IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 128/2017**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

JOSEPH MULENGA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
on the 7th August, 2018 and 5th September, 2018

For the Appellant: Mrs. M.M. Marebesa-Mwenya, Legal Aid Counsel

For the Respondent: Ms. S. Muwamba, Acting Principal State Advocate

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Kambarage Kaunda vs. The People (1990 - 1992) Z.R. 91**
2. **Simon Malambo Choka vs. The People (1978) Z.R. 243**
3. **Emmanuel Phiri vs. The People (1982) Z.R. 77**
4. **Bernard Chisha vs. The People (1980) Z.R. 36**
5. **Mwewa Murono vs. The People (2004) Z.R. 207**
6. **Machipisha Kombe vs. The People Judgment No. 27 of 2009**
7. **Shawaz Fawaz and Prosper Chelelwa vs. The People (1995-1997) Z.R. 3**
8. **Yokoniya Mwale vs. The People SCZ Appeal No. 285/2014**
9. **George Musupi vs. The People (1978) Z.R. 271**

10. **Ivess Mukonde vs. The People (2011) Z.R. 134, Vol. 2**
11. **Benson Nguila vs. The Queen (1963-1964) Z.R. 17 (Reprint)**

The appellant was convicted of the offence of defilement by the Subordinate Court sitting at Chinsali in the Muchinga Province of the Republic of Zambia. The particulars alleged that between July and October 2014, the appellant had unlawful carnal knowledge of the named child under the age of 16 years.

The facts established by the prosecution are that the appellant, then a student teacher, invited the prosecutrix to his house to assist him in marking Grade 7 tests and it was while she was in his house that he defiled her in his bedroom. He gave her two scones and told her not to report the incident to her parents. The second incident happened when he called her to the classroom where he again had unlawful carnal knowledge of the prosecutrix. The mother of the prosecutrix produced an under-five card showing that she was born on the 11th June, 2000 and that she was aged 13 years at the time she was defiled. The prosecutrix was examined by a doctor and found to be eight weeks pregnant but unfortunately the pregnancy was naturally terminated.

According to the aunt to the prosecutrix, the appellant approached her and admitted being responsible for the pregnancy and pleaded for forgiveness. The mother to the prosecutrix also stated that the appellant admitted he had defiled the child at a meeting attended by his mother and other people.

In his defence, the appellant elected to give an unsworn statement in which he denied the allegation though he admitted that the child was his pupil.

In his judgment, the trial magistrate was alive to the need for corroboration as a matter of law with respect to the evidence of the prosecutrix. In addressing the issue of corroboration as to the identity of the offender, the trial magistrate found corroboration in the evidence of the mother and aunt of the prosecutrix who stated that the appellant had asked for forgiveness. The trial magistrate saw no reason why the mother and aunt to the child could implicate the appellant who was the child's teacher. As to corroboration on the commission of the offence, the trial court

found solace in the medical report which confirmed that the child was defiled.

Before the High Court for sentencing, the appellant's Counsel pleaded for leniency pointing out that he was remorseful and that as a teacher his future was now shattered and the court was urged to impose a light sentence considering that the appellant was in his youthful years and capable of reforming. The learned sentencing judge noted that there were aggravating circumstances in this case namely that the victim of the sexual assault was the appellant's pupil whom he should have protected from sexual abuse. Hence the sentence of 20 years imprisonment with hard labour was imposed on the appellant.

In this court, Mrs. Marebesa-Mwenya learned Counsel for the appellant relied on the heads of argument filed herein. The gist of the sole ground of appeal is that the trial magistrate erred in convicting the appellant based on the evidence of PW2 and PW3 the aunt and mother to the prosecutrix respectively. Learned Counsel contended that the two witnesses fell in the category of witnesses with an interest to serve and that, therefore, they could not

corroborate the prosecutrix's evidence. She relied on the case **Kambarage Kaunda vs. The People**[1] and that of **Simon Malambo Choka vs. The People**[2] where we held that:

> **(i) A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanour and the plausibility of his evidence. That "something more" must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness.**
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> **(ii) In the circumstances of this case the evidence of the one suspect witness could not be corroborated by the evidence of the other suspect witness.**

Counsel's argument is that in the absence of independent evidence apart from the aunt and mother of the prosecutrix, the trial court ought to have acquitted the appellant as there was no corroboration as to the identity of the offender. Mrs. Marebesa-Mwenya relied heavily on the case of **Emmanuel Phiri vs. The People**[3] and the case of **Bernard Chisha vs. The People**[4] which she cited at length to emphasize that a child's testimony requires corroboration as children are prone to fantasy, influence of third parties and may not be able to separate the truth from falsehood. Counsel submitted that in terms of the principle laid down in

Mwewa Murono vs. The People[5] the prosecution failed to discharge the burden that it was the appellant who defiled the child.

In her brief augmentation, Counsel for the appellant contended that the fact that the appellant was the victim's teacher cannot lead us to the conclusion that he was the perpetrator. Mrs. Marebesa-Mwenya argued that although the appellant did not cross-examine the mother of the prosecutrix with regard to his alleged admission that he had impregnanted the prosecutrix, corroboration was still required.

In supporting the conviction, Ms. Muwamba submitted that there was sufficient evidence on record which pointed to the guilt of the appellant. She conceded that corroboration of the evidence of the child was a matter of law. The learned Acting Principal State Advocate rallied behind the trial court's view that corroboration or "something more" existed in the form of the confession the appellant made to PW2 and PW3 (the aunt and mother to the prosecutrix). She pointed out that the evidence of the mother to the prosecutrix to the effect that the appellant confessed to the commission of the

offence was not challenged. And further that the appellant gave an unsworn testimony which reduced the weight of his evidence. Learned Counsel cited the case of **Machipisha Kombe vs. The People**[6] where we held, *inter alia,* that corroboration was no longer technical adding that there was sufficient evidence to sustain the appellant's conviction.

The issue for our determination in this appeal, is whether there was corroboration as to the identity of the offender within the meaning of the celebrated case of **Emmanuel Phiri vs. The People** and indeed other cases in which we have pronounced ourselves on this issue. Mrs. Marcbesa-Mwenya contends that the evidence of the aunt and the mother to the prosecutrix that the appellant admitted and asked for forgiveness for his alleged despicable act needs corroboration because the two witnesses are witnesses with an interest to serve. For this reason, Counsel reasoned, the two witnesses could not corroborate the evidence of the prosecutrix. Counsel also insisted that the evidence of the mother to the prosecutrix cannot stand despite the fact that the appellant did not cross-examine the witness. We are alive to the authorities cited by

Mrs. Marebesa-Mwenya. Should we agree with Mrs. Marebesa-Mwenya then we must acquit the appellant.

First of all, we wish to address Mrs. Marebesa-Mwenya's argument that despite the fact that the appellant did not cross-examine the mother to the prosecutrix, that evidence still required corroboration because she was a witness with an interest to serve. The learned authors of **Cross on Evidence 6th Edition** state that:

> **"The object of cross-examination is two-fold, first, to elicit information concerning facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted, and secondly to cast doubt upon the accuracy of the evidence-in-chief given against such party.**

In the case of **Shawaz Fawaz and Prosper Chelelwa vs. The People**[7] we held, *inter alia*, that:

> **(i) Cross-examination cannot always shake the evidence of untruthful witnesses in every respect; it is sufficient to show the unreliability of a witness if he is shown to have told an untruth about an important part of his evidence.**

In **Shawaz Fawaz and Prosper Chelelwa** we emphasized the value of cross-examination of a witness. That it brings out any untruth in a witness' evidence. It is a test of the witness' evidence and it is up to the opposing party to question the witness and

possibly discredit that witness. In the case in *casu*, the appellant cross-examined the aunt to the prosecutrix but left the mother's evidence unchallenged which was to the effect that there was a meeting to discuss the fact that the prosecutrix was expecting and it was at that meeting that the appellant admitted being responsible for the pregnancy. Surely, the trial court or indeed this court cannot be expected to ignore the uncontroverted evidence which without a doubt gave support to the prosecutrix's evidence that the appellant was responsible for her pregnancy and that he had defiled her twice: once in his bedroom and also in the classroom. Granted that the appellant had no legal representation during trial yet he managed to cross-examine the prosecutrix, her aunt and the arresting officer but left the evidence of the mother unchallenged. Why? We can only conclude that this was because she told the truth and he could not challenge her. The unchallenged evidence of the mother to the prosecutrix corroborated the prosecutrix's evidence that the appellant defiled her. The question of lack of corroboration of the mother's evidence therefore did not arise and the trial court was entitled to rely on it in its entirety.

We now address the main issue in contention which is whether there was corroboration as to the identity of the offender in view of the fact that the trial court relied on the evidence of the mother and the aunt of the prosecutrix who were witnesses with an interest to serve. Counsel for the appellant referred us to the case of **Kambarage Kaunda vs. The People** which in our view has been cited out of context many a time by lawyers as only a part of the holding is usually relied upon. We held, *inter alia*, that:

> **(ii) That as the prosecution eye witnesses were relatives or friends of the deceased and could, therefore, well have had a possible bias against the appellant; and as they were the subject of the initial complaint by the appellant as having attacked him and his friends and, therefore, had a possible interest of their own to serve, failure by the learned trial judge to warn himself and specifically to deal with this issue was a misdirection;**

It is important to note that in the **Kambarage Kaunda case** the witnesses were both relatives of the deceased and were also suspects as they were reported to have allegedly attacked the appellant. This issue of relatives and friends of the accused or appellant was dealt with in much detail in the case of **Yokoniya Mwale vs. The People.**[8] In that case, the appellant was charged with the murder of a mental patient who according to the appellant

he found in the process of stealing his motor bike. The witnesses whose evidence was in contention were that of a neighbour who found the appellant assaulting the deceased and a brother of the deceased. It was argued by Counsel for the appellant that the trial court erred in relying on the evidence of the neighbour and the brother to the deceased as they were witnesses with a bias or with an interest to serve and that their evidence required corroboration. We stated thus after considering various authorities including **Kambarage Mpundu Kaunda vs. The People, Simon Malambo Choka vs. The People** and **George Musupi vs. The People**[9] that:

> **We ought however, to stress, that these authorities did not establish, nor were they intended to cast in stone, a general proposition that friends and relatives of the deceased, or the victim are always to be treated as witnesses with an interest to serve and whose evidence therefore routinely required corroboration. Were this to be the case, crime that occurs in family environments where no witnesses other than near relatives and friends are present, would go unpunished for want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of want of independent corroboration.....** (Emphasis ours)

Looking at the evidence on record, our firm view is that the trial magistrate cannot be faulted for relying on the evidence of the mother and the aunt to the prosecutrix.

We wish to add further that apart from the evidence of the mother and the aunt, the fact that the appellant was the victim's teacher afforded him the opportunity to defile the child. We have held that opportunity provides corroborative evidence. In the case of **Ivess Mukonde vs. The People**,[10] we held, *inter alia*, that:

> **2. Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of a particular case. The circumstances and the locality of the opportunity may be such that in themselves amount to corroboration.**

We also note that the appellant elected to give unsworn testimony which was his constitutional right. In the case of **Benson Nguila vs. The Queen**,[11] the evidence against the appellant was that of two eye-witnesses who saw the appellant chasing the headman from the village with a knobkerry and an axe, then they saw him set fire to two houses in the village; the complainant's house, the subject of the charge, and the headman's house. Against this direct testimony the appellant, after being warned of his rights, elected to make an unsworn statement. In the said case, it was stated that:

"...The court may attach what weight it chooses to the contents of such statement. The balance of opinion seems to be that an unsworn statement is evidence in the case, but is of less weight than sworn testimony, which can be tested by cross-examination. ..."

In the present appeal, considering the prosecution evidence not much weight could be attached to the appellant's unsworn statement in which he acknowledged that he was the victim's teacher.

Further, it is clear that there were odd coincidences in this case. Ms. Muwamba relied on the case of **Machipisha Kombe vs. The People** where we held, *inter alia*, that:

4. Law is not static; it is developing. There need not now be a technical approach to 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.

We held further that:

5. 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.

In the appeal before us, it is an odd coincidence that the same person who was the teacher to the appellant should be the same person alleged to have approached the aunt to the prosecutrix to ask for forgiveness and also that he admitted at a family meeting, in the presence of his own mother and the mother of the prosecutrix, that he was responsible for the prosecutrix's pregnancy. We take the firm view that all these odd coincidences constituted something more which confirmed that the prosecutrix was telling the truth that it was the appellant who defiled her.

And to crown it all, in mitigation, Counsel for the appellant before the sentencing judge in the court below informed the court that the appellant was "remorseful to have defiled a minor".

Having perused the evidence before the trial court, we cannot fault the trial magistrate as the evidence against the appellant was

overwhelming and the prosecution proved their case beyond reasonable doubt that it was the appellant who defiled the prosecutrix. We uphold the conviction and the sentence of 20 years and dismiss the appeal for lack of merit.

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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