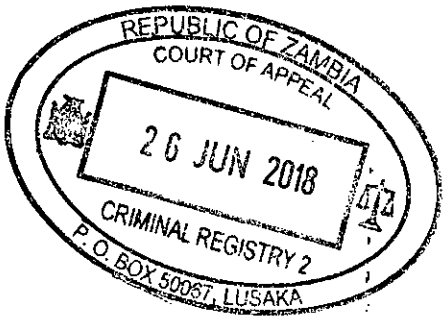
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO.184/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:



KINGSTONE MAKUNGU **Appellant**

AND

THE PEOPLE **Respondent**

Coram: Chashi, Mulongoti and Ngulube JJJA

On 20th February 2018, and 26th June 2018

For the Appellant: Mr. K. Muzenga, Deputy Director, Legal Aid Board and Mr. H.M: Mulonda of Messrs L.M Chambers

For the Respondent: Mr. M. Lupiya- State Advocate, National Prosecutions Authority

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J U D G M E N T

MULONGOTI, JA, delivered the Judgment of the Court

Cases referred to:

1. **Pesulani Banda v. the People (1979) ZR 202**
2. **Mwewa Murono v. the People (2004) ZR 207**

3. **Charles Lukolongo and others v the People (1986) ZR 115**
4. **Chimfwembe v The People SCZ/9/145/2013**
5. **Joseph Mulenga and another v. The People (2008) ZR 1**
6. **Mulenga v The people (1972) ZR 272**
7. **Director of Public Prosecution v Ngoma (1976) ZR 189**
8. **Katebe v The People (1975) ZR 13**
9. **Emmanuel Phiri and others v The People (1978) ZR 79 (SC)**
10. **Davies Chiyengwa Mangoma v The People SCZ Appeal No. 217/2015**
11. **Kajimanga v Chilemya SCZ Appeal No. 50/2014**
12. **Mark Mutengo v The People (CAZ) Appeal No. 139/2017**

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**

The appellant was arraigned in the Subordinate Court at Lusaka of one count of incest contrary to **section 159 of the Penal Code**[1]. The particulars alleged that the appellant had unlawful carnal knowledge of his niece between January, 2015 and February, 2016. He was convicted and committed to the High Court which sentenced him to 20 years imprisonment with hard labour. The appellant now appeals against conviction.

Below is a summary of the evidence adduced in the Subordinate Court.

The prosecutrix, PW2, who was aged 15 at the material time, and a double orphan had been living in Mufulira with her grandmother. She later went to live with her uncle, the appellant, in Lusaka where she enrolled in school. She testified that about six people

lived in her uncle's house. They lived in peace until September, 2014 when the appellant started making sexual advances towards her. One day, he called her, put her on his laps and started kissing her. She moved away from him and later reported to her aunt, PW3, the appellant's wife. PW3 called the prosecutrix and the appellant for a meeting over the report but the appellant denied the allegations. The court heard that on another occasion in 2015 the appellant asked for water to drink from the prosecutrix. When she took the water she found him in the bedroom near the door naked. She left the water by the door and ran outside the house where she waited for her cousins to return. The next day, her aunt and cousins were away from home. The appellant called her and asked her why she ran away the previous day. When she tried to run away, he pinned her to the bed, removed her pant, had sexual intercourse with her and told her not to tell a soul. It was her testimony that the appellant had sexual intercourse with her again in March 2015 in the study room and in September 2015 in her bedroom. According to her, despite the sexual abuse, she remained in the house because she had nowhere to go.

She later confided in one of her male cousins, who advised her to gather evidence before she reported to anyone. The prosecutrix and her cousin later reported to her aunt, PW3, who advised her to keep the matter a secret. She then reported to her teacher, PW1, who took her to the University Teaching Hospital (UTH) for examination.

PW1, Alice Kabuswe, who was the prosecutrix's teacher at Nyumba Yanga School confirmed that, on 17th February, 2016, the prosecutrix informed her that she was a double orphan who had been invited by her uncle to live with him in Lusaka. The prosecutrix reported that one day, the appellant asked her if she had a boyfriend which she denied. The appellant then started touching her and had sexual intercourse with her. The prosecutrix told PW1 that she contemplated running away from home due to the sexual abuse but PW1 calmed her down. PW1 denied that she was aware that the prosecutrix and her cousins had a ploy against the appellant or that the prosecutrix had an affair with a married man.

PW3, Janet Nyangu Makungu, the aunt to the prosecutrix and wife to the appellant testified that the prosecutrix was problematic and had a bad attitude. She kept pornographic material on her phone and used to dress indecently. PW3, however, confirmed that she did not know anything about the incest as she only learnt of it when the police apprehended the appellant.

After close of the prosecution case, the trial court found the appellant with a case to answer and put him on his defence.

In his defence, the appellant denied having sexual intercourse with the prosecutrix who is his late brother's daughter. His defence was that he was being falsely implicated after he refused to give the

prosecutrix and her cousins Kunda and Kennedy money. They believed that he was stingy and had been favouring his wife's relatives. He got angry and chased all three of them out of his house. The prosecutrix returned to apologise after which he took her back in while planning to call for a family meeting. Before he could do that, he was apprehended sometime in March 2016.

DW2, Kennedy Bwalya, said he connived with his cousins Kunda and the prosecutrix to falsely implicate the appellant after their failed attempt to blackmail him into giving them money. *According* to him, the accused used to have a lot of money during that period. DW2 and his cousins were unhappy because the appellant used to give his wife's relatives money. After they failed to steal the appellant's money, they planned to falsely accuse him of having sexual intercourse with the prosecutrix hence his arrest.

The trial magistrate found that the prosecutrix is the appellant's niece who lived with him between 2015 and 2016 with other dependants, male and female. The magistrate found as a fact, on page 30 of the record, that from the medical report, the prosecutrix had experienced sexual intercourse.

The magistrate further found that, the findings of the doctor in the medical report were consistent with the circumstances of the alleged offence. Furthermore, that the prosecutrix and DW2 arranged to take

pictures and record the subsequent acts of sexual abuse but before they could do so, the prosecutrix reported to her teacher, PW1.

The trial court concluded that, the only reasonable inference that could be drawn regarding the blackmail is that DW2 knew of the appellant's previous sexual encounter with the prosecutrix so that there was a likelihood of the appellant doing it again and that it was odd that of the males in the house, the appellant is the only one who was mentioned as having had sexual intercourse with the prosecutrix.

The magistrate reasoned that being an orphan, the prosecutrix had no motive to falsely implicate the appellant who was her only bread winner and carer. She noted that the sexual experience the doctor found was as a result of the carnal knowledge the appellant had with the prosecutrix. The appellant was accordingly convicted and committed to the High Court for sentencing. The High Court found that the conviction was safe and sentenced the appellant to twenty years imprisonment with hard labour.

Discontented with the conviction, the appellant now appeals to this court raising five grounds as follows:

1. **The learned trial court erred in law and fact when it found the appellant with a case to answer and put him on his defence**

when the evidence before it was not sufficient enough to warrant the appellant being found with a case to answer.

2. **The learned trial court erred in law and fact when it used a medical report which was not tendered into evidence by the prosecution.**
3. **The learned trial court erred in law and fact when it proceeded to convict the appellant without evidence of arrest before it.**
4. **The learned trial court erred in law and fact when it convicted the appellant in the absence of corroborative evidence.**
5. **The trial court erred in law and fact when it proceeded to sentence the appellant in the absence of compelling evidence in the light of the state not supporting conviction.**

In support of the grounds of appeal, Mr. Muzenga and Mr. Mulonda (Co-counsel) who appeared for the appellant filed heads of argument.

It is argued in relation to ground one that at the close of the prosecution case, there was insufficient evidence to place the appellant on his defence. That the offence of incest is a sexual offence for which, as a matter of strict law, corroboration is required as to the identity of the offender and the commission of the offence.

According to Mr. Muzenga, on the facts of this case, there is no corroboration as to the commission of the offence as no medical evidence was tendered. No medical report was produced in the court

below nor was any medical expert called to testify. Relying on the decisions of the Supreme Court in the cases of **Pesulani Banda v the People**[1] and **Mwewa Murono v the People**[2] to the effect that where a document is referred to in evidence but it is not produced, acceptable evidence should be given why it was impossible to produce it. And that a submission of no case to answer may be upheld where no evidence is laid to produce the essential element of the alleged offence. We are urged to uphold ground one and acquit the appellant. Ground two was argued on the same premise as ground one except counsel referred to the case of **Charles Lukolongo and others v the People**[3] where the Supreme Court held that:-

> ***"If medical evidence is available it should be called rather than a court relying on its opinion."***

In arguing ground three, it is the submission of counsel that in sexual offences, there is need to rule out the possibility of false implication hence the need for evidence of arrest being adduced to rule out any possibility of false implication.

The case of **Chimfwembe v the people**[4] was also referred to where it was held that:

> ***"It is trite law that the evidence of the victim or complainant in sexual offences requires corroboration. Corroboration entails independent or separate supporting evidence which affect the accused by connecting or tending to connect him or her with the crime."***

Accordingly, that the trial magistrate erred to convict the appellant in the absence of the evidence of arrest.

Counsel, succinctly argues in ground four that the witnesses whose evidence the magistrate accepted were witnesses with a possible interest of their own to serve and may have had a motive to give false evidence.

Ground five was simply argued that the High Court Judge erred in sentencing the appellant with the pronounced gaps in the prosecution evidence.

Mr. Lupiya, who appeared for the respondent also filed the respondent's heads of argument. He argued in relation to grounds one, two and three that there was sufficient evidence from PW1 and PW2 which warranted the appellant being placed on defence and later convicted. The evidence of the two was not discredited and PW2 maintained her story even during cross examination.

However, the learned state advocate conceded that the medical report was not property before court as it was not produced nor was it identified by any of the prosecution witnesses.

It is contended that, this notwithstanding, the prosecutrix (PW2) indicated when cross-examined that she was medically examined

and it was proved that she was defiled, which evidence was unchallenged.

The case of **Joseph Mulenga and another v The People**[5] was cited as authority that:

> **"When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed. Leaving assertions which are incriminating entitles the trial court to find the accused guilty."**

It is counsel's view that in exceptional cases, the Court can still proceed to convict even in the absence of medical evidence, as held in **Mulenga v The people**[6].

Regarding the absence of evidence on arrest, it is argued that the appellant himself testified as to his arrest.

Reliance was placed on the case of the **Director of Public Prosecution v Ngoma**[7] that:-

> ***"There is no position of law which suggests that evidence of arrest is necessary in a charge of murder."***

That this also applies in *casu*. Therefore issues of false implication, do not arise.

In relation to grounds four and five, it is the submission of counsel that the fact that the prosecutrix lived with the appellant entails that he had an opportunity to commit the alleged offence. Additionally, that an inference can be made that DW2 knew that the prosecutrix was being sexually abused by the appellant when he testified that they planned to take pictures. Thus, the trial court was on firm ground in the view it took of the evidence of DW2. Further, that this constituted something more. The learned state advocate relied on the cases of **Katebe v The People**[8] and **Emmanuel Phiri and others v The People**[9] to the effect that a trial court can rely on uncorroborated evidence of a prosecutrix, where there is '***something more***' such as lack of motive to falsely implicate the accused.

We have considered the submissions and judgment of the lower court. The appeal raises a number of issues. Chiefly, is whether there was corroboration as to the appellant's commission of the offence and to his identity. Furthermore, whether the trial magistrate could convict based on a medical report which was not produced before her and also without evidence of arrest.

The offence of incest is created by **section 159 of the Penal Code** which provides that:

> ***"Any male person who has carnal knowledge of a female person who is to that person's knowledge his grandmother, mother, sister, daughter, grand-daughter, aunt or niece commits a felony and is***

liable, upon conviction, for a term of not less than twenty years and may be liable to imprisonment for life."

It is imperative that before the appellant could be convicted of incest the prosecution needed to prove beyond reasonable doubt that the appellant, being a male person, had carnal knowledge of the prosecutrix, his niece. The fact of the relationship between the appellant and the prosecutrix is not in dispute. The question then is whether the appellant had carnal knowledge of the prosecutrix whom he knew to be his niece.

The prosecution led evidence as regards the alleged sexual intercourse between the appellant and the prosecutrix through the prosecutrix, PW2. According to PW2, during her stay at the appellant's house, the appellant had sexual intercourse with her at home on three occasions while her aunt and other family members were away. No one witnessed any of the alledged sexual encounters between the prosecutrix and the appellant. PW1's testimony is based on the report she received from PW2. PW3 who is the appellant's wife confirmed during trial that she did not know about the incest until the appellant was apprehended. Thus, the evidence of PW2 is the crucial evidence which the prosecution led to link the appellant to the offence.

In **Davies Chiyengwa Mangoma v The People**[10], the appellant was accused of incest of his biological daughter aged below 14. The

Supreme Court restated the position as regards sexual offences at page J10 as follows:

> ***"...the core issue in sexual offences of this nature, as we pointed out in the case of Emmanuel Phiri vs. The People, is whether there was corroboration of both the commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication, and a recognition that failure by the trial court to warn itself is a misdirection..."***

Further, at page J11 that ***"the duty of the trial court is to exclude the danger of false implication..."***

As earlier alluded to, the only evidence that was available as regards the commission of the offence and identity of the perpetrator is that of PW2.

The trial magistrate properly warned herself, on page 30 of the record, of the danger of convicting without corroborative evidence. However, the trial magistrate heavily relied on the medical report which was not produced before court and it did not form part of the record. The medical report could not be relied upon in securing the conviction of the appellant because it is material that was not available to the court.

We are fortified in this position by the case of **Kajimanga v Chilemya**[11] in which the Supreme Court stated that:

"...the rules relating to documentary evidence in criminal matters require that each document must be specifically identified and produced by the relevant witness during trial before its contents can be published and relied upon to support a party's case."

For this reason, the trial court misdirected itself when it relied on the medical report to make findings of fact and subsequently convict the appellant as the same was not produced before her in open court. Ground two is therefore successful.

We are alive to the arguments by the learned counsel for the appellant that corroboration in sexual offences is a matter of strict law. Furthermore, that the trial magistrate erred in law and fact when she relied on the testimony of witnesses with an interest to serve such as DW2 (nephew to the appellant and cousin to PW2).

We note that **section 122 of the Juveniles Act**[2] provides that testimony of a child aged 14 and below requires corroboration as to the identity and commission of the offence.

In this case the prosecutrix was aged 15 at the material time. It is trite that corroboration of a child above 14 is not required as a matter of strict law. However, a trial magistrate, in such instances can use the cautionary rule to satisfy herself that the dangers of convicting without corroboration had been excluded.

In **Katebe v The People**[8] supra the Supreme Court elucidated, regarding the cautionary rule, that:

> ***"the reasons for the cautionary rule, in sexual offences are legion.... Obviously, there are circumstances in which a woman will make false allegations in order to protect a boyfriend or a circumstance where she may fear the anger of a husband or a father. In the present case there is nothing to suggest that any of these factors is present. We can see no motive for the prosecutrix in this case, deliberately and dishonestly making a false allegation against the appellant. This case is in practice no different from any other in which the conviction depends on the reliability of the evidence of the complainant as to the identity of the culprit and this is a, 'special and compelling ground' which would justify a conviction on the uncorroborated testimony of a prosecutrix."***

Thus, the cautionary rule comes into play in circumstances where there is no corroboration but the trial court can convict on the uncorroborated evidence after excluding the danger of false implication.

We opine therefore, that the magistrate in *casu* was on firm ground to have warned herself of the danger of convicting without corroborative evidence. The magistrate, despite erroneously, finding that the testimony of the prosecutrix (PW2) needed corroboration, properly cautioned herself. So she proceeded on the basis of the cautionary rule as well. At page 32 of the record of appeal lines 22 to 26, she observed, "***I see no reason why the prosecutrix, an orphan who***

had no one else to look after her other than the accused would fabricate false allegation against her only bread winner..." the magistrate believed the prosecutrix's story and ruled out the danger of false implication by reasoning that she saw no reason why the prosecutrix would fabricate false allegation against her only bread winner. Based on the circumstances of this case, we cannot fault her. Though we agree with the appellant's counsel that she erred when she relied on the evidence of DW2 who qualified as a witness with an interest to serve and or possible bias being a nephew and dependant of the appellant.

The trial magistrate believed the story of PW2, who she observed was an orphan, with no one else to look after her other than the appellant and therefore had no reason to fabricate false allegation against her only bread winner.

Thus, had she properly directed herself without looking for corroboration in the medical report which was not admitted in evidence and the evidence of DW2, she would have still convicted on the uncorroborated evidence of PW2 since she cautioned herself and believed her. She found that PW2 had no reason to falsely implicate her guardian and bread winner. Guided by the **Katebe** case supra, we cannot fault the trial magistrate.

We, therefore, come to the inescapable conclusion that the conviction is safe. The magistrate was on firm ground when she put the

appellant on his defence. Accordingly, we find that grounds one and four lack merit.

With regard to ground three in which it is contended that the Court erred when it convicted the appellant without evidence of arrest.

In the **Director of Public Prosecutions v Ngoma** supra, the Supreme Court had occasion to pronounce itself on this issue and elucidated that:

> ***"We are not aware of any proposition of law which suggests that evidence of arrest is necessary in a charge of murder, and it was abundantly clear on the evidence that the death of the deceased was established."***

In our decision in **Mark Mutengo v The People**[12], we followed the decision in **Director of Public Prosecutions v Ngoma**[7] and concluded that though that case was dealing with a murder case, it was applicable to all criminal cases. We further held that the burden on the prosecution is to prove that the offence was committed and it is the accused person before the Court who committed it.

We have upheld the conviction of the appellant in this case. The trial magistrate found that he was the prosecutrix's uncle and guardian. She also believed the prosecutrix's story, after cautioning herself and convicted the appellant. The case against him was proved and going by the above decisions the evidence of arrest is immaterial. It is also

noteworthy that this issue was not raised in the lower courts. It is improper to do so now. See **Mark Mutengo v The People**, supra. Ground three therefore fails.

It is the appellant's contention in ground five that the High Court erred in law and fact to have proceeded to sentence the appellant with pronounced gaps in the prosecution's evidence.

Having upheld the conviction on the basis of the cautionary rule, this ground also fails.

In the net result, the appeal is devoid of merit and is dismissed.

J. CHASHI
COURT OF APPEAL JUDGE

J.Z MULONGOTI
COURT OF APPEAL JUDGE

P.C.M NGULUBE
COURT OF APPEAL JUDGE