**IN THE SUPREME COURT FOR ZAMBIA SCZ/103/2011**

**HOLDEN AT NDOLA**

(Criminal Jurisdiction)

**BETWEEN:**

**JOSEPH MWAMBA KALENGA APPELLANT**

**VS**

**THE PEOPLE RESPONDENT**

***Coram:*  SAKALA, CJ, MUYOVWE and MUSONDA, JJS**

**On the 6th December, 2011 and 8th May, 2012**

For the Appellant: Mr. A. Ngulube, Acting Director of Legal Aid

For the Respondent: Mr. P. Mutale, Acting Deputy Chief State

 Advocate

**J U D G M E N T**

**MUYOVWE, JS, delivered the Judgment of the Court.**

**Cases referred to:**

1. **Emmanuel Phiri vs. The People (1982) Z.R. 77**
2. **Katebe vs. The People (1975) Z.R. 13**

**Legislation referred to:**

1. **Section 137(1) of the Penal Code Cap 87 of the Laws of Zambia**.

The Appellant was convicted of the offence of indecent assault contrary to **Section 137(1) of the Penal Code Cap 87 of the Laws of Zambia**. The particulars alleged that on 22nd May 2006 at Luwingu, in the Luwingu District of the Northern Province of Republic of Zambia he unlawfully and indecently assaulted Emphemia Chileshe without her consent. The Appellant was committed to the High Court for sentence and the High Court, sitting at Kasama, sentenced him to 16 years imprisonment with hard labour.

Briefly, the facts are that on the material day as the prosecutrix, (PW1), who is the grandmother to the Appellant, proceeded home, she met the Appellant who advised her that he had gathered some firewood in the bush and offered to give her some. She went with him in the bush and as they proceeded, she was shocked to find him stark naked behind her and he descended on her and had sexual intercourse with her without her consent. The Appellant fled and PW1 went home and immediately informed the Appellant’s mother. The matter was reported first to the village Headman, then the Chief (PW3) and subsequently to the police. The 70 year old prosecutrix was medically examined by PW2 and his findings were that she had a sexually transmitted infection called terachomonas vaginalis. PW2 explained that this is a condition that can affect a woman without her knowledge.

PW4, the arresting officer, explained that the Appellant denied the charge although he admitted having gone into the bush with PW1 to fetch firewood. The last witness was PW5 who conducted an HIV test on the Appellant.

At the close of the prosecution case, the Appellant was found with a case to answer and he opted to remain silent.

The trial magistrate after recounting the evidence found, as a fact, that, the Appellant accompanied the prosecutrix into the bush and that they were only two at the time of the incident. That while PW1 said the Appellant invited her to accompany him into the bush to fetch the firewood, the Appellant through cross-examination, claimed that it was PW1 who invited him to go with her into the bush. The trial Court accepted that PW1 was tricked into going into the bush by the Appellant because no firewood was collected. The trial magistrate considered this to be corroboration of PW1’s testimony which showed that she was ambushed by the Appellant who instead of leading the way into the bush, remained behind, undressed himself and forced himself on her. The trial magistrate believed the evidence of PW1 and found no reason why PW1 would tell lies against the Appellant. The trial Court concluded that the prosecution evidence remained unchallenged in the face of the Appellant’s choice of remaining silent. He found the Appellant guilty as charged and referred the case to the High Court for sentencing.

The sentencing Judge upheld the conviction and sentenced the Appellant to 16 years imprisonment with hard labour taking into account that the maximum penalty for this offence is 20 years.

On behalf of the Appellant, the Acting Director of Legal Aid Mr. Ngulube, advanced three grounds of appeal namely:-

1. **The Court below misdirected itself by failing to warn itself of the need for corroboration.**
2. **The conviction is unsafe and unsatisfactory as there was no finding of corroborative evidence, and the evidence is insufficient.**

1. **The Court below misdirected itself in the manner it received evidence and in the manner it recalled PW4.**

Mr. Ngulube filed written Heads of Argument which he relied on.

 Counsel combined his arguments on ground one and two. He submitted that the trial Court did not warn itself of the need for corroboration and failure to do so amounted to a misdirection. Citing the case of **Emmanuel Phiri vs. The People¹,** he conceded that a conviction may be upheld if corroboration is available in the case. He contended that, in this case, the trial Court misdirected itself in that there was no corroboration of both the commission of the offence and the identity of the offender. That the only evidence is that of the prosecutrix. It was submitted that there was no supporting evidence as to the injuries which the prosecutrix claimed she suffered during the struggle. That there was no independent proof of the injuries sustained by PW1 as the mother to the Appellant to whom PW1 first reported did not testify. That there was no explanation as to why PW1 delayed to report the incident. Mr. Ngulube pointed out that, going by the police report (exhibit P1), the matter was only reported on 1st June, 2006 and there was no explanation for the delay. He contended that, with due diligence, the Appellant should have been apprehended the same day. It was submitted that PW2, the medical officer, did not explain how the sexually transmitted infection is transmitted and how long one can live with it without treatment and symptoms manifesting.

Mr. Ngulube also pointed out that the Record of Appeal shows that on 6th September 2006, the public prosecutor applied for an adjournment to have the Appellant taken to hospital for medical examination. That on 28th September 2006, PW5 testified that the Appellant was tested for HIV. Counsel questioned why the Appellant was not tested for other sexually transmitted diseases including terachonomas vaginalis or any other sexually transmitted infection which would have had a bearing on the case. Counsel argued that the trial Court should not have allowed PW4 to comment on the report authored by PW2 and which PW2, who had earlier given evidence, had commented on.

He submitted that, in view of the inadequacies and improprieties in the Record of Appeal, it cannot be said that the prosecution proved its case beyond all reasonable doubt and that the conviction is unsafe.

In relation to ground three, it was submitted that the trial Court did not comply with the Rules relating to re-examination of a witness.

Counsel pointed out that in fact PW4, the arresting officer, was recalled by the prosecution without any formal application. He contended that in fact there was no basis for recalling PW4 and that the Appellant was denied the opportunity to be heard on the recalling of PW4. That although the Record shows that the matter came up for cross-examination of PW4 by the Appellant, he offered no questions for the said witness. It was pointed out that against procedure, the public prosecutor was allowed to re-examine the witness extensively.

Mr. Ngulube argued that the re-examination of PW1 went outside the rules of evidence as the re-examination covered new issues which were not raised in cross-examination by the Appellant. That the trial Court should not have allowed this unacceptable procedure.

He urged us to allow the appeal, quash the conviction and set aside the sentence.

On behalf of the state, Mr. Mutale informed the Court that he supported the conviction. He conceded that the trial Court did not warn itself of the dangers of convicting on uncorroborated evidence. He contended that, as established in many authorities such as **Emmanuel Phiri vs. The People¹,** a conviction may stand when there is “something more” even if there is no corroboration. Relying on the case of **Katebe vs. The People²,** Mr. Mutale argued that the fact that the prosecutrix did not deliberately make a false allegation against the Appellant amounted to “something more”. It was submitted that there is no evidence to show that the Appellant could have been framed by the prosecutrix. He argued that the evidence of identification was clear as the Appellant was well known to the prosecutrix. He submitted that this is a special and compelling ground which can serve as “something more”. Mr. Mutale submitted that the Appellant opted to remain silent, thereby leaving only the prosecution evidence for consideration. That the prosecution evidence showed that the Appellant had the opportunity to commit the offence and that he did not dispute that he was in the company of the prosecutrix.

Mr. Mutale submitted that even if the trial Court did not warn itself against convicting on uncorroborated evidence, the evidence of identification was sufficient and there was no evidence that the Appellant was framed. He submitted that the appeal has no merit and it should be dismissed.

We have considered this appeal together with the judgment of the Court below, the arguments advanced by Counsel for the Appellant in his filed Heads of Argument and the submissions by the Acting Deputy Chief State Advocate and the authorities cited.

The gist of the arguments in grounds one and two is that the trial Court failed to warn itself of the need for corroboration and that there was no evidence of corroboration in this case and that, therefore, the conviction is unsafe.

In the celebrated case of **Emmanuel Phiri vs. The People¹** it was held that:

1. **In 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.**
2. **A conviction may be upheld in a proper case notwithstanding that no warning as to corroboration has been given if there in fact exists in the case corroboration or that something more as excludes the dangers referred to.**
3. **It is special and compelling ground, or that something more which would justify a conviction on uncorroborated evidence, where, in the particular circumstances of the case there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against an accused; and the case in effect resolves itself in practice to being no different from any other in which the conviction depends on the reliability of her evidence as to the identity of the culprit.**

We note that in his submissions, Mr. Ngulube alluded to the fact that the Appellant was not medically examined for other sexually transmitted infections and that there was no evidence to explain how terachomonas vaginalis is transmitted and the consequences of living with it. This may be so, but we hold the view, that such evidence would not have assisted the Appellant. This case was anchored on the evidence of PW1 and the trial magistrate found that he had no reason to disbelieve her evidence that she was sexually molested by the Appellant. Since the Appellant chose to remain silent, the trial Court could only deduce the Appellant’s defence through the questions he put forward in cross-examination.

Mr. Mutale rightly conceded that the failure by the trial magistrate to warn himself with regard to the need for corroboration was a misdirection. The trial magistrate did not follow the principles laid down in **Emmanuel Phiri vs. The People¹** and **Katebe vs. The People².** However, we agree with Mr. Mutale that since the prosecutrix was the grandmother of the Appellant, the question of mistaken identity cannot arise. We also do not see any motive for the prosecutrix to falsely implicate her grandson of such an atrocious crime. The evidence that the Appellant had the opportunity to commit the subject offence came from the Appellant himself. This was during the testimony of PW4, the arresting officer, who explained that in his warn and caution statement, the Appellant admitted being in the bush with PW1. When questioned by the trial magistrate over the alleged admission the Appellant stated that:

 **“It’s true I gave a statement to police but that it was a denial of the charge, though** **I admitted escorting her in the bush to fetch firewood”**

In our view, this amounts to “something more” which confirms the evidence of the prosecutrix who, as we have stated, clearly had no reason to falsely implicate her grandson. In other words, had the trial magistrate applied the facts and the law properly he would have found that there was corroboration of both the commission of the offence and the identity of the offender.

We, therefore, find no merit in grounds one and two.

Coming to ground three, which states that the trial Court misdirected itself in the manner it received evidence and in the manner it recalled PW4. The Record shows that when the arresting officer (PW4) gave evidence, the Appellant asked PW4 one question, to which he replied:

**“Yes I took you to hospital for Medical examination and I am yet to take you there again.”**

At that stage, the public prosecutor applied for an adjournment to allow the Appellant to be taken to the hospital for medical examination. And the next witness was the Clinical Officer (PW5) who conducted an HIV test on the Appellant. We agree with learned Counsel for the Appellant, that it was not necessary for PW5 to comment on the Medical Report as he was not the author of the Report especially that PW2, who was the author of the Report, had already given evidence.

The Record shows, that when the matter came up for continued trial, PW4 was recalled and the public prosecutor informed the trial Court that the matter was coming up ‘for cross-examination by the accused’ to which the Appellant responded that he had no questions. The procedure adopted by the trial magistrate in allowing PW4 to be recalled without a formal application is against our Rules of evidence. In fact, the Record shows that Appellant had already cross-examined the witness in the earlier sitting. We agree with Mr. Ngulube that there was no basis for recalling PW4.

Counsel also alluded to the evidence of PW5. We note that when it came to PW5, the Appellant did not cross-examine the witness, yet the public prosecutor was allowed to re-examine. The correct procedure is that, once a witness is cross-examined by the prosecution, re-examination is restricted to the issues raised in cross-examination. Therefore, since the witness was not cross-examined, it was wrong for the trial Magistrate to allow the public prosecutor to re-examine him.

In the same vein, we agree that it was wrong for the trial magistrate, to allow questions in re-examination of PW1, which were not raised by the Appellant in cross-examination.

The trial magistrate misdirected himself when he adopted the wrong procedure to the detriment of the Appellant who was unrepresented. This means the evidence obtained as a result of the irregular procedure should not have been and cannot be considered. Ground 3, therefore, succeeds.

In conclusion, we hold the view, that had the trial magistrate properly applied his mind to the law as regards corroboration and had he followed the correct procedure in taking evidence from witnesses, he would have inevitably come to the same conclusion that the Appellant was guilty as charged. And we come to this conclusion, having disregarded the evidence that was irregularly received by the trial Court. We are satisfied that, notwithstanding the misdirections, the conviction cannot be set aside as the evidence against the Appellant is overwhelming. We, therefore, apply the proviso to Section 15 (1) of the Supreme Court Act and we dismiss the appeal against conviction.

 With regard to sentence, the Appellant, a first offender, was sentenced to 16 years imprisonment. In our view, the fact that the victim is an old woman and the Appellant’s grandmother is an aggravating circumstance. The sentence of 16 years comes to us with a sense of shock having regard to the circumstances. We set aside the sentence of 16 years and in its place, we impose a sentence of twenty years (20) imprisonment with hard labour with effect from the date of arrest.

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**E.L. SAKALA**

**CHIEF JUSTICE**

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**E.N.C. MUYOVWE P. MUSONDA**

**SUPREME COURT JUDGE SUPREME COURT JUDGE**