IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 181/2014**

HOLDEN AT NDOLA

(CRIMINAL JURISDICTION)

BETWEEN:

PETER KABINDIBINDI **APPELLANT**

And

THE PEOPLE **RESPONDENT**

CORAM: CHASHI, SIAVWAPA AND NGULUBE, JJA

On the 20th of February, and 26th June, 2018.

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

For the Respondent: M. Kapambwe-Chitundu, Deputy Chief State Advocate, National Prosecution Authority.

JUDGMENT

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Mwewa Murono vs. The People (2004) ZR 207 (SC)*
2. *Dorothy Mutale and Richard Phiri vs. The People (1977) SJ 51(SC)*
3. *Shawaz Fawaz and Prosper Chelelwa vs. The People (1995) ZR 3*
4. *Saluwema vs. The People (1965) ZR 4 (CA)*
5. *Partford Mwale vs. The People CAZ Appeal No. 08 of 2016*

Legislation referred to:

1. *The Penal Code, Chapter 87 of the Laws of Zambia*

2. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*
3. *The Juveniles Act, Chapter 53 of the Laws of Zambia*

This is an appeal against a Judgment of the Subordinate Court of the Third Class for the Kapiri Mposhi District in which the appellant was convicted of the offence of defilement contrary to Section 138(1) of **The Penal Code**[1], as amended by Acts Number 15 of 2005 and Number 2 of 2011. The appellant was subsequently committed to the High Court for sentencing, and was sentenced to a term of 15 years imprisonment with hard labour with effect from 6th April, 2015 the date of his arrest.

The particulars of the offence are that the appellant, on 5th April, 2015 at Kapiri Mposhi in the Kapiri Mposhi District of the Central Province of the Republic of Zambia did unlawfully have carnal knowledge of a minor girl below the age of sixteen years. The evidence on which the learned trial Magistrate based the conviction was anchored on the testimony of three (3) witnesses.

PW1, Jacklyn Musonda the victim's mother, testified that, on the material day, 4th April, 2015, she lost a twenty kwacha note within her house and when she asked her daughter about the money, she denied knowing anything about it. PW1 then sent

her to go and draw water from the well and she left. She testified that her daughter did not return and when she got tired of waiting, she followed her to the well where she found the bucket but her daughter was not there. PW1 testified that she went to church at 1000 hours and returned home at about 1700 hours but still found her daughter had not returned. She looked for her but failed to find her. She then went to report the matter to the Police at Kapiri Mposhi Central Police Station. The following morning, she received information that her daughter was seen at Matilyo compound in the company of a man.

At about 2200 hours, she accompanied Police officers to the compound where she found her daughter at the appellant's house. PW1 further testified that she found condoms on the bed and subsequently, the appellant and her daughter were taken to the Police Station.

PW1 later testified that she only found condom wrappers in the appellant's house. She stated that when she asked her daughter what she was doing at the appellant's house, she told her that the appellant had unlawful carnal knowledge of her twice. She checked her daughter's private parts but did not see anything unusual.

PW1 further testified that she took her daughter to the hospital where she was told that her daughter was defiled. She was then given a month's course of medication. PW1 testified that she took a medical report form to the hospital which was duly signed by the doctor, which she identified in court. PW1 also identified her daughter's under five card. According to PW1, she saw the accused for the first time on the night her daughter was found at his house.

PW2, a child of tender years gave sworn evidence after the court conducted a voire dire. Her testimony was that she left home on the 4th of April, 2015 after having a difference with her mother over a missing twenty kwacha. Her mother sent her to go and fetch water but she decided to go to her grandmother's home in Kawama. On the way, she met the appellant who offered to show her the way to Kawama. PW2 then went to the appellant's house in Matilyo compound; she did not enter the house and the appellant escorted her until they got to the railway line. She however returned to the appellant's house with him and spent the night there. PW2 testified that the appellant had unlawful carnal knowledge of her twice, and that he used a condom. She

further stated that the following morning, the appellant left her in his house where she stayed alone until he returned.

PW2 testified that the appellant returned in the night and as they sat together outside, she saw her mother arrive with the Police and she and the appellant were taken away. She further testified that she was taken to the hospital where she was issued with a medical report and was given some medication. PW2 identified the medical report.

In cross-examination, PW2 reiterated that the appellant had unlawful carnal knowledge of her in his bedroom.

PW3, Munalula Mwangana, Inspector, at Kapiri Mposhi Police Station, testified that he received a complaint from PW1 on 6th April 2015 that her daughter aged twelve years had gone missing. PW1 further reported that her daughter had allegedly been seen in Matilyo compound. PW3 and other officers subsequently went to the compound, where PW1's daughter was found at the appellant's house. PW3 testified that he also found a used condom in a plastic bag as well as some blood stained pieces of cloth.

PW3 took the appellant to the Police Station where he was interviewed. He then charged and arrested him for the offence of Defilement. A medical report form was issued to PW2. It was later endorsed by the doctor at the hospital and retuned to the Police Station.

PW3 testified that he interviewed PW2 who told him that she spent the night at the appellant's house and that he had unlawful carnal knowledge of her. PW3 identified a used condom in a yellow maximum condom packet in court. He also identified two pieces of cloth which he found at the appellant's house on the material night. PW3 identified the medical report, the photocopy of the prosecutrix's birth record, and the under five card and tendered the exhibits in court as part of the prosecution evidence.

The appellant was found with a case to answer and was accordingly put on his Defence.

In his Defence, the appellant admitted that he spent a night with PW2 at his house but he denied having carnal knowledge of her because he suffered from erectile dysfunction. He stated that he

only wanted to help PW2 by giving her transport money for her to travel to Kabwe.

The learned trial Magistrate after analysing the evidence found that the prosecution had proved its case against the appellant beyond all reasonable doubt and convicted him. The learned trial Magistrate then referred the matter to the High Court for sentencing in terms of Section 217 of **The Criminal Procedure Code[2],** where he was accordingly sentenced. Dissatisfied with the conviction, the appellant has appealed to this court advancing one ground of appeal as follows:

"The Learned trial court erred both in law and fact when it found the Prosecution's case to have been established beyond all reasonable doubt in the presence of the evidence of the accused's dysfunctioning manhood."

Counsel for the appellant, Mr Mweemba relied on the filed heads of argument and submitted that in criminal law, the burden of proof is on the prosecution and does not shift at any stage to the accused. Counsel referred to the case of **Mwewa Murono vs. The People[1]** where it was stated that –

"in criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of the accused person lies from the beginning to the end on the prosecution. The standard of proof must be beyond all reasonable doubt."

Counsel submitted that sexual offences are easy to allege and that if not properly examined could lead to convictions in un deserving cases. He submitted that it is not clear from the medical report when the prosecutrix was defiled and further that the actual period of the defilement has been difficult to discern. Counsel submitted that the court referred to blood soaked cloths when PW1, PW2 and PW3's evidence did not talk about any blood. He submitted that the evidence on record does not conclusively lead to the appellant being the perpetrator of the offence.

Counsel submitted that the appellant told the Police that he has a problem as he could not achieve an erection and that he has a medical report to prove this fact. He was also attending prayers with a pastor emmanuel because of his condition. Counsel further submitted that the appellant explained that he left a medical report on the issue of his erectile dysfunction at home

and was not allowed to get it from there. Mr Mweemba submitted that this evidence flew in the teeth of the allegations and required a serious rebuttal. He stated that no importance was attached to this in the lower court as the court did not even allude to it when analysing its evidence. He further stated that this piece of evidence was not challenged and that the prosecution has the duty of proving the case beyond all reasonable doubt which was not done by the prosecution.

Counsel cited the case of ***Dorothy Mutale and Richard Phiri vs. The People***[2] where it was held that -

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

Counsel submitted that it is possible that the prosecutrix could have been defiled by another person during the time when the appellant left his house and went to work. He further submitted that the court can make several inferences and that the favourable inference is that the appellant has a problem with his manhood which makes him fail to have an erection.

Counsel referred to the case of ***Shawaz Fawaz and Prosper Chelelwa vs. The People***[3] where the court held that –

"Cross-examination cannot always shake the evidence of untruthful witnesses in every respect."

He submitted that the State should have subjected the appellant to a test in order to refute his claims. Counsel referred to the case of ***Saluwema vs. The People***[4] where it was held that –

"If the accused'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."

Counsel submitted that the explanation that the appellant gave was reasonably possible though not probable. As such, the prosecution had not established their case beyond all reasonable doubt.

Counsel submitted that on the totality of the evidence, the prosecution has not proved their case beyond all reasonable doubt. He accordingly prayed that the court allows the ground of appeal, quashes the conviction, sets aside the sentence, acquits the appellant, and sets him at liberty. In the alternative, Counsel

prayed that the matter be sent back for retrial to test the evidence of the appellant by subjecting him to physical tests.

Mr Mweemba re-emphasised that no evidence was led by the prosecution to rebut the appellant's statement that he suffers from erectile dysfunction. He stated that the only evidence on record is that the appellant had an opportunity to commit the offence.

Mrs Chitundu, Deputy Chief State Advocate on behalf of the People submitted that the State was in support of the conviction. She submitted that there was overwhelming evidence on record which negated the statement by the appellant that he suffered from erectile dysfunction hence the court below not entertaining the assertion. Mrs Chitundu referred to page 12 of the record of appeal, specifically at line 15 where PW3, the arresting officer stated that he found a used condom in the appellant's house. Further, she submitted that the appellant admitted that he lived alone and spent the night with PW2 at his house without any other person being present. Counsel submitted that the appellant was the one who used the condom that was found in his house, and that his manhood functions perfectly well.

Counsel submitted that there is evidence on record to the effect that there were cloths that were soaked in blood which belonged to PW2 at the appellant's house. She submitted that the appellant defiled PW2, hence the cloths that were soaked in blood being found at the appellant's house. Counsel submitted that the appellant kept PW2 at his house the whole night and the following day after he found her walking on the road. She submitted that the appellant would have kept PW2 at his house overnight for a second night if he was not disturbed. Counsel submitted that PW2 did not have any motive to falsely implicate the appellant for an offence that he did not commit.

Counsel further submitted that there was nothing that was laid before the court for the prosecution to rebut on the issue of erectile dysfunction. She submitted that if the appellant indeed had a medical report to prove the erectile dysfunction, he would have asked a family member to take the said documents to him while he was in custody. Since the documents were not in court, she submitted that they do not exist. Counsel submitted that it is the appellant who defiled PW2. She urged the court to uphold the appellant's conviction and dismiss the appeal.

We have considered the submissions by Counsel and the judgment in the court below. We have also considered the sole ground of appeal. The said issue the ground of appeal raised is –

"whether the Learned trial court should have found the prosecution's case established and proved beyond all reasonable doubt when the accused stated in his evidence that he had a malfunctioning manhood."

Having identified the issue, we are satisfied that the entire appeal rests on the determination of whether the appellant's manhood suffers from an erectile dysfunction and whether it is the appellant who defiled the prosecutrix. The evidence against the appellant is that of the prosecutrix who testified that the appellant had carnal knowledge of her in his house twice on the material night.

The evidence on record is that PW2 was defiled and this was corroborated by the medical report whose findings are indicative of the fact that someone had sexual intercourse with PW2. The court also relied on the evidence of PW1, who testified that she found her daughter, PW2 at the appellant's house and found condoms on the bed. The court further relied on the evidence of

PW3, the arresting officer who testified that he found PW2 at the appellant's house and that he also found a used condom as well as blood stained cloths in the appellant's bedroom.

The gist of the appellant's argument is that the lower court erred when it convicted him for the offence of defilement when his defence is that he suffers from erectile dysfunction and therefore could not have defiled PW2.

On the other hand, the prosecution contend that there is no evidence on record to prove that the appellant does in fact suffer from erectile dysfunction. They contend that PW2 was found in the appellant's house with a used condom in his bedroom, thus forming the conclusion that it is the appellant who defiled her. The evidence on record is mainly centred on PW2, a child of tender years. As such, Section 122 of **The Juveniles Act**[3] comes into play.

In the case of ***Partford Mwale vs. The People***[5], the Court of Appeal stated 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 in **The Juveniles Act**[3]. Section 122 of the Act states that- *"where, in any criminal or civil proceedings against any*

person, a child below the age of fourteen years 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 to speak 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 prosecutrix, the accused shall not be liable to be convicted of the offence unless the evidence is corroborated by some other material evidence in support thereof implicating the accused"

The court therefore has a duty to conduct a voire dire to ascertain whether the child is possessed of sufficient intelligence for the evidence to be received on oath and that the child understands the duty to speak the truth. Further, where the

evidence of a child of tender years is admitted and given in support of the prosecutrix's case, the accused shall not be liable for conviction unless the evidence is corroborated by some other material evidence in support thereof implicating the accused.

The evidence on record is that the court conducted a voire dire in accordance with the provisions of Section 122(a) of the Juveniles Act. We are of the view that the said voire dire was sufficient to justify the reception of the child's evidence. The evidence of PW2 is corroborated by the medical report which shows that she was indeed defiled. Further, the evidence of PW3 the arresting officer is that he found a used condom in the appellant's bedroom. The medical evidence was obtained not long after PW2 was found at the appellant's house. The used condom was also found on the material night. These facts established good opportunity on the part of the appellant, of the type which amounts to corroboration as to the identity of the offender. We accept that mere opportunity does not amount to corroboration but where the opportunity may be of such character as to bring in the element of suspicion, it will amount to corroboration. In the present case, the circumstances in which the appellant and PW2 were found

amount to corroboration. This evidence must be adequate to support a conviction.

Mr Mweemba, on behalf of the appellant submitted that the trial court did not consider the appellant's defence that he could not have defiled the prosecutrix since he suffers from erectile dysfunction. We find this argument of no consequence in the face of overwhelming evidence and corroboration before the trial court. We find no merit in this argument. The appellant could not have used the condom if he had the problem of erectile dysfunction.

As regards the sentence of fifteen years Imprisonment with hard labour, it came to us with a sense of shock. We are of the view that the appellant deserves more than the minimum mandatory sentence of imprisonment as he lured PW2 to his house in the pretext of helping her to find her way to her grandmother's house in Kawama, Kabwe. However, he took her to his house where he kept her for over twenty-four hours and defiled her. In our view the sentence of fifteen years is inadequate taking into account the aggravating factors. We accordingly enhance the sentence to twenty years imprisonment with hard labour.

The net result is that we find no merit in this appeal. We dismiss it and uphold the conviction. We further set aside the sentence of fifteen years imprisonment with hard labour and impose a sentence of twenty years imprisonment with hard labour.

.....

J. CHASHI
COURT OF APPEAL JUDGE

.....

M.J. SIAVWAPA
COURT OF APPEAL JUDGE

.....

P.C.M. NGULUBE
COURT OF APPEAL JUDGE