

**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT KABWE**  
*(Criminal Jurisdiction)*

**APPEAL NO. 191/2015**

**BETWEEN:**

**WINFRED MAPAPAYI**

**APPELLANT**

**AND**

**THE PEOPLE**

**RESPONDENT**

**Coram: Muyovwe, Kabuka and Chinyama, JJS**

**On the 1<sup>st</sup> November, 2016 and 24<sup>th</sup> January, 2017**

For the Appellant: Mr. N.A.R. Sambo of Sambo Kayukwa and Co.

For the Respondent: Mrs. C.M. Hambayi, Deputy Chief State  
Advocate, National Prosecutions Authority

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## **J U D G M E N T**

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**MUYOVWE, JS**, delivered the Judgment of the Court

**Cases referred to:**

1. **Emmanuel Phiri vs. The People (1982) Z.R 77**
2. **Nsofu vs. The People (1973) Z.R. 287**
3. **Katebe vs. The People (1975) Z.R. 13**
4. **Machipisha Kombe vs. The People (2009) Z.R. 282**

**Legislation referred to:**

1. **Section 138 (1) of the Penal Code**
2. **Section 122 of the Juveniles Act**

The appellant was tried and convicted by the Subordinate Court sitting at Lusaka of the offence of defilement contrary to

Section 138 (1) of the Penal Code. The particulars alleged that on the 14<sup>th</sup> February, 2014 at Lusaka he unlawfully had carnal knowledge of a child under the age of 16 years.

The prosecution called 10 witnesses. In summary the facts were that on the 14<sup>th</sup> February, 2014 when the appellant and his colleague Sergeant Chiteta reported on duty at Mulongoti Police Post under Matero Police Station from 18:00 hours to 08:00 hours, they found the prosecutrix and one Sunday Chipoya in custody on a charge of theft. Apparently, the prosecutrix had stolen K500 from her mother in collusion with Sunday Chipoya who was her boyfriend and whose pregnancy she was carrying at the time. During the night, the female cell got flooded and the appellant and his colleague decided to move the prosecutrix to another room. It was while she was in the other room that, according to the prosecutrix, the appellant defiled her. In the morning, she was moved back into the female cell after the water was mopped out. The prosecutrix reported the matter to Woman Constable Mwechoonya who reported in the shift that followed the appellant's shift and this was after the appellant and Sergeant Chiteta had knocked off. Subsequently, an identification parade was carried out

where the prosecutrix identified the appellant as the person who defiled her. She was examined by Dr. Lalick Banda who confirmed she was defiled. Dr. Banda explained that the prosecutrix had no fresh injuries or bleeding in her private part because it is not every penetration that causes injury.

In his defence, the appellant completely denied the allegation. According to the appellant, the decision to move the prosecutrix from the female cell was a joint decision with his colleague Sergeant Chiteta who in his testimony confirmed this position. The appellant explained that the room where the prosecutrix was moved to was an open place adjacent to the Inquiries Office. He said his colleague did not leave the premises that night and he was shocked by the allegation that he had defiled the prosecutrix. He alleged that while investigations were still on-going, the father to the prosecutrix offered to drop the charges on condition that he surrendered his house to him and he declined claiming he was innocent. The appellant expressed surprise that Detective Sergeant Mulenga who allegedly received the report over this matter was not called as a prosecution witness. Further, that the prosecutrix got confused after spending time in detention and was capable of anything.

That this case was meant to destroy his career of 18 years with a clean record. The appellant believed that he was a victim of circumstances.

The learned Senior Resident Magistrate in her judgment acknowledged that the prosecutrix's evidence required corroboration. She rejected the appellant's claim that he was framed by one Sergeant Mulenga or any of his colleagues and that the evidence of Woman Constable Mwechoonya who first received the report from the prosecutrix did not require corroboration. The learned magistrate found no reason for the prosecutrix to pick on the appellant. She was satisfied that the question of mistaken identity could not arise as the prosecutrix had interacted with the appellant when he interviewed her as to why she was in detention and that he moved her to another room with the sole purpose of taking advantage of her that night. That this was an opportunity that the appellant took advantage of and used his authority as a police officer to have carnal knowledge of the prosecutrix with the knowledge that she was below the age of 16 years. The learned magistrate took the view that corroboration existed in the surrounding circumstances prevailing at the time such that false

complaint was eliminated. She found the appellant guilty as charged and convicted him accordingly. The case was remitted to the High Court for sentencing.

The sentencing judge, after considering the judgment of the court below, sentenced the appellant to 20 years imprisonment with hard labour.

The appellant has appealed against conviction advancing one ground of appeal. His complaint is that the trial court convicted him in the absence of corroboration and that the danger of false complaint and false implication was not excluded.

Mr. Sambo, learned Counsel for the appellant filed the appellant's heads of argument which he relied on at the hearing of the appeal.

Firstly, it was submitted that there was no corroboration of both the commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication in terms of the celebrated case of **Emmanuel Phiri vs The People.**<sup>1</sup> Counsel submitted that the medical report did not reveal that the offence was committed especially in view of the fact

that the prosecutrix had sexual relations before and she was pregnant at the time of the alleged commission of the offence. Secondly, that the trial court should have been alert to the danger of false complaint and false implication having regard to the character of the prosecutrix who was in custody for stealing from her mother and was living with her boyfriend. It was contended that these factors should have weighed in favour of the appellant as the prosecutrix could have thought of falsely implicating the appellant, a police officer, to secure her own release and that of her boyfriend from custody.

In his brief oral submissions, Mr. Sambo Counsel for the appellant reiterated his submission that there was no corroboration as to the commission of the offence and that the medical evidence adduced fell short of the standard laid down in the celebrated case of **Emmanuel Phiri**.<sup>1</sup>

In her response, Mrs. Hambayi the learned Deputy Chief State Advocate also filed heads of argument which she relied on. She submitted that the appellant did not dispute that he was with Sergeant Chiteta (PW1) on duty on the material night and he

confirmed taking the girl from the cell to an unlockable room. This was after the appellant had had a conversation with the girl and clearly, he took interest in her. And considering that the station was not busy on the material night, Counsel contended that the appellant had the opportunity to commit the offence. Relying on the case of **Nsofu vs. The People**,<sup>2</sup> Counsel submitted that in the case in *casu*, opportunity to commit the offence in light of the circumstances of the case amounts to corroboration which proves that the prosecutrix was telling the truth. Counsel further submitted that considering that the prosecutrix was in custody, the appellant ought to have seen her details in the occurrence book when taking over the shift and so he ought to have known that she was a child but he went ahead to defile her. On the medical report, it was Counsel's submission that although no fresh injuries were seen, the doctor was categorical that defilement could not be ruled out.

In her brief oral submission, Mrs. Hambayi submitted that medical evidence sufficiently showed that the prosecutrix was defiled and that the absence of injuries did not mean that the offence was not committed. She contended that under the guise of

being kind by taking the prosecutrix to another room and the active role he played in the movement of the prosecutrix, the appellant took advantage of her. Mrs. Hambayi reiterated that the appellant had the opportunity to defile the prosecutrix and she beseeched us to uphold the conviction.

We have considered the evidence on record, the judgment of the trial court and the submissions by Counsel for the parties.

In the lone ground of appeal, two issues emerge: whether there was corroboration of the commission of the offence having regard to the medical report presented by the prosecution and whether there was corroboration of the identity of the offender.

With regard to the first limb of the lone ground, Mr. Sambo placed emphasis on the contents of the medical report which indicated that the prosecutrix had no fresh injuries in her private part. The fact that the prosecutrix was pregnant at the time the offence was committed was also an issue Mr. Sambo contended with. The gist of Mr. Sambo's argument is that since the prosecutrix was sexually active, coupled with the fact that she was in custody for stealing money from her mother, her demeanour was

questionable and the learned trial magistrate should have been alert to these factors.

We have perused the record and it was and is not in dispute that the prosecutrix was sexually active and pregnant at the time of the alleged offence. The medical evidence placed before the trial court was clear that although there was no evidence of penetration, the doctor stated that this did not mean that the girl was not defiled. We note that the learned magistrate was alive to these factors when she accepted that the girl had been defiled leading her to the conclusion that there was corroboration as to the commission of the offence. In the premises, Counsel's argument on this limb must fail.

The next issue is, whether there was corroboration of the fact that it was the appellant who defiled the prosecutrix? It is common cause that the appellant was on duty on the night in question together with his workmate Sergeant Chiteta. There was uncontroverted evidence that he was the one who moved her to another room. The appellant even had a discussion with the girl to find out why she was in custody. We agree with the learned trial

magistrate that the girl could not have mistaken the appellant for another person.

Mr. Sambo's argument on corroboration is based on Section 122 of the Juveniles Act. The amendment to Section 122 of the Juveniles Act provides that children aged 14 years and above can give sworn evidence without the need to conduct a *voire dire*. This means that children aged 14 years and above are now treated on the same footing as adults. Looking at the prevailing circumstances, there is overwhelming evidence that the appellant had the opportunity to defile the girl. The opportunity lies in the fact that the appellant was on duty the night the girl was defiled; he showed kindness to the girl by moving her from the flooded cell and finding out about her situation. In line with the case of **Nsofu vs. The People**<sup>2</sup> this amounts to corroboration or 'something more'. It can almost be said that the appellant 'groomed' the girl before he defiled her and before she could realise what was happening.

Further, the appellant was on duty with another officer on the night in question and the appellant was identified by the girl on an identification parade. This laid to rest any question of mistaken

identity. From the circumstances of this case, we have not discerned any motive that the prosecutrix could have had to falsely implicate the appellant who showed her kindness and who was a total stranger to her.

Having considered all the evidence in totality, we cannot fault the learned trial magistrate for convicting the appellant as charged.

In the premises, we uphold the judgment of the lower Court and dismiss this appeal.



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**E.N.C. MUYOVWE**  
**SUPREME COURT JUDGE**



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**J.K. KABUKA**  
**SUPREME COURT JUDGE**



.....  
**J.C. CHINYAMA**  
**SUPREME COURT JUDGE**