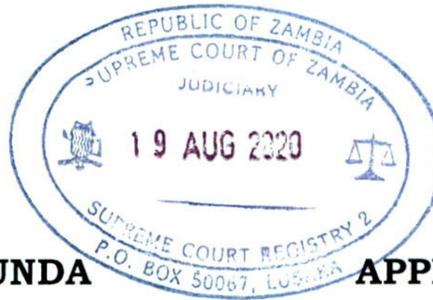
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 37/2020**
HOLDEN AT KABWE
(Criminal Jurisdiction)



BETWEEN:

FREDRICK MWANDWE KUNDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On the 11th August, 2020 and 19th August, 2020

For the Appellant: Ms. Z. Ponde, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. M.M. Bah-Matandala, Deputy Chief State Advocate, National Prosecutions Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Emmanuel Phiri vs. The People (1982) Z.R. 77**
2. **Bernard Chisha vs. The People (1980) Z.R. 36**
3. **Goba vs. The People (1966) Z.R. 113**
4. **Mwewa Murono vs. The People**

Legislation referred to:

1. **Section 122 of the Juveniles Act, Cap 53 of the Laws of Zambia**

This is an appeal against conviction. The appellant was tried and convicted of the offence of defilement. It was alleged that on the 26th July, 2013 at Mufulira in the Mufulira District of the Copperbelt Province of Zambia he had unlawful carnal knowledge of his 7-year-old cousin, a girl.

The brief facts were that the mother to the prosecutrix left home to go and work in the field leaving her children who included the prosecutrix. On returning home, the prosecutrix informed her that the appellant had defiled her in her absence. According to the prosecutrix when the appellant's wife left to go and draw water, he took her into his house and defiled her. He threatened to beat her if she revealed what he had done to her but when her mother returned, she informed her that the appellant did 'bad things' to her. Medical examination confirmed that the child was defiled.

In his defence, the appellant denied defiling the prosecutrix and stated that on the material day he went out with a friend around 17:00 hours.

After analysing the evidence, the trial magistrate convicted the appellant on the following grounds: The medical report confirmed

that the child was defiled, therefore, there was corroboration as to the commission of the offence. The appellant and the victim were related so the identity of the offender was not an issue. The trial magistrate believed the story of the child and her mother and found the appellant guilty as charged and convicted him. The matter was remitted to the High Court for sentencing before Siavwapa J (as he then was) and he sentenced the appellant to 25 years imprisonment with hard labour.

On behalf of the appellant Miss Ponde filed two grounds of appeal couched in the following terms:

1. **The learned trial court erred in law and fact when it convicted the appellant in the absence of corroborative evidence.**

2. **The learned trial court erred in law and fact in receiving evidence of a child witness after a defective voire dire.**

In relation to ground one Ms. Ponde argued that the trial magistrate did not comply with the provisions of Section 122 of the Juveniles Act which provides that a child's evidence requires corroboration. To support her argument, she relied on the cases of **Emmanuel Phiri vs. The People**[1] and **Bernard Chisha vs. The**

People[2] in which this court has given guidance to lower courts on that when it comes to children of tender years, corroboration is a matter of law and this is in order to eliminate the danger of false implication.

The gist of Ms. Ponde's argument in ground two is that the trial court applied the repealed law when conducting the *voire dire.* Counsel argued that the current law provides that when conducting a *voire dire*, the trial court should satisfy itself that the child is possessed of sufficient intelligence and understands the duty to tell the truth. Relying on the case of **Goba vs. The People**[3] Ms. Ponde submitted that the *voire dire* was defective and, therefore, the evidence of the prosecutrix must be discounted on this score. Counsel prayed that the appeal be allowed, and that the appellant be acquitted forthwith.

Mrs. Bah-Matandala, on behalf of the State supported the conviction. In response to ground one, addressing the issue of the identity of the offender, she submitted that the appellant and the prosecutrix are biological cousins; the defilement occurred during day time thereby ruling out the danger of false implication and the appellant had the opportunity to defile the prosecutrix.

Responding to ground two, Mrs. Bah-Matandala argued that the *voire dire* conducted by the trial court was not defective. It was contended that through the questions put to the child, the trial court was satisfied that the child was possessed of sufficient intelligence and understood the duty to speak the truth. It was submitted that the trial court was, therefore, on terra firma when he received the evidence of the child witness. We were urged to dismiss the appeal for lack of merit.

We have considered the judgment of the court below and the submissions by Counsel for the parties. We propose to deal with ground two first which we believe is central to this appeal. We cannot talk about corroboration without first looking at whether the child witness was competent to give evidence. In this case, the child witness was a child of tender years. Section 122 provides that:

122. Where, in any criminal or civil proceedings against any person, a child below the age of fourteen 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 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 evidence admitted by virtue of this section is given on behalf of the prosecution, 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.

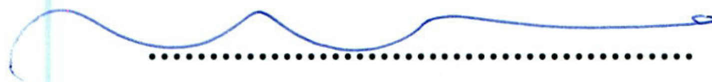
And so in accordance with the amendment to Section 122 of the Juveniles Act, the trial court had first to establish whether the child was possessed of sufficient intelligence to justify the reception of her evidence on oath and whether she understood the duty of speaking the truth. This is the first part and once the child gives evidence the trial court must not convict unless the child's evidence is corroborated by other material evidence. However, in this case, the trial magistrate asked the child whether she knew the meaning of an oath which was a requirement under the repealed Section 122. The error is evident in the following Ruling delivered by the trial court after conducting the *voire dire:*

> **This girl knows the meaning of an oath as well as the difference between truth and untruth. I am therefore satisfied that she qualifies to testify on oath, being possessed of that sufficient intelligence.**

What this means is that the trial magistrate did not comply with Section 122 of the Juveniles Act and the evidence of the prosecutrix must be discounted on this account. The question is, where does this leave the prosecution case? Is there any evidence to prove that it is the appellant who defiled the prosecutrix? Can the conviction stand? The answer is no. The record shows that apart from the mother who was told by the prosecutrix that the appellant defiled her, there is no other evidence to connect him to the offence. Mrs. Bah-Matandala supported the trial magistrate's position that simply because the appellant was a cousin to the prosecutrix, he had the opportunity to commit the offence. While it was not disputed that the appellant was a cousin to the prosecutrix, this relationship was not proof that he is the one who defiled her or that he had the opportunity to commit the offence. We do not therefore agree with Mrs. Bah-Matandala's arguments. In **Mwewa Murono vs. The People**[4] we held that:

1. **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 lies from beginning to end on the prosecution.**
2. **The standard of proof must be beyond all reasonable doubt.**

All in all, we find that the prosecution failed to prove their case beyond reasonable doubt. We find merit in this appeal and we quash the conviction and set aside the sentence. The appellant is acquitted forthwith.



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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE