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SCZ Appeal No. 155/2009

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Appellant Jurisdiction)

BETWEEN:

PANTALEO BWALYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

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

For the Appellant: **Mr. K. Muzenga, Deputy Chief Legal Aid Counsel, Legal Aid Board**

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

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **Emmanuel Phiri -v- The People (1982) ZR 77 (S.C.)**
2. **Tapisha –v- The People (1973) ZR 222**
3. ***Mudenda –v- The People (1981) ZR 175***
4. ***Edward Kunda –v- The People (1971) ZR 99.***

This is an appeal against the judgment of the Subordinate Court of the Third Class for the Chinsali District holden at Chinsali in which the Appellant was convicted on one count of the offence of defilement contrary to Section **138(1) of the Penal Code Cap 87 of the Laws of Zambia** as amended by the **Penal Code (Amendment) Act No. 15 of 2005**. The Appellant was subsequently committed to the High Court for sentencing, and was sentenced to a term of 15 years imprisonment with hard labour, with effect from the date he was arrested; being 28th July, 2008.

The particulars of the offence were that the Appellant on the 12th of July, 2008 at Chinsali in the Chinsali District of the Northern Province of the Republic of Zambia did unlawfully have canal knowledge of a minor girl-child below the age of 16 years. The evidence on which the learned trial Magistrate based the conviction was anchored on the testimony of five (5) witnesses.

PW1 was Agnes Lukonde, the victim's grandmother and guardian. This witness knew the Appellant and lived in the same village. On the material day, she left the victim at her home to go to the fields. This was around about 12 hours. When she returned from the fields, she noticed that the victim had not gone to school and her books were scattered behind the door. She gathered the books for safe keeping. The next day, the victim had stopped attending school altogether and was increasingly looking weak, sickly and without appetite for food. Upon inquiring from her, the victim narrated that she had been defiled by the Appellant when she had gone to his house to help him pound his millet. PW1 examined the victim soon after receiving the report from her and observed the injuries on her private parts. PW1 then proceeded to the Appellant's house and confronted him over the matter. The Appellant admitted defiling the victim and pleaded for forgiveness while claiming that he had been influenced by alcohol. PW1 reported the Appellant to his uncle and a meeting was convened at which the Appellant, yet again, confessed. Thereafter, the Appellant was reported to the Police

Station through the Community Crime Prevention Unit members in the company of PW3, the victim's grandfather. A medical report was obtained from the Police Station and the victim was examined and treated at the Government Hospital where the defilement was confirmed. A medical report, which was produced as part of the prosecutions' evidence indicated that the victim had also suffered a sexually transmitted infection.

The victim (PW2), then aged 12 years, gave evidence on oath after a successful voire dire test. She was a school pupil in Grade 5. She testified that on the material day around 15 hours, she was given casual work by the Appellant who asked her to pound millet at his house and promised to give her K100 for her church offering. She entered his house and the Appellant immediately attacked her and defiled her on his bed, and immediately declared that from then onwards she was his wife. Thereafter, he gave her the K100 he promised and warned her not to reveal what had happened.

PW3 was Peter Chanda, the victim's grandfather. His evidence before the trial court was that he received a report from PW1 concerning the victim's defilement. PW1 and other people brought the Appellant to his house and invited other villagers to attend the meeting; and that during that meeting, the Appellant confessed to have committed the offence and claimed that he had been lured by the devil.

PW4 was Clement Patela, the Appellant's son-in-law, who happened to be the Chairman of the Community Crime Prevention Unit in the village. His evidence was that the Appellant was brought to his home by PW1, PW3 and other villagers. He was reported to have defiled the victim at his house. When he asked the Appellant about the offence, the Appellant confessed to him that he had committed the offence. According to this witness, the Appellant was not beaten and did not appear to have been beaten by anyone. When he asked the Appellant whether anyone had beaten him, the Appellant denied. Thereafter, PW4 accompanied the Appellant to the Police Station where he witnessed the recording of his

written confession statement by PW5, the Officer who received the criminal complaint.

PW5 was Detective Chief Inspector Silwamba who investigated this case. His evidence was that he received the Appellant from PW4 and interviewed him, after warning and cautioning him. The interview took place after the victim had brought back the medical report form from the hospital. The medical report form which was produced as part of the Prosecution's evidence, confirmed the injuries as a result of the defilement and also, that the victim had been infected with a sexual transmitted infection.

In his defence, the Appellant put himself at the scene of crime. He stated that he had gone to the bush and upon his return, he found the victim pounding millet. He talked to her and later left her for a church function. When he returned, he again talked to the victim who accused him of having carnal knowledge of her. According to the Appellant, the victim asked him to meet her parents and explain, which he did at a family

gathering. He conceded in his evidence that he was later handed over to the Community Crime Prevention Unit members who, in turn took him to the Police Station.

The learned trial Magistrate admitted the Appellant's written confession statement which was recorded by the Investigating Officer, PW5. The court found that the Appellant failed to challenge the evidence given by the prosecution witnesses. The court also found that the Appellant's own evidence supported the prosecutions' evidence to the effect that he met the victim at his house. On the basis of the evidence from the witnesses and the Appellant's own evidence, the court found that the offence of defilement had been proved beyond all reasonable doubt. He was found guilty as charged and convicted

In support of the appeal, Mr. Muzenga advanced two grounds. These were:

1. **That the learned trial Magistrate erred in law and in fact in convicting the Appellant in the absence of corroborative evidence.**
2. **The learned trial Magistrate erred in law and in fact in conducting the trial within a trial when the issue of voluntariness of the alleged confession statement was not raised.**

In support of these grounds, Mr. Muzenga filed written heads of arguments which were augmented by oral arguments. In support of Ground 1, Mr. Muzenga contended that Section 122(1) of the Juveniles Act, Cap 53 of the Laws of Zambia imposes a requirement, as a matter of law, for corroboration in respect of evidence of children of tender years, such as PW2, the complainant in this case. Mr. Muzenga referred us to this court's decision in the case of **Emmanuel Phiri –v- the People**[1] which decided as follow:

"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."

According to Mr. Muzenga, in the present case, there seems to be corroboration as to the commission of the offence, and this is found in the medical report produced as exhibit **P1** which confirmed that the hymen was broken. The gist of Mr. Muzenga's argument, however, is that there was no corroboration as to the evidence of the identity of the offender. Mr. Muzenga argued that the Appellant's medical report which was produced as part of the prosecution's evidence **(Exhibit P3),** indicated that the Appellant had a urinary tract infection while the victim's medical evidence indicated that she was found with a sexually transmitted infection. It was Mr. Muzenga's understanding that had the infections been similar between the Appellant and the victim, that fact would have provided the needed corroboration to the victim's evidence. Mr. Muzenga also criticized the trial court for not making any reference to the infection in its judgment; and that if it had done so, the court would have appreciated the differences in

the nature of the two infections. Mr. Muzenga conceded that the trial court was alive to the requirement of corroboration in this type of sexual offences. This is shown in the trial court's comment, in its judgment to the effect that PW1's testimony corroborated that of PW2, the complainant. According to Mr. Muzenga, this finding was a misdirection because PW1's evidence was merely an account of what she was apparently told by PW2, the victim. She was more than a listening witness. Regarding the Appellant's confession, Mr. Muzenga argued that in its judgment, the trial court did not make an appropriate finding as to whether the Appellant admitted the offence or not.

With regard to Ground 2, the gist of Mr. Muzenga's argument was that when the Appellant was confronted with the alleged confession statement made to PW5, his response was as follows:

"I did not make a statement. I have just seen this statement here."

According to Mr. Muzenga, it is trite law that a trial within a trial can only be conducted where the question of voluntariness of a confession statement has been raised. We were referred to the decisions of the Court of Appeal, which is the fore-runner to this court in the case of **Tapisha –v- The People**[2]. According to Mr. Muzenga, by denying ever making a statement, the Appellant raised a general issue which should have been determined by the court like any other issue during trial. It was Mr. Muzenga's view that the trial within a trial which was conducted by the trial court was wrong at law and the proceedings thereof must be completely ignored. On the basis of these argument, we were urged to allow the appeal, quash the conviction, set aside the sentence and set the Appellant at liberty.

In response, Mrs. Khuzwayo supported the conviction. In respect of Ground 1, she argued that the corroboration can be found in the evidence of PW2 who was prompt in relating the incident to PW1 and that the second corroboration is provided by the opportunity which the Appellant had in the

circumstances of this case, to commit the offence and the Appellant's own confession which is on record. Mrs. Khuzwayo also argued that the Appellant failed to cross examine PW3 and PW4 on the issues he raised in this appeal. Mrs. Khuzwayo, however, admitted that the learned trial Magistrate did not make reference to the Appellant's confession at different meetings. Mrs. Khuzwayo invited us to invoke this court's power under the proviso to Section 15 of the Supreme Court of Zambia Act, Cap 25 of the Laws of Zambia, and make a finding that the Appellant did make a confession. On the quality of the medical evidence in both the victim's medical report and the Appellant's medical report, Mrs. Khuzwayo argued that the Doctor who carried out the test was not called by the Appellant to testify during trial in order to show that urinary tract infection and venereal infection are not the same.

We have considered the two grounds of appeal, the written heads of argument and the submissions before us. We have also considered the judgment of the trial court and the

Judge's notes of the High Court which sentenced the Appellant.

It is clear from Mr. Muzenga's arguments and submission that it is conceded that the learned trial Magistrate was alive to the requirement of corroboration in sexual offences. It is also conceded that the medical evidence provided corroboration to the commission of the offence against the victim. The gist of Mr. Muzenga's argument is that there was no corroboration on the identity of the Appellant as the offender.

As can be seen from the narration of the evidence that was before the trial court, the Appellant's confession statement was admitted as evidence. In addition, PW1, PW3 and PW4 witnessed the Appellant's admission of the defilement when the Appellant was confronted at the village meeting before he was reported to the Police Station. These three witnesses were village-mates of the Appellant and the Appellant neither objected to nor challenged their evidence of

his admission during the trial. Further, in addition to the evidence of his written confession statement given by PW5, the Appellant was asked by the trial court to cross examine PW5 if he so wished. This is what the record indicates as his response (***at page 12 of the record):***

> ***"I have no question. All that the witness has said is the truth."***

It is clear to us that the evidence that the Appellant admitted defiling the victim to PW1, PW3 and PW4 is well established. It is also clear that PW5's evidence that he recorded a confession statement from the Appellant after he was warned and cautioned, is overwhelming. No matter how articulate the Appellant's arguments may now be, the fact remains on record that he did confess to PW5, in writing, that he defiled the victim. In our considered view, where there is a validly admitted confession statement, whether oral or written, the requirement of corroboration to the evidence of the identity of the offender as a precondition to a conviction, is ousted.

Further, we have also considered the peripheral argument regarding the Appellant's medical report which was produced during the trial; as against the victim's medical report. Mr. Muzenga repeated the fact that the victim's medical report showed that she suffered a sexually transmitted infection; while the Appellant was found with a urinary tract infection. According to Mr. Muzenga, this should have spurred the trial court to consider whether the Appellant's identity as the offender was well corroborated. This argument, we believe, was meant to suggest that the two infections are differently caused.

We find this argument to be odd and contrary to logic. We do not accept the suggestion that a sexually transmitted infection and a urinary tract infection are caused differently in circumstances where sexual contact has taken place. We also do not accept the suggestion that the making of any reference to the infections in the judgment of the lower court, would have led to a different conclusion.

The second Ground of Appeal criticizes the holding of a trial-within-a-trial. Mr. Muzenga's view is that there was a misdirection in the circumstances of this case because the Appellant did not raise the issue of voluntariness of the confession statement, allegedly made by him.

We do agree that the purpose of holding a trial-within-a-trial is to determine the voluntariness of a confession statement when the issue of its admissibility is objected to by the Accused or his Counsel. Once the test of voluntariness fails, the confession becomes inadmissible. It must be emphasized that the necessity of conducting a trial-within-a-trial only arises when the Accused does not dispute the making or signing of the alleged statement but only challenges its voluntariness. Where on the other hand, the accused totally denies making or signing any confession statement, a trial-within-a-trial is not necessary. In that event, the question of whether the Accused made or signed any confession statement becomes a general issue to be decided in the main trial on the basis of the evidence adduced by both

sides. (***See Tapisha –v- The People[2] and Mudenda –v- The People[3]***)

In the present case, the record of proceedings shows that the issue of a trial-within-a-trial arose when PW5, the investigating Police Officer, took the witnesses stand and offered to produce the Appellant's confession statement after identifying it by the Appellant's signature, his own signature and that of PW4 who witnessed its recording. Earlier, PW4 identified the same document to the court, without any objection from the Appellant. His objection to PW5's evidence was as follows:

> ***"I didn't make a confession. I have just seen this statement here."***

Immediately thereafter, the Public Prosecutor applied to hold a trial-within-a-trial and the main trial was stopped. The Appellant's response is recorded as follows:

> ***"I am also ready for a trial-within-a-trial."***

However, when the learned trial Magistrate invited the Appellant to cross-examine PW5, this is what he said:

> ***"I have no question. All that the witness has said is the truth."***

Immediately thereafter, the Public Prosecutor abandoned the trial-within-a-trial and the learned trial Magistrate made a ruling admitting the Appellant's confession statement as part of the prosecutions' evidence, and proceeded with the rest of the main trial.

It is clear from the record that the Appellant was uncertain about his objection to his alleged confession statement. He did not object when PW4 took the stand, and he withdrew his objection when PW5 took the stand. In our considered view, the learned trial Magistrate was perfectly entitled to exercise caution over the Appellant's confession statement and proceed to hold a trial-within-a-trial and later abandoned it when the Appellant withdrew his objection to the making of the confession statement. By proceeding in the

manner he did, the learned trial Magistrate avoided the possibility of a mistrial; as it is trite that failure to hold a trial-within-a-trial may lead to a mistrial. ***(See Edward Kunda –v- The People[4].)***

In the present case, we are satisfied that no mistrial occurred and that the holding of the trial-within-a-trial was perfectly in order; and so too was its abandonment, after the Appellant's own address to the court.

In any event, we hold that the evidence against the Appellant was overwhelming. We find no merit in both grounds of appeal and we dismiss this appeal in its totality.

(RETIRED)
D.K. CHIRWA
SUPREME COURT JUDGE

H. CHIBOMBA
SUPREME COURT JUDGE

G.S. PHIRI
SUPREME COURT JUDGE