IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA AND KABWE
(Criminal Jurisdiction)

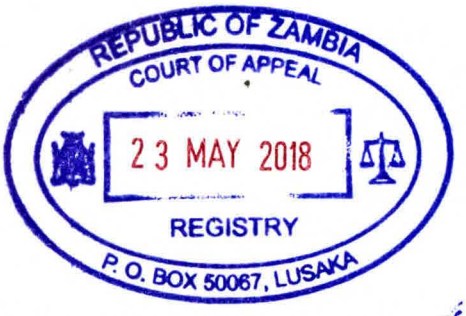
Appeal No. 163/2017

BETWEEN:

MATHEWS MUMBA — APPELLANT

AND

THE PEOPLE — RESPONDENT



Coram: Mchenga DJP, Mulongoti and Sichinga, JJA

On 14th November 2017, 15th November 2017 and 23rd May 2018

For the Appellant: Z. Sinkala, Muleza Mwimbu & Company
For the Respondent: N.T. Mumba, Deputy Chief State Advocate, National Prosecution Authority

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JUDGMENT

Mchenga, DJP, delivered the Judgment of the court.

Cases referred to:

1. Zulu v The People [1973] Z.R. 326
2. Emmanuel Phiri and Others v The People [1978] Z.R. 79
3. Saidi Banda v The People, Selected Judgment No. 30 of 2015
4. Richard Daka v The People, Selected Judgment No. 33 of 2013
5. Bernard Chisha v The People [1980] Z.R. 36
6. Kalebu Banda v The People [1977] Z.R. 169
7. Mushemi Mushemi v The People [1982] Z.R. 71
8. Mutale and Phiri v The People [1995-1997] Z.R. 227
9. Nsofu v The People [1973] Z.R. 287
10. Mwelwa v The People [1972] Z.R. 29
11. R v Redpath [1962] 46 Cr. App. Rep 319

12. **Rabson Kalonga v The People [1988-1989] Z.R. 90**
13. **Shawaz Fawaz and Prosper Chelelwa v The People [1975] Z.R. 3**
14. **Yotam Manda v The People [1988-1989] Z.R. 129**
15. **Emmanuel Phiri v The People [1982] Z.R. 77**
16. **Machipisha Kombe v The People [2009] Z.R. 82**
17. **Zimba v The People [1980] Z.R. 269**
18. **Peter Yotamu Haamenda v The People [1977] Z.R. 184,**
19. **R v Henry and Manning [1969] 53 Crim. App. Rep. 150**
20. **Director of Public Prosecutions v Ngandu and Others [1975] Z.R. 253**
21. **Mwamba Mutamba v The People SCZ Appeal No. 406/2013**

Legislation referred to:

1. **The Juveniles Act, Chapter 57 of the Laws of Zambia**
2. **The Penal Code, Chapter 87 of the Laws of Zambia**
3. **The Court of Appeal Act, Act No. 7 of 2016**

The appellant appeared before the Subordinate Courts charged with a count of the offence of defilement contrary to **section 138 (1) of the Penal Code**. It was alleged that on 14th June 2016, at Lusaka, he had unlawful carnal knowledge of O.C., a girl below the age of 16 years. He denied the charge and the matter proceeded to trial.

The prosecution evidence was that on 14th June 2016, K.C.K., left home for work early in the morning. She left her maid, S.V., preparing her daughter, O.C., who was 4 years old, for school. The child was picked by a school bus and taken to school. On her return home, at about 16:30 hours, K.C.K. found that her daughter had not returned from school. She got concerned because the child was usually back around 16:00 hours. She contacted the school authorities and

at about 18:55 hours, the appellant, who was driving the school bus, brought the child home. He told her that he was late because he was dropping other children.

Food was prepared for the child, but she refused to eat that evening complaining that she was tired and had body pains. The following day the child did not go to school, she remained in the house the whole day. On her return from work, the maid told K.C.K. that her daughter was still complaining about body pain and upon being questioned, she told them that she had been defiled by the appellant. When the child was checked, they discovered swollen private parts and some "whitish stuff".

The following morning, on 16th June 2016, the matter was reported to the police. The child was examined by a doctor at the University Teaching Hospital on the 17th June 2016 and issued with a medical report confirming that she had been defiled.

In his defence, the appellant denied defiling the child. He said the delay in taking her home was on account of her having jumped on the wrong bus. She was further delayed because the regular driver was unwell and he had to make two trips. He told the court that he dropped the child home at 18:12 hours. He admitted that at the time he dropped her, the teacher on duty was not on the bus. He also admitted that the child lived nearer to the school than the other children he dropped earlier.

The appellant called Lackson Chirwa, a driver, as a witness. His evidence was that at about 18:00 hours, he received a call from the child's mother informing him that she had not been dropped home. After 18:30 hours, she contacted him again and informed him that the child had been dropped. The teacher on duty, John Banda also gave evidence. His evidence was that two trips were made on the material day, one at 16:15 hours and the other at 17:10 hours. He was dropped at 18:06 hours and he left the child on the bus with the appellant. He did not know what happened to the child after he dropped. He admitted that although it was his duty to ensure that the children on the bus were safe, he dropped off before the child was dropped.

After considering the evidence before her, the trial magistrate found that the child, who was aged four years, could not testify on account of her age. She found that on the material day, the child knocked off at 16:00 hours and was picked by the appellant who took her home. When she arrived home, the child was tired and distressed and failed to eat super. She also found that the following day, the child was found to have been defiled, a fact that was confirmed by the medical report issued two days later.

The trial magistrate found that the medical report corroborated the fact that the child was defiled. As regards the identity of the offender, she noted that the child was distressed at the time the appellant dropped her; she run to her mother, hugged her but refused to eat that evening. She also found that the appellant had the opportunity to commit the offence after the teacher on duty had dropped off. Although the defilement was discovered the following day,

she ruled out the possibility of another person committing the offence because no male person had contact with her.

On the evidence before her, the trial magistrate found that the only inference that could be drawn was that the appellant had committed the offence. She convicted him as charged and committed the case to the High Court where he was sentenced to 25 years imprisonment with hard labour.

Three grounds have been advanced in support of the appeal. They were couched as follows:

1. **The learned trial court misdirected itself in convicting the appellant on the basis of circumstantial evidence which is not sufficient enough to warrant only an inference of guilt;**
2. **The learned trial court below erred both in law and in fact when it convicted the appellant in the absence of corroborative evidence or evidence of something more to exclude the danger of false complaint and false implication as required in sexual offences; and**
3. **The learned magistrate erred in law and in fact when she held that the child was not competent to give evidence.**

At the hearing of the appeal, Mr. Sinkala, who appeared for the appellant, relied on the heads of arguments filed on 17th November 2017, which he complimented with oral submissions. Ms. Mumba made an oral response to the submissions.

In this judgment, we will first deal with the 3rd ground of appeal. Thereafter, we shall deal with the 1st and 2nd grounds of appeal at the same time, as the issues they raise are interrelated.

In support of the 3rd ground of appeal, Mr. Sinkala referred to the case of **Zulu v The People**[1] and submitted that faced with a situation where there is a child witness, **section 122 of the Juveniles Act,** requires a court to conduct a *voir dire*. He submitted that there was misdirection when trial magistrate held that the child was not competent to give evidence without conducting a *voir dire*.

In response to his ground of appeal, Ms. Mumba submitted that, the failure to call the child as a witness was not fatal to the case against the appellant. This is because the prosecution evidence presented to the trial magistrate proved that he committed the offence.

We have combed through the record of appeal and have not come across any evidence pointing at, or suggesting that, there was an attempt to have the child testify. While we understand that there is a high possibility that a child who is aged 4 years may fail to testify on account of her age, it is our view that it was not necessary for trial magistrate to delve into the issue and make the finding she made. The reasons why the child was not brought to court are unknown and there was no evidence before her warranting the finding that she made. We agree with Mr. Sinkala that there was misdirection when the said finding was made. The 3rd ground of appeal has merit and we uphold it.

Reverting to the 1st and 2nd grounds of appeal, Mr. Sinkala referred to the case **Emmanuel Phiri and Others v The People[2]** and submitted that in sexual offences, like in the case at hand, corroborative evidence or "something more", is required before an offender can be convicted. He submitted that the evidence of the child's mother and the maid, cannot be relied on as corroborative evidence because it is hearsay evidence.

As regards proof that the appellant committed the offence, Mr. Sinkala referred to the cases of **Saidi Banda v The People[3]** and **Richard Daka v The People[4]** and submitted that since the case against the appellant was anchored on circumstantial evidence, the conviction can only be upheld if an inference of guilt is the only one that can be drawn on it. He argued that there is no evidence of when the child was defiled, the case was reported on 16th June 2016 and the doctor only examined her on 17th June 2016. In addition, he pointed out that when the child was checked on 15th June 2016, some "whitish stuff" was observed. He then referred to the case of **Bernard Chisha v The People[5]** and submitted that since corroborative evidence was required in this case, had a DNA test been carried out, it would have provided corroborative evidence. He argued that the failure to conduct the test amounted to a dereliction of duty and going by the decision in the case of **Kalebu Banda v The People[6],** this court must find that the outcome of such a test would have been favourable to the appellant.

Mr. Sinkala also submitted that there is no evidence that the appellant had the opportunity to commit the offence. It was wrong for the trial magistrate to find

that the appellant was the only person who had the opportunity to commit the offence when there were boys and male teachers at her school. He also pointed out that there was conflicting evidence of when the child was dropped home. The mother said it was at 18:55 hours, while the maid said 18:45 hours. He referred to the cases of **Mushemi Mushemi v The People**[7] and **Mutale and Phiri v The People**[8] and submitted that the conflict should be resolved in favour of the appellant.

He urged us to accept the evidence of the appellant's witness, Lackson Chirwa, who said the child's mother called him at 18:30 hours and informed her that the child had been dropped and find that the child was dropped before 18:30 hours. It would then follow, that the appellant dropped the child 6 minutes after dropping the teacher on duty. This being the case, it is highly improbable that he could have committed the offence in that short period of time. He concluded his arguments on the question of opportunity by referring to the case of **Nsofu v The People**[9] and submitting that the mere fact that appellant had the opportunity to commit the offence, cannot he the basis for finding that it was conclusively proved that he had done so.

Mr. Sinkala also pointed out that the child only complained 24 hours after the incident. He referred to the case of **Mwelwa v The People**[10] and submitted that the failure to complain early raises doubts in the credibility of the complaint in this case. He then referred to the case of **R v Redpath**[11] and submitted that the distressed condition of the child at the time she was dropped home, was of little or no weight.

Mr. Sinkala then referred to the cases of **Rabson Kalonga v The People**[12] and **Shawaz Fawaz and Prosper Chelelwa v The People**[13] and submitted that there was misdirection when the trial magistrate failed to make a finding on why the child missed the scheduled bus trip at 16:00 hours and where she was. Finally, he referred to the case of **Yotam Manda v The People**[14] and submitted that since an inference of guilt is not the only one that can be drawn on the evidence that was before the trial court, the appeal must be allowed. The appellant's conviction must be quashed and the sentence set aside.

In response to the 1st and 2nd grounds of appeal, Ms. Mumba submitted that all the elements of the offence of defilement, as were set out in the case of **Emmanuel Phiri v The People**[15], were proved. The fact that the child was defiled was proved by the medical report. Coming to the identity of the offender, the circumstantial evidence linked the appellant to the commission of the offence; he took the child home late after remaining on the bus with her alone, he therefore had the opportunity commit the offence.

Ms. Mumba also submitted that it must be accepted that the child was taken home between 18:45 and 18:55 hours because both her mother and the maid were not challenged when they gave those timings. She argued the timings given by the appellant's witnesses should not be believed as they were witnesses with a possible interest of their own to serve. They were his friends and the evidence of the teacher on duty, who got off the bus despite it being his responsibility to remain on the bus, lacked credibility.

Ms. Mumba then referred to the case of **Machipisha Kombe v The People**[16] and submitted that opportunity can be corroborative evidence. The appellant was the last male person to be in the company of the child before she complained and when she was examined, she was found to have been defiled. She also submitted that the trial magistrate properly warned herself of the danger of convicting on uncorroborated evidence. There was also evidence of distress when the child was taken to school. She referred to the case of **Zimba v The People**[17] and submitted that the issue of distress was properly addressed. She argued that a child of four years cannot fake distress. She urged us to uphold the conviction and dismiss the appeal.

It is common cause that there was no eye witnesses and the case against the appellant is founded on circumstantial evidence. The law is settled and there is a plethora of authorities, some of which have been referred to by the parties, that where a case is anchored on circumstantial evidence, a conviction can only be upheld if an inference of guilt is the only one that can be drawn on it. However, before we deal with whether it is the case in this matter, we will deal with some issues that Mr. Sinkala raised in his submissions. These are, the delayed lodging of the complaint, dereliction of duty, contradictions in the time when the child was dropped and the absence of corroborative evidence.

Mr. Sinkala submitted that the failure to file the complaint on to time affected the credibility of the complaint and he referred to the case of **Mwelwa v The People**[10] on the point. In that case, Chomba J., as he then was, at page 30, observed as follows:

> **"The trial magistrate considered that evidence of early complaint amounted to corroboration. There are many decided authorities which state that such evidence cannot be regarded as corroboration. Evidence of an early complaint in sexual offences only goes to the issue of consistency on the part of the prosecutrix, see R v Lillyman [2] and R v Osborne [3]."**

We endorse the judge's view that an early complaint cannot be treated as corroborative evidence and that all it does, is to improve the credibility of the complaint by showing consistence. In this case, the evidence indicates that the child was defiled on 14th June 2016 and the violation was discovered on 15th June 2016, in the evening. The following morning, a report was lodged with the police. In the circumstances, it is our view that it cannot be claimed that there was a delay in reporting the complaint as the mother reported soon after she discovered that her daughter had been defiled.

It was also Mr. Sinkala's position that there was a dereliction of duty because the "whitish stuff" seen by the child's mother, was not subjected to DNA examination. In the case of **Peter Yotamu Haamenda v The People[18],** dealing with the issue of dereliction of duty, the Supreme Court held as follows:

> **"Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the Investigating Agency fails to investigate it in circumstances amounting to a dereliction of duty and in consequence of that dereliction of duty the accused is seriously prejudiced because evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty."**

In this case, the allegation was that the appellant defiled a child, the police issued a medical report and the child was examined by a medical doctor to

ascertain whether she had been defiled. Even though the medical report makes no mention of the "whitish stuff" seen by the child's mother, the child was attended to by a medical doctor who found that she had been defiled. In the circumstances, we do not agree with Mr. Sinkala's view that there was a dereliction of duty by the police. They had the child examined after the incident was brought to their attention.

Mr. Sinkala has also invited us to find that there were contradictions on the time that the child was dropped and that we should find that she was dropped before 18:30 hours, which is favourable to the appellant. He argued that with such a finding, we should also find that the appellant could not have committed the offence because he was with the child for only 6 minutes. First of all, we do not know how finding that the appellant was with the child for only 6 minutes will help his case. The defilement of a child is not an elaborate and complicated act that needs a lot of time to accomplish. It can be done in a few minutes or even in seconds. Further, in the case of **Director of Public Prosecutions v Ngandu and Others**[19], it was held that an appellate court can only set aside a finding of fact if it be alleged that it was made without any evidence or on a view of the facts which could not reasonably be entertained.

It is our view, that the trial magistrate cannot be faulted for not making a finding on the exact time when the appellant took the child home or when the offence was committed. This is because all the witnesses, including the appellant's witnesses, gave estimated times of the events of that afternoon. We do not see how she could have accepted the time given by one witness and not the

other, when the variation in their estimated times was between 5 and 10 minutes. We find that on the evidence that was before her, she was entitled to find that the child was brought home after 18:00 hours. That finding is supported by the evidence of the child's mother and the appellant and his witnesses.

Mr. Sinkala submitted the evidence of the child's mother and the maid, to the effect that the child told them that she was defiled by the appellant, cannot be relied on because it is hearsay evidence. We agree with him. Suffice to mention that the trial magistrate did not rely on that evidence to come to the conclusion that the appellant had committed the offence. She relied on circumstantial evidence which we shall consider in a moment.

Mr. Sinkala also argued that the allegation that the appellant committed the offence was not corroborated as is required in sexual offences. The requirement for corroboration in sexual offences has long been associated with the words of Lord Justice Salmon in the case of **R v Henry and Manning[20],** at page 153, where he said as follows:

> **"in cases of alleged sexual offences it is nearly dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases girls and women do sometimes tell an entirely false story which is very easy to fabricate, but entirely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all"**

From this extract, it is clear that in a sexual offence, it is the testimony of the victim that requires to be corroborated by some other evidence to rule out the

possibility of false implication. The requirement for corroboration does not extend to the testimony of other witnesses, other than those witnesses who may fall into the category of witnesses who ordinarily require corroboration. These include children who give evidence by virtue of **section 122 of the Juveniles Act** or witness who can be classified as accomplices. In this case, since the child, the victim of the sexual assault, did not testify, the question of her evidence being corroborated does not arise. Neither was there any need to have the testimony of any of the prosecution witnesses corroborated because they were neither accomplices nor suspect witnesses.

We now revert to the case against the appellant. We agree with Mr. Sinkala's submission that a case of defilement cannot be anchored on evidence of opportunity only. The circumstantial evidence against the appellant was more than the mere opportunity to commit the offence. He collected the child from school and even though she stayed very close, he dropped her last. The child got home after 18:00 hours, which was later than the usual time. When the child got home, she was distressed and refused to eat. She also complained about body pain. The following morning the child did not go to school and remained in the house. She did not have contact with anyone else. When she was examined that evening, she was found to have been defiled, a fact confirmed by a medical examination. The appellant was the last man to be in the company of the child after the teacher on duty dropped off; he remained on the bus with the her alone. There is also evidence of the child's reaction when she was taken to school for the purpose of identifying who had violated her.

Mr. Sinkala argued that it is possible that the child could have been abused by some other man or boy before she got on the bus. In the absence of evidence that the child was not accounted for after school, before she was picked by the appellant, we find no basis for the trial magistrate considering such a possibility. On the facts outlined above, we are satisfied that the trial magistrate was entitled to come to the conclusion that the child was defiled by the appellant.

We agree with Ms. Mumba that the only inference that can be drawn on the evidence that was before the trial magistrate is that it is the appellant committed the offence. It would be too much of a coincidence that the appellant, who was the last man to be with the child, dropped the child who stayed closest to the school last and later than she was usually taken home. When the child was examined, she was found to have been defiled. We find no merits in both the 1st and 2nd grounds of appeal and we dismiss them.

Though we upheld the 3rd ground of appeal, it has no bearing on the outcome of this appeal as it does not go to the root of the conviction. The 1st and 2nd grounds of appeal, which deal with the propriety of the conviction, having been unsuccessful, the appeal against conviction fails and we dismiss it.

Even though the appeal was against conviction only, **Section 16(5) of the Court of Appeal Act** allows us to consider whether the sentence imposed was correct. It provides as follows:

> **"The court may, on an appeal, whether against conviction or sentence, increase or reduce the sentence, impose such other sentence or make such other order as the court could have imposed or made, ..."**

In the case of **Mwamba Mutamba v The People[21]**, commenting on why a sentence of life imprisonment, for a 42 years old offender, who defiled a 2 years old child, should be maintained, Phiri, JS, at page J16, observed as follows:

> **"We have always stated in such cases that in as much as the age of the victim is a factor in the elements of the offence of defilement; the actual age of the victim also determines whether the aggravation is low or high for purposes of sentence. On this basis, we do not consider a sentence of life imprisonment with hard labour as coming to us with a sense of shock when the victim was a female baby aged only two years and eight months while the perpetrator of the crime was a well known neighbour aged 42 years who also infected her with an STD."**

In this case, the appellant was 39 years old and his victim was only 4 years old at the time the offence was committed. The appellant was in a position of trust as it was his duty to safely convey the child home but he decided to defile her. Though the judge in the court below noted that the appellant was entrusted to carrying the child home and that she was of tender age at the time of sentencing, we are satisfied that had she appreciated that these were factors

that seriously aggravated the case against the appellant, she would not have imposed a sentence of 25 years imprisonment.

The sentence of 25 years imprisonment comes to us with a sense of shock, it is totally inadequate considering the aggravating circumstances we have just outlined. We will interfere with it. In its place, we impose a sentence of 45 years imprisonment with hard labour.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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J. Z. Mulongoti
COURT OF APPEAL JUDGE

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D.L.Y. Sichinga
COURT OF APPEAL JUDGE