IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.149/2016**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

ANTHONY MWABA MPUNDU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS

On 2nd October, 2018 and 7th December, 2018

For the appellant : Mr M. Mukonka, Legal Aid Counsel

For the respondent : Mrs A.N. Sitali Deputy Chief State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Ndakala v The People (1974) ZR 19**
2. **Emmanuel Phiri & Others v The People (1978) ZR 79**
3. **Haonga & Others v The People (1976) ZR 200**
4. **Nsofu v The People (1973) ZR 287**

Legislation referred to:

The Penal Code, Chapter 87 of the Laws of Zambia

The appellant appeals against his conviction by the subordinate court of the offence of defilement.

On 30th April, 2015, the appellant was taken before the subordinate court at Luwingu, on a charge of defilement contrary to **Section 138(1)** of the **Penal Code, Chapter 87** of the **Laws of Zambia**. It was alleged that in the month of January, 2015, in Luwingu, the appellant had carnal knowledge of a girl below the age of 16 years. The appellant denied the allegation.

The evidence which the prosecution presented before the court below was this:

The victim was a girl of 12 years of age, and was related to the appellant. On 18th January, 2015, the victim informed PW2, her aunt, that the appellant had had carnal knowledge of her, as a result whereof she was feeling pain on her private parts. In turn, the victim's aunt repeated the complaint to the victim's mother, PW1. The latter immediately took the complaint to members of the local community crime prevention unit. The appellant was apprehended and taken to the local police station, where he was charged for defilement.

At the trial, the victim, particularly, gave a detailed account of the sexual encounters she alleged to have had with the appellant. She explained how, on the first occasion, the appellant accosted her in the bush, tied her up and then defiled her. She further told the court that a few days later the appellant accosted her again in the bush and defiled her. She said that on this second occasion she decided to inform her aunt about the appellant's misdeeds.

In defence the appellant denied having had any sexual encounter with the victim. He said that he could not have had the opportunity to meet with, and have carnal knowledge of, the victim because he used to report for work every morning, and only returned home around 16.00 hours each day.

The trial court found that medical evidence corroborated the victim's testimony that she had been defiled. As regards corroboration of the victim's testimony that it was the appellant who had defiled her, the court said that it found no corroboration in the form of testimony or eye-witness accounts. However, the court identified the presence of some special and compelling grounds which satisfied it that the danger that the victim could be falsely implicating the appellant had been excluded. According to the trial court, one such ground was that there was no motive for the victim

to falsely accuse the appellant of having sexually assaulted her. The other ground which the court identified was that of opportunity: The court observed that the victim had alleged that the appellant had defiled her in broad daylight. The court went on to hold that even assuming that the appellant used to go for work, as argued by him, the fact that he used to come back between 15:00 and 16:00 hours provided him the opportunity to sexually assault the victim in broad daylight as alleged. For these reasons the trial court convicted the appellant of the offence of defilement.

Upon committal to the High Court for sentence, the appellant was sentenced to 26 years imprisonment with hard labour.

The appellant advanced only one ground of appeal before us. The ground is that the magistrate erred in law and fact when he ruled out the danger of false implication and convicted the appellant.

On behalf of the appellant, the appeal was argued on the basis of written heads of argument. The crux of the arguments was that, in this case, the danger of false implication of the appellant had not been ruled out for the following reasons;

(i) that the victim failed to make an early complaint of the alleged sexual encounters; and,

(ii) that the victim told a lie during her testimony

With regard to the making of a complaint we were referred to two cases; namely, the case of **Ndakala v The People**[1] where we held:

> **"the corollary to the principle that evidence of early complaint is admissible to show consistency is that the failure to make an early complaint must be weighed in the scales against the prosecution case".**

The second case cited was that of **Emmanuel Phiri & Others v The People**[2]. This was a case which did not involve a sexual offence, at all. So, we wonder where counsel for the appellant got the holding that is purported to have been made in that case.

However, proceeding on the holding in **Ndakala v The People**, the appellant pointed out that there were three alleged sexual assaults in this case which the prosecutrix did not immediately report, but only came to report them on 18th January, 2015; and that, even then, the record was silent as to how many days or weeks had elapsed after the last sexual assault. It was counsel's argument that, in the circumstances, the failure to make an early complaint should have been weighed against the prosecution's case.

Regarding the alleged lie, it was pointed out that both the mother and the aunt of the prosecutrix told the court that the victim had told them that the appellant had sexual intercourse with her on two occasions. It was pointed out also that even the victim herself told the court that the appellant had sexual intercourse with her on two occasions; and yet as she narrated the events, she recounted three occasions on which she had sexual encounters with the appellant. According to counsel for the appellant, this means that the prosecutrix lied to her mother, her aunt and to the court.

The appellant particularly referred us to the case of **Haonga & Ors v The People**[3] where we held that, where a witness has been found to be untruthful on a material point, the weight to be attached to the remainder of his evidence is reduced.

With the foregoing observations and authorities, counsel argued that the trial court's statements that; (i) the appellant failed to challenge the victim on identity, and, (ii) that the appellant's testimony in his defence was an afterthought were serious misdirections. We were urged to allow the appeal.

In response to the above arguments the state argued as follows: first, that there was early complaint in this case. That this was borne out by the fact that when the victim's aunt examined the private parts, upon receiving the complaint, she observed some sores thereon. That even the doctor who examined the child observed bruises and extreme tenderness on her private parts. According to the State this exemplified the fact that the sexual assault had been fairly recent at the time that it was reported.

We were also urged to consider: (i) the victim's tender age; (ii) the relationship she shared with the appellant; and (iii) the threats issued to her after the assault in order for us to understand the reason why the sexual assaults were not reported there and then.

On the appellant's contention that the victim lied on the number of occasions that the appellant was alleged to have defiled her, the State disagreed with the appellant. It was submitted that what the appellant contends to be a third sexual assault, as narrated by the victim, was actually not. The State pointed out that the victim had clearly stated that, at the beginning, the appellant had merely molested her by way of attempting to kiss her in his

kitchen. Otherwise, argued the state, she was consistent in her testimony that the sexual assaults were on two occasions.

With the foregoing arguments, the State urged us to uphold the appellant's conviction.

We have heard the arguments from both sides. While it is trite that a late complaint will affect the weight to be attached to a complainant's testimony, it should be borne in mind that this rule was designed primarily for adult complainants in sexual offences. Hence when one looks, for example, at the case of **Ndakala v The People**[1], the case involved an adult complainant who, after the alleged rape, went with a female friend to a bar, instead of immediately laying a complaint about the rape. In this case, as rightly argued by the State, we are dealing with a child of tender years who can easily be scared by threats to herself if she reveals the sexual assaults. In this case the victim testified that the appellant threatened to kill her if she told her mother about the sexual assaults.

On the appellant's contention that the victim gave inconsistent stories about the number of times that the appellant sexually assaulted her, we agree with the State that the defence have misrepresented the victim's testimony. The victim's aunt told the

court that the victim reported two sexual assaults to her. The victim's mother also said that she was informed of two sexual assaults. In her testimony, the victim recounted three incidents with the appellant; the first incident was when the appellant sent the victim in to his house to fetch water, but then he followed and attempted to kiss her. The second and third incidents were when the actual sexual intercourse took place. So, the victim was very consistent as to the number of times that she was sexually assaulted.

For the foregoing reasons, we find no merit in both arguments by the appellant and, consequently, the ground of appeal has no merit either.

We would like to take this opportunity to commend the trial magistrate for the correct manner in which he approached the issue of corroboration. His approach showed that he was alive to the fact that, in cases requiring corroboration, the court first looks for corroborative evidence, whether in terms of testimony of other witnesses or in terms of the real evidence produced; and that when that is lacking, the court may now look to any special and compelling grounds which will satisfy it that the danger of false implication has been excluded. Finally, the trial magistrate

exhibited his awareness of the fact that it is not the corroborative evidence, or special and compelling grounds, upon which an accused is convicted, but on the testimony of the suspect witness himself or herself; the corroborative evidence, or the special and compelling grounds, being merely used to satisfy the court that it is safe to rely on the testimony of the suspect witness, as we held in the case of **Nsofu v The People**[4].

All in all, this appeal lacks merit and stands dismissed.

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. Chinyama
SUPREME COURT JUDGE