IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 125 OF 2019

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN

NATHAN KUNDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Chashi, Mulongoti, Lengalenga, JJA

ON: 19th and 27th February 2020

For the Appellant: *C. Ngoma, Messrs. Simeza Sangwa and Associates.*

For the Respondent: *M.K. Chitundu (Mrs.) Deputy Chief State Advocate and S. Zulu, State Advocate, National Prosecutions Authority.*

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. ***Machipisha Kombe v The People (2009) ZR 282***

2. *The People v John Nguni (1977) ZR 376*
3. *King v Job Whitehead (1929) 1 KB 99*
4. *Dorothy Mutale and Richard Phiri v The People (1997) SJ 51*
5. *Saidi Banda v The People – SCZ Selected Judgment No. 30 of 2015*
6. *Ilunga Kabala and John Masefu v The People (1981) ZR 102*
7. *Subramanian v The Public Prosecutor (1956) 1 WLR 956*
8. *Joseph Bwalya v The People - CAZ Appeal No. 174 of 2017*
9. *R v Baskerville (1916) 2 KB, 658*
10. *Ives Mukonda v The People - SCZ Judgment No. 11 of 2011*
11. *Saul Banda v The People – CAZ Appeal No. 117 of 2017*
12. *Daniel Banda v The People – CAZ Appeal No. 137 of 2018*
13. *Mwewa Murono v The People (2004) ZR 207*

Legislation referred to:

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

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of the Subordinate Court of the First Class (S. Chikuba), delivered on 28th March 2018. By that Judgment, the Appellant was convicted of defilement contrary to section 138(1) of ***The Penal Code***[1] as read with Act No. 15 of 2005 and Act No. 2 of 2011. The Appellant was subsequently committed to the High Court (Hon. Mr. Justice Isaac Kamwendo) for sentencing and was sentenced to a term of forty (40) years imprisonment with hard labour with effect from 15th October 2018.

1.2 This Appeal considers whether, an inference of guilt is the only one that could have been drawn from the evidence that was before the trial court.

2.0 CHARGE BEFORE THE TRIAL COURT

2.1 The Appellant was charged with one count of defilement contrary to section 138(1) of ***The Penal Code***[1] as read with Act No. 15 of 2005 and Act No. 2 of 2011. The Particulars of the offence alleged that the Appellant

between 17th October and 18th October 2018, at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, had unlawful carnal knowledge of a child below the age of sixteen (16) years.

3.0 EVIDENCE BEFORE THE TRIAL COURT

3.1 From the outset, we wish to state that, the child aged three (3) years at the time, did not give evidence in this case because after conducting a **voire dire,** the learned trial Magistrate was of the view and rightly so we must add, that she did not possess sufficient intelligence for her testimony to be received in evidence. The main evidence, therefore, rested on that of the child's mother, Jane Shatontola (PW1).

3.2 The facts underlying the conviction were briefly as follows; on the material day, around 20:00 hrs, after having dinner, the child disappeared and only returned after an hour. PW1 took the child for a bath and the child started crying. When asked why she was crying, the child said that *"it was the uncle from there who hurt me."*

3.3 When PW1 checked the child, she observed sores on her private parts. This was also confirmed by PW3, their neighbour. The child then pointed towards Flat No. 5, belonging to the Appellant, who was the immediate neighbour as they occupied Flat No. 4. The child alleged that; it is the Appellant who defiled her.

3.4 PW1 then knocked on the Appellant's door and when the Appellant opened the door, she asked him for the other occupants. The Appellant informed her that he was the only one present. He called them as demanded by PW1 and only one came. When the child was asked who had defiled her between the two, she pointed at the Appellant.

3.5 PW1, together with the Appellant and his friend took the child to the clinic, where they were advised to go to the police. They went to Mpunde police station, where the child was interviewed by PW4 and when asked who had defiled her, the child, yet again, pointed at the Appellant. PW4 subsequently detained the Appellant overnight before transferring him to Kabwe Central Police for official arrest and investigations.

3.6 The next day, PW1 and the child were referred to Kabwe Central Police, where an identification parade was conducted by PW5. There were 5 participants on the parade and the child consistently pointed at the Appellant. Thereafter, the child was taken to Kabwe General Hospital, where she was examined and the findings as set out in the medical report revealed that she had sustained injuries. The Appellant was subsequently charged and arrested for the subject offence.

3.7 In his defence, the Appellant denied any involvement in the offence. He alleged that, on the fateful day, he left home sometime after 18:00 hrs to meet the village headman to pay for the Kulamba Kubwalo Ceremony and only returned home around 20:30 hrs. He claimed that he was not home when the incidence occurred. He further alleged that while he was detained at the police station, he phoned his friend and upon his arrival, the child pointed at his friend and said, *"it is this one."* Thereafter, the Appellant's friend was also detained in connection with the same offence but later released.

3.8 The Appellant called one witness, the senior headman, who confirmed that he met up with the Appellant on the material day between 18:30 and 20:30 hrs to discuss payments for the Kulamba Kubwalo ceremony. About fifteen (15) minutes after the Appellant and the headman parted ways, he received a call from the Appellant who requested him to go to Mpunde clinic. When he arrived at the clinic, he found the Appellant with two women claiming that he had defiled a young girl.

4.0 FINDINGS OF THE TRIAL COURT

4.1 Upon considering the evidence on record and the submissions of the parties, the trial court found as a fact that the age of the child was duly established by PW1 and PW2, the parents to the child and in addition, an under five card was tendered into evidence which showed that at the time of the incidence, the child was aged three (3) years old.

4.2 The learned Magistrate found that, indeed someone had defiled the child. He was of the view that, the commission

of the offence was corroborated by the medical report and the evidence of PW1 and PW3. He further found as a fact that, at the time of the offence, the Appellant and the child lived in the same premises, sharing a corridor with doors next to each other.

4.3 The trial Magistrate then considered the evidence relating to the identity of the assailant. He found that, it was not in dispute that the child led PW1 and PW3 to the Appellant's house and pointed at him as the person who defiled her, which evidence the Appellant confirmed in his testimony. Relying on the case of **Machipisha Kombe v The People**,[1] the trial Magistrate opined that, it was an odd coincidence that the child pointed at the Appellant as the person that defiled her and he happened to be alone in his house. In his view, this raised the possibility of the Appellant having had the opportunity to commit the subject offence.

4.4 The Magistrate further considered the alibi raised by the Appellant in his defence to the effect that he was with the headman at the time the incidence occurred. The learned

trial Magistrate was of the view that, there was an inconsistency as to how long the Appellant was with the headman. While the headman testified that he was with the Appellant between 18:30 and 20:30 hrs on the material day, during his cross examination, he testified that he spent less than two hours with the Appellant and that he met the Appellant at the roadside, about 200 metres from the Appellant's house.

4.5 In his view, this contradicted the evidence of the Appellant, who painted a picture that he met the headman at his village and yet it was near his house, which indicated that the Appellant never went far from his home. He opined that, it was illogical that a handover of a list could take up to 2 hours or more. In his view, this confirmed that the Appellant had the opportunity to commit the offence.

4.6 The trial Magistrate further discounted the Appellant's allegation that it could have been his friend Clement who defiled the child. He found that it had been established that the said Clement left Mpunde area a day before the

incidence occurred. Further, that the issue of the alibi could not be investigated by the Police because it only came up during his defence and hence there was no dereliction of duty on the part of the Police.

4.7 With regard to the child not testifying, the learned trial Magistrate opined that in the absence of the child's testimony, the statements by the prosecution witnesses were not hearsay and were admissible as they were not intended to establish the truth of what is contained in the statement but merely to establish that the child made the statement.

4.8 The learned trial Magistrate further found that, there was no indication of a motive on the part of the child's parents to falsely implicate the Appellant, as the evidence on record revealed that the Appellant and the child's parents related very well prior to the incidence. The trial Magistrate further dismissed the Appellant's allegation that the child pointed at his friend while at Kabwe Central Police as an afterthought because it was only raised during his defence.

4.9 The court was satisfied that the vital ingredients of the offence had been proven by the prosecution and found the Appellant guilty as charged and convicted him accordingly. The Appellant now appeals against conviction and sentence.

5.0 GROUND OF APPEAL

5.1 The Court below erred in law when it considered that the evidence adduced by the prosecution sufficiently identified the Appellant as the assailant of the child and the perpetrator of the offence.

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 Mr. Ngoma, Counsel for the Appellant, made viva voce submissions in support of the sole ground of appeal. We note that the Appellant argued this ground of appeal under four limbs, however, in our view, the main issue arising out of the said arguments relates to hearsay evidence, which essentially touches on the weight of the prosecution's case.

6.2 The Appellant's Counsel attacked the evidence of PW1 through to PW5 terming it as hearsay evidence, as their

evidence was merely an account of what they had been told by the child that it was the Appellant who defiled her. It was contended that the said evidence should not have been admitted and relied upon. Counsel referred us to the case of **The People v John Nguni**[2] and submitted that, by that case, the only time that hearsay evidence was admissible to identify an assailant was under the principle of **res gestae**.

6.3 According to Counsel, the reliance on hearsay evidence was erroneous and unfair because the source of the statement was the child who had failed the **voire dire.** Counsel argued that, the only way the identity of the assailant could have been ascertained, was if the testimony of the child was admitted into evidence and subjected to cross examination. In the absence of that evidence, the evidence of PW1 – PW5 remained in the ambit of hearsay evidence and should not have been relied on.

6.4 In connection to this argument, was the issue of corroboration. Counsel relied on the case of **King v Job**

Whitehead[3], for the position that corroboration must emanate from a source other than the witness requiring corroboration. According to Counsel, in the present case, the source of evidence linking the Appellant to the offence was hearsay evidence based on what the child had said. Therefore, the identification of the Appellant was not proved beyond reasonable doubt.

6.5 Based on the foregoing, Counsel was of the view that there were other inferences that could have been drawn from the evidence on record. Counsel submitted that the trial court erred by not resolving those inferences in favour of the Appellant. Counsel drew our attention to the case of **Dorothy Mutale and Richard Phiri v The People**[4] and submitted that a second inference could have been drawn and that is, the Appellant was with the village headman from 18:00 hrs to 20:30 hrs.

6.6 On the whole, the Appellant submitted that the evidence of the prosecution witnesses did not connect the Appellant to the subject offence and that the trial court ought not to have relied on it.

7.0 ARGUMENTS OPPOSING THE APPEAL

7.1 On behalf of the State, the learned Deputy Chief State Advocate Mrs. Chitundu opposed the appeal and supported the conviction and sentence. From the onset, Counsel conceded that, there was no direct evidence on record linking the Appellant to the offence but submitted that the whole case hinged entirely on circumstantial evidence, which had attained the required degree of cogency that the only inference to be drawn is that the Appellant defiled the child.

7.2 We were referred to the case of **Saidi Banda v The People**[5], for the position that circumstantial evidence is as good as any other evidence and in some cases can even be better. The circumstantial evidence referred to by Counsel is as follows; that the child informed PW1 that it is the Appellant that defiled her and that the child pointed at the Appellant.

7.3 Counsel further submitted that, there was sufficient opportunity for the Appellant to have committed the offence because when the child pointed at the Appellant,

he was alone in the house, which, according to Counsel was an odd coincidence. Counsel submitted that, the circumstantial evidence and the odd coincidences in this case, corroborated the evidence of the prosecution witnesses that it is the Appellant that defiled the child. We were referred to the **Machipisha Kombe case**[1] and **Ilunga Kabala and John Masefu v The People**[6].

7.4 On the question of hearsay evidence, Counsel was of the view that the statements made by the prosecution witnesses with regards to what they were told by the child, were not meant to establish the truth of what was contained in the statement, but to show that the child made the statement. According to Counsel, the statement made by the child, even though it may not have been true, coupled with the other circumstances of the case, is what we should consider when arriving at our decision.

7.5 In other words, Counsel implored us to consider the statement made by the child to the witnesses that it was the Appellant that defiled her, the circumstantial evidence of the child pointing at the Appellant and the

odd coincidence of the Appellant being found alone in his house as corroborating the identity of the assailant. And further that there was no motive on the part of the child's parents to falsely implicate the Appellant.

7.6 Counsel submitted that, the circumstances surrounding this case were the 'something more' envisaged in the **Machipisha Kombe case**[1]. We were urged to dismiss the appeal and uphold the conviction and sentence.

8.0 ARGUMENTS IN REPLY

8.1 In reply, Mr. Ngoma reiterated his arguments on hearsay evidence and in addition submitted on the rationale for corroboration in sexual offences, that is to exclude the possibility of false implication. He submitted that, the evidence on record did not exclude the possibility of false implication.

9.0 DECISION OF THE COURT

9.1 We have considered the evidence on record and submissions by both learned Counsel. We have also considered the impugned Judgment of the lower Court.

9.2 The evidence as it stands is that, the child was defiled and this was corroborated by the medical report which revealed that there were lacerations on the left inner side of the labia majora and the hymen was broken. It was further revealed that the findings were consistent with the alleged circumstances.

9.3 The commission of the offence was further corroborated by the evidence of PW1 and PW3 who inspected the child and observed sores on her private parts. Therefore, the sole ground of appeal as we see it, mainly deals with the identity of the assailant.

9.4 The gist of the Appellant's argument is that the evidence linking the Appellant to the offence is hearsay evidence, as the witnesses' account of what transpired on that ill-fated day was based on what they were told by the child whose testimony was not received into evidence.

9.5 Per contra, the State argues that there is strong and compelling circumstantial evidence on record, coupled with odd coincidences which materially link the Appellant to the offence. Further that, the statements made by the

prosecution witnesses did not amount to hearsay as they were not intended to establish the veracity of the statement made by the child.

9.6 It is clear from the record that, the source of the evidence linking the Appellant to the offence was the child who informed the prosecution witnesses that it is the Appellant who defiled her. As earlier alluded to, the **voire dire** conducted by the learned trial Magistrate was unsuccessful and as such the child's testimony could not be received in evidence. It is on this basis that the Appellant alleges that the witnesses' evidence amounts to hearsay evidence. The case of **Subramanian v The Public Prosecutor**[7], lays down with clarity what amounts to hearsay. It was stated as follows:

> *"Evidence of a statement made to a witness by another person...may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is purposed to establish by the evidence, not*

the truth of the statement, but the fact that it was made. The fact that the statement is made quite apart from its truth, is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement is made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter as the witness or of some other person in whose presence the statement was made"

9.7 We have perused the evidence of the prosecution witnesses, and it is clear that, in the absence of the child's evidence, all other witnesses who made mention of the Appellant as the perpetrator, reported on what they were told by the child. In light of the holding in the above case and the circumstances of this case, the witnesses by their evidence intended to establish the truth of what was contained in the statement made by the child. It was intended to establish that it is the Appellant who defiled the child. It follows therefore, that such evidence is

inadmissible hearsay, and the trial court ought not to have relied on it.

9.8 In our view, although the child did not give evidence, it is the child's allegation which needed to be corroborated. The question, therefore, is whether there was any other evidence that linked the Appellant to the commission of the offence. Mrs. Chitundu argues that the circumstantial evidence of the child pointing at the Appellant as the defiler, the odd coincidence of the Appellant being found alone in his house and the opportunity amounted to corroboration as to the identity.

9.9 In the case of **Joseph Bwalya v The People**[8], we had the opportunity to discuss circumstantial evidence as amounting to corroboration. We stated as follows:

> *"While we are aware that circumstantial evidence can constitute corroboration, such evidence must be able to confirm that the witness is telling the truth in some part of her story and that the only rational inference open to the court is that the accused committed the offence with which he is charged."*

9.10 In the case of **R v Baskerville**[9], Lord Reading CJ had this to say at page 667:

> *"We hold that evidence in corroboration must be independent testimony which affects the accused by connection or tending to connect him with the crime. In other words, it may be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it"*

Further in the case of **King v Job Whitehead**[3], it was held that corroboration must emanate from a source other than the witness requiring corroboration. It must therefore come from a source which is independent of the witness whose evidence is to be corroborated. In other words, in order that the evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated.

9.11 Section 122 (b) of **The Juveniles Act**[2] (as amended) requires that the evidence of a child of tender years be

corroborated by some other material evidence in implicating the accused. In **casu**, it is clear that, it is the child who informed the prosecution witnesses that it is the Appellant who defiled her and it is the child who led PW1 to the house of the Appellant. In addition, the pointing out of the Appellant at his house, at the police station and also at the identification parade was by the child. It is, therefore, clear that the identification evidence emanated from the child, rendering the child the source and it is this evidence that required corroboration by law. There was no other material evidence on record connecting the Appellant to the offence.

9.12 With regards to opportunity, it is trite law that the evidence of opportunity may indeed amount to corroboration of the identity of the perpetrator, when it can properly be established from the circumstances of the case that the accused had the opportunity to commit the offence. In the case of **Ivess Mukonde v The People**[10], the Supreme Court held as follows:

"1) Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of a particular case. The circumstances and the locality of the opportunity may be such that in themselves amount to corroboration.

2) The circumstances and the locality of the opportunity in the instant case amounted to corroboration of the commission of the offences."

9.13 Further in the case of **Saul Banda v the People**[11], we had the opportunity to discuss opportunity and we stated as follows:

"The law on opportunity in defilement cases was aptly discussed in the illustrious case of Nsofu v The People, where the Supreme Court stated as follows:

"Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular case. In Credland v Knowler [2] Lord Goddard, C.J., at page 55 quoted

with approval the following dictum of Lord Dunedin in Dawson v Mackenzie [3]:

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

We went further to explain opportunity in the case of **Daniel Banda v The People**[12] as follows:

"Our application and understanding of the combined effect of the authorities cited above, in so far as they relate to opportunity, is that for such opportunity to be said to have corroborative value, there should have been something unusual or out of the ordinary as to raise suspicion as to the interaction of the accused with the child. In the circumstances of this case, the appellant and the child are cousins who lived in the same house when the offence was

allegedly committed. Does this alone amount to corroboration as to the identity of the appellant as the one who defiled the child? We are inclined to answer this question in the negative, because there is nothing unusual or indeed suspicious about cousins living in the same house in a family setting, nor do these circumstances satisfy the element of locality. As such, anyone else other than the appellant could have defiled the child between January and June 2017. There is therefore no evidence that closes out the possibility of anyone else to have defiled the child at the alleged time, as the opportunity was not confined to the appellant alone."

9.14 PW1 and PW2, the parents to the child confirmed that they lived in the same premises with the Appellant and that they even shared the same corridor. Further, that there were about nine flats altogether in the said premises. In our view, based on the authorities cited above, there was nothing unusual or out of the ordinary

about the Appellant being found alone in his flat to raise suspicion nor did it amount to an odd coincidence so as to constitute "something more" which tends to confirm that the Appellant committed the offence.

9.15 There was no other evidence on record connecting the Appellant to the offence that closed out the possibility of anyone else having defiled the child at the alleged time, considering that PW1 and PW2 testified that there were more than five flats in the said premises. Anyone else could have had the opportunity and locality to defile the child. Coupled with the Appellant's conduct, of accompanying PW1 and the child to the hospital, in our view this conduct was not consistent with a person who was guilty of having committed an offence. We are of the view that the evidence of opportunity in this instance was insufficient to amount to corroboration as to the identity of the perpetrator.

9.16 The circumstances of the case reveal that other inferences could have been drawn from the evidence on record other than the guilt of the Appellant. The

prosecution failed to prove the case beyond reasonable doubt and the principles as laid down in the case of **Mwewa Murono v The People**[5] regarding the burden of proof were not met. The identity of the Appellant was questionable and as such the conviction was unsafe.

10.0 CONCLUSION

10.1 The upshot of the foregoing is that this appeal is meritorious. In the circumstances, we allow the appeal and set aside the conviction and the Appellant is set at liberty forthwith.

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J. CHASHI
COURT OF APPEAL JUDGE

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J.Z MULONGOTI
COURT OF APPEAL JUDGE

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F.M LENGALENGA
COURT OF APPEAL JUDGE