SCZ Appeal No. 217/2015

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

DAVIS CHIYENGWA MANGOMA **APPELLANT**

AND

THE PEOPLE

RESPONDENT

Coram: Phiri, Muyovwe and Chinyama JJJS
On the 6th day of June, 2017 and 13th June, 2017

For the Appellants: **Ms E. I. Banda, Senior Legal Aid Counsel**

For the Respondent: **Mr. K. I. Waluzimba**
Deputy Chief State Advocate, NPA

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **Emmanuel Phiri vs. The People (1982) Z.R. 77**
2. **Musupi vs. The People (1978) Z.R. 271**
3. **Mwabona vs. The People (1973) Z.R. 28**
4. **Yokoniya Mwale vs. The People – SCZ Appeal No. 285/2014**
5. **Andrew Mwenya vs. The People - SCZ Appeal No. 640/2013**
6. **Chimbini vs. The People (1975) Z.R. 197**
7. **Kambarage Mpundu Kaunda vs. The People (1990-1993) Z.R. 215**
8. **Simutenda vs. The People (1975) Z.R. 294**

The appellant was tried and convicted by the Subordinate Court of the offence of **Incest contrary to Section 159 of the Penal Code, Chapter 87 of the Laws of Zambia.** Particulars of the offence were that on a date unknown but between 1st January, 2010 and 22nd September, 2010 at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia, the appellant had unlawful carnal knowledge of a named girl who, to his knowledge, was his daughter. He was subsequently sentenced by the High Court to a term of 30 years imprisonment with hard labour.

The facts of the case were that during the night of 21st September, 2010, the appellant, his wife (who testified as PW1), his 8 year old biological daughter (who testified as PW2) and her two younger brothers were sleeping in their family home. The home consisted of the sitting room where all the children slept, and the bedroom where the appellant and his wife (PW1) slept.

According to PW1's evidence, at about 22.00 hours she was dumbfounded to see the appellant on top of their daughter, naked, in the act of deflowering their daughter. The room was lit by

electricity light at the time. PW1 immediately challenged the appellant's misconduct. In response, the appellant threatened to stab her with a knife and ordered her to keep quiet. PW1 was scared and obliged. When he was done, the appellant slept until the next morning and went to report for work. In turn, PW1 took the victim to the community counsellor, PW3 who reported the appellant to the Police and later took the victim to the hospital for examination and treatment.

The victim, who testified as PW2 after a successful *voire dire,* equally implicated the appellant. She testified that she usually slept in the sitting room but during the night in question, she found herself in the appellant's bed, naked. She gave graphic details of how the appellant deflowered her and inflicted pain and injuries to her private parts from which she bled. The injuries were confirmed by Dr. Kunda Kapembwa of Batoka Hospital, the medical doctor who examined and treated her after the act. The doctor, according to his report admitted in evidence, found that the victim's hymen was absent.

When put on his defence, the appellant opted to exercise his right to remain silent. The learned trial Magistrate analyzed the evidence and acknowledged the need for corroboration. He warned himself of the dangers of convicting the appellant on the basis of uncorroborated evidence of PW1 and PW2. He accepted the medical evidence and the evidence given by PW2 as credible and sufficient corroboration, and excluded the danger of false implication; hence the conviction.

Dissatisfied with the judgment, the appellant appealed to this Court advancing one ground of appeal; namely, that the trial Court erred in law and fact when it convicted the appellant on the uncorroborated evidence of PW1 and PW2 being witnesses with an interest to serve or witnesses whose evidence was suspect.

In support of the sole ground of the appeal, Ms. Banda filed written heads of argument which she augmented orally. Ms Banda advanced her arguments under two limbs. Under the first limb, Ms Banda submitted that the only evidence implicating the appellant was given by PW1 and PW2 whose evidence required corroboration.

In support of this proposition, Ms Banda cited our decision in the case of **Emmanuel Phiri vs. The People**[1] where we 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 dangers of false complaint and false implication. Failure by the Court to warn itself is a misdirection".**

Ms Banda also cited the proviso in **Section 122 of the Juveniles Act, Chapter 53 of the Laws of Zambia** which states that:

> **"Provided that 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 him".**

It was argued that the trial Court misdirected itself by seeking corroboration of PW2's evidence by looking at PW1's evidence thereby ignoring the plethora of decided cases which illustrate what needs to be done with respect to testimony that comes from relatives and close friends. Ms Banda particularly cited the case of **Musupi vs. The People**[2], where we stated that:

> **"The critical question is not whether the witness does in fact have an interest or a purpose of his own to serve but whether he is a witness who because of the category in which he falls or because of the particular circumstances of the case may have a motive to give false evidence".**

In the second limb of Ms Banda's submission, she argued that PW1 and PW2 were biased witnesses; and that failure by the trial Court to warn itself of this category of witnesses was a serious misdirection which was to the detriment of the appellant. In support of this argument Ms Banda cited the case of **Mwabona vs. The People**[3] where it was held that:

> **"The evidence of a biased witness should be treated with caution and suspicion and failure to regard him as such is a misdirection on the part of the Court which may lead to a conviction being quashed.....We are alive to the fact that in order to mitigate such apparent bias of a relative or a family member there is need of independent evidence or the "something more".**

Ms Banda submitted that in the present case there is nothing to mitigate or offset the apparent bias and prejudice to the appellant. In making this submission, Ms Banda indicated to us that she was mindful that this Court in the recent case of **Yokoniya Mwale vs. The People**[4], has gone further to clarify the correct position by stressing that its authorities on this subject matter neither established nor were they intended to cast in stone, a general proposition that friends and relatives of the deceased or the victim were witnesses with an interest to serve and that their evidence routinely required corroboration. Ms Banda insisted

however, that there is nothing on the record to support the defilement; that the medical report which simply stated that the hymen was absent, was not helpful, and therefore, that the trial Court convicted the appellant in the absence of corroboration or "something more" to exclude the dangers of false implication. Thus, we were urged to uphold this appeal, quash the conviction and sentence and set the appellant at liberty.

In response to the appellant's sole ground of the appeal and the submission in support thereof, Mr. Waluzimba, the learned Deputy Chief State Advocate supported the appellant's conviction. It was submitted that the appellant's basis for seeking to impeach the judgment of the lower Court was anchored, in the main, on the relationship that existed between PW1 and PW2 and the assumption that there was a danger of the prosecution witnesses to falsely implicate the appellant. Mr. Waluzimba submitted that mere relationship of a witness with the deceased was, in the case of **Andrew Mwenya vs. The People**[5], held not to create an interest to serve on the part of the witness without establishing particular circumstances which could have motivated such a witness. For

instance, evidence of poor relationship between the witness and the person accused of committing the crime can constitute such circumstances. Mr. Waluzimba equally referred us to the case of **Yokoniya Mwale vs. The People**[4] where we pointed out that evidence of a witness does not become suspect merely because he or she is related to the deceased or to the victim of the crime, as in this case. It was submitted that there must be evidence before the trial Court upon which the Court may conclude that there was bias or interest to serve; but in the present case a critical review of the evidence before the trial Court does not disclose any motive on the part of PW1 and PW2 to falsely implicate the appellant.

On the quality of PW2's evidence, Mr. Waluzimba submitted that this was an 8 year old girl whose testimony was not expected to be totally in tandem with that of PW1, her mother. It was argued that although the medical report indicated that her hymen was absent, with no lacerations and bruises, this does not in any way mean that the offence was not committed because the report shows that the doctor's findings were consistent with the criminal complaint of defilement; and the fact remains that PW2 was defiled,

and the evidence of PW2 was corroborated by the fact that the appellant was the only adult male person in the family house where the offence was committed. Therefore, there was no doubt as to who the perpetrator of the crime was. It was further submitted that the trial Court did recognize the need for PW2's evidence to be corroborated and went further to warn itself of the danger of false implication and the need to exclude such danger before convicting the appellant.

Lastly it was submitted on behalf of the State, that the appellant elected to exercise his constitutional right to remain silent in the face of a very serious allegation against him; thus he did not offer any defence or explanation on his position to the trial Court. It was argued that in accordance with our decision in the case of **Chimbini vs. The People**[6] the trial Court was at liberty to consider and take this fact into account as part of the totality of the evidence before it. Thus, we were urged to dismiss this appeal.

We have considered the totality of the evidence that was before the trial Court, the judgment of that Court, the ground of this

appeal and the submissions made by the learned Counsel for the appellant and for the State.

As correctly pointed out by the learned Counsel for the appellant, the core issue in sexual offences of this nature, as we pointed out in the case of **Emmanuel Phiri vs. The People[1],** is whether there was 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, and a recognition that failure by the trial Court to warn itself is a misdirection.

In the first limb of the appellant's submission, it is canvassed that the prosecution evidence lacks the necessary corroboration and that failure by the Court to warn itself was a misdirection. At page J2 of the lower Court's judgment the Court made the following observation:

> **"I warn myself that though it is possible to convict the accused on the uncorroborated evidence of PW2, it is dangerous to do so unless there is corroboration in this case I am seized of this danger throughout. If I will accept the uncorroborated evidence of PW2, I must be satisfied that the risk of false implication is excluded. The question now is, is there any corroboration in this matter? In my view, there was ample corroboration.....".**

With the foregoing observations, the lower Court then proceeded to analyze the evidence adduced by PW1 and PW2 as well as the medical report which was admitted in evidence, and concluded that the offence of incest was committed by the appellant. A reading of the passage from the judgment of the lower Court which we have quoted above clearly shows that the trial Court was conscious of its duty and obligation to treat the prosecution's evidence with caution, and the need to warn itself against the danger of false implication; and the need to exclude such danger. Although the lower Court did not quote the authorities which prescribe the correct approach to such evidence, and used what appeared to be unorthodox language, we have no doubt that the lower Court's approach was correct and acceptable. We have no doubt that the lower Court was quite aware of its duty and obligation towards the need for corroboration in sexual offences, and the duty of the trial Court to exclude the danger of false implication. In this case the lower Court did find that the evidence of PW2 was corroborated by that of her mother PW1.

It is worth noting that the appellant neither denied nor explained himself away from the damning allegation by PW1 his own wife, that he had sex with PW2 his own daughter in their well lit bedroom and that when PW1 challenged him, he threatened to stab her with a knife. Therefore, there was no doubt about his identity as the offender and the medical evidence did establish that the injury suffered by the victim was consistent with her complaint that she was sexually assaulted. In the case of **Simutenda vs. The People**[8], it was held that "an accused person is by law entitled to remain silent in Court. If however he wishes to rely on any particular defence, it shall be incumbent upon him to adduce evidence to support such a defence".

In the present case the appellant did not adduce evidence to support such a defence, and the learned trial Magistrate was entitled to be at large and consider the totality of the prosecution evidence in the manner he did.

The second limb of the appellant's submission, which is in all respects related to the first, was that by virtue of their relationship, PW1 and PW2 were witnesses with a bias and that PW1 was a

witness with a possible interest of her own to serve. In short, that PW1 and PW2 were suspect witnesses. We have addressed this aspect of the law on many occasions. In the case of **Kambarage Mpundu Kaunda vs. The People**[7] we stated that:

> **"Prosecution witnesses who are friends or relatives of the prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses. The Court should therefore warn itself against the danger of false implication of the accused and go further to ensure that that danger has been excluded".**

In the more recent case of **Yokoniya Mwale vs. The People**[4] we yet again considered the general proposition that friends and relatives of the deceased or the victim are always to be treated as witnesses with an interest to serve and that their evidence routinely required corroboration. We went further to clarify that:

> **"Were this to be the case, crime that occurs in family environments where no witnesses other than near relatives and friends are present, would go unpunished for want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of want of independent corroboration. This in our view, would be to severely circumscribe the criminal justice system by asphyxiating the Courts even where the ends of criminal justice are evident. The point in all these authorities is that this category of witnesses may, in particular circumstances ascertainable on the evidence, have a bias or have an interest of their own to serve, or a motive to falsely implicate the accused. Once this was discernable and only in those circumstances, should the Court treat those witnesses in the manner we suggested in the Kambarage case".**

We wish to emphasize that with the foregoing clarification, the manner of treatment of evidence of friends and relatives should not pause any serious challenge. While we consider such evidence, we must take note that the evidence from a spouse against a spouse carries with it statutory protection which must always be taken into account. In cases where the victim is a child of the family, this protection is found in **Section 151(1) (c) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia,** which provides that:

> **"151(1). In any inquiry or trial, the wife or husband of the person charged shall be a competent witness for the prosecution or defence without the consent of such person.....**
>
> **(c) In any case where such person is charged in respect of an act or omission affecting the person or property of the wife or husband of such person or the child of either of them".**

In the present case, the victim is a child of the family, while the only eyewitness to the crime is the victim's biological mother, and the implicated perpetrator of the crime is the victim's biological father. In these circumstances, the evidence of PW1 is no doubt strengthened by the provisions of **Section 151(1) (c) of the Criminal Procedure Code.** In the circumstances, it is our view that PW1's evidence is strengthened in its efficacy as from a very

competent source against the appellant. It would not be farfetched to hold that PW1's evidence is stronger in its efficacy than that of an ordinary friend or relative to such a victim. In our considered view therefore, the learned trial Magistrate was on firm ground to hold that PW1's evidence was credible and offered PW2 the necessary corroboration in the circumstances of this case. That aside, the evidence of PW1 and PW2 established that the appellant had the opportunity to commit the crime in his own matrimonial home. We have stated before that opportunity may, under certain circumstances, such as in the present case where the appellant was the only adult male person in the house where the offence as committed, amount to corroboration.

The net result is that we find no merit in the single ground of the appeal. We dismiss the appeal and uphold both the conviction and sentence.

G. S. Phiri
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE