IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO.174 OF 2017**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

JOSEPH BWALYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

REPUBLIC OF ZAMBIA
COURT OF APPEAL
22 MAY 2018
REGISTRY
P. O. BOX 50067, LUSAKA

CORAM: Chashi, Siavwapa and Ngulube, JJA
On 21st February and 22nd May 2018

For the Appellant: *H. M Mweemba, Principal Legal Aid Counsel, Legal Aid Board*

For the Respondent: *M.K. Chitundu (Mrs.) Deputy Chief State Advocate, National Prosecutions Authority*

JUDGMENT

CHASHI JA, delivered the Judgment of the Court

Cases referred to:

1. **Woolmington v DPP (1935) AC 1**
2. **Machipisha Kombe v The People (2009) ZR 282**
3. **Phiri and Others v The People (1978) ZR 79**
4. **Mkandawire and Others v The People (1978) ZR 46**
5. **Saluwema v The People (1965) ZR 4**
6. **Dorothy Mutale and Richard Phiri v The People (1997) S.J. 51**
7. **Mwewa Murono v The People (2004) ZR 207**
8. **Martin Nc'ube v The People – CAZ Appeal No. 22 of 2017**

9. **Kenneth Mtonga and Victor Kaonga v The People SCZ Judgment No. 5 of 2000**
10. **Partford Mwale v The People – CAZ Appeal No. 08 of 2016**
11. **R v Baskerville (1916) 2 KB, 658**
12. **King v Job Whitehead (1929) 1 KB, 99**
13. **R v Wilson (1914) 58 Cr APP r, 304**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **The Juveniles Act, Chapter 53 of the Laws of Zambia**

Other works referred to:

1. **Evidence: Text and Materials, 2nd edition, by Steve Uglow, London, Sweet & Maxwell 2006**

This is an appeal against conviction. The Appellant was convicted of the offence of defilement of a child, contrary to section 138 of **The Penal Code**[1] as amended by Act No. 15 of 2005 and Act No. 2 of 2011 by the Subordinate Court of the First Class sitting at Kabwe.

The Particulars of the offence were that Joseph Bwalya, on 30th August, 2015 at Kabwe in the Kabwe District of the Central

Province of the Republic of Zambia, had unlawful carnal knowledge of a child (the victim).

Upon committal to the High Court for sentence, the Appellant was sentenced to 20 years imprisonment with hard labour with effect from 15th November 2015.

The evidence of the Prosecution was centered on the evidence of PW3, the victim aged 10 years who after a **voire dire** testified that on the material date, she left home around 15:00 hrs to see her friend Chola. On her way, the assailant got hold of her and took her to his house. While in the house, the assailant undressed and defiled her. He then covered her mouth with a cloth and as a result, she was unable to scream.

When **PW4, Joyce Tembo**, PW3's sister, was bathing PW3 in the evening, PW3 started crying and upon inquiry, PW3 informed her that she had sores on her private parts. When PW4 checked, she noticed that the vagina was reddish and bruised.

PW4 then called **PW1, Given Kunda,** PW3's mother and **PW2, Esnart Zulu,** PW1's friend, who both examined PW3's private parts and observed that the vagina opening was enlarged and bruised. Upon inquiry on who had done that to her, PW3

informed PW1 that she was able to lead her to the person and the house where the offence occurred.

PW1 testified that when they went to Kasanda police station to report the matter, they were advised to go back the next day. The next morning, they were issued with a medical report form for medical examination. At the clinic, PW3 was examined and the findings as set out in the medical report revealed that there were bruises and cuts on the vulva signifying that there was sexual intercourse. PW3 also received ARVs to take for a month.

PW1 further testified that when PW3 led her to the house where the offence transpired; she was informed by **PW7, Frank Kapongwe**, the landlord, that the Appellant had abandoned the house in November 2015.

PW6, Brian Mundia, the police officer, testified that numerous attempts had been made to capture the Appellant who was on the run and was only apprehended on 10th November 2016. It was his evidence that after he interviewed the Appellant, he charged and arrested him for the subject offence.

It was the Prosecution's evidence that at an identification parade conducted by **PW5, Mundia Muyunda,** a police inspector, PW3 identified the Appellant as the assailant.

In his defence, the Appellant gave sworn evidence and testified that at the time of the offence; he was unwell and had travelled to Lusaka for medicals at Levy Mwanawasa hospital. It was his testimony that he had informed PW7's wife about his whereabouts but when he returned from Lusaka, he found that his house was occupied by other tenants. He was subsequently apprehended by the police and taken to Kasanda police station. The Appellant denied having defiled PW3.

The Appellant in his testimony alleged that PW3 and PW1 were in the vehicle when the police arrested him and that PW3 saw him at the police station prior to the identification parade.

Upon reviewing the evidence before him, the trial magistrate was satisfied that it had been proven that the Appellant had carnal knowledge of a child.

In his Judgment, the learned trial magistrate found that, indeed someone had defiled the Prosecutrix. He was of the view that the

commission of the offence was confirmed by the medical report and the evidence of PW1, PW2 and PW4.

The trial magistrate then considered the evidence relating to the identity of the culprit at the identification parade. He was of the view that the fact that PW3 saw the Appellant prior to the identification parade rendered the identification at the parade unreliable. In view of this, the trial magistrate discounted such evidence completely. That notwithstanding, he relied on the odd coincidence of the Appellant deserting his house after the incident happened as having established a link between the Appellant and the offence.

The court was satisfied that the vital ingredients of the offence had been proven by the Prosecution and found the Appellant guilty as charged and convicted him accordingly.

Dissatisfied with the Judgment of the lower court, the Appellant has appealed to this Court advancing one ground of appeal couched as follows:

The learned trial court erred both in law and in fact when it convicted the Appellant of the offence on insufficient evidence.

At the hearing, both learned Counsel relied entirely on their filed written heads of argument.

In support of their lone ground of appeal, Mr. Mweemba, Counsel for the Appellant, submitted that in criminal matters, the burden of proof lies with the prosecution throughout the case and the standard required is beyond reasonable doubt. Where there is any doubt in the mind of the court, such doubt must be resolved in favour of the accused. The case of **Woolmington v DPP**[1] was cited in that respect.

It was submitted that the learned trial court was on firm ground when it found that the identification parade was unreliable based on the fact that PW3 had seen the Appellant prior to the identification parade being conducted.

Counsel submitted that the trial magistrate, having correctly found that the identification at the parade was unreliable, erred when he proceeded to rely on the evidence of PW1 and PW7 in arriving at the conclusion that the Appellant was the perpetrator of the offence.

According to Counsel, the evidence of PW7 at page 14 of the record of proceedings does not provide sufficient details as to

when the Appellant left the house in question. That further the Appellant, during cross examination, stated that he had informed PW7's wife about his whereabouts and that he had left her with the keys to the house. According to Counsel this evidence was not challenged by the State.

It was Counsel's submission that the Appellant's conduct was not strange and did not amount to an odd coincidence as per the holding of the lower court. It was contended that the Appellant proffered an explanation for his absence and such explanation was reasonably possible. Counsel drew our attention to the case of **Machipisha Kombe v The People**[2] where it was held *inter alia* that:

> *"Odd coincidences constitute evidence of something more. They represent an additional piece of evidence which the court is entitled to take into account. They provide a support of the evidence of a suspect witness or an accomplice or any other witness whose evidence requires corroboration. This is the less technical approach as to what constitutes corroboration."*

Counsel further relied on the cases of **Phiri and Others v The People**[3] and **Mkandawire and Others v The People**[4] where it was stated that:

> "odd coincidence can, if unexplained, be supporting evidence."

It was submitted that the Appellant testified that at the time of the offence he was receiving medical attention in Lusaka and such information was communicated to PW7's wife. It was Counsel's submission that this amounted to an explanation and as such his alleged running away cannot be said to be an odd coincidence.

In support thereof, the case of **Saluwema v The People**[5] was cited in which the Court held *inter alia* that:

> *"If the accuser's case is reasonably possible, although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof."*

According to Counsel, the explanation proffered by the Appellant was reasonably possible and the circumstances of the case

reveal that other inferences could have been drawn from the evidence on record.

It was further submitted that it was not known when the Appellant left the house in question and no evidence was adduced to the effect that other persons had no access to the house in question other than the Appellant. According to Counsel, it is possible that someone other than the Appellant could have defiled the Prosecutrix.

Counsel drew our attention to the case of **Dorothy Mutale and Richard Phiri v The People**[6] where it was held *inter alia* that:

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

It was further submitted that, there were several favourable inferences that could have been drawn other than that of the guilt of the accused. As such the Prosecution failed to prove the case beyond reasonable doubt and the principles as laid down in the case of **Mwewa Murono v The People**[7] were not met.

Lastly, Counsel prayed that the appeal be allowed and the conviction and sentence be set aside.

On behalf of the State, the learned Deputy Chief State Advocate Mrs. Chitundu supported the conviction and sentence.

In her written submissions, she submitted that there was sufficient evidence in the lower court to warrant the conviction of the Appellant. Counsel contended that the offence of defilement requires corroboration of the offence as well as corroboration as to the identity of the offender. Reliance was placed on the case of **Machipisha Kombe v The People**[2] where the Supreme Court gave guidance on the requirement of corroboration as follows:

> *"Corroboration is 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. The Supreme Court went further to state that the approach should no longer be static. There is no need to be technical about corroboration, evidence of something more, which though not constituting corroboration as a matter of strict law, yet satisfies the Court that the*

danger of false implication has been excluded, and it is safe to rely on the evidence implicating the accused, is sufficient."

According to Counsel it was not in dispute that the Prosecutrix was defiled, this was confirmed by the evidence of PW1, PW2, PW4 and the medical report.

On the issue of corroboration as to the identity of the offender, Counsel submitted that the evidence of PW3 was in line with that of PW1, PW2 and PW4 and linked the Appellant to the offence.

Counsel further submitted that despite the overwhelming evidence against the Appellant, he did not challenge PW3 as to the commission of the offence but merely cross examined her on when she first identified him. According to Counsel, the reason why such evidence was not challenged is due to the fact that the Appellant was guilty of the offence.

It was submitted that PW3 and the other Prosecution witnesses had no prior knowledge of the Appellant before the incident occurred and this was confirmed by the Appellant. It was further submitted that it would be odd for the Prosecutrix who had not

previously known the Appellant to have led others to a house and allege that the Appellant lived there.

It was Counsel's contention that since the Appellant was not previously known to the Prosecutrix, she lacked the motive to falsely implicate him. As such the only reason she was able to point out the Appellant at the parade is because he was the assailant.

According to Counsel, there was strong identification evidence based on the fact that while at the police station, PW3 was able to identify the Appellant on his way out of the police cells. However, Counsel was of the view that even though the identification parade was conducted, this was a case in which such parade was not necessary as PW3 had already identified the Appellant before the parade was mounted and such parade was of no relevance.

Counsel submitted that it was an odd coincidence that the Appellant moved from his house after the incident had occurred and that such a move was necessitated by the fact that he was guilty of the subject offence. We were in that respect referred to the case of **Phiri and Others v The People**[3].

According to Counsel, when the Appellant was put on his defence at page 18 of the record of appeal (the record), he merely put up a bare denial that he did not commit the offence. Reliance was placed on the case of **Saluwema v The People**[5]

Counsel submitted that the Appellant's case cannot be deemed to be reasonably possible based on his bare denial of the offence. The only inference that could be drawn was that the Appellant was indeed the perpetrator of the offence.

We were urged to dismiss the ground of appeal and uphold the conviction.

We have carefully considered the evidence on record, the Judgment of the trial court and the submissions by both learned Counsel.

Before we deal with the ground of appeal, we note that this being a case of defilement, a perusal of the proceedings on record reveals that the proviso to section 138(1) of **The Penal Code**[1] was not brought to the attention of the accused at the point of taking plea neither was it explained to him at the point he was put on his defence.

We, however note that though the proviso was not brought to the attention of the accused, the learned magistrate made reference to it in his judgment at page J4. He was of the view that based on his ocular observation; the defence would not have been available to him as the victim could not be considered to be 16 years or above.

It is a legal requirement that the proviso to Section 138(1) of **The Penal Code**[1] must be explained to an accused person facing a charge of defilement at an early stage of the proceedings. The failure to explain the defence is an irregularity on the part of the court and consequently will prejudice the Accused.

However, in the case at hand, the child was 9 years old at the time the offence was committed and as such does not fall within the ambit of a borderline case. In our recent decision in the case of **Martin Nc'ube v The People**[8] we were of the view that the effect of the omission is not absolute but must be considered on a case to case basis. Therefore the test to be applied in cases where such an omission has occurred is whether the Accused was prejudiced by such omission.

Considering the age of the victim in casu, we agree with the trial magistrate to the extent that even if the proviso had been brought to the attention of the accused, it would not have been available to him. There was no prejudice occasioned to the Appellant by the failure to explain the proviso.

We now turn to the ground of appeal.

The sole ground of appeal, as we see it mainly deals with the issue of identity of the assailant.

The evidence as it stands is that PW3 was defiled and this was corroborated by the medical report which revealed that the vulva had some bruises and cuts which was indicative that someone had sexual intercourse with PW3. The court also relied on the evidence of PW1, PW2 and PW3 who inspected PW3. Therefore, what is in issue is the identity of the perpetrator of the alleged offence.

The gist of the Appellant's argument is that the lower court erred when it relied on the evidence of PW1 and PW7 after it correctly found that the identification by PW3 at the parade was unreliable. On the other hand, the State contend that the identification at the parade by PW3 was properly conducted and

that in fact, it was unnecessary to conduct the same considering that PW3 had previously identified the Appellant when he was walking out of the cells prior to the parade.

The trial magistrate had this to say at page J4 of the Judgment regarding the identification at the parade:

> *"In response to a question by accused, PW3 informed the court she first saw accused at Kasanda police post before the parade was conducted at Kasanda police post. She recounted further that at first she could not see accused as he was hiding behind a metal sheet but was able to point at him as he was emerging from the police cells. Under cross examination by accused, PW5 told the court accused did not inform him about the fact that accused was with PW3 at Kasanda police post and in the motor vehicle, on the way to Kasanda police. The criticism is therefore that PW3 had prior view of the accused before an identification parade was conducted. In Musonda vs the People(1968) ZR 93 the practice of allowing witness to see accused persons at a police station before identification parade was held was condemned. The court further observed that those conducting identification parade were to show high standards of fairness and impartiality and that evidence of identification which was improperly done cannot be relied upon to support a conviction. In the People v Kamwandi (1972) ZR 131 the High Court held that showing an accused person to the witness before the*

formal parade is improper and unfair. In the case before me I found the evidence of the identification parade is unreliable in view of the aforesaid..."

From the above portion of the Judgment, we note that the learned trial magistrate expressed dissatisfaction with the identification at the parade and discounted it entirely. He then proceeded to rely on the evidence of PW1 and PW7 to arrive at its decision.

We wish to state here, that it is trite law that where the evidence of identification is weakened, all that needs to be done by the trial court, is to look elsewhere for evidence to support and strengthen the weak identification evidence. This is fortified by case of **Kenneth Mtonga and Victor Kaonga v The People**[9] where the Supreme Court held inter alia that:

i) If, therefore, any irregularity committed in connection with the identification parade can be regarded as having any effect whatsoever on the identification, it would not be to nullify the identification given the ample opportunity available to the witnesses.

(ii) If the identification is weakened then, of course, all it would need is something more, some connecting link in order to remove any possibility of a mistaken identity.

Going by the holding in the above case, we are of the view that the trial magistrate misdirected itself by discounting the identification evidence entirely instead of looking elsewhere for something more to strengthen the said weak identification evidence.

The learned trial magistrate having done away with the identification evidence of PW3, he relied on the evidence of PW1 and PW7 to the effect that the Appellant deserted his house without informing his landlord or relatives after the incidence. He found this to be an odd coincidence thereby establishing a link between the Appellant and the offence.

As earlier alluded to, the evidence on record is mainly centered on PW3, the Prosecutrix aged 10 years. This essentially entails that Section 122 of **The Juveniles Act**[2] automatically comes into play and it is apparent to us that in advancing their respective arguments, both learned Counsel were oblivious to this provision of the law.

We have time and again emphasized as we did in the case of **Partford Mwale v The People**[10] that where the court is faced with the evidence of a child of tender years, as was the case here, the applicable law is to be found under the provisions of **The Juveniles Act**[2]. Section 122 provides as follows:

> *"Where, in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth:*
>
> *Provided that-*
>
> *(a) if, in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and does not understand the duty of speaking the truth, the court shall not receive the evidence; and*
>
> *(b) where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to*

be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused."

It is clear from the aforestated provision, that the test to be applied is two limbed; firstly the court will conduct a **voire dire** to ensure that the child possess sufficient intelligence for the evidence to be received on oath and that the child understands the duty of speaking the truth. Secondly, where the evidence of a child of tender years is admitted and given on behalf of the Prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused.

From the evidence on record, the court was alive to the provisions of section 122 (a) and correctly conducted a **voire dire** which is to be found at pages 8 and 9 of the record. In our view such **voire dire** was sufficient to justify the reception of the child's evidence.

However, regarding the second limb, we note that the learned magistrate did not address his mind to the provisions of section 122(b) of **The Juveniles Act**[2] relating to corroboration.

Corroboration is that independent evidence which supports the evidence of a witness in a material particular. In defining what constitutes corroboration, Lord Reading CJ had this to say in the case of **R v Baskerville**[11] at page 667:

> *"We hold that evidence in corroboration must be independent testimony which affects the accused by connection or tending to connect him with the crime. In other words it may be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it"*

In such a case as the present, where the offence but not the involvement of the accused is not disputed, there is of course no need for us to expatiate on the corroborative evidence regarding the commission of the offence. What is then needed is independent evidence corroborating the testimony of the suspect witness which in our case is PW3 with regard to identity.

The trial magistrate in arriving at his decision regarding the identity of the offender had this to say at page J4 of the Judgment:

"The question still remains is the evidence that connects accused to the crime other than that of PW3. In my view there is circumstantial evidence from PW1, and 7. When PW1 went to the house PW3 said the offence occurred at, she found the place deserted. PW7 recounted that the occupant of the house accused had left the place without word and he had to inform DW2 to collect accused belongings. Now to my mind the disappearance of accused from his rented house without notifying either PW7 nor his own relatives appears to be an odd coincidence. This took place following the assault on PW3. In my view I find that there is enough evidence to support my finding against the accused. This was from PW1 and 7..."

From the above portion of the Judgment, the learned trial magistrate when arriving at his decision did not address the provisions of Section 122(b) of **The Juveniles Act**[2] which requires corroboration as a matter of law where a child with tender years is concerned.

However, a perusal of the Judgment reveals that even though the learned trial magistrate made no reference to the

requirement of corroboration, it would appear that he was looking for something more to support the evidence that the Appellant committed the offence. In doing so, he found the same in the circumstantial evidence of PW1 and PW7 to the effect that the Appellant left home without informing his landlord or relatives. The court was of the view that this amounted to an odd coincidence establishing a link between the Appellant and the offence.

While we are aware that circumstantial evidence can constitute corroboration, such evidence must be able to confirm that the witness is telling the truth in some part of her story and that the only rational inference open to the court is that the accused committed the offence with which he is charged. Therefore, what needs to be determined is whether this odd coincidence amounts to corroboration as envisaged under Section 122(b) of **The Juveniles Act**[2].

In the case of **King v Job Whitehead**[12], it was held that corroboration must emanate from a source other than the witness requiring corroboration. It must therefore come from a source which is independent of the witness whose evidence is to

be corroborated. In other words, in order that the evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated.

In casu, it is PW3 who led PW1 to the house where the offence occurred and it is PW3's evidence that it is the Appellant that committed the offence. It would appear that PW1's evidence emanated from PW3 thereby rendering PW3 the source. According to the above mentioned case, corroboration must emanate from a source independent of the witness whose evidence requires to be corroborated. Relying on the evidence of PW1 would essentially entail that PW3 was corroborating her own evidence.

From the evidence on record, the subject offence is alleged to have occurred on 30th August 2015 and according to PW7 and PW1, the Appellant abandoned his house sometime in November 2015. We note, however that there is no evidence to indicate exactly when PW1 and PW3 visited the Appellant's house.

This evidence, or lack thereof, casts doubt on whether the Appellant did actually commit the subject offence. It does not point to the fact that the Appellant's running away was

necessitated by the fact that he committed the offence. In the case of **Machipisha Kombe v The People**[2] where the Supreme held inter alia that:

> *"Odd coincidences constitute evidence of something more. They represent an additional piece of evidence which the court is entitled to take into account. They provide a support of the evidence of a suspect witness or an accomplice or any other witness whose evidence requires corroboration. This is the less technical approach as to what constitutes corroboration."*

We find that this odd coincidence does not constitute "something more" which tends to confirm that the Appellant committed the offence and in fact we find that the Appellant's explanation appears more plausible considering the circumstances.

We are of the considered view that the evidence of PW1 and PW7 did not amount to corroboration as envisaged under Section 122(b) of **The Juveniles Act**[2] which requires corroboration as a matter of law.

In addressing corroboration as a matter of law, the learned authors of **Evidence, Text and Materials**[1] at Page 401 had this to say:

> *"This is the situation where corroboration in the form of independent evidence is required as a matter of law. In other words, if there is no supporting evidence the Judge must direct an acquittal. These situations are all statutory crimes."*

In the English case of **R v Wilson**[10], Edmund Davis LJ, went on to state that:

> *"it is established by authority that, where one has a statutory provision about the requirement of corroboration, the customary warning in sexual cases about the danger of convicting in the absence of corroboration is insufficient. The jury must be told in clear terms that unless corroboration required by the statute is forthcoming, they cannot convict."*

The above quotes are relevant to the case at hand as Section 122(b) of **The Juveniles Act**[2] contains a statutory requirement for corroboration and if the trial court had addressed its mind to the said provision, it would not have arrived at the same decision.

It is therefore our firm view that the lower court erred in law by convicting the Appellant in the absence of corroborative evidence in support of PW3's evidence as to the identity of the offender and as such the evidence of PW3 cannot be relied upon.

In the circumstances, we allow the appeal and set aside the conviction and the Appellant is set at liberty.

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J. CHASHI
COURT OF APPEAL JUDGE

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M.J. SIAVWAPA
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE