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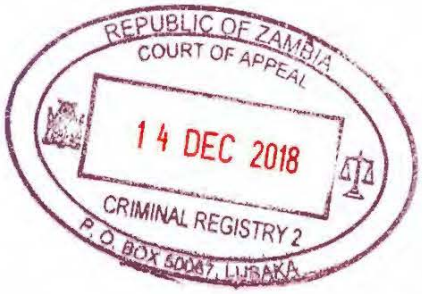
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 81/2018**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

ISAAC MUSADABWE **APPELLANT**



AND

THE PEOPLE **RESPONDENT**

CORAM: MULONGOTI, SICHINGA AND NGULUBE, JJA
On 15th October, 20th November and 14th December, 2018

For the Appellant: *K. Muzenga, Deputy Director, Legal Aid Board.*

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

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Mwaba vs The People (1974) ZR 264*
2. *Gift Mulonda vs The People (2004) ZR 135*
3. *Nsofu vs The People (1973) ZR 287*
4. *Emmanuel Phiri vs The People (1982) ZR 77*
5. *Martin Nc'ube vs The People Appeal Number 22 of 2017*
6. *Willeim Roman Buchman vs Attorney General (1994) SJ 79*
7. *Kombe vs The People (2009) ZR 282*
8. *Ivess Mukonde vs The People, Supreme Court Judgment No. 11 of 2011*
9. *Katebe vs The People (1975) ZR 13*
10. *R v Baskerville (1916) 2KB 658*

Legislation referred to:

1. The Penal Code, Cap 87 of the Laws of Zambia

The appellant was charged with and convicted by Magistrate sitting at Lusaka Subordinate Court, of one count of Defilement of a girl under the age of sixteen years, contrary to Section 138(1) of the Penal Code, Cap 87 of the Laws of Zambia as read with Act Number 15 of 2005. The particulars of the offence were that the appellant, on an unknown date, but between November, 2013 and February, 2014, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, had unlawful carnal knowledge of MM, a girl under the age of sixteen years. A trial was conducted and upon conviction, the appellant was committed to the High Court for sentencing. He was sentenced to fifteen years Imprisonment with Hard Labour. The appellant now appeals against conviction and sentence.

The case for the prosecution relied on the evidence of PW1, the prosecutrix, PW2, the prosecutrix's uncle; PW3, the prosecutrix's aunt, PW4, the medical doctor; and PW5, the arresting officer. The facts in brief are that sometime in November, 2013, the appellant

gave the prosecutrix a lift in his car as he was taking his child to school. After the appellant dropped his child, he asked the prosecutrix if she had any serious lessons at school that day. She went into the school to check while the appellant waited for her. She returned and informed him that she had no lessons that day and he took her to a lodge in Kamwala South where he defiled her. Thereafter, the appellant drove the prosecutrix back to Chilenje and dropped her at her home. On the way, he bought four tablets of cafemol which he gave to her and told her to drink the medicine as soon as she would get home.

The prosecutrix testified that subsequently, sometime in the month of November, 2013, the appellant went to her school and offered her a lift home which she accepted. However, on the way she noticed that he used a different route, and they ended up at a deserted place near the American Embassy in Ibex Hill, where the appellant defiled her in his motor vehicle. Thereafter, he drove her back home to Chilenje. The prosecutrix stated that she did not tell anyone what happened to her because she did not know how to approach anyone about such a thing. She stated that after the

second incident, the appellant tried to communicate with her on a number of occasions but she ignored him.

Sometime in January, 2014, the appellant sent a message to the prosecutrix, telling her that he missed her. She stated that at the time, her sim card was in her uncle's phone because hers was not working. Her uncle saw the message and asked her what was happening. She eventually told her uncle and aunt that she was defiled by the appellant. She was taken to Chilenje Police Station where she gave a statement and was referred to UTH for medical examination where she learnt that she was HIV positive.

In cross-examination, the prosecutrix stated that the appellant defiled her at a lodge in Kamwala South sometime in November 2013.

The second prosecution witness, *Dexter Mwila*, the prosecutrix's uncle's testimony was that MM is his niece, and that she was born on 9th February, 1998. He identified a copy of her birth record in Court and it was marked ID1.

The prosecutrix's uncle testified that on 9th January, 2014, he got her sim card and put it in his phone since her phone was damaged. Later that day, he received a message from the appellant's phone, which stated that "it was nice seeing you." The prosecutrix's uncle stated that he got worried and called the appellant to ask him what was going on between him and his niece. The appellant told him that he knew the prosecutrix from her school where he did some work with vulnerable children. This offended the prosecutrix's uncle and he asked his wife to inquire from the prosecutrix what was happening.

Eventually, the prosecutrix opened up and told her uncle that the appellant defiled her twice. The witness reported the matter to Chilenje Police Station where he and other members of his family gave statements. The prosecutrix was issued with a medical report which he identified in Court as ID2. He stated that the prosecutrix was subsequently taken for medical examination at UTH where it was confirmed that she was defiled. The appellant was well known to him and his family. He would even visit their home and supply them with chickens.

The third prosecution witness, *Lydia Mwila* the prosecutrix's aunt testified that sometime in January, 2014, a message was received on her husband's phone, to the effect that the appellant wanted to be in a relationship with the prosecutrix. She stated that she inquired from her niece what was happening and she eventually told her that the appellant defiled her twice, in November, 2013.

The matter was reported to Chilenje Police Station and subsequently, the prosecutrix was taken to UTH where she was medically examined. The witness stated that the prosecutrix was born on 9th January, 1998 and that she was aged 15 years in November,2013. The prosecutrix told her aunt that the appellant wanted to be in a relationship with her. She later told her that she had sexual intercourse with the appellant at a named lodge in Kamwala South which she even showed to the Police.

The evidence of the fourth prosecution witness, *Dr Sam Miti*, a pediatrician at the University Teaching Hospital was that he examined the prosecutrix on 10th February, 2014 and tested her for pregnancy as well as sexually transmitted diseases. He found that

she had a torn hymen and was HIV positive. The witness identified the medical report that he issued and it was marked ID2.

The fifth prosecution witness, *Boas Moonga*, the arresting officer's testimony was that he investigated a case of defilement in which the prosecutrix was allegedly defiled. He apprehended the appellant who he later arrested for the subject offence. He tendered the prosecutrix's under five card, medical report and communication report from airtel in support of the prosecution's case.

The appellant gave sworn evidence in his Defence. He denied ever taking the prosecutrix out and stated that he worked for an organization that sponsored vulnerable children. As such, he would meet the prosecutrix at her school when he had assignments there.

He stated that he knew the prosecutrix's uncle well as they lived in the same area. He admitted that he offered the prosecutrix a lift on her way to school on 23rd October, 2013 and left her there. He denied defiling her at a lodge or taking her to a place near the American Embassy. He stated that he was medically examined at Chilenje clinic where he was found to be HIV negative. The appellant admitted sending the prosecutrix a message which made

her uncle attack him aggressively. He stated that he got to know the prosecutrix in 2000 and that her uncle is jealous of him because of his success. He maintained that he had no intimate relationship with the prosecutrix.

After evaluating the evidence in its entirety, the learned trial Magistrate found the appellant guilty as charged and convicted him accordingly. When the matter was committed to the High Court for sentencing, the appellant was sentenced to fifteen years Imprisonment with Hard Labour.

The appellant now appeals against the said conviction and sentence, and filed two grounds of appeal which state as follows-

1. That the learned trial Court erred in law and fact when it failed to explain the proviso to the appellant and that as a result of that failure, he was denied the opportunity to make out the defence which the proviso creates.
2. The learned trial Court erred in law and in fact when it convicted the appellant in the absence of corroborative evidence as to the identity of the offender.

In support of the two grounds of appeal, Mr. K. Muzenga, Deputy Director, Legal Aid Board, filed heads of argument which he relied on.

On ground one, he submitted that the proviso to Section 138 of the Penal Code was not read to the appellant and that there is nowhere on record where it indicates that the learned trial Court addressed its mind to the proviso. We were referred to the case of **Mwaba vs The People**[1] where the Supreme Court held that-

> ***"1) It is a rule of practice that where it appears that an unrepresented accused person may be intending to plead guilty to a charge of defilement, the proviso to section 138 of the Penal Code should be explained to him.***
>
> ***2) Even where an accused person pleads not guilty, it is desirable that the proviso be explained before plea, but certainly at an early stage in the proceedings so that the accused may have the opportunity to direct his cross-examination of the prosecution witnesses to the question of the girl's age.***
>
> ***3) In a borderline case, in terms of age, the failure to explain the statutory defence to an accused is an irregularity which may be cured if there has been no prejudice."***

We were further referred to the case of **Gift Mulonda vs The People**[2] where the Supreme Court held, inter alia that-

> ***"It is a rule of practice that the proviso to section 138 of the Penal Code should be explained to an accused person."***

We were also referred to the case of **Nsofu vs The People**[3] where the Supreme Court stated that-

> ***"For a defence under the proviso to succeed, an accused must satisfy the Court that he had reasonable cause to believe that the girl was of or above the age of sixteen years, and must satisfy the Court also that he did in fact believe this."***

It was submitted that the learned trial Court did not address its mind to the appearance of the prosecutrix in this matter, hence the prejudice. Counsel prayed that ground one of the appeal be allowed.

On ground two, it was submitted that the evidence against the appellant, as given by PW1 is that the prosecutrix was aged fifteen years. She alleged that she was defiled by the appellant on two

occasions, firstly at a lodge and secondly in a car near the American Embassy.

We were referred to the case of **Emmanuel Phiri vs The People**[4] where it was held that-

> ***"In a sexual offence there must be corroboration of both the commission of the offence and the identity of the offender in order to eliminate the danger of false complaint and false implication. Failure by the Court to warn itself is a misdirection."***

Counsel submitted that in this matter, there is corroboration as to the commission of the offence, but none as to the identity of the offender. It was submitted that the learned trial magistrate relied on the fact that the appellant in his evidence agreed to having given the prosecutrix a lift to school one morning as he took his children to school.

Counsel contended that this is not the kind of opportunity which would constitute something more which would rule out the possibility of false implication. We were referred to the case of **Nsofu vs The People** where the Supreme Court stated that-

"Whether evidence of opportunity is sufficient to amount to corroboration depends upon all the circumstances of the particular case."

Counsel submitted that there was nothing unusual or suspicious about the giving of a lift to PW1. It was submitted that it would have qualified as proper opportunity if someone from the lodge was called to confirm that they saw the appellant enter the lodge's premises or leave a room there. It was further submitted that the prosecutrix could have falsely implicated the appellant to protect her boyfriend in order to avert further interrogation by her uncle and her aunt. Counsel contended that the possibility of false implication in this matter was not ruled out.

It was further submitted that since the appellant tested HIV negative while the prosecutrix was found to be HIV positive, this should operate in his favour as clearly, the prosecutrix was infected by someone else.

It was submitted that there was no corroboration of the prosecutrix's allegations that she was defiled by the appellant. It was further contended that there were no special and compelling

grounds to rule out inherent dangers of false implication. We were urged to uphold the appeal, quash the conviction, set aside the sentence and set the appellant at liberty.

The respondent filed heads of argument which they relied on. Mrs Chitundu, Deputy Chief State Advocate submitted that a person who is HIV negative and has sexual contact with another who is HIV positive may not contract HIV from the encounter according to the Zambia HIV Impact Assessment Report of 2016, which states that one may not contract HIV from a sexual partner in particular cases.

Responding to ground one, Counsel submitted that the trial Court addressed its mind to the evidence on record and inevitably found for the respondent. It was submitted that the trial Court was on firm ground when it found that the prosecution had proved the case against the appellant beyond all reasonable doubt.

We were referred to the case of **Martin Nc'ube v The People**[5] in which the Court stated that the age of a victim in defilement cases is cardinal and an essential ingredient of the charge.

On the statutory defence created by the proviso to Section 138 of the Penal Code, it was submitted that the appellant knew the prosecutrix over a long period of time as she was his friend's niece who lived in the same area as he did.

He also knew her from her school where his organization, Family Legacy Mission sponsored vulnerable children. It was submitted that he ought to have known how old the prosecutrix was and that as such, the statutory defence cannot apply to him. It was further submitted that the appellant was represented by Counsel at the time of taking plea and throughout the proceedings. He was not a lay person representing himself who was not alive to the provisions of the law and that being the case, he could not allege that he was prejudiced. Counsel contended that his Defence Counsel knew about the proviso and that it ought to have been read to the appellant. His Counsel should have raised the issue at the earliest possible opportunity so that it would have been addressed. Counsel submitted that the raising of the defence at this stage is a mere afterthought since at the trial, the appellant knew that the prosecutrix was under the age of sixteen years. It was submitted

that the appellant pleaded not guilty and that no prejudice was occasioned under the circumstances of the case as he denied having carnal knowledge of the prosecutrix.

We were referred to the case of **Willeim Roman Buchman vs Attorney General** [6] where the Court held that-

> ***"A matter that is not raised in the court below cannot be raised before a higher court as a ground of appeal."***

It was submitted that attempting to raise a new ground of appeal over a defence that was not pleaded is against the rules of evidence and would amount to attempting to have a second bite at the cherry. It was submitted that the appellant blatantly denied having sex with the prosecutrix and that as such, the proviso to section 138 of the Penal Code was not available to him.

It was submitted that the conduct of the appellant amounts to blowing hot and cold at the same time, as he wishes to rely on the proviso and yet he denied having carnal knowledge of the prosecutrix.

It was submitted the trial Court cannot be faulted for concluding that the appellant had carnal knowledge of the prosecutrix and that

the Court was on firm ground when it convicted the appellant on the evidence before it. We were urged to uphold the decision of the learned trial Court and dismiss ground one of the appeal.

With regard to ground two, Counsel submitted that it is trite that the Court cannot convict an accused person on the uncorroborated evidence of a prosecutrix in sexual offences. We were referred to the case of **Kombe vs The People**[7] where the Supreme Court stated that-

> ***"In sexual offences such as rape and defilement corroboration is required as a matter of law before there can be a conviction."***

It was submitted that the evidence that was adduced before the Court corroborated both the commission of the offence and the identity of the offender, the appellant. With respect to the offence, it was submitted that the medical report produced and marked P2 corroborated the evidence of the prosecutrix that she was defiled and that this piece of evidence was not challenged by the appellant.

Regarding the identity of the offender, it was submitted that the prosecutrix knew the appellant as her uncle's friend. He also

admitted knowing the prosecutrix, which amounted to corroboration of the identity of the appellant. It was submitted that the appellant admitted giving a lift to the prosecutrix on a date in November, 2013, which shows that he had the opportunity to defile the prosecutrix. We were referred to the case of **Ivess Mukonde vs The People**[8] where the Court held that-

> ***". . .circumstances and the locality of the opportunity may be such as in themselves amount to corroboration."***

It was submitted that no evidence was adduced to suggest that the prosecutrix had any motive to falsely implicate the appellant. We were referred to the case of **Katebe vs The People**[9] where the Court held that-

> ***"Where there can be no motive for a prosecutrix to deliberately and dishonestly make false allegations against an accused, this is a special and compelling ground which would justify a conviction on uncorroborated testimony".***

On the issue of the appellant testing HIV negative, it was submitted that this fact does not in itself exonerate him from the commission of the offence. Counsel submitted that the trial Court was on firm

ground when it convicted the appellant. We were urged to uphold the decision of the trial Court and dismiss the appeal.

In reply, Mr Muzenga reiterated the contents of his written heads of argument and prayed that the appeal succeeds.

We have considered the grounds of appeal, the submissions by Counsel the evidence in the Court below and the Judgment appealed against.

In ground one, the appellant contends that the learned trial Court erred when it failed to explain the proviso to the appellant, thus denying him the opportunity of making the defence which the proviso creates.

The argument in support of this ground of appeal is that drawing a distinction between an accused who is represented and one who is not would disadvantage the represented accused as he would not benefit from information that would be helpful to his case. It was contended that Counsel representing him may not have known of the defence, thus resulting in prejudice being occasioned to the appellant.

As rightfully pointed out by the State, for the statutory defence to succeed, the accused must have had reasonable cause to believe that the prosecutrix was above the age of sixteen years. In the present case, the appellant admitted knowing the prosecutrix since the year 2000 and that he was a family friend who knew her uncle well. He would even visit them home to deliver chickens and was not a stranger to the prosecutrix.

Further, the appellant was represented by Counsel throughout the trial. His defence was that he did not have carnal knowledge of the prosecutrix at all. Although the proviso was not read to him, we do not find that he suffered any prejudice as his defence, which he discussed with his learned Counsel was that he did not have carnal knowledge of the prosecutrix. For him to raise the defence of having believed that the prosecutrix was over the age of sixteen years is unhelpful to him and amounts to an afterthought which is contrary to the defence that he raised at trial as a represented accused person. A perusal of the record shows that at no time did the appellant indicate that he intended to plead guilty to the charge of

defilement, which would have given him the opportunity to rely on the proviso to Section 138 of the Penal Code.

We do not find merit in this ground of appeal and we accordingly dismiss it.

Regarding ground two, that the trial Court erred in law and fact when it convicted the appellant in the absence of evidence of corroboration, the learned Counsel for the appellant's argument is that there was danger in convicting the appellant on the uncorroborated testmony of the prosecutrix and that the opportunity which the appellant had of merely giving a lift to the prosecutrix was not adequate to draw a conclusion that he had the opportunity to commit the offence.

Corroboration is independent evidence which supports the evidence of a witness in a material particular. In defining what constitutes corroboration, Lord Reading, CJ, said, in the case of

R v Baskerville[10] that-

> ***"we hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him to the crime. In other***

words it may be evidence which implicates him, that is, which confirms in some material particular not only evidence that the crime has been committed but also that he is the person who committed it."

We are satisfied that the trial Magistrate was mindful of the need for corroborative evidence when he concluded that the medical report, exhibit P2 corroborated the evidence of the prosecutrix that she was defiled. The appellant admitted giving the prosecutrix a lift to school one day in November, 2013. We are of the view that the appellant had the opportunity to defile the prosecutrix, who he took to a lodge in Kamwala South. On a second occasion, he defiled her in his vehicle at a deserted place near the American Embassy. Further, the identity of the offender is not an issue in this matter because the prosecutrix was very well known to the appellant, a position he admitted in his defence.

There is nothing from the record of proceedings suggesting the presence of particular circumstances which could have motivated the prosecutrix or her uncle and aunt to give false evidence against the appellant. We therefore do not find any reason to fault the trial

Court's acceptance of the prosecutrix's evidence or that of PW2 and PW3, her uncle and her aunt, respectively.

The trial Court took into account all the evidence on record, including the medical evidence. The appellant had good opportunity to commit the offence, of the type which amounts to corroboration.

We form the view that the evidence on record was adequate to support a conviction and that the prosecutrix's evidence was well corroborated.

We find no merit in ground two and it is accordingly dismissed.

The net result is that we find no merit in the appeal. We dismiss it and uphold both the Conviction and Sentence.

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE