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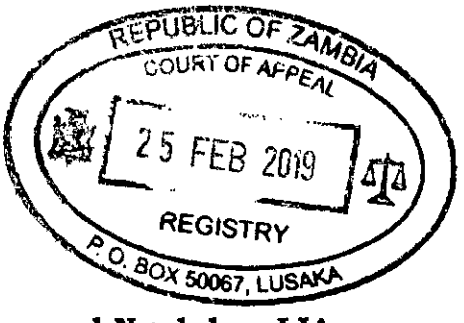
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 137/2018**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:



DANIEL BANDA	**APPELLANT**
AND	
THE PEOPLE	**RESPONDENT**

CORAM: **Makungu, Sichinga and Ngulube, JJA**
On 19th February, 2019 and 25th February, 2019

For the Appellant: Mr. K. Tembo- Legal Aid Counsel
For the Respondent: Ms. N. T. Mumba- Acting Chief State Advocate, NPA

J U D G M E N T

SICHINGA, JA delivered the Judgment of the Court

CASE REFERRED TO

1. **Solomon Chilimba v The People ZR 31 (C.A.)**
2. **Jutronich, Schuttle and Lukin v The People (1965) ZR 9 (C.A.)**
3. **Modesta Kalaba v The People CAZ No. 86 of 2017**
4. **Phiri and Others v The People (1973) ZR 47 (C.A.)**
5. **Zulu v Avondale Housing Project Ltd. (1982) Z.R. 172 (S.C.)**
6. **Anthony Mwaba Mpundu v The People SCZ Appeal No. 149 of 2016**
7. **Nsofu v The People (1973) Z.R. 287**
8. **Ives Mukonde v The People (SCZ Judgment No. 11 of 2011)**
9. **Saul Banda v The People CAZ Appeal No. 117 of 2017**
10. **Partford Mwale v The People CAZ Appeal No. 8 of 2016**

11. **Katebe Vs. The People (1975) Z.R. 13 (S.C.).**

STATUTES REFERRED TO

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **The Anti-Gender Based Violence Act No. 1 of 2011.**
3. **The Juveniles Act, Chapter 53 of the Laws of Zambia.**

This is an appeal against a sentence of 30 years imprisonment with hard labour imposed on the appellant, who was charged with the offence of defilement, contrary to ***section 138 (1) of the Penal Code***[1] as read with Act No. 15 of 2005. The particulars of the offence alleged that on unknown dates but between 1st June, 2017 and 30th June, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, the appellant did have unlawful carnal knowledge of LP, a girl under the age of 16 years.

The prosecution's case was mainly centered on the evidence of five witnesses: PW1, the prosecutrix's mother; PW2, the prosecutrix aged twelve; PW3, the prosecutrix's aunt; PW4, also the prosecutrix's aunt; and PW5, the arresting officer. PW1 testified that the prosecutrix was twelve years old at the time the offence was committed, and she produced an under five card as proof of age. She told the trial Court that after she noticed that the prosecutrix had become withdrawn, she sent her to her elder sister's place, PW3. Later, PW3 informed PW1 that she had been told by the prosecutrix that the appellant, their nephew, had been defiling the prosecutrix. The matter was reported to the police. After obtaining a medical report form from the police, the prosecutrix was

taken to the University Teaching Hospital (UTH) where she was examined. PW1 testified further that the appellant had lived with her from August, 2016 until March, 2017. She told the Court that the prosecutrix went to PW3's house on 4th April, 2017, and that the matter was taken to the police station on 9th June, 2017.

Following a successful *voire dire*, the prosecutrix (PW2) gave evidence on oath. She testified that the appellant defiled her on three occasions in her mother's house when her mother was at work. PW2 told the Court that she and her siblings slept in the mother's bedroom while the appellant slept in the living room. According to her, the appellant defiled her while her mother, PW1, was working the night shift at a lodge. The first time the appellant allegedly defiled her, he asked her to bring him beddings and when she did, he laid her down, removed her skirt and pant, slept on top of her, removed his penis and put it into her vagina. Consequently, she bled from her vagina and she wiped the blood with a cloth. Her siblings had been sleeping in her mother's bedroom during this ordeal.

According to the prosecutrix, the following day, when the maid asked what was wrong with her, she said that she had a wound on her leg. PW2 testified that the maid normally knocked off around 16:00 hours. She added that two days after she was first defiled, the appellant defiled her again when she had approached him to assist with homework. The following day, a Friday night, while the two were watching TV, the appellant got hold of her and defiled her

again. The prosecutrix told the Court in cross examination that all the incidents took place after the maid had knocked off, as she usually left around 16:00 hours, but later on began to spend nights with them when the appellant started working night shifts. She testified that she was taken to PW3's house the following day, who she informed that the appellant had defiled her. She repeated this to the police the same day.

PW3 was PW1's sister, whose testimony was to the effect that when she went to PW1's house sometime in January 2017, she noticed that the prosecutrix was not looking well. When she queried the prosecutrix, she was told that the appellant had defiled her and threatened to kill her if she told anyone about the sexual intercourse. PW3 then informed PW1 of this development, and the matter was later reported to the police. PW3 testified that the matter was not reported to the police in January, 2017 because the prosecutrix had been hiding the information regarding her defilement. In cross examination, she testified that the prosecutrix only disclosed the fact that she was defiled in June, 2017.

PW4 testified that sometime in June 2017, PW1 went to her house with the prosecutrix and asked her to speak to the prosecutrix. According to PW4, the prosecutrix informed her that the appellant had defiled her several times. She relayed this information to PW1 and advised her to report the matter to the police.

PW5 was the arresting officer. He testified that PW1 informed him that her daughter had been defiled and that she was kept at YWCA

for counseling. He testified that PW2 informed him that the appellant had defiled her on several occasions. The appellant was apprehended and when questioned, he denied having defiled the prosecutrix. However, following investigations, PW5 charged the appellant with the subject offence. In cross examination, the officer testified that the prosecutrix had told him that the appellant had sex with her several times between January 2017 and June 2017.

The appellant gave a short unsworn statement, wherein he admitted to having lived with PW1 from 28th September, 2016 and that he started working on 1st October 2016, but denied having defiled the prosecutrix. He testified that sometime on 8th June, 2017 he was called by his uncle, who informed him that he was wanted in connection with the defilement of the prosecutrix. He denied defiling the prosecutrix and stated that there was a maid who stayed with them at that time, and he therefore could not have defiled the prosecutrix.

The trial Court examined the evidence before her and found that the prosecution had proved its case against the appellant. She found that there was corroboration of the identity of the defiler and commission of the offence. As regards corroboration as to the commission of the offence, according to the trial Magistrate, the evidence was that the prosecutrix told the police officer that she had been defiled by the accused and upon being medically examined it was found that she was indeed defiled. This amounted to corroboration because within a reasonable time of its occurrence,

it was reported to PW3 and then to the police. The learned trial Magistrate relied on the medical report produced as well as the testimonies of PW1, PW3 and PW4, which according to her corroborated the prosecutrix's testimony. With particular reference to the evidence of PW1, the trial Magistrate found that the behaviour shown by the prosecutrix, who was withdrawn and looked worried, caused the mother to be suspicious, which also amounts to corroboration.

With regard to the identity of the offender, the trial Magistrate in her judgment stated that the appellant had an opportunity to commit the said offence based on the evidence that at home, there was only the prosecutrix and her siblings and the appellant at night. This made it possible for the appellant to have courage to have sex with the prosecutrix, as he was the only male adult in the house on those days. He took advantage of the absence of any other person. Based on this, the trial Court drew an inference that no one else had the opportunity to have sex with the prosecutrix. The Court further found that the appellant was known to the prosecutrix and there was no chance of false implication. Consequently, the learned trial Magistrate convicted the appellant and committed him to the High Court for sentencing, which sentenced him to 30 years imprisonment with hard labour.

The appellant now appeals against sentence, and his sole ground of appeal is couched as follows:

1. The learned trial Court erred in law and in fact when it imposed a severe sentence of 30 years imprisonment on the appellant considering that he is a first offender.

Heads of argument in support of the ground of appeal were filed on 13th February, 2019, and it is argued therein that the sentence of 30 years imposed on the appellant is severe and does not reflect the leniency due to a first offender. We are referred to the case of ***Solomon Chilimba v The People***[1] wherein it was held that unless the case has some extraordinary features which aggravate the seriousness of the offence, a first offender ought to receive the minimum sentence. Our attention is further drawn to the case of ***Jutronich, Schuttle and Lukin v The People***[2] where the Court set out circumstances in which a trial Court may interfere with a lower Court's sentence. Several other cases were cited on behalf of the appellant in this regard, and we have taken note of these authorities and the guidance set out therein in. Suffice to say that the appellant submits that we set aside the sentence and consider imposing the statutory minimum sentence.

In response and opposition to the appeal, the learned Acting Chief State Advocate, Ms. Mumba, gave *viva voce* submissions on behalf of the respondent. Her submissions were to the effect that there were aggravating circumstances to justify a sentence of 30 years in this case; that the child was only twelve years old when she was defiled, worse still, by a person in whose care she had been left. The case of ***Modesta Kalaba v The People***[3] was cited in this

regard. Ms. Mumba also added that there was violence used to commit the offence, in terms of ***section 3(1) (a) of the Anti-Gender Based Violence Act***[2]. It was submitted in this regard that after the alleged defilement, the prosecutrix was no longer herself, as the defilement had psychological effects on her, thereby necessitating her referral to YWCA for counseling.

Having perused the record of appeal, we have carefully considered all the evidence on record and submissions made on behalf of both parties. Although the conviction has not been challenged, we feel compelled, for reasons that will soon be apparent, to address certain issues raised by what we noted based on the evidence on record and the judgment of the trial Magistrate.

We noted some glaring errors and inconsistencies in the prosecution's evidence, which ought to have been addressed by the trial Court in its judgment. Firstly, it is not clear when it was discovered that the prosecutrix was defiled. Her mother testified that she let her go and stay with her sister PW3 on 4th April, 2017 and after two days, PW3 informed her that the prosecutrix said she had been defiled by the appellant and the matter was reported to the police. On the other hand, PW3's testimony was that it was in January 2017 when she was visiting her sister PW1 that she noticed that the prosecutrix was not well. After quizzing her, she learnt that the appellant had defiled her. At the same time, PW3 testified that the matter was not reported in January, 2017 because

the prosecutrix was hiding the information. She added that the prosecutrix only disclosed that she was defiled in June, 2017.

Despite not addressing these conspicuous inconsistencies in the evidence by the witnesses, the trial Court proceeded to make findings of fact that were not supported by the evidence. For instance, at page J17 the trial Court found as follows;

> ***"The evidence of the said witness was corroborated by independent evidence of PW3 and PW1 who received a report of defilement almost immediately...after it happened and PW1 went further to report the matter to the police station."***

Clearly this finding, in so far as it relates to early reporting of the incident, is inconsistent with the witnesses' evidence as highlighted above, as there is undisputed evidence by PW1 that the appellant stayed at her house from August 2016 to March 2017, yet the matter was only reported in June, 2017, as evidenced by the dates on the police report and medical report. Further, PW3, who was the first person to be made aware of the alleged defilement by the prosecutrix, testified that the matter was not reported in January, 2017 because the prosecutrix had been hiding the information. We therefore cannot fathom how the trial magistrate could have arrived at the conclusion that the matter was reported immediately. It is our considered view that given the set of facts at her disposal, the

learned trial Magistrate acted contrary to the evidence placed before her by speculating the way she did, thereby departing from the guidance in the case of ***Phiri and Others v The People***[4] where it was stated that:

> ***"The courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence, to justify a conviction, the courts have no alternative but to acquit the accused..."***

Yet another finding of the trial Court that we reckon necessitates our interrogation is the finding of fact that it was the appellant who committed the offence. This is at page J11 of the impugned judgment, where it was stated as follows:

> ***"I find that the prosecutrix had sex with someone on the material date. I find that it was the accused that had sex with her..."***

We note that this passage is at the point of the judgment where the Magistrate was making her findings of fact after summary of the evidence. She then went ahead to apply the law to the facts. It goes without saying that there is no factual basis upon which the trial Court arrived at the finding that it was the appellant who had sex with the prosecutrix. Moreover, considering the early stage at which she made this finding of fact, it is as if her analysis of the

factual evidence tying the appellant to the offence was just to justify what she had already found as a fact: that it was the appellant who defiled the prosecutrix. We cannot overemphasise how erroneous this was. Suffice to say, we find that this is a proper matter befitting the exercise of our power to interfere with this finding of fact on the basis that it was prematurely made and in the absence of any supporting evidence. We are accordingly guided in this regard by the case of ***Zulu v Avondale Housing Project Ltd***[5], and we set aside this finding of fact.

We will now address our minds to the evidence of late reporting of the alleged defilement. The evidence on record shows that the offence was allegedly committed in January 2017, but only reported in June 2017, as evidenced by the police report and medical report, which are both dated June 2017. Contrary to the finding of the trial Court as set out above, the offence was reported relatively late.

The Supreme Court in a judgment delivered by Hamaundu, SJ on 7th December, 2018 in the case of ***Anthony Mwaba Mpundu v The People***[6] had occasion to pronounce itself on the issue of late reporting in defilement cases. In the ***Anthony Mwaba***[6] case, the prosecutrix was equally twelve years old and was allegedly threatened with death if she told anyone about the alleged defilement. The Court had the following to say at page J8:

> ***"While it is trite that a late complaint will affect the weight to be attached to a complainant's testimony, it should be borne in mind that this rule was designed primarily for***

adult complainants in sexual offences. Hence when one looks, for example, at the case of Ndakala v The People, the case involved an adult complainant who, after the alleged rape, went with a female friend to a bar, instead of immediately laying a complaint about the rape. In this case, as rightly argued by the State, we are dealing with a child of tender years who can easily be scared by threats to herself if she reveals the sexual assaults. In this case, the victim testified that the appellant threatened to kill her if she told her mother about the sexual assaults."

We are accordingly guided by the Supreme Court and note that notwithstanding the apparent time interval between the alleged commission of the offence and when it was reported, given the age of the prosecutrix, the issue of the late reporting alone should not work to the detriment of the state's case.

We note that the learned trial Magistrate in her judgment repeatedly stated that the appellant had the opportunity to commit the subject offence, and it is safe to say that this is the main basis upon which she convicted the appellant *vis* corroboration of his identity as the offender.

Evidence of opportunity may indeed be corroborative of the identity of the perpetrator in a defilement case such as this one, when it can properly be established from the circumstances of the case that the accused had the opportunity to commit the offence. Our jurisdiction is not devoid of authorities as to what constitutes 'opportunity' for

such purposes. One of the leading authorities in this regard is the case of ***Nsofu v The People***[7], which has been reaffirmed in a number of cases and indeed been a great guide to this Court in cases including ***Ives Mukonde v The People***[8] and ***Saul Banda v The People***[9]**.** We stated at pages J9 to J10 in the ***Saul Banda***[9] case among other things thus:

> ***"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 to amount to corroboration".***

As regards the practical application of evidence relating to opportunity to commit the offence, we make reference to the case of ***Partford Mwale v The People***[10] wherein the appellant was charged with incest, particulars of which were that he allegedly had sexual relations with his daughter of whom he had custody after having

divorced with her mother. In that case, we did not go ahead and uphold the conviction because it is indeed normal for a father to live in the same house as his daughter. Equally, in the ***Saul Banda*** case, *Supra,* where the appellant, a teacher, allegedly defiled the prosecutrix at school in a classroom while other pupils were outside, we had the following to say at pages J10 to J11 *vis* opportunity amounting to corroboration:

> ***"It is also alleged that this incident occurred in a classroom, during the day and whilst pupils and teachers were roaming the school grounds freely. Directing our minds to the evidence in this case, the child was only examined a day later. The opportunity in this case was not confined to the appellant or the classroom. We have noted from the record that nobody saw the appellant anywhere near the classroom. This therefore means that the element of locality in this case was missing, thereby not raising any suspicion against the appellant...***
>
> ***...she only told her aunt the next day that she had been defiled at school by the head teacher. The time lapse raises the possibility that between the time she was defiled and the time she reported the defilement, the head teacher was not the only man she was exposed to. It is clear that any opportunity, if at all, that the appellant might have had to commit the offence is merely speculative and fails to meet the standard required for it to be of corroborative value. The identity***

of the appellant as the perpetrator of the offense was thus not corroborated and that being the case, this appeal is allowed and the conviction and sentence are accordingly quashed."

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 prosecutrix. In the circumstances of this case, the appellant and the prosecutrix are cousins who lived in the same house when the offense was allegedly committed. Does this alone amount to corroboration as to the identity of the appellant as the one who defiled the prosecutrix? 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 prosecutrix between January and June 2017. There is therefore no evidence that closes out the possibility of anyone else to have defiled the prosecutrix at the alleged time, as the opportunity was not confined to the appellant alone.

We have earlier alluded to how late reporting alone should not prejudice the prosecution's case due to the peculiar nature of defilement cases. However, the lack of unusual or suspicious circumstances *vis* the interaction of the appellant and prosecutrix,

coupled with the late reporting of the alleged incidents, that is; about six months from the dates of the commission of the alleged offence, compromises the corroborative value of the evidence against the appellant, thereby weakening the prosecution's case even further. Consequently, we find that the evidence on record does not satisfy the requisite standard in terms of locality and otherwise, for purposes of opportunity amounting to corroboration of the appellant's identity as the one who defiled the prosecutrix. Seeing as corroboration of the identity of the perpetrator is required as a matter of law and there was no such corroboration in this case, we see no basis upon which the conviction can stand.

We also note that the trial Court employed the cautionary rule as enunciated in ***Katebe Vs. The People***[11]. In applying the said cautionary rule, the learned trial Magistrate stated at pages 15-16 of the Judgement thus:

> ***" There has also been no motive that has been shown for the prosecutrix to deliberately and dishonestly make a false allegation against the accused. The proseutrix has also been reliable in her evidence as to what happened to her which makes it qualify as a special compelling ground which has justified the conviction"***

It is trite law in this jurisdiction that corroboration of the testimony of a child below the age of fourteen is required as a matter of law as per ***section 122 of the Juvenile's Act***. The record shows that the only evidence as to the identity of the appellant as the one who

defiled the prosecutrix was the testimony of the prosecutrix herself. All other witnesses who made mention of the appellant as the defiler gave hearsay evidence which is unreliable.

The cautionary rule cannot suffice to secure a conviction, especially that the prosecutrix was below the age of fourteen and her testimony is by law required to be corroborated. In a nutshell the Magistrate erred in law and fact by applying the cautionary rule.

On the basis of the reasons stated above, we find that the conviction was not safe and we accordingly quash it and set aside the sentence. Given this decision, we see no reason to delve into the sole ground of appeal which is considered to be *otiose*.

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C. K. Makungu
COURT OF APPEAL JUDGE

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D. L. Y. Sichinga
COURT OF APPEAL JUDGE

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P. C. M. Ngulube
COURT OF APPEAL JUDGE