IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 13/2018
HOLDEN AT NDOLA AND LUSAKA
(Criminal Jurisdiction)

BETWEEN:

PERCY CHISANGA APPELLANT

AND

THE PEOPLE RESPONDENT

Coram: Mchenga, DJP, Chishimba and Majula, JJA

On 22nd May 2018 and 23rd August 2018

For the Appellant: H.M. Mulunda, LM Chambers
For the Respondent: F.M. Sikazwe, Senior State Advocate, National Prosecution Authority.

JUDGMENT

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. Ndalama v The People [1976] Z.R. 220
2. Mwaba v The People [1974] Z.R. 264
3. Gift Mulonda v The People [2004] Z.R. 135
4. Mwanza (A.B.) v The People [1973] Z.R. 329
5. Emmanuel Phiri and Others v The People [1980] Z.R. 77
6. Kalebu Banda v The People [1977] Z.R. 169
7. Saluwema v The People [1965] Z.R. 4
8. Emmanuel Phiri v The People [1982] Z.R. 77

9. **Zambia Revenue Authority v Hitech Trading Company Limited [2001] Z.R. 17**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**

On the 14th of October 2008, the appellant appeared before the Subordinate Courts charged with one count of the offence of defilement contrary to **section 138(1) of The Penal Code.** The allegation was that on 4th October 2008, he had unlawful carnal knowledge of a girl who was below the age of 16 years. At that time, he was not represented and the *proviso* to **section 138(1) of the Penal Code** was not explained to him when he took the plea. He denied the charge and the matter proceeded to trial.

The evidence implicating the appellant was essentially that given by the prosecutrix, whose mother told the court, was 13 years old at the time the offence was committed. The prosecutrix testified that on 4th October

2008, around 16:00 hours, she left home in the company of friends. They met the appellant and went to a bar in Kaunda Square Stage 1, where they took alcoholic beverages. They then moved to Avondale Shopping Complex, where they continued to take alcoholic beverages.

Between 23:00 and 24:00 hours, the appellant, who was driving, volunteered to drop her home. She got into his motor vehicle and instead of him taking her home, they ended up spending the night in the motor vehicle. In the course of the night, he forcibly had carnal knowledge of her. She only got home around 09:00 hours, the following morning.

According to the prosecutrix's mother, her daughter did not turn up on 4th October 2008. When she returned the following morning, she took her to Chelston Police Station where they were issued with a medical report. They went to the hospital where she was examined by a

doctor. Dr. Jonathan Kaunda Mwambo found that she had been carnally known. He also observed that her private parts were swollen and bruised.

There was also evidence from Inspector Hellen Mwankomba, the arresting officer, that on 7th October 2018, she was assigned to investigate the case. She interviewed the appellant, who gave a statement. The statement was admitted into evidence after a trial-within-a-trial, in which, the trial magistrate found that it was made freely and voluntarily. In that statement, the appellant admitted having been with the prosecutrix on the night she did not turn up home. He also admitted carnally knowing her.

On 2nd February 2017, after the testimony of the arresting officer, the public prosecutor applied to have the charge amended. The date on which the offence was committed was amended from 29th September 2008, to

4th October 2008. The appellant was then allowed to retake the plea and he still denied the charge.

Following the closure of the prosecution's case, the trial magistrate found that a *prima facie* case had been made out against the appellant and she placed him on his defence. The appellant elected to remain silent and did not call any witness. However, in his final submissions, he told the court how he met the prosecutrix. He said he picked her from a bar in Kaunda Square, while she was in the company of others and dropped them at the Avondale Shopping Complex. He denied spending the night with her in his motor vehicle or carnally knowing her.

The trial magistrate found that even though the appellant was not represented at the time he took plea, it was not necessary to explain the *proviso* to him. She found that the prosecutrix's age was proved by the Under-Five card, which showed that she was below the

age of 16 years at the time the offence was committed. She also found that the medical report established that she was defiled.

Finally, it was her finding that the prosecutrix's evidence that she was defiled by the appellant, was corroborated by the appellant's warn and caution statement and what he said during his final submissions. She found the appellant guilty as charged and convicted him. He was committed to the High Court for sentencing and a sentence of 20 years imprisonment with hard labour was imposed on him.

Before we set out what this appeal is about, we are going to comment on the completeness of the record of appeal. Other than the statement that was recorded from the appellant, which is missing, we find that the record of appeal represents all the proceedings in the High Court and Subordinate Court. All the efforts to trace the statement have been futile but we are satisfied

that its contents are substantially reproduced by the arresting officer's testimony during the trial-within-a-trial. She told the trial magistrate what the appellant told her during the interview.

This is an appeal against conviction and it is based on three points of law. The first, is that the appellant was not informed of the statutory defence set out in **section 138(1) of The Penal Code**; the second, being that prosecution witnesses were not recalled for cross-examination after the charge was amended and the plea retaken; and the third, is that the appellant was convicted on the uncorroborated evidence of the prosecutrix.

In support of the argument that there was a misdirection when *proviso* to **section 138(1) of The Penal Code**, was not explained to the appellant when he was taking the plea, Mr Mulunda referred to the cases of **Ndalama v The People**[1], **Mwaba v The People**[2] and **Gift Mulonda v The**

People[3]. He submitted that the appellant was prejudiced by the omission because he could have successfully raised the defence in the *proviso,* as the prosecutrix was 13 years old at the time the offence was committed.

In response to this argument, Mr. Sikazwe submitted that there was no need to explain the *proviso* because the appellant was represented at the time the plea was retaken and could not, therefore, have been prejudiced. He also submitted that the court correctly found that there was no need to explain the *proviso* because the law does not apply retrospectively.

The appellant initially took his plea on 14th October 2008. At that time, **section 138 of the Penal Code,** following the **Penal Code (Amendment) Act No. 15 of 2005,** read as follows:

> **"(1) Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life.**

(2) Any person who attempts to have unlawful carnal knowledge of any child commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fourteen years and not exceeding twenty years.

(3) Any person who prescribes the defilement of a child as cure for an ailment commits a felony and is liable, upon conviction, to imprisonment for a term of not less than fifteen years and may be liable to imprisonment for life.

(4) A child above the age of twelve years who commits an offence under subsection (1) or (2) is liable, to such community service or counselling as the court may determine, in the best interests of both children."

It is clear that at the time the plea was taken, **section 138 of the Penal Code,** did not have the *proviso*. That being the case, the trial magistrate could not have read it out to him. The *proviso* only returned to the **Penal Code** on 12th April 2012, following the **Penal Code (Amendment) Act No. 2 of 2011.** Consequently, we find no merit in the argument that the appellant was prejudiced when the *proviso* was not explained to him.

Coming to the argument that, the appellant was prejudiced by the trial magistrate's failure to ask the appellant whether he wanted to have any of the witnesses recalled, following the amendment of the charge, Mr. Mulunda placed reliance on the case of **Mwanza (A.B.) v The People**[4]. In response, Mr. Sikazwe referred to **section 213(1) of The Criminal Procedure Code** and submitted that following the amendment, the appellant was allowed to retake the plea. By allowing him to retake the plea, the law was complied with and there was no misdirection.

Section 213(1) of The Criminal Procedure Code and the case of **Mwanza (A.B.) v The People**[4], are concerned with the procedure that a court should follow when a charge is amended for being defective "either in form or substance". In this case, the amendment of the charge was not on account of it being defective in form or the substance. Following the testimony of the witnesses, the date on which the offence was committed, as was set

out in the charge sheet, was at variance with that given by the witnesses in their testimony. The amendment of the charge and retaking of the plea, was seemingly made in compliance with **Section 213(1) of The Criminal Procedure Code** and it reads as follows:

> **"Where, at any stage of a trial before the accused is required to make his defence, it appears to the court that the charge is defective either in substance or in form, the court may, save as in section two hundred and six otherwise provided, make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that, where a charge is altered under this subsection-**
>
> **(i) the court shall thereupon call upon the accused person to plead to the altered charge;**
>
> **(ii) the accused may demand that the witnesses, or any of them, be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters**

> **arising out of such further cross-examination."**

However, **sub-section (2)** of the same provision, which deals with variation in the charge and the evidence, on the date on which the offence was committed, reads as follows:

> **"Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."**

It follows, that if the date when the offence was committed is not correct, a charge is not defective "in form or substance" to warrant amendment on the basis of **section 213 of the Penal Code.** It was therefore not necessary for the trial magistrate to amend the charge, retake the plea or recall the witnesses.

We will now deal with the argument that the conviction cannot be sustained because it is anchored on the

uncorroborated evidence of the prosecutrix. Mr. Mulunda referred to the case of **Emmanuel Phiri and Others v The People**[5], in which it was held that were there is insufficient evidence to support a conviction, an appellate court should not fill in the gaps by making adverse assumptions against the convict to justify the conviction. He argued that in this case, the prosecutrix's evidence of who defiled her, was not supported by any witness even though she was in the company of friends at the time the offence was allegedly committed. Those witnesses should have been called to give evidence in support her testimony.

Mr. Mulunda also pointed out that the medical examination indicates that the prosecutrix had hepatitis B, a sexually transmitted disease. He argued that the appellant should have been examined to determine whether he also had the disease. He referred to the case **Kalebu Banda v The People**[6] and submitted that the failure to examine him for the disease,

amounted to a dereliction of duty. It should lead to the assumption that had the examination been carried out, they would have found that he did not have the disease. In turn, it raises the possibility that the offence could have been committed by someone else.

Mr. Mulunda also referred to the case of **Saluwema v The People**[7] and submitted that since it was possible that someone else could have committed the offence, the prosecution did not prove the case against the appellant beyond all reasonable doubt.

In response to these arguments, Mr. Sikazwe referred to the case of **Emmanuel Phiri v The People**[8] and pointed out that this being a case of defilement, the prosecutrix's identification of the appellant, as the person who defiled her, should have been corroborated. He then argued that it was corroborated; the medical report confirmed her claim that she was defiled, while the appellant's statement to the police supported her

evidence that he is the one who committed the offence. There was also evidence that the appellant was with the prosecutrix that night in the motor vehicle, he therefore had the opportunity to commit the offence; such opportunity corroborated the prosecutrix evidence.

As regards the discovery of hepatitis B on the prosecutrix and the failure to examine the appellant for it, Mr. Sikazwe argued that even if there was dereliction of duty, there was overwhelming evidence implicating the appellant.

Before we deal with the arguments by counsel on the question of corroboration, we will comment on the trial magistrate's finding that the prosecutrix's testimony was among other things, corroborated by what the appellant said in his submissions.

In the case of **Zambia Revenue Authority v Hitech Trading Company Limited**[9], it was held, *inter alia*, that:

> **"Arguments and submissions at the bar, spirited as they may be cannot be a substitute for sworn evidence."**

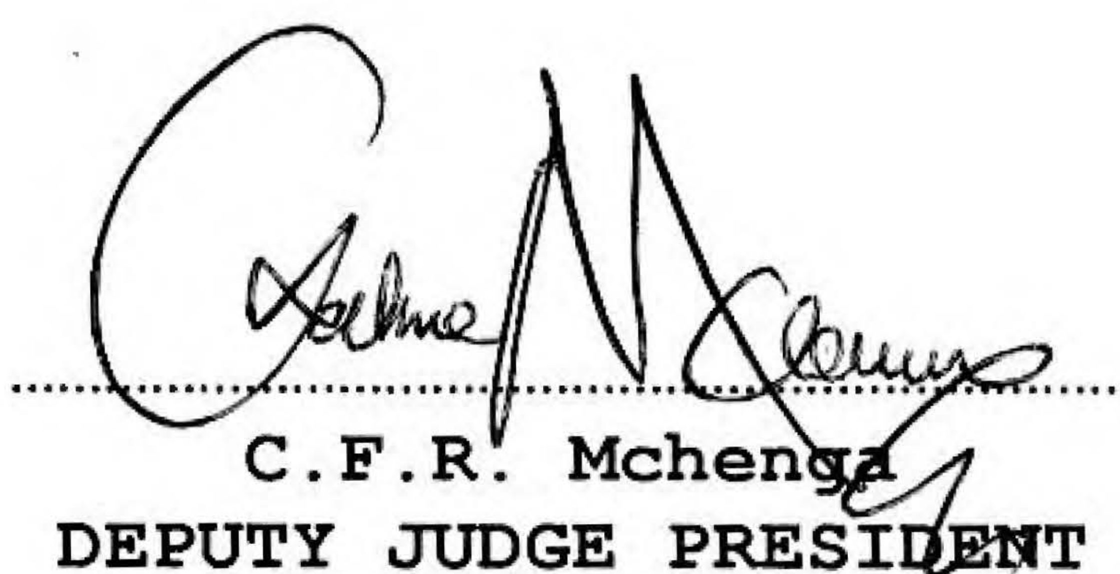
Submissions, give the parties the opportunity to direct the court to the issues in contention by accurately setting out the facts and the law applicable to them. They are not a second opportunity for leading evidence. Having elected to remain silent, the trial magistrate should have guided the appellant when he started giving evidence during his submissions. Short of that, she could have allowed him to proceed as she did, but not have placed any reliance on the evidence that he led during the submissions.

We find that there was misdirection when the trial magistrate decided to treat the appellant's submission as evidence. Notwithstanding this misdirection, we are satisfied that the prosecutrix's testimony was corroborated. As was submitted by Mr. Sikazwe, the prosecutrix's evidence that she was defiled, was corroborated by the medical report, while her evidence

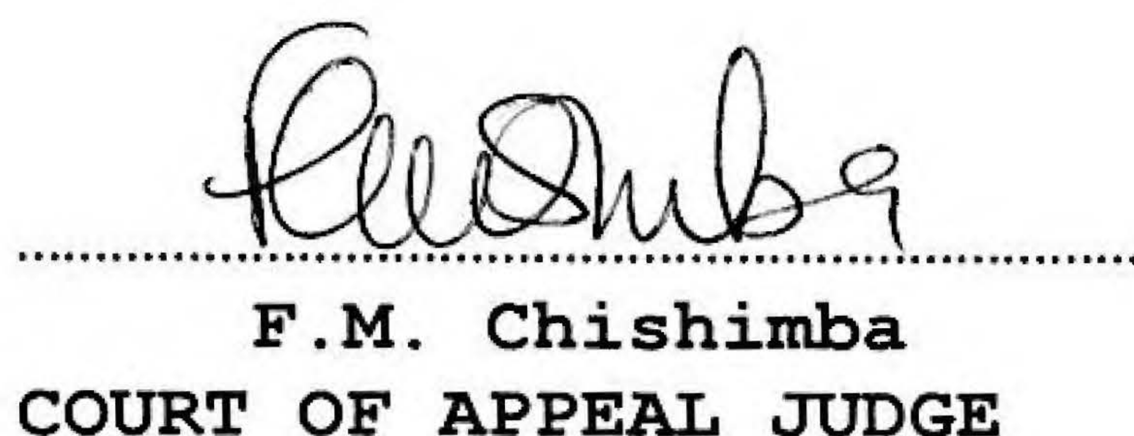
that it was the appellant, was corroborated by the appellant's statement to the police. In that statement, he admitted carnally knowing the prosecutrix when he spent the night with her in the motor vehicle. In our view, the trial magistrate rightly found that the medical report and the statement, corroborated the prosecutrix's testimony. It cannot, in the circumstances, be said that the appellant was convicted on the uncorroborated evidence of the prosecutrix.

As regards the argument that there was a dereliction of duty when the appellant was not tested for hepatitis B, we find that it was not the case. Even if the appellant was not tested for hepatitis B, the evidence against him is overwhelming. In any case, results after such an examination, would not have impacted on the charge in any way because he was not charged with infecting the prosecutrix with the disease, but defiling her. Further, whether he was infected or not, would not have implicated or exonerated him from the charge.

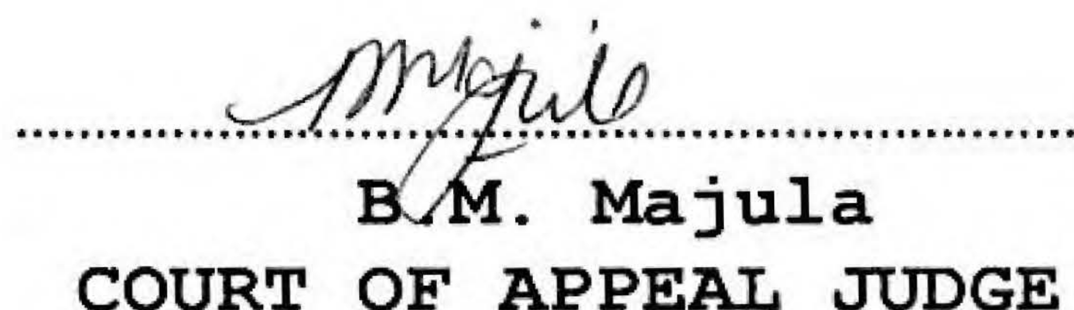
All the arguments in support of the appeal having failed, the appeal against the conviction is unsuccessful, the sentence imposed by the judge in the court below is upheld.



C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



F.M. Chishimba
COURT OF APPEAL JUDGE



B.M. Majula
COURT OF APPEAL JUDGE