**IN THE SUPREME COURT OF ZAMBIA** **APPEAL No. 21/2017**
**HOLDEN AT KABWE**
(*Criminal Jurisdiction*)

BETWEEN:

**DADDLY FICHITE** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENTS**

Coram: Phiri, Muyovwe and Chinyama, JJS.

On 1st August 2017 and on 10th December, 2018.

*For the Appellant:* *Mr J. Zulu, Senior Legal Aid Counsel - Legal Aid Board.*

*For the Respondents:* *Mrs C. Mbewe-Hambayi, Deputy Chief State Advocate - National Prosecutions Authority.*

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# JUDGMENT

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

***Cases referred to:***

1. *R v Allen, 9 C & P 31*
2. *Darius Sinyinza v The People (2009) Z.R. 24*
3. *Machipisha Kombe v The People (2009) Z.R. 282*
4. *Kambarage Mpundu Kaunda v The People (1990-1992) ZR 91*
5. *Sole Sikaonga v The People (2009) Z.R. 192*
6. *Winfred Mapapayi v The People, Appeal No. 191 of 2015*
7. *Nsofu v The People (1973) Z.R. 287*
8. *Kabwita v The People, SCZ Appeal No. 345/2013*
9. *Joseph Mutaba Tobo v The People (1990-1992) ZR 140*
10. *Joseph Mulenga and Albert Joseph Phiri v The People (2008) 2 Z.R. 1*
11. *Katebe v The People (1975) Z.R. 13*
12. *Emmanuel Phiri v The People (1978) Z.R. 79*

***Statutes referred to:***

1. *The Penal Code, Chapter 87, Laws of Zambia, sections 137, 138 (1)*
2. *The Juveniles Act, Chapter 53, Laws of Zambia, section 122*
3. *The Criminal Procedure Code, Chapter 88, Laws of Zambia, sections 151(1) (b); 186(3)*

The appellant was convicted on one count of Defilement contrary to **section 138 (1)** of the **Penal Code** by the Subordinate Court at Lusaka and was sentenced to 25 years imprisonment with hard labour by the High Court. The appeal is against both the conviction and sentence.

The prosecution led evidence from five (5) witnesses, the sum of which was that during the December, 2014 school holidays, PW1 took her daughter, the prosecutrix, aged 9 years at the time, to her paternal grandmother who resided in Lusaka's Kamwala area. We should point out at this early stage that the age of the prosecutrix is not in dispute and was properly established by PW1 who stated that her daughter was born on 9th April, 2005. The prosecutrix was in apparent good health when she went for the holidays. While there, the appellant whom the prosecutrix referred to as "uncle Daddly" because he is married to her paternal aunt, the sister to her late father, collected her together with another younger girl named

Mwangala, aged six years, several times and took them to his home where, on at least four occasions, he had carnal knowledge of the prosecutrix.

On the first occasion, according to the prosecutrix, whose evidence was received, as PW3, after a *voire dire* in compliance with section 122(b) of the **Juveniles Act**, she slept in the sitting room with Mwangala in the night, while the appellant and his wife were in the bedroom. That same night the appellant went to where the prosecutrix was sleeping on a mattress with Mwangala. The light was on. He undressed her and had carnal knowledge of her.

The next incident was the next day during the day when the appellant picked up the prosecutrix from home with Mwangala. He sent Mwangala on an errand while he had carnal knowledge of the prosecutrix in his bedroom.

The appellant again collected the prosecutrix and Mwangala the next evening and in the night he had carnal knowledge of her while Mwangala and his wife were asleep. Notably on this day, according to the prosecutrix, the appellant had earlier sent her and Mwangala to buy two packets of shake-shake beer and brandy.

The next evening the appellant took the prosecutrix, Mwangala and another girl named Faith after informing PW4 (referred to as "Uncle Mark" by the prosecutrix) who is also a brother to her late father and the appellant's wife and went with them in his car to his home. The children had their meal after which the appellant and his wife took them back to their grandmother's home.

Another day, the appellant picked the prosecutrix and Mwangala after telling the children's grandmother (the appellant's mother in law) that he would bring them back the next day. In the night the appellant again had carnal knowledge of the prosecutrix while Mwangala and the appellant's wife were asleep.

According to the prosecutrix she used to feel pain but the appellant threatened to kill her if she disclosed the escapades.

PW4 was the prosecutrix's uncle Mark. This witness operated a barber shop at his mother's (the prosecutrix's paternal grandmother's) home. He testified that he used to see the appellant pick the girls, that is to say, the prosecutrix and Mwangala around 10:00 hours in the morning and would return them around 16:00 hours in the afternoon. He saw this on more than four occasions.

He stated that at one time the appellant collected the prosecutrix, Mwangala and a boy named Peter. The witness stated that his mother (prosecutrix's paternal grandmother) operated a shebeen at the house which was patronised by both men and women but he dispelled any possibility of a customer having defiled the prosecutrix. He stated that he would chat with the appellant in his barbershop which was just by the gate before the appellant proceeded into the house to greet the people in there after which he would leave with the girls. He denied that the prosecutrix ever slept in the barber shop alone.

When the holidays were over, PW1 collected the prosecutrix from the grandmother. The witness noticed that her daughter looked unhappy, sick and weak, was coughing, had lost weight and slept most of the time. After two weeks the girl told her that she was experiencing pains in her private part. She examined her and found a wound on her private part and a growth of skin protruding. When she touched it, it discharged pus.

PW2, the mother to PW1 and maternal grandmother to the prosecutrix took the prosecutrix to a clinic where the initial

examination revealed that the prosecutrix had syphilis and was HIV positive. When the prosecutrix was asked by the doctor as to who had carnal knowledge of her, she responded that it was "uncle Daddly". The doctor advised that the matter be reported to the police.

PW5, Brinah Simozo, was the arresting officer stationed at Kabwata Police Station. Her evidence was that she received a complaint on 16th March, 2015 from PW1 that her daughter had been defiled by a person whom the prosecutrix knew. According to the witness, she gave the complainant a medical report form and referred them to the University Teaching Hospital (UTH) where another medical form was issued. The medical reports which were completed by a medical doctor at UTH recorded, among other particulars noted upon examining the prosecutrix, evidence of syphilis, HIV and what was termed a "PV discharge". It was also recorded that the victim had no previous sexual experience and that the hymen was intact with no body injuries in terms of bruises and bites. The doctor found these circumstances to be consistent with the allegation of defilement. The witness stated, in cross

examination, that she was aware of the appellant's night shifts but did not confirm whether he had been on duty on the dates he was alleged to have defiled the prosecutrix. In re-examination, PW5 stated that she did not investigate whether the appellant was away on duty because the victim had mentioned the name of the suspect.

In his defence the appellant confirmed that the prosecutrix was his wife's niece. He testified that the prosecutrix was collected from her grandmother's place, where she had been since November, 2014, by his wife. He was not at home at the time having been away on duty at Arrackan Barracks for the one week that the prosecutrix stayed at his home. On the day that he returned home his wife took the prosecutrix back to her grandmother. A week later he was informed that the prosecutrix had mysteriously left the grandmother's home. He discovered later that the girl had returned to her mother, PW1. He denied that he had carnal knowledge of her. He stated that his in-laws, at the prosecutrix's grandmother's place, operated a shebeen and a barber shop and a lot of people go there.

After cautioning herself on the need for corroboration of the prosecutrix's evidence as this was a sexual offence and more particularly that it was a requirement under section 122 of the **Juveniles Act**, the magistrate found corroboration in the medical report that the offence had been committed which, according to her, showed that the doctor's findings were consistent with the circumstances alleged. She took the view that being HIV positive and having syphilis, a sexually transmitted disease, was confirmation of sexual abuse. On the presence of the hymen, the magistrate was of the position that in order to constitute sexual intercourse for the purpose of the offence of defilement, full penetration so as to rapture the hymen is not necessary. She stated that even the slightest penetration will suffice drawing from the old English case of **R v Allen**[1] where it was held that a penetration which was not of such depth as to injure the hymen was sufficient to constitute the offence of rape.

On the question whether the appellant was the defiler, the magistrate found no reason why the prosecutrix would want to falsely implicate the appellant who was her uncle when she could

have picked any other male person at her grandmother's place. She found support in the evidence of PW4 that he used to see the appellant pick her up from her grandmother's home. She found that the evidence of PW2 and PW4 corroborated the evidence of the prosecutrix. She discounted the suggestion that any other male person might have committed the offence. The trial magistrate found the appellant guilty as charged and convicted him accordingly.

The sentencing High Court judge noted that the medical reports showed that the victim contracted an STI and she was of very tender age at the time, that she has been robbed of her right to good health and her innocence at a young age. The judge considered the contraction of the STI to be an aggravating circumstance. She sentenced the appellant to a term of twenty-five (25) years imprisonment with hard labour with effect from 31st March, 2016 when the Subordinate Court convicted him.

The appellant seemingly aggrieved by both the conviction and sentence has appealed to this Court advancing three (3) grounds of appeal as follows:

1. **The learned trial court erred both in law and in fact when it convicted the appellant despite the medical evidence showing that there was no inflammation around the vagina and that the hymen was intact.**

2. **The learned trial court erred both in law and in fact when it convicted the appellant despite lack of corroboration of both the commission of the offence and the identity of the offender.**

3. **The learned trial court erred both in law and in fact when it sentenced the appellant to 25 years imprisonment despite there being no evidence on record to show that the appellant infected the prosecutrix with the sexually transmitted diseases.**

Mr Zulu, argued the appeal on behalf of the appellant. Regarding ground 1, counsel opened with the case of **Darius Sinyinza v The People**[2] in which this court held that the charge of defilement could not be sustained because the medical evidence showed that there was no inflammation around the vagina and that the hymen was intact. Counsel criticised the finding by the learned magistrate, despite the medical evidence indicating that the hymen was intact, that there was still defilement because the prosecutrix was HIV and syphilis positive which was confirmation of sexual abuse; that the HIV and syphilis which the prosecutrix was found with are not only transmitted through sexual intercourse but also through other means such as mother to child transmission or

through blood contact with an infected person; that the trial court wrongly relied on the case of **R v Allen**[1] to hold that despite the hymen being intact there was still defilement because that case related to the offence of rape where the absence of a hymen was not an issue. We were urged to quash the appellant's conviction.

Ground 2 brought the argument that there was no corroboration of the fact that the appellant was defiled and that it was the appellant who defiled her. Counsel relied on section **122(b)** of the **Juveniles Act** on the need to corroborate the sworn evidence of a child witness and the case of **Machipisha Kombe v The People**[3] where it was held that "**in criminal cases of a sexual nature, such as rape and defilement, corroboration is required as a matter of law before there can be conviction**". It was reiterated that the medical reports did not corroborate the commission of the offence. As regards corroboration as to the identity of the perpetrator, it was submitted that there was none; that neither the appellant's wife who was a competent witness under section 151 (1) (b) (not 150 (1) (b) as submitted) of the **Criminal Procedure Code**, according to counsel, nor Mwangala

who in all instances was in the company of the prosecutrix were called as witnesses to corroborate the prosecutrix' story. That these witnesses would have confirmed the presence of the prosecutrix in the appellant's house at the material times alleged.

It was argued that PW4's story that the appellant got the prosecutrix and Mwangala on four occasions around 10:00 hours and would bring them back around 16:00 hours, contradicts PW3's story to the effect that at least three of those encounters allegedly happened at night when the prosecutrix and Mwangala slept over at the appellant's place. It was also argued that PW4 was a relative to the prosecutrix which made him a witness with a possible interest of his own to serve. On the authority of the case of **Kambarange Mpundu Kaunda v The People**[4], it was argued that it was a misdirection for the trial court to fail to warn itself and specifically deal with this issue to exclude the danger of false implication by PW4. It was argued, therefore, that PW4 could not corroborate the prosecutrix.

Ground 3 of this appeal was argued as an alternative ground in the event that grounds 1 and 2 fail. This ground challenges the

imposition of the custodial sentence of twenty-five (25) years imprisonment by the court below which found the contraction of sexually transmitted infections as an aggravating factor. Mr. Zulu referred us to the case of **Sole Sikaonga v The People**[5] in which it was held that:

> **An ordinary case of defilement will ordinarily attract a minimum of 15 years. However, where an accused is found to have infected the victim with a sexually transmitted disease, the offence will certainly attract a more severe sentence above the minimum of 15 years.**

It was argued that the record shows that the prosecutrix was found to be syphilis and HIV positive but the evidence does not at all suggest that the appellant is the one who infected her because, firstly, the appellant was not subjected to any medical examination to establish if he is also HIV and syphilis positive and secondly, that the possibility of infection through other means such as mother to child or blood contact were not excluded. Therefore, holding that the appellant had infected the prosecutrix was a misdirection. We were thus urged to interfere with the sentence of 25 years imprisonment by reducing it.

Mrs Hambayi responded on behalf of the respondents. She submitted, generally, that the court below was on firm ground when

it convicted the appellant as there was ample evidence adduced during trial which provided corroboration to the evidence of the prosecutrix as to the commission of the offence and the identity of the offender. That the commission of the offence was proved by the medical report whose findings are consistent with the allegation whereas the identity of the offender was proved by the evidence of the prosecutrix which was corroborated by PW4.

In reacting to ground 1, it was argued that the trial court was on firm ground when it found that the prosecutrix was defiled based on the evidence of PW1 and PW2 who saw the wound and pus on the private parts of the prosecutrix a few weeks after the defilements happened. That the reason why the medical doctor could not find any bruising or bites on the body as well as any vaginal or hymen tears or wounds was because he examined the prosecutrix three (3) months after the four incidents of defilement had occurred. It was submitted that the findings of syphilis and HIV, which are primarily sexually transmitted diseases, in one as young as the prosecutrix indicates sexual activity which in this case was perpetrated by the appellant on the prosecutrix. That the

presence of the two diseases cements the findings by the medical doctor on the medical report. It was argued that even assuming that the prosecutrix contracted the HIV through mother to child transmission, how then could she have contracted syphilis? That the only conclusion to be drawn is that the child contracted the two diseases as a result of sexual abuse at the hands of the appellant. Therefore, that the court below was on firm ground when it held that even though the hymen appeared intact there was still penetration even if the penetration was not of such a depth as to rupture the hymen as partial penetration was enough. Authority for this argument was drawn from the case of **Winfred Mapapayi v The People**[6] in which, according to counsel, we found that even though the medical report did not show fresh injuries on the prosecutrix, defilement could not be ruled out because the doctor's findings were consistent with the allegations. In that case, the prosecutrix had been examined by a doctor sometime after the sexual assault and he explained to the court that it is not in all cases that injuries will result after defilement. The respondents have, therefore, argued that lack of injuries and an intact hymen do not rule out the occurrence of defilement as the penetration could

have been partial and the examination in this case was conducted three months after the incident.

In reacting to ground 2, the respondents have argued that corroboration was provided by the ample medical evidence (medical reports) and the evidence of PWs 1 and 2 which, according to counsel, all show that the prosecutrix was defiled. Further, that the identity of the appellant was firmly established as he was well known to the prosecutrix and there was no possibility of mistaken identity. That the evidence of PW4 confirms the prosecutrix' evidence that the appellant used to pick her and Mwangala up on at least four different occasions and that the appellant was the only male person that he saw go away with the prosecutrix. Therefore, that the appellant had ample opportunity to commit the crime which amounts to corroboration. As authority, the case of **Nsofu v The People**[7] was relied on in which we 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 locality of the opportunity may be such as in themselves to amount to corroboration.**

Counsel for the respondents further argued that PW4 is not a suspect witness and did not have a motive to falsely implicate the appellant. It was contended that the appellant has not established why PW4 is a suspect witness as he has not shown whether PW4 had a bad relationship with him or any other reason why his evidence could be suspect. That without such proof, his evidence adds something more to the prosecutrix' evidence that it was the appellant who defiled her. And that in cross-examining the prosecutrix, the appellant neither expressly denied having sex with her nor did he try to raise the alibi which he brought up during his defence that he was at work when the prosecutrix had gone to his home. It was further argued that the conduct of the appellant was very odd in that it was strange for an adult male person to insist on picking up little girls and taking them to his house especially that he was only related to the prosecutrix through marriage. It was submitted that this conduct proves that his motives were not pure but of a nefarious nature.

In response to ground 3, it was submitted that the contraction of syphilis and HIV by the prosecutrix is an aggravating factor

because the prosecutrix' life has been irrevocably changed by these diseases. Further, that the evidence of PW1 and PW2 shows that the prosecutrix was well when she went for the school holiday but it was after PW1 went to collect her that she noticed that the child was unwell and had lost weight. It was pointed out that the evidence of PW4 was that when the prosecutrix went to stay at his house she was well. Counsel, accordingly concluded that the prosecutrix' health started failing after the sexual assaults and infections were inflicted on her by the appellant. That the appellant who was the girl's uncle held a position of trust which he violated as a family member and this further aggravates the case. Therefore, that the trial court was on firm ground when it imposed the sentence of 25 years imprisonment as the damage occasioned to the prosecutrix is life changing and the appellant deserves a stiff sentence to deter would be offenders. We were urged to uphold both the conviction and the sentence.

We have considered the evidence adduced by the parties in the Subordinate Court, the judgment of the court, the comments made by the sentencing judge and the arguments advanced before us in

this appeal. The issues for decision are basically two, namely, whether the prosecutrix was defiled and that it was the appellant who defiled her. These two issues in fact are part of the three essential ingredients of the offence of defilement, the third being that the victim was aged below sixteen (16) years which we have already said there is no dispute over and was established by the evidence of PW1, the mother to the prosecutrix. The law also requires that there be corroboration that the prosecutrix was defiled and that it was the accused person who defiled her. Further, that where the prosecutrix is a child of tender age and testifies in her own behalf under section 122(b) of the **Juveniles Act** the accused is not liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused.

With regard to the issues raised in ground 1, our understanding of the case of **Darius Sinyinza**[2] is that it did not settle a universal rule that whenever an examination of the victim of an alleged defilement did not present inflammation or bruises or other injury around the vagina and that the hymen was found

intact then the offence has not been made out. Quite clearly, the case was decided on its own peculiar facts. The critical issue in that case was simply that there was no evidence to support the allegation that the prosecutrix had been defiled. In the case of **Winfred Mapapayi**[6], however, the prosecutrix was already sexually active and was pregnant by another man and had no hymen when she was carnally known by the appellant. We upheld the conviction for the offence of defilement on the basis that the medical evidence was consistent with the alleged defilement. Similarly, in the case of **Kabwita v The People**[8], we found the offence of defilement proved even though the hymen was intact. These cases reinforce the view that the offence of defilement does not necessarily depend on the absence or presence of inflammation or bruises around the vagina or an intact hymen. Whatever may be the circumstances, however, evidence that there was penetration, even partial as determined in the case of **R v Allen**[1], in which the offence was that of rape, is required. In our considered view, the offence of rape and that of defilement are of the same genus, the difference being merely that in the former, the victim is a woman or girl of the age of 16 years and above while the latter relates to girls below 16 years of age.

Another issue contended in ground 1 related to the finding by the trial magistrate that the syphilis and HIV which the prosecutrix was found with confirmed that she was sexually abused. We agree with Mr Zulu that syphilis and HIV may be transmitted through other means. In this case, however, the doctor who examined the prosecutrix found her condition to be consistent with the allegation that she was defiled. A medical doctor is entitled to make logical inferences from observations that he or she makes himself or herself. In the case of **Joseph Mutaba Tobo v The People**[9] we commented thus:

> **We wholly agree with the Commissioner that the real value of the evidence of a medical expert consists in the logical inferences which he draws from what he has himself observed.**

At the time when the medical reports were tendered as evidence for the prosecution, there was no objection from the defence and the documents were admitted as part of the prosecution evidence. Further, PW5 who produced and tendered the medical reports was not cross-examined on them and no effort was made to request the presence of the medical officer who completed the medical reports so that he/she could be questioned in relation

to his opinion. In the case of **Joseph Mulenga, Albert Joseph Phiri v The People**[10], we said the following –

> **During trial parties have the opportunity to challenge evidence by cross-examining witnesses. Cross-examination must be done on every material particular of the case. When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed. Leaving assertions which are incriminating to go unchallenged, diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial.**

As we have said the defence did not raise any objection or challenge the medical evidence during the trial. The result is that, there being no reason to hold otherwise we agree with the medical doctor's opinion that his findings (of the syphilis and HIV in the prosecutrix) were consistent with the allegation that the prosecutrix had been defiled.

It is our considered view, therefore, that the appellant's allegation that she was defiled was corroborated by the medical report and indeed the evidence of PW1 and PW2 who inspected the prosecutrix when it became apparent that she was not well and had complained of pain in her private part. Clearly ground 1 has no merit and we dismiss it.

Turning to ground 2, having already found that the appellant was defiled, we move on to consider and determine the allegation that it is the appellant who defiled her. The evidence tending to corroborate the allegation is that of PW4. There is no dispute that PW4 is related to the prosecutrix. In terms of the decision of this court in the case of **Kambarage Mpundu Kaunda v The People**[4], the evidence of witnesses who are relatives and friends to the deceased (or indeed other victims of crime as in this case) must be approached with caution because they could possibly be biased against the accused and a court dealing with such witnesses must warn itself against the dangers of false implication and go further and exclude the danger. We did peruse the judgment of the subordinate court and noted that the court did not caution itself when considering the evidence of PW4 in this manner. That was a misdirection.

Contrary to the argument by Mrs Hambayi, however, the appellant did not have to establish why PW4 is a suspect witness. It is the status of being a relative to the victim which renders his testimony suspect as he may be disposed to give biased testimony. Hence the need for the court to be cautious in dealing with the

testimony and to ensure that the danger of false implication is excluded before it can rely on the evidence.

The foregoing, notwithstanding, we think that the trial court would still have concluded that PW4 was a credible witness if the court took into account the fact that not only was PW4 related to the prosecutrix but that he was also related to the appellant's wife who was his sister. In the circumstances, the likelihood by the witness to give evidence biased in favour of his niece is countermanded by interest arising from his relationship with the appellant's wife. These competing interests, in our view, and without anything else confirm that the witness was credible.

There was also criticism of PW4's evidence arising from what Mr Zulu touted as the contradiction or discrepancy with the prosecutrix's evidence regarding the times she was collected and returned. In our considered view the contradiction is of little or no significance. What is important, is the confirmation that the appellant was seen several times taking away the prosecutrix. In fact, PW4 stated that the appellant would chat with the people he found at home before going away with the girl. There is no doubt

that PW4 just like the prosecutrix was very familiar with the appellant so that the question of a mistaken identification does not arise.

On the whole, we are satisfied that PW4 was a credible witness and supported the prosecutrix's testimony that the appellant used to take her away. This then provided the appellant with opportunities to have sexual connection with the prosecutrix. As held in the case of **Nsofu v The People**[7] cited by Mrs Hambayi, the character of the opportunity may bring in suspicion so as to amount to corroboration. In this case the appellant frequently took away the prosecutrix. This conduct was, as submitted by Mrs Hambayi, very odd in that the appellant was only related to the prosecutrix through marriage. This adds "something more" in support of the allegation that the appellant defiled the prosecutrix as alleged. We agree with Mr Zulu's submission that the absence of the appellant's wife and Mwangala deprived the prosecution of the evidence of witnesses who might have also confirmed the appellant's activities. However, the absence of these potential witnesses does not affect the prosecution's case in any adverse way.

Suffice that we are satisfied that the evidence availed sufficiently established that the appellant defiled the prosecutrix.

As for the appellant's alibi that he was away from home for the one week during which the prosecutrix was at his home, it is obvious that the defence was not being raised for the first time during the trial of the case. PW5, the Arresting Officer, when asked, during cross-examination, about the night shifts that the appellant claimed to have been working, replied that she was aware of them but did not follow up the issue. To the appellant's credit we have chosen to accept that the night duties which the witness referred to were those stated by the appellant when he said that he spent one week at Arakan Barracks and was not able to leave because he was on standby. In the case of **Katebe v The People**[11] this court held that-

> **The law is clear that where a defence of alibi is set up and there is some evidence of such an alibi it is for the prosecution to negative it. There is no onus on an accused person to establish his alibi; the law as to the onus is precisely the same as in cases of self-defence or provocation.**

There was no attempt in this case to disprove the defence by direct evidence. The question, however, is whether there is evidence on record to counteract the alibi. We have already resolved that PW4

was a credible witness and that his evidence supported the prosecutrix's evidence that the appellant used to take her away. The effect of this is that the appellant's alibi cannot afford him a defence. PW4's testimony clearly placed him in the locality of the crime. Ground two equally has no merit and we dismiss it.

Coming to the third ground of appeal, there is no doubt in our minds that the view taken by the sentencing judge that the offence was aggravated by the syphilis and HIV contracted by the prosecutrix which the judge attributed to the appellant is supported by the uncontroverted medical evidence. Therefore, this ground of appeal has no merit. Bearing in mind what we said in the case of **Sole Sikaonga**[5], and particularly that the prosecutrix now has HIV for which currently there is no cure, we view the sentence of 25 years imprisonment imposed as being so totally inadequate. Pursuant to the powers vested in this court under **section 15 (4)** of the **Supreme Court of Zambia Act**, we set aside that sentence. In its stead, we sentence the appellant to life imprisonment which will not only punish the appellant but we believe may restrain would be offenders.

Ultimately, the entire appeal has collapsed.

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**G.S. PHIRI**
**SUPREME COURT JUDGE**

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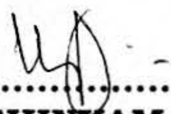
**E.N.C. MUYOVWE**
**SUPREME COURT JUDGE**



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**J. CHINYAMA**
**SUPREME COURT JUDGE**