IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(*Criminal Jurisdiction*)

APPEAL NO. 52 OF 2015

BETWEEN

DENNIS NKOMA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Wanki, Muyovwe and Malila, JJS**

On 5th May, 2015 and 2nd June, 2015.

For the Appellant: Ms. S.C. Lukwesa, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. M. D. Lungu, Senior State Advocate, National Prosecutions Authority

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JUDGMENT

MALILA, JS 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. *Katebe v. The People (1975) ZR 13*
4. *Nsofu v. The People (1973) ZR 287*
5. *Machipisa Kombe v. The People, SCZ Judgment No. 27 of 2009*
6. *Simutenda v. The People (1975) ZR 299*
7. *The People v. Kalenga and Mufumu (1968) ZR 181*
8. *R. v. Redpath (1962) 46 Criminal Appeal Reports 319*
9. *Chimbini v. The People (1973) ZR 191*
10. *Dorothy Mutale and Richard Phiri v. The People (1997) SCZ Judgment 51*

Legislation referred to:-

1. *Section 138 (1) of the Penal Code, chapter 87 of the laws of Zambia*

This is a short appeal. It arises from the judgment given on 17th November, 2014 by the Subordinate Court of the First Class Holden at Lusaka. In that judgment the appellant was convicted on a charge of defilement of a girl under the age of sixteen years, contrary to the provisions of **section 138(1)** of the **Penal Code,** chapter 87 of the laws of Zambia as read with the Penal Code (Amendment) Act No. 15 of 2005 of the laws of Zambia. On committal to the High Court for sentencing pursuant to section 217(1) of the provisions of the **Criminal Procedure Code**, chapter 88 of the laws of Zambia, the High Court sentenced the appellant to 35 years imprisonment with hard labour.

The facts of the case were briefly that the prosecutrix, aged 14 years and a grade 6 pupil, lived with the appellant who was her uncle at the appellant's house. The prosecutrix, together with other children of the appellant, used to sleep in the living room of the appellant's two bedroomed house in Chipata compound. On the night of 22nd August, 2014, while the prosecutrix was sleeping, the appellant, in drunken stupor, entered the room where the prosecutrix was, took off her clothes and ravished her. The

prosecutrix narrated her ordeal to one Ireen, her cousin, who however, advised the prosecutrix not to relay that information to anyone else. The following night, the appellant, repeated his malefaction on the prosecutrix and warned her under threat of expulsion from his home, against telling anyone about the encounter. Despite this entreaty, the prosecutrix did, the following day, narrate the ordeal to her cousin, Brian Simwinga. The said Brian Simwinga escalated the matter to the police, resulting ultimately in the medical examination of the prosecutrix at the University Teaching Hospital and the subsequent arrest and prosecution of the appellant.

After three prosecution witnesses had given evidence, the appellant opted not to give evidence for himself, but called only one witness, his wife, Elizabeth Nalwenga. The gist of her evidence in defence of her husband, painted the prosecutrix as an exceeding naughty child who, at 14 years of age, had the bad habit of routinely coming home late at night. The learned trial Magistrate would not have any of that, and in a curt opinion dismissed the defence and found the appellant guilty.

Through this appeal, the appellant impugns, on a lone ground the trial court's finding. The appellant asserts that it was a misdirection for the trial court to hold that the appellant was the assailant despite the prosecution having failed to prove beyond reasonable doubt that it was the appellant who defiled the prosecutrix.

Written heads of argument were filed and relied upon by counsel for both parties. At the hearing of the appeal, Ms. Lukwesa, learned Senior Legal Aid Counsel, for the appellant, with much verve, supplemented her written heads of argument orally.

The main point taken by Ms. Lukwesa was largely factual. She took us through the evidence on record of the prosecutrix to the effect that on the occasion of her second defilement by the appellant, the prosecutrix was warned of the prospect of her being chased from the appellant's house if she revealed the appellant's nocturnal sexual exploits of her person. The appellant's wife, however, gave evidence pointing to the prosecutrix's character as a truant child who habitually came home late in the night. There was also evidence from the prosecutrix herself that she had a boyfriend. The learned counsel also referred to the evidence of PW2 as to how

the prosecutrix was chased from the appellant's house and had taken an HIV test which showed the prosecutrix was HIV positive. Citing the case of **Emmanuel Phiri v. The People**[1] as authority, Ms. Lukwesa submitted that in sexual offences, there must be proof of both the commission of the offence and the identity of the offender. In the present case, the prosecutrix and PW2 alleged that it was the appellant who defiled the prosecutrix, and that as a result she was infected with HIV, and yet no medical evidence was preferred before the trial court to confirm that the appellant was HIV positive, or that he was a carrier of the HIV virus. According to the learned counsel, had such evidence been tendered in court, it would have proved beyond reasonable doubt that the HIV infection that the prosecutrix was found with was indeed as a result of being defiled by the appellant. In the absence of proof that the appellant was HIV positive, went on the learned counsel for the appellant, it is possible to conclude that the prosecutrix was infected by one or other of the boys that she had for boyfriends.

Ms. Lukwesa also complained that as testified to by PW2, the prosecutrix was at PW2's house for four days when PW2 was informed, not by prosecutrix herself, but by one Rhoda, that the

prosecutrix had been chased by her aunt, DW1, and that she only reported her hospital visit after she was found HIV positive. According to Ms. Lukwesa, this late report by the prosecutrix must be viewed with suspicion. This, coupled with the lack of medical evidence on the HIV status of the appellant, made it a possibility that the prosecutrix was merely implicating the appellant falsely. The learned counsel quoted from the case of **Bernard Chisha v. The People**[2] where we held that:

> **"although children may be less likely to be fraudulent or acting from improper motives than adults yet they are possibly more under the influence of third persons – sometimes their parents that are adults, and they are apt to allow their imaginations to run away with them and to invent untrue stories."**

Ms. Lukwesa beseeched us to apply the reasoning in the **Chisha**[2] case and allow the appeal.

Mrs. Lungu, respondent's learned counsel, countered the arguments advanced on behalf of the appellant. She pointed out that although there was evidence that the prosecutrix had a boyfriend, there was equally evidence that she never had sexual intercourse with her boyfriend; that she logically explained her going home late as she whiled time away at a neighbour's house, not with boys as alleged. Medical evidence tendered in court

showed that the prosecutrix was defiled and was HIV positive. The evidence as to who defiled her was given by the prosecutrix herself. According to the learned counsel for the respondent, there is nothing on the record to show that the prosecutrix had any motive to falsely implicate the appellant who was her guardian. The learned counsel quoted what was stated in **Katebe v. The People**[3] regarding absence of motive on the part of the prosecutrix to falsely implicate the accused.

It was the learned counsel's argument that the appellant, a bar worker who returned home drunk, had a perfect opportunity to defile the prosecutrix whom he would find sleeping in the sitting room. The learned counsel referred us to the case of **Nsofu v. The People**[4], where it was stated that opportunity to commit an offence is not conclusive in itself, but may be corroboration of evidence on the point. Mrs. Lungu also adverted to the case of **Machipisa Kombe v. The People**[5] where we cautioned against taking a technical approach to corroboration. She ended by making the point about the appellant's option to remain silent. Citing the cases of **Simutenda v. The People**[6] and that of **The People v. Kalenga and Mufumu**[7] she submitted that while there is no obligation on

the accused person to give evidence, the court cannot speculate as to a possible explanation for the event in question. The court is entitled and should draw appropriate inferences from the evidence available. In the present case, she argued, the court should draw the only logical inference, namely that the appellant was guilty as charged.

We have very carefully considered the evidence on record, the judgment of the trial court and the submissions of the parties before us. The short question we have to determine is whether the evidence before the trial court was sufficient to safely sustain a conviction for defilement.

The ingredients for the offence of defilement as defined in **section 138 (1)** of the **Penal Code**, chapter 87 of the laws of Zambia, must be firmly had in mind in assessing whether the facts in the present case did establish each of these ingredients.

Section 138(1) of the **Penal Code**, chapter 87 of the laws of Zambia, which creates the offence of defilement provides in part that:

> **"Any person who unlawfully carnally knows any child commits a felony."**

Section 131 (A) on the other hand defines a child as "a person below the age of sixteen years."

The ingredients for the offence of defilement which must be proved by the prosecution in order to secure a conviction are therefore, first unlawful canal knowledge of a child by the accused and second, such child must be below the age of sixteen.

The question we ask ourselves is whether in the present circumstances, sufficient evidence was laid before the trial court to support the conviction. As we have already stated, the evidence of defilement was given by the prosecutrix herself who was 14 years of age at the time. All the other witnesses who testified on behalf of the prosecution did not witness the defilement itself.

It is trite that corroboration is required in defilement offences since they invariably involve children below the age of sixteen. In **Nsofu v. The People**[4] we defined corroboration as

> **"independent evidence which tends to confirm that the witness is telling the truth when he or she says that the offence was committed and that it was the accused who committed it. It is the evidence of the witness of which a conviction is based; the corroborative evidence serves to satisfy court that it is safe to rely on that evidence."**

In the present case, the evidence of PW2 and PW3 on the defilement itself and the identity of the defiler, was a mere regurgitation of what the prosecutrix herself told them. In order for evidence to be corroborative, it must come from an independent source other than the witness whose evidence requires corroboration. In **R. v. Redpath**[8], the accused was charged with indecent assault on a young girl. The complainant's mother testified that the complainant returned home very distressed and immediately complained. The court held that while the complainant's distressed condition may in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any weight to the evidence because it is all part and parcel of the complaint.

Likewise, in the present case, the evidence of PW2 could not corroborate that of the prosecutrix since it was part of the complaint.

Although Ms. Lukwesa did not raise the issue of corroboration in the lone ground of appeal, we believe that this is an important

aspect to consider in ascertaining whether or not the conviction was safe.

Although a perusal of the judgment of the trial court makes no reference to evidence of corroboration in those terms, it seems to us that the learned Magistrae in the trial court was satisfied that the evidence of the prosecutrix was indeed corroborated. At J14 of the judgment, she stated among other things that:

> **"in this matter, I also have no doubt in my mind that the prosecutrix was sexually penetrated into her vagina. The medical evidence being both P1 and P2 show the prosecutrix was HIV positive, and further that she had hymnal injuries in that this hymen was torn at 3 points."**

For our part, we are satisfied that the evidence of the prosecutrix was adequately corroborated by the medical evidence which was admitted without objection in court. The medical evidence in the form of a medical report corroborated the issue of the defilement.

As regards the identity of the appellant, we are of the decided view that the appellant had the opportunity to commit the offence and there can be no question as to mistaken identity of the

appellant in this case. In this regard, we agree with the submission by counsel for the respondent that the prosecutrix had no motive to falsely implicate the appellant who was her guardian. As we stated in the case of **Katebe v. The People**[3]**:**

> **"where there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against an accused, and the case is in practice no different from any others in which the conviction depends on the reliability of her evidence as to the identity of the culprit, this is a "special and compelling ground" which would justify a conviction on uncorroborated testimony."**

As regards the age of the prosecutrix, the clinic cards submitted in court and received without the appellant raising issue with them, proved that the prosecutrix was indeed a child under the age of sixteen when the offence was committed.

Ms. Lukwesa raised an interesting point, namely that the appellant was not tested for his HIV status and, therefore, there is a possibility that he might be HIV negative; that if that be the case, the appellant was not the defiler of the prosecutrix. In our view, this argument does, in truth, obfuscate if not deflect the real issue, which is whether there was defilement of the prosecutrix by the appellant, and not whether there was infection of the HIV virus of

the prosecutrix by the appellant. The argument here is purely legal and does not call for any esoteric medical explanation to understand it. How the prosecutrix came to be infected with HIV may, in our view, be explained quite apart from the defilement without in the least obliterating the evidence establishing the appellant guilty of the offence of defilement. Of course, if the appellant were to test positive of HIV, had a test been done at the appropriate time after the defilement, this could at best only be further evidence establishing the possible sexual contact between the appellant and the prosecutrix. It would not, in our view, be conclusive evidence that the appellant defiled the prosecutrix, nor would it indeed prove conclusively that the appellant was responsible for transmitting the HIV virus to the prosecutrix. As we have indicated already, we are not inclined to make any inferential deductions in the absence of a clear medical explanation as to who or how the HIV virus was transmitted to the prosecutrix. The fact that anyone else could or may have transmitted HIV to the prosecutrix does not absolve the appellant from the charge of defilement.

As regards the appellant's own defence in the lower court, we take note that he elected not to give any evidence by himself. He is, of course, entitled to that option, and, as we stated in **Chimbini v. The People**[9]:-

> **"where, however, as in the present case, there is direct evidence by a complainant that she identified her assailant as a man whom she has known before, and this evidence, if accepted, establishes the guilt of the deceased, the fact that he chooses to remain silent may properly be taken into account. This fact is part of the totality of the evidence which the court must consider in coming to the conclusion that it is satisfied beyond reasonable doubt as to the guilt of the accused."**

In the present case, according to the evidence of PW3, the appellant had admitted to defiling the prosecutrix in a statement he made to the police. He recanted this statement during cross examination of PW3 when he suggested that he admitted merely to be able to get out of police custody.

In light of all the other evidence adduced against him, the appellant opted to remain silent. His wife's evidence that the prosecutrix was a naughty dependent, does not, in our view, dispel the evidence that the appellant defiled the prosecutrix, naughty as she may have been. The court was, in these circumstances,

entitled to make inferences. As we stated in **Dorothy Mutale and Richard Phiri v. The People**[10]

> **"where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one that is more favorable to an accused, if there is nothing in the case to exclude such inference."**

The learned trial Magistrate heard the evidence of the prosecution. There was not much in the form of evidence in support of the appellant's defence. We are on our part, perfectly satisfied that the inference of guilt on the part of the appellant by the lower court, was the correct one. The court's verdict is unassailable. The appeal accordingly fails.

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M. E. Wanki
SUPREME COURT JUDGE

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E. C. Muyovwe
SUPREME COURT JUDGE

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M. Malila, SC
SUPREME COURT JUDGE