

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

APPEAL NO. 119/2019

BETWEEN:

PERWARD MWANSA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: CHISANGA, JP, SICHINGA AND NGULUBE, JJA.
On 18th February and 25th February, 2020.

For the Appellant: *Ms K. Chitupila, Senior Legal Aid Counsel, Legal Aid Board.*

For the Respondent: *Mrs M. Kapambwe – 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. *R vs Henry and Manning (1969) 53 Crim App Rep 150*
2. *Emmanuel Phiri vs The People (1982) Z.R. 79*
3. *Fawaz and Chelelwa vs The People (1995-1997) Z.R. 3*
4. *Simon Malambo Chooka vs The People (1978) Z.R. 243*
5. *Bwanausi vs The People (1976) Z.R. 103*
6. *Miller vs Minister of Pensions (1947) 2 All ER 372*
7. *Saidi Banda vs The People, Selected Judgment Number 30 of 2015*
8. *Katebe vs The People (1975) Z.R. 13*
9. *Winfred Mapapayi and The People, Appeal Number 191 of 2015*
10. *Machipisa Kombe vs The People (2009) Z.R. 282*
11. *The People vs Antifellow Chigabba, SCZ Selected Judgment Number 454 of 2017*

12. *Daddy Fichite vs The People, Appeal Number 21/2017*
13. *Christopher Nonde Lushinga vs The People (2011) 2ZR 301*
14. *Nsofu vs The People (1977) Z.R. 77*

LEGISLATION REFERRED TO:

1. *The Penal Code, Chapter 87 of the Laws of Zambia*
2. *The Juveniles Amendment Act Number 3 of 2011*
3. *The Juveniles Act, Chapter 53 of the Laws of Zambia*

1.0 Introduction

1.1 The appellant was arraigned in the Subordinate Court at Lusaka of one count of the offence of defilement, contrary to **Section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia**¹.

The particulars alleged are that the appellant, on dates unknown, but between 1st February 2018 and 9th March, 2018 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia had unlawful carnal knowledge of NC, a girl under the age of sixteen years.

1.2 He was convicted and committed to the High Court for sentencing. The High Court reviewed the evidence before the lower court and was of the view that there was insufficient evidence to sustain a conviction for the offence of defilement but found that the evidence on record proved the offence of attempted defilement, contrary to Section 138(2) of the Penal Code. He was sentenced to fourteen years imprisonment with hard labour, with effect from 9th March,

2018, the date of his arrest. The appellant now appeals against conviction and sentence.

2.0 Summary of the evidence adduced in the Subordinate Court.

2.1 The prosecutrix, PW1 who was aged 10 years gave sworn evidence after the court conducted a voire dire and pronounced that it had satisfied itself that the child understood the purpose and nature of telling the truth and possessed the intelligence to give evidence on oath.

2.2 The prosecutrix's testimony was that sometime in February, 2018, her mother sent her to buy vegetables at 18:00 hours within Chunga compound where she lived and when she got to the makeshift store, she did not find anyone. She then proceeded to the house of the owner of the said store where she found an old man who happened to be the husband to the owner of the said store. The prosecutrix entered the house as the old man told her to wait for his wife to bring the vegetables. She waited for a while and when she realised that the vegetables were not coming, she told the old man that she was leaving because it was getting late.

2.3 As the prosecutrix knelt down to greet the old man, he held her hand and pulled her. He then kissed her on the mouth and locked

the door of the house. The old man covered the prosecutrix's mouth with a cloth which he tied around her neck and made her lie down on the floor. He undressed her and proceeded to defile her. As this happened, she felt pain on her private parts.

- 2.4 When he finished, she dressed up and went home. A few days later, the prosecutrix felt pain on her private parts and told her mother what the old man did to her on the fateful evening. She also narrated the details of the defilement to her grandmother and was taken to Chunga Police Station where the matter was reported. Thereafter, the prosecutrix was taken to the University Teaching Hospital for medical examination. She identified the old man who defiled her when she saw him in the dock. She knew him well because he was a neighbour and also used to go see her father for prayers.
- 2.5 In cross-examination, the prosecutrix stated that she did not tell her mother of the defilement the day it occurred because the accused told her that if she told her mother, her parents would die. She eventually narrated her ordeal because she could not endure the pain that she was experiencing. On the evening when she was defiled, the old man was alone at his house.

2.6 PW2, Elizabeth Mwape aged 29 years of Chunga compound gave evidence that on 8th March, 2018 at about 18:00 hours, she was with her daughter at home, who told her that there was something that she wanted to tell her but she feared that PW2, her mother, would die. When PW2 assured her daughter that she would not die, the child narrated that on the day that she was sent to buy vegetables and later returned home crying, she lied that she had fallen down. The truth was that she was defiled by Mwansa, the old man, who warned her that if she told her mother about the defilement, she would die.

2.7 PW2 took her child to the Police Station the following day and they were issued with a medical report form. She was later taken to the University Teaching Hospital where she was examined. The following day, at 04:00 hours, PW2 led the Police to the house which her daughter showed her as the place where she was defiled a few days earlier. She identified the suspect to the Police. She knew him well as he would even attend prayers at her house. PW2 identified her daughter's under-five card in court and it was duly marked. She sent her daughter to buy vegetables at the end of February, 2018.

- 2.8 PW3, Maxwell Mwene, a constable in the Zambia Police Service, based at Chunga Police Station gave sworn evidence that on 11th March, 2018, he was assigned a case of defilement. He went to the home of the suspected defiler in the company of the prosecutrix and her mother. When the prosecutrix identified the man that they found at the house as the one who defiled her, PW3 apprehended him and took him to the police station.
- 2.9 PW4, Agness Musakanya a woman constable stationed at Chunga Police Station gave sworn evidence that on 11th March, 2018, she was assigned a docket of defilement in which PW2 reported on behalf of her daughter, PW1. She was handed over the suspect, Perward Mwansa who was aged 72 years. She also received a medical report and an under-five card belonging to the prosecutrix. She charged and arrested the suspect for the subject offence, which he denied.
- 2.10 PW5, Bryce Musonda the medical doctor who treated the prosecutrix gave sworn evidence and stated that when he examined her, he noticed that she had bruises at the entrance of her vagina although the hymen was intact. He examined the prosecutrix two weeks after she was allegedly defiled and stated

that healing after a defilement takes place within three days. He only saw bruises when he conducted the examination on the prosecutrix.

2.11 The accused gave evidence on oath in his defence to the effect that on 11th March, 2018, police officers went to his house and he was apprehended. He denied ever seeing the prosecutrix but remembered that her mother, PW2 went to his house sometime in 2017 to tell him that her husband had divorced her. She threatened to fix him because she thought the accused ill-advised her husband to divorce her.

2.12 He alleged he was falsely implicated in the offence of defilement and went on to state that he has fifteen granddaughters who visit him at his house regularly, but he has never defiled them. He also suffered a stroke which affected his reproductive organs in 2015 and he has never had a sexual encounter since then. In cross-examination, the accused stated that the prosecutrix knew him well. She did not go to his house on the material day and he denied defiling her.

2.13 DW2, Bridget Mukandu of Lilanda Compound gave sworn evidence that on 11th March, 2018, she was informed that her

grandfather had been arrested for the offence of defilement. However, the previous day she visited him and was at his home the whole day, from 10:00 hours to 16:00 hours.

2.14 The trial magistrate found that the accused's wife sold vegetables and that the accused used to visit the prosecutrix's father. The court went on to find that the appellant was known to the prosecutrix and that she knew the accused's house where his wife sold vegetables since there was a cholera outbreak at the time. The court went on to make a finding of fact that during the period, vendors sold merchandise from their homes because they were banned from selling on the streets.

2.15 The court found that the prosecutrix knew the accused's home and that she was defiled between 1st February, 2018 and 9th March, 2018. The court found that the accused was well known to the prosecutrix and her parents as he even attended prayers at their house and that the doctor confirmed that the prosecutrix was defiled.

2.16 Upon analyzing the evidence before her, the learned trial magistrate concluded that the accused had the opportunity to defile the prosecutrix when she went to buy vegetables at his

house. He made her wait for his wife and since he was alone there, he had the opportunity to defile her. The court also found that the accused was properly identified and that he was the only one who had the opportunity to defile the prosecutrix. He was accordingly convicted for the offence as charged and the matter was committed to the High Court for sentencing.

2.17 The High Court Judge reviewed the evidence on record and was of the view that the facts of the case as well as the evidence on record revealed the offence of attempted defilement, contrary to Section 138(2) of the Penal Code. The court sentenced the convict to fourteen years imprisonment with hard labour with effect from the date of his arrest, the 9th of March, 2018.

3.0 Grounds of Appeal in this Court

3.1 Dissatisfied with the conviction and sentence, the appellant now appeals to this court raising the following grounds-

- 1. The learned trial court erred in law and in fact when it convicted the appellant based on circumstantial evidence and the uncorroborated testimony of a single identifying witness, being PW1.**

2. **The Learned trial court misdirected itself when it found the appellant guilty of attempted defilement of a child relying on the evidence of PW2 who was a witness with a possible interest to serve.**
3. **The Learned trial court misdirected itself when it neglected to consider the appellant's reasonable explanation when he was placed on his defence.**

3.2 Ms Chitupila, Senior Legal Aid Counsel argued on behalf of the appellant. Regarding ground one, it was submitted that the prosecutrix, PW1, who was the only witness reported the occurrence to her mother, PW2, two weeks after the offence was allegedly committed. We were referred to the case of **R vs Henry and Manning**¹ where the court cautioned on the danger of convicting on the evidence of a woman or girl alone in cases of sexual offences.

3.3 Counsel criticized the learned trial magistrate for convicting the appellant on the uncorroborated testimony of a single identifying witness, whose evidence needed corroboration. She went on to state that the conduct of the prosecutrix from the time of the alleged defilement to the day she made the report did not show

consistency. Emphasizing the need for corroboration, we were referred to the case of **Emmanuel Phiri vs The People**² where the Supreme Court stated 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 dangers of false implication.”

- 3.4 We were further referred to the case of **Fawaz and Chelelwa vs The People**³, where the Supreme Court held, inter alia that in single witness identification, corroboration or something more is required. Counsel submitted that the medical report did not show whether the prosecutrix was indeed defiled and as such, this made the evidence on record purely circumstantial, and did not conclusively point at the appellant as the person who committed the offence. We were urged to quash the appellant’s conviction.
- 3.5 Grounds two and three brought the argument that PW2 had a possible interest of her own to serve because sometime in 2017, she visited the appellant and threatened that she would fix him for having ill-advised her husband to divorce her. Counsel contended that PW2 had a personal vendetta against the appellant

and therefore had reasons to want to personally implicate him in the offence of defilement which he knew nothing about. We were referred to the case of **Simon Malambo Chooka vs The People**⁴ where the court held that-

“a witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on the demeanour and the plausibility of the evidence.”

3.6 We were urged to quash the conviction and sentence and set the appellant at liberty because the court relied on the uncorroborated testimony of a single identifying witness and neglected to critically examine the inconclusive findings of the doctor who examined the prosecutrix, thus making the conviction unsafe.

3.7 Mrs Kapambwe – Chitundu, Deputy Chief State Advocate filed submissions on behalf of The People. In responding to ground one, Counsel submitted that the circumstantial evidence in this matter had attained the necessary cogency to take the case out of the realm of conjecture to permit the inference that the appellant

took advantage of the prosecutrix and defiled her. We were referred to the case of **Bwanausi vs The People**⁵ where the court held that a conclusion based purely on inference may be so made if it is the only reasonable inference that can be made on the evidence.

3.8 Counsel submitted that the court considered all the evidence before it and the possible inferences on the said evidence and came to the logical conclusion that it was the appellant who defiled the prosecutrix. It was contended that the evidence against the appellant was so strong as to reach the standard envisaged in the case of **Miller vs Minister of Pensions**⁶ where Lord Denning stated inter alia that-

“The degree of cogency required in a criminal case before an accused person is found guilty is well settled. It need not reach certainty but it must carry a high degree of probability.”

3.9 The court was also referred to the case of **Saidi Banda vs The People**⁷, in which the Supreme Court restated the law on circumstantial evidence, that in many instances, it is probably as

good, if not even better than direct evidence. Counsel submitted that the medical report, exhibit “P2” is conclusive evidence that the prosecutrix was defiled. Referring to the case of **Katebe vs The People**⁸, it was submitted that a court may convict on uncorroborated evidence if there are special and compelling grounds. It was stated that there was no motive for the prosecutrix to tell a lie against the appellant and that this was a special and compelling circumstance as she had no reason to implicate the appellant out of all the men in the community where she lived.

3.10 Referring to the case of **Winfred Mapapayi and The People**⁹, Counsel submitted that the appellant placed himself at the scene of the offence but also had ample opportunity to defile the prosecutrix. It was contended that the conduct of the appellant when the arresting officer, PW3 went to apprehend him provided “something more” as was stated in the case of **Machipisa Kombe vs The People**¹⁰, because when the police officers asked the appellant if he knew the prosecutrix, he denied knowing her. Counsel argued that the appellant knew the prosecutrix well

because he used to visit her father at home for prayers but decided to deny knowing her to distance himself from the crime.

3.11 It was further submitted that notwithstanding that the prosecutrix took long to report the matter, this does not take away the fact that the appellant defiled her. It was argued that issues relating to sex are not discussed easily under African tradition and that this contributed to the prosecutrix's delay in telling her mother about the defilement and the subsequent reporting of the matter to the police.

3.12 Responding to grounds three and four, we were referred to the case of **The People vs Antifellow Chigabba**¹¹, where the court stated that the mere fact that witnesses are related does not mean that they have interests of their own to serve or that they have motives to falsely implicate the appellant. Counsel submitted that in casu, the witnesses had no interest of their own to serve nor did they have a motive to falsely implicate the appellant who had previously been relating well with them.

3.13 It was submitted that the court convicted the appellant of attempted defilement, contrary to section 138(2) of the Penal Code because the court was of the view that the medical report was

inconclusive. We were referred to the case of **Winfred Mapapayi vs The People (supra)**, where the court stated that not every penetration in defilement results in injury. We were further referred to the case of **Daddy Fichite vs The People¹²**, and it was submitted that an intact hymen is not a measure of whether defilement occurred or not. Consequently, it was argued that the lower court was on firm ground when it convicted the appellant for the offence of defilement as charged. We were urged to convict the appellant of the said offence as the evidence on record was cogent.

4.0 Decision of the Court

4.1 We have carefully considered the evidence on record, the Judgment of the trial court and the submissions by both Learned Counsel. Ground one is that the trial court convicted the appellant on the evidence of a single identifying witness which was not corroborated. The evidence on record is that the prosecutrix was aged ten years and was therefore a child of tender years. **The Juveniles (Amendment) Act Number 3 of 2011²** deals with the evidence of a child of tender years. Section 122 of the said Act provides that-

“122. 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 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 of speaking 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 the 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 that evidence is corroborated by some other material evidence in support thereof implicating the accused.”**

4.2 The facts of this case, being of a sexual nature, the prosecution needed to establish corroboration of both the commission of the offence and the identity of the offender. The case for the prosecution depended largely on the evidence of the prosecutrix, a child of tender years whose sworn evidence was received after a successful voire dire was conducted. In the case of **Christopher Nonde Lushinga vs The People**¹³, the Supreme Court held that **section 122(1) of the Juveniles Act**³ requires that the evidence given for the prosecution by a child of tender years requires corroboration.

4.3 In her Judgment, the learned trial magistrate, prior to convicting the appellant stated that-

“.....I warn myself that it is dangerous to convict the accused on the evidence of the prosecutrix alone without independent evidence implicating the accused in a material particular.”

4.4 The court went on to state that since the prosecutrix went to buy vegetables at the accused's house, he had the opportunity to defile the prosecutrix as he was alone at home. In the case of **Machipisa**

Kombe vs The People (supra), the Supreme Court, in relation to what constitutes corroboration held that-

“.... There need not be a technical approach to corroboration. Evidence of “something more” which though not constituting corroboration as a matter of strict law, yet satisfies the court that the danger of false implication had been excluded and that it is safe to rely on the evidence implicating the accused.”

- 4.5 The Judgment of the trial court indicates that the learned trial magistrate was alive to the requirement for evidence corroborating the prosecutrix’s allegations. The magistrate believed and accepted the prosecutrix’s evidence that the appellant defiled her and stated that he had the opportunity to commit the offence.
- 4.6 In the case of **Nsofu vs The People**¹⁴, the following was said about the element of opportunity corroborating an allegation that the accused had committed the crime in question-

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

Mere opportunity does not amount to corroboration but the opportunity may be of such a character as to bring in the element of suspicion. That is, the circumstances and locality of the opportunity may be such as in themselves amount to corroboration.

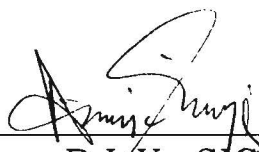
- 4.7 In the matter in casu, the allegation is that the prosecutrix went to buy vegetables at the appellant's house while his wife was away. He made her wait for her return and after a while, he pulled her into his house and defiled her. Noting that the prosecutrix made the complaint late because she was warned not to tell her mother about the defilement by the appellant.
- 4.8 Having considered the evidence on record and the circumstances of this matter, we form the view that there was no corroboration of the prosecutrix's testimony on the defilement as required by section 122 of the Juveniles Act.
- 4.9 There is no conclusive evidence that establishes that the prosecutrix went to the appellant's house where she was allegedly defiled on the material night. The only evidence against the appellant is the prosecutrix's testimony. Further, we are of the view that there is no evidence of opportunity that can constitute

corroboration of the prosecutrix's testimony as to the identity of the appellant as the person who defiled the prosecutrix.

4.10 We therefore find merit in ground one of the appeal and it succeeds. This renders grounds two and three of the appeal otiose. For the foregoing reasons, we are of the view that the lower court's conviction of the appellant was unsafe and we quash the conviction and sentence and set the appellant at liberty forthwith.



F. M. CHISANGA
JUDGE PRESIDENT - COURT OF APPEAL



D.L.Y. SICHINGA
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE