge erred in law and in fact in convicting the Appellant of the subject offence in the absence of proof beyond all reasonable doubt given the nature and quality of the evidence adduced.
2. The learned trial Court erred in law and in fact in receiving the evidence of a child on oath after a defective ***Voire dire*** and ruling.

Counsel filed written heads of arguments based on the two grounds.

The summary of the written heads of arguments on ground one is that, the only evidence to the effect that the Appellant perpetrated the offence was that given by PW3, a child of tender age and that of her mother PW1 and her grandmother PW2. That there was no independent evidence. The case of **Emmanuel Phiri v The People**[1] was cited where the Supreme Court held ***inter alia*** that:

> *"In a sexual offence there must be corroboration of both the 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".

It was further argued that more significantly, Section 122 of ***The Juveniles Act***[14] contains a proviso that mirrors a statutory requirement of corroboration in cases such as the one in casu as follows:

"Provided that 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 him".

It was the Appellant's argument that the findings by the trial Court, that the Appellant had sexual intercourse with PW3 on several occasions and that the observation made by PW1 of the sores and enlarged vagina was ascertained by the examination done on 27th May 2014, that there was penetration into the genital of PW3 by a male person (refer exhibit P1); were flawed as there is no independent evidence on record to show that the Prosecutrix was defiled.

It was further argued that the medical report, P1, does not show evidence which corroborates enlarged vagina as amplified by the

trial Court. That in fact the report is so vague that the findings are couched as "unable to see hymen intact. Some discharge present". That it also raises further doubt where it reads that "could be consistent with defilement".

According to Counsel, the vagueness highlighted renders the medical report unreliable, especially in the absence of the author as a witness who could have clarified the statements in the report.

It was contended that the trial Court fell into deeper error when it stated that the testimonies of PW1 and PW2 corroborated the testimony of PW3 and implicated the Appellant in a material particular that he actually committed the alleged offence. That this demonstrated that the Court did not address its mind to certain niceties surrounding the matter, such as the fact that PW1 and the Appellant were estranged, following their divorce. Further, the record presents undertones of a custody dispute over PW3 between the two. It was further contended that, this establishes ample motive for PW1 and PW2 through PW3 to falsely implicate the Appellant for the offence so as to have custody of PW3.

The case of **Bernard Chisha v The People**[2] was cited where the Supreme Court observed that, a child, due to immaturity of mind is susceptible to the influence of third persons and as such their

evidence requires to be corroborated. That in view of the fact that PW1 and PW2 are the mother and grandmother to PW3 respectively, their evidence cannot be relied on as they fall within the category of persons that may influence a child, in this case PW3, and their evidence cannot be relied on as per the case of **Mwambona v The People**[3].

According to Counsel, PW1 and PW2 testified that the Appellant conveyed the message regarding PW3's illness to PW1 and PW2. It is contended that, this act of proffering information of PW3's illness was not conduct consistent with that of a guilty person.

Counsel went on to contend that the Appellant's and his witness' testimony that PW3 was born with a condition whereby she had growths on her genitals could reasonably be true. However, the trial Court exhibited bias towards the Prosecution case and neglected to conduct a proper analysis of the totality of the evidence including the Appellant's defence. That in sum, the trial Court convicted the Appellant in the absence of proof beyond all reasonable doubt, given the nature and quality of the evidence on record.

It was contended that the learned trial Court erred in law and in fact in convicting the Appellant in the absence of corroborative

evidence or evidence of something more to exclude the dangers of false complaint or false implication.

The gist of the written heads of arguments on the second ground was that after conducting the ***Voire Dire***, the trial Court in its ruling stated that *"the* Prosecutrix *has sufficient intelligence to warrant receiving evidence on oath".*

According to Counsel, the trial Court lost sight of the test that Section 122 (1) of ***The Juveniles Act***[14] envisages for swearing of Juvenile witnesses. The trial Court did not comply with the guidelines for conducting a ***voire dire*** outlined by the Supreme Court in the case of **Zulu v The People**[4] where they held inter alia that:

> *"The correct procedure under Section 122 of the Juveniles Act, cap 217 is as follows:*
>
> (a) *The Court must first decide that the proposing witness is a child of tender years; if he is not, the Section does not apply and the only manner in which the witness evidence can be received is on oath.*
>
> (b) *If the Court decides that the witness is a child of tender years, it must then inquire whether the child understands the nature of an oath; if he does he is*

sworn in the ordinary way and his evidence received on the same basis as that of an adult witness.

(c) *If having decided that the proposing witness is a child of tender years, the court is not satisfied the child understands the nature of an oath, it must then satisfy itself that he is possessed of sufficient intelligence to justify the reception of his evidence, and that he understands the duty of speaking the truth, if the Court is satisfied on both these matters then the child's evidence maybe received although not on oath, and in the event, in addition to any other cautionary rules relating to corroboration (for instance because the offence charged is a sexual one) there arises the statutory requirement of corroboration contained in the provision to Section 122 (1). But if the Court is not satisfied on either of the foregoing matter, the child's evidence may not be received at all.*

Counsel contended that the ***voire dire*** in issue was defective and as such the entire evidence of PW3, the Prosecutrix, must be discounted entirely. Reference in that respect was made to the case of **Goba v The People**[5] and it was submitted that this is not a

proper case in which to order retrial as there is no corroborative evidence or evidence of something more.

Counsel prayed that the appeal be allowed and the conviction and sentence be set aside.

On behalf of the State, the learned Deputy Chief State Advocate, Mrs. Hambayi supported the conviction and the sentence.

In her written submissions she submitted that there was sufficient evidence to warrant the conviction as there was corroborating evidence which confirmed the identity of the Appellant as the perpetrator as well as to the commission of the offence.

According to Counsel, the fact that the Appellant lived alone with the Prosecutrix afforded him opportunity to commit the offence. That the Appellant did not discredit her in cross examination and essentially did not put any questions to her that showed that he was denying the offence nor did he raise any possible defence.

It was submitted that the evidence of PW3 was corroborated by that of PW1 and PW2 who said that the Appellant lived alone with PW3. That PW1 and PW2 provided sufficient corroboration as to the identity of the offender.

Counsel went on to submit that in this instance, the nature of the opportunity to commit the offence amounts to corroboration which inevitably connects the Appellant to the offence. Counsel cited the case of **Nsofu v The People**[6] where the Supreme Court held that:

> *"Mere opportunity alone does not amount to corroboration but the opportunity may be of such a character as to bring in the element of suspicion. That is that the circumstances and the locality of the opportunity may be such as in themselves to amount to corroboration".*

It was Counsel's contention that, the fact that the Appellant lived alone with the Prosecutrix afforded him an opportunity to commit the offence and corroborates the evidence of PW3 that it was indeed the Appellant who had carnal knowledge of her.

Counsel further contended that, the Appellant's defence as well as that of his witness, DW2, failed to address the allegations leveled against him. The Appellant skirted around the cardinal issues and did not raise any possible defence.

That the result is that the Prosecution's evidence stands unimpeached.

It was further argued and submitted that the Prosecution witnesses had no motive to falsely implicate the Appellant.

According to Counsel, the Court was on firm ground when it found that PW3 was sexually abused, which evidence was corroborated by PW2 who saw sores on the girl's private parts. That was factual evidence, and it confirmed the evidence of PW3. It was also submitted that the medical report did not exclude the possibility of sexual abuse taking place.

It was additionally argued and submitted that the evidence by the defence that PW3 suffered from a condition affecting her private parts was a fabrication and an afterthought.

On the allegation that the prosecution witnesses were suspect because they were all related, Counsel contended that, that was not the case. That in actual fact it was the Appellant's witness who was suspect, who clearly stated that she had come to Court to give evidence in favour of the Appellant hence clearly showing her bias. Reliance in that respect was placed on the case of **Phiri v The People**[7], where the Supreme Court stated that:

> *"We must emphasize that suspect witnesses need not only be friends or relatives to the Prosecutrix. They may be*

friends or relatives to the accused. They may also have a possible interest to serve"

In that regard it was Counsel's contention that the trial Court was entitled to rely on the prosecution evidence as it was credible than that of the defence.

In response to the second ground of appeal, Mrs. Hambayi submitted that the ***Voire dire*** was indeed defective as the trial Court omitted to state the full finding after conducting the ***Voire dire.*** It was submitted that Section 122 of ***The Juveniles Act[14], Amendment No. 3 of 2011 provides that"***

"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".

It was pointed out that, the trial Court on page 5 of the record, line 19 after conducting the ***voire dire*** held that *"the* Prosecutrix *has sufficient intelligence to warrant receiving her evidence on oath".* That this finding was incomplete as the Court ought to have also

made a finding on whether the Prosecutrix understood the duty of speaking the truth.

According to Counsel, the test is two limbed: The child must possess sufficient intelligence for the evidence to be received on oath and the child must understand the duty of speaking the truth. The case of **Richard Daka v The People**[8] was cited where the Supreme Court adequately addressed the amendment to Section 122 of ***The Juveniles Act***[14] as follows:

> *"In the instant case, the **voire dire** in contention is found at page 10 and 11 of the record of proceedings.*
>
> *The Court concluded that the child possessed sufficient intelligence to give evidence on oath but it did not specifically state that the child understood the importance of telling the truth. Therefore from the requirements of the law under Section 122 of **The Juveniles Amendment Act,** 2011, we are satisfied that the **voire dire** was defective. We therefore allow this third ground".*

Counsel further pointed out that, in the instant case, similarly the Court did not make a specific finding stating that the Prosecutrix understood the importance of telling the truth, hence that rendered the ***voire dire*** defective. She further went on to submit that the

case of **Zulu v The People**[4] cited by the Appellant is misconceived as it gives the procedure of conducting the ***voire dire*** under the repealed law. That however the defective ***voire dire*** does not render the whole proceedings a nullity as there is corroborative evidence connecting the Appellant beyond reasonable doubt.

Counsel implored the Court to Order a retrial.

In her short reply, Ms. Mukulwamutiyo pointed out that the record will show that the Appellant in his defence did raise cardinal issues which were not rebutted by the Prosecution and raised lingering problems in the matter. That he brought to the fore that, PW3 suffered growths on her genitals. That there is a medical report which does not clearly establish that PW3 was defiled.

According to Counsel, the report does not reveal any evidence that clarifies the position of PW3. The report states that some discharge was present on the vagina, but there is no other evidence as to whether this was an abnormal thing to be found on the Prosecutrix. That if indeed as was testified by PW2, she had sores on her vagina, the Prosecution needed medical expert evidence to establish the nature of the sores on her vagina, leading to the conclusion that they were sustained as a result of the defilement or the condition. It was argued that in the absence of such medical expert evidence

the lingering doubts exist in the matter and it was unsafe for the Court to convict. That the medical report therefore cannot be relied upon as evidence which supports corroboration.

We have carefully considered the evidence on record, the Judgment of the trial Court and the submissions by both learned Counsel.

Although the first ground of appeal was argued first, we intend to consider the second ground of appeal first for the obvious reason that it is the evidence of PW3, the Prosecutrix which is most crucial and it is that evidence which needs to be corroborated.

The arguments in support of the first ground of appeal were based on Section 122 (1) of ***The Juveniles Act***[14]. In advancing her arguments, the learned Counsel for the Appellant was oblivious to the fact that the provisions of ***The Juveniles Act***[14] she relied on have since been amended and consequently the guidelines for conducting a ***Voire dire*** which were outlined in the case of **Zulu v the People**[4] are no longer applicable.

As rightly pointed out by the State, the law now applicable is to be found under ***The Juveniles Act***[14] Amendment No. 3 of 2011 which deals with the evidence of a child of tender years.

To understand and appreciate the position as it stands now, it is necessary to set out the whole amendment which repealed and replaced Section 122 of ***The Juveniles Act***[14] which Counsel for the Appellant wrongly relied on.

Act No. 3 of 2011, Section 122 reads as follows:

> *"122 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 corraborated by some other material evidence in support thereof implicating the accused".

The short arm of the aforestated amendment for emphasis purposes is that:

1. A child of tender years is a child below the age of fourteen years.
2. A child of tender years can only give evidence on oath if in the opinion of the Court-
   (a) The child is possessed of sufficient intelligence to justify the reception of the child's evidence.
   (b) The child understands the duty of speaking the truth.
3. There is no longer provision for a child of tender years to give unsworn evidence.
4. Where the evidence of a child of tender years is admitted and 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.

As earlier alluded to, the argument by Counsel for the Appellant is misplaced and misconceived in view of the aforestated amendment.

However Mrs. Hambayi the learned Deputy Chief State Advocate has conceded and rightly so, that the ***voire dire*** was defective as the trial Court omitted to state its full finding after conducting the ***voire dire.***

The ***voire dire*** in this case is to be found on page 5 of the record of appeal. After conducting the same, the conclusion of the Court in line 19 was as follows:

> *"The* Prosecutrix *has sufficient intelligence to warrant receiving the evidence on oath".*

As submitted by Counsel for the State, the trial Court did not make a finding as to whether (PW3) understood the duty of speaking the truth. Therefore based on the case of **Richard Daka v The People**[3] cited by the State where the Supreme Court adequately addressed the amendment, we are satisfied, that based on the argument by the State only and not of the Appellant that the ***voire dire*** was defective and we therefore allow the second ground of appeal.

We now turn to the first ground of appeal.

The first ground of appeal, though couched in the manner it was, from the arguments by both Counsel, it is mainly dealing with the issue of corroboration.

Having found that the ***voire dire*** was defective, the effect of that is that PW3's evidence was no evidence at all.

We will however proceed to discuss corroboration with a view of determining whether we ought to order a retrial or not.

Corroboration is independent evidence which supports the evidence of a witness in a material particular. In defining what constitutes corroboration, Lord Reading CJ, said, in the classic case of **R v Baskerville**[9] at page 667:

> *"We hold that evidence in corroboration must be independent testimony which affects the accused by connection or tending to connect him with the crime. In other words it may be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it".*

In addressing corroboration as a matter of law, the learned authors of ***Evidence, Text and Materials***[15] at page 401 had this to say:

> *"This is the situation where corroboration in the form of independent evidence is required as a matter of law. In other words, if there is no supporting evidence the Judge must direct an acquittal. These situations are all statutory crimes".*

In the English case of **R v Wilson**[10] the Appellant was convicted of incest with his daughter, attempted procuration of his daughter by threats and of inciting her to commit incest. As regards the offence of attempted procuration of his daughter by threats, contrary to common law, Section 2 of the Sexual Offences Act, 1956 provided by Subsection (1) that:

> *"It is an offence for a person to procure a woman, by threats or intimidation, to have unlawful sexual intercourse in any part of the world"*

Subsection (2) went on to provide that:

> *"A person shall not be convicted of an offence under this Section on the evidence of one witness only, unless the*

witness is corroborated in some material particular by evidence implicating the accused".

Edmund Davis LJ, went on to state that it is established by authority that, where one has a provision of the latter kind in a statute, the customary warning in sex cases about the danger of convicting in the absence of corroboration is insufficient. The jury must be told in clear terms that unless corroboration required by the statute is forthcoming, they cannot convict.

We are satisfied that although the trial Magistrate at page 18 of the record of appeal did not make specific reference to the proviso to Section 122 (b) of ***The Juveniles Act***[14] he was mindful of the need for corroborative evidence, when he concluded that the testimonies of PW1 and PW2 had corroborated the testimony of PW3 and had implicated the accused in a material particular that he actually committed the alleged offence.

The question we must resolve in ground one is whether there was absence of corroboration evidence as required by the provision not to have warranted the conviction of the Appellant.

On the evidence of the commission of the offence, the trial Magistrate relied on the evidence of PW3 that she had developed sores on her vagina, experienced pain in her stomach as well as

vagina and had difficulties in walking. That this was confirmed by PW2 who inspected her and discovered that PW3 had sores on her vagina and it was big in size as though she was an adult woman.

The trial Magistrate went on at page 18 line 6 of the record of appeal to state that the observation made by PW2 of sores and enlarged vagina was ascertained by the examination done on 27th May 2014 that there was penetration into the genital of PW3 by a male person.

On the identity of the perpetrator of the offence, as earlier alluded to, the trial Magistrate relied on the evidence of PW1 and PW2 as corroboration.

A perusal of the medical report reveals that it was indeed inconclusive and does not establish that there was penetration of the vagina by a male person as concluded by the trial Magistrate; especially in view of the finding by the medical officer that he was unable to see whether the hymen was intact, which finding was vague. Also, the report did not disclose the source and the nature of the discharge, which was important especially in light of the allegations by the defence that PW3 had a condition called "Sungu" which the trial Magistrate ought to have considered but declined to

do and dismissed the defence story without an explanation for doing so.

Counsel for the Appellant has raised the issue of PW1 and PW2 being relatives to PW3 and that being as such may have had their own interest to serve and that they had every reason to falsely testify against the Appellant as there was a custody dispute over PW3. According to learned Counsel, the fact that PW1 and the Appellant were estranged established ample motive for PW1 and PW2 through PW3 to falsely implicate the Appellant of the offence.

In the case of **Kambarage Kaunda v The People**[11] the Court held that:

> *"Prosecution witnesses who are friends or relatives of the Prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses. The Court should therefore warn itself against the danger of false implication of the accused and go further to ensure that the danger is excluded".*

In the case of **Chola Nyampande and Sichula v The People**[12] the Supreme Court held that:

"In the case where the witnesses are not necessarily accomplices, the critical consideration is not whether the witness did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the circumstances of the case, they may have had the motive to give false evidence.

Where it is possible to recognise this possibility the danger of false implication is present and it must be excluded before a conviction can be held to be safe. Once this is a reasonable possibility the evidence falls to be approached on the same footing as for accomplices.

There is nothing on the record to show that the trial Court warned itself of the danger of false implication of the Appellant in this matter and neither did the Court exclude that danger.

We are also mindful of the recent Supreme Court case of **Yokoniya Mwale v The People**[13] where the Supreme Court once more had the occasion to address the evidence of witnesses who are friends and relatives and to put the issue in its proper perspective.

Malila JS at page J15 had this to say:

> *"The consistent position of this Court has been that in criminal proceedings, relatives and friends of the deceased may well be witnesses with an interest to serve or may be merely biased.*
>
> *In* ***Kambarage Mpundu Kaunda v The People***[11] *we stated that as relatives and friends of the deceased may be witnesses with an interest to serve, it was incumbent upon a Court considering evidence from such witnesses, to warn itself against the dangers of false implication of the accused by the evidence of such witnesses and that the Court should go further to exclude the danger".*

The Supreme Court went on to stress that their authorities on this subject matter did not establish nor were they intended to cast in stone, a general proposition that friends and relatives of the deceased or the victim are always to be treated as witnesses with an interest to serve and that their evidence routinely required corroboration.

Malila JS, went on to state that:

> *"Were this to be the case, crime that occurs in family environments where no witnesses other than near relatives and friends are present, would go unpunished for*

want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of want of independent corroboration. This in our view, would be to severely circumscribe the criminal justice system by asphyxiating the Courts even where the ends of criminal justice are evident. The point in all these authorities is that this category of witnesses may, in particular circumstances ascertainable on the evidence, have a bias or have an interest of their own to serve, or a motive to falsely implicate the accused. Once this was discernable and only in those circumstances, should the Court treat those witnesses in the manner we suggested in the ***Kambarage case***[11]***.***

The Supreme Court then went on to conclude that a conviction will thus be safe if it is based on the uncorroborated evidence of witnesses who are friends and relatives of the deceased or the victim provided that on the evidence before it, those witnesses could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve. That, what was key was for the Court to satisfy itself that there was no danger for false implication.

As earlier alluded to, the Appellant and PW1 were estranged and it was also evident that the Appellant, PW1 and PW2 were embroiled in the custody dispute and PW1 and PW2 had everything to gain by falsely implicating the Appellant as that would enable them have custody of PW3, once the Appellant was incarcerated.

That indeed puts PW1 and PW2 in the category of witnesses with a possible interest of their own to serve as envisaged in the **Kambarage Kaunda**[11] case.

As such the trial Court should have treated PW1 and PW2 being relatives to the victim as witnesses who may have a possible interest to serve as stated in the **Kambarage Kaunda**[11] case, warned itself of false implication of the Accused and gone further to satisfy itself that there was no danger of false implication.

Having failed to do so, the evidence of PW1 and PW2 cannot safely be relied on as evidence capable of being corroborative of PW3's evidence, assuming that the evidence of PW3 was admissible.

In view of the aforestated, we are in agreement with Counsel for the Appellant that the evidence of PW1 and PW2 cannot be relied upon and cannot therefore be the basis of corroboration.

That being the case it would not be in the interest of justice to send this matter for retrial as it was not only the ***voire dire*** that was defective. The other prosecution evidence fell far short of the required standard. A retrial would have the effect of affording the Prosecution a second bite at the cherry, to the prejudice of the Appellant.

In the circumstances, we allow the appeal and set aside the conviction and the sentence and the Appellant is set at liberty.

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F. CHISANGA

JUDGE PRESIDENT

COURT OF APPEAL

.....

J. CHASHI

COURT OF APPEAL JUDGE

.....

J. Z. MULONGOTI

COURT OF APPEAL JUDGE