IN THE HIGH COURT OF ZAMBIA
AT THE SUPREME COURT REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

APPEAL No./69/2017

BETWEEN:

GODFREY DAMALEKANI TEMBO — **APPELLANT**

VS

THE PEOPLE — **RESPONDENT**

CORAM: Hamaundu, Kaoma and Kajimanga JJS
On 10th April 2018 and 7th June 2018

FOR THE APPELLANT : Mr. C. Siatwinda, Legal Aid Counsel

FOR THE RESPONDENT: Ms G. C. Mulenga, Principal State Advocate

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J U D G M E N T

Kajimanga, JS delivered the judgment of the Court.

Cases referred to:

1. **The People v Champako (2010) Vol 1 Z. R. 25 (HC)**
2. **Mulenga and Another v The People (2008) Z. R. 1 (SC)**
3. **Emmanuel Phiri v The People (1982) Z. R. 77**
4. **Phiri and Others v The People (1978) Z. R. 79**
5. **Machipisha Kombe v The People (2009) Z. R. 282**

Legislation referred to:

Criminal Procedure Code Chapter 88 section 217

This appeal is against conviction and sentence. The appellant was tried and convicted on a charge of defilement of a girl under the age of sixteen years, contrary to section 138(1) of the Penal Code, Chapter 87 of the Laws of Zambia. Particulars of the offence allege that on 22nd December, 2013 at Mumbwa, the appellant had carnal knowledge of a female child (ACM) aged 10 years.

The case for the prosecution was anchored on the evidence of PW1, (the prosecutrix) and her elder sister (PW2) who was 13 years old. They both stated that on 22nd December 2013, their mother (PW3) sent them to sell sour milk in Mulangu village. They carried 2 x 2.5 litres of sour milk each. When they reached Nangoma police station, the appellant who was the officer-in-charge called them and he bought one container. Thereafter, he asked them where they would sell the other container and they said that they were going to Kasalu and Corner bar.

It was their evidence that they decided to go to Kasalu first. On their way they were approached by the appellant who came in a car and gave them a ride. When they reached Kasalu he told them to come out of the vehicle and wait for him near a bush. After parking the car, he followed them. When he found them he told PW2 to undress PW1 after

which he made the latter to lie down. The appellant went on top of PW1 and inserted his manhood in her private part. She felt pain and when she cried he told PW2 to close her mouth. When the appellant finished defiling PW1, he told them to go where he parked the car. He found them at the car and gave them their container of sour milk and K50.00. They were warned that he would kill them if they told other people. They then took the sour milk to Kasalu and thereafter started returning home.

They testified that on their way home, PW1 failed to walk and someone with a motor bike gave her a ride up to their home. When their mother asked PW1 why she was limping she could not say anything because of what the appellant told them. According to PW2, she told her mother that her sister hit a stone.

PW3 was the mother of the two girls. Her evidence was that on the material day she sent her daughters (PW1 and PW2) to sell milk around 07.00 hours. When they returned around 14.00 hours PW3 saw PW1 dropping from a motor bike and she was limping. When asked why she was limping, she remained mute. When she later asked PW2, she said that PW1 hit a stone. That in the night PW1 started crying and said that something was pulling inside her stomach. The following day she

took her to Nangoma Mission Hospital where she was hospitalised for almost one month. PW1 was examined by a doctor who said that she had been defiled. PW3 was advised to get a medical report from the police. She went to Nangoma police station and obtained a medical report from an officer by the name of Kajoba. PW3 also said that she went to collect PW2 from Lusaka where she had gone. As PW2 was not disclosing what had happened to her sister, PW3 told the police to detain her so that she could speak. She went back to the police station the following day and was told by Kajoba that PW2 told him that PW1 was defiled by Mr. Tembo, the officer-in-charge. They then went to Mumbwa police station where they gave statements. As they were about to leave the police station, PW2 was called back and taken to an office where there were many police officers while PW3 remained outside. The police told PW3 that her daughter was not telling the truth and that she would remain in the cells. She spent a night in the cells and the following day officers from Kabwe brought her.

Detective Chief Inspector Mukuka Sifuba, the investigating officer, was PW5. Among others, he interviewed PW1 and PW2 who told him that PW1 was defiled by the officer-in-charge of Nangoma police station near Kasalu Primary School in the bush, who had given them a ride.

PW2 took PW5 to an area where she alleged that her sister was defiled. He was later directed to hand over the docket to the district.

Assistant Superintendent Christina Kahampa was PW6, the arresting officer. She stated that she was assigned with a docket of defilement to investigate in which the appellant was alleged to have defiled a minor. She noticed from the docket that a warn and caution statement had already been effected and there was a medical report form as well as an under five card for the victim.

It was also the evidence of PW6 that the investigations were done by the Chief Investigations Officer (CIO) and that the docket showed that the scene was visited. She also further stated that the testimony of the victim and her sister as well as the medical report form connected the appellant to the commission of the offence.

In his defence, the appellant denied defiling PW1. He said that when he returned from Kabwe, Sergeant Kajoba informed him that he was a suspect in this matter. He wondered how he could be a suspect when he had investigated the matter and the person who defiled PW1 was unknown and on the run. That this fact was recorded in the record of complaints but Kajoba tore the page from the book.

According to the appellant, PW3 and the officers under his command teamed up in alleging that he defiled PW1. He said that according to his investigation, PW1 was defiled by Joe. He stated that he had seen PW1 and PW2 before and that they used to sell sour milk.

DW1 was at the time the officer commanding, Mumbwa. He said that he interviewed PW2 who told him that the person who defiled her sister was Joe, a mini bus conductor and not the appellant. He was not satisfied and ordered her detention to help with investigations. He interviewed PW1 at the hospital and she said that the person who defiled her was known by her elder sister.

Under cross-examination, he admitted that it was a wrong procedure to detain PW2 before investigating. He also conceded that his officers did not do proper investigations and that several officers dealt with the matter.

DW3 was the medical doctor who attended to PW1. His testimony was that PW1 came to the hospital with complaints of abdominal pains and upon further investigations it was found that she was defiled.

After considering the evidence the trial magistrate found that PW1 was under the age of 16 and that she was defiled by the appellant. He

found him guilty as charged and convicted him accordingly. In terms of section 217 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, the trial magistrate committed the appellant to the High Court for sentencing. The appellant was subsequently sentenced to 25 years imprisonment with hard labour.

Dissatisfied with his conviction and sentence, the appellant now appeals on two grounds as follows:

1. **The learned magistrate erred both in law and fact when he convicted the appellant on the basis of evidence which was unreliable.**
2. **The learned magistrate misdirected himself in law and fact by convicting the appellant when the identity of the offender had not been proved beyond all reasonable doubt.**

In the appellant's heads of argument, the two grounds were argued together. It was submitted by Mr. Siatwinda on behalf of the appellant, that this case should not have gone beyond the case to answer stage. That the case left much to be desired in the manner it was prosecuted and the way the evidence was hanging as exemplified by the following: the arresting officer did not visit the crime scene; the docket shows that

the officer who visited the crime scene did not give details of the specific point shown to him as the spot where the defilement occurred, for instance, on account of disturbed grass, or peculiar features in the area or vicinity and where the vehicle was parked; PW1 said the vehicle used by the appellant was a taxi which belonged to someone she knew but was unable to tell its colour; PW2 said the vehicle was green, PW5 said PW2 told him that the vehicle was white and the owner was not called by the prosecution; the defilement is alleged to have occurred on Sunday 22nd December 2013 while the medical report was obtained twelve days later on 3rd January 2014 and Counsel wondered whether sperms or seminal fluid which PW3 claimed to have seen could survive for that long and be observed with the naked eye or medical equipment; and PW1 stayed in hospital for a month but what she was suffering from was not disclosed.

Further, that PW1 and PW2 lied about the defilement to PW3, PW4 and the police as PW1 was unable to take the police to the scene of crime; this case generated a lot of interest and officers were under pressure to investigate, including those from Kabwe as PW5 handed over the case to PW6 without knowing why; there was no evidence that the appellant was asked by the investigators to be subjected to a

medical examination to exclude him or implicate him in the face of the vaginal infection which PW1 had; there is a possibility that the medical report was 'doctored'; there was no evidence of admission in an informal or social setting or otherwise so as to create an odd coincidence; PW1 appeared not to have known the appellant prior to 22nd December 2013; there was a discrepancy in what PW1 wore whether it was a skirt or a pair of trousers; and no evidence was elicited from PW2 as to what clothes the appellant wore besides a general statement that he was in plain clothes.

Counsel argued that the trial court was not required at the case to answer stage, to find that the prosecution had proved its case beyond reasonable doubt and was not supposed to determine the reliability of the witnesses. Counsel relied on the case of **The People v Champako**[1] in support of this argument.

It was also submitted that the doctor was called but vital information was not obtained or questions asked such as the cause of the vaginal infection, the possibility of transmission via sexual contact, causes of absence of the hymen, the life span of spermatozoa, the possibility or probability of finding spermatozoa after twelve days and by what means, the treatment PW1 was put on, etc. That the State had

the right under section 210 of the Criminal Procedure Code to rebut any evidence that the appellant adduced in his defence.

Relying on the case of **Mulenga and Another v The People**[2], it was contended that the prosecution must prove its case in a fair manner which implies that even evidence favourable to the accused must be produced before the court. That the prosecution did not disclose the evidence of DW2 which was favourable to the appellant.

Further, that the trial court came to the conclusion that the police command tried to shield the appellant but did not see the shortcomings in the prosecution's case. It was argued that the fact that a doctor says a victim was defiled does not necessarily lead to that conclusion simply because of the absence of hymen which can be attributed to other causes. Further, that the medical report form shows that PW1 suffered from a pelvic inflammatory disease but its causes were unexplained.

It was also submitted that this case has traces of the possibility of false allegation against the appellant. That there is no evidence of corroboration of the defilement or sexual act and identity of the offender as guided by the case of **Emmanuel Phiri v The People**[3]. We were finally urged to find that the appellant's conviction is unsafe and

consequently to quash the conviction, set aside the sentence and acquit the appellant.

In response, Ms Mulenga submitted on behalf of the Respondent, that contrary to the appellant's assertion, the trial court analysed the evidence before it and demonstrated how the appellant was implicated in the offence with which he was charged and subsequently convicted of. According to counsel, this analysis is found on pages 40 – 43 of the record of appeal. That at page 40, the trial court raised the following as points that needed to be determined: whether the accused had sexual intercourse with a child under the age of 16 years and what evidence was there to connect him to the commission of the alleged offence?

She submitted that in determining that there was evidence implicating the appellant, the trial court made the following findings: that the appellant bought milk from PW1 and PW2 on the material date; as PW1 and PW2 were going to Kasalu, the appellant followed them in a green motor vehicle; there was evidence that the appellant was in plain clothes on the material day as confirmed by the appellant under cross-examination; the conduct of the police command at Mumbwa in trying to protect the appellant as evidenced by the detention of PW2 shows the appellant's connection to the offence; a number of police officers who

handled the matter failed to complete the investigation; and the appellant was receiving feedback about the investigation in the matter.

Ms Mulenga contended that other than the evidence of PW1, PW2, PW3 and the medical report, the trial court found that the act of defilement was further supported by the evidence of DW3 (Dr. Katota) and that of the appellant. That what appeared to be in dispute was the identity of the perpetrator. She submitted in this regard, that the prosecutrix testified that she was defiled by the appellant. The appellant was known to the prosecutrix before the commission of the offence, hence the possibility of mistaken identity does not arise. That in fact, the prosecutrix knew the appellant so well that she referred to him both by name and designation in her testimony.

Counsel also argued that the danger of false implication in this case is excluded by other supporting evidence which links the appellant to the subject offence. According to counsel, the evidence of the prosecutrix was corroborated and that the appellant gave a bare denial and skirted around the material issues. In support of her contention, Ms Mulenga referred us to the case of **Phiri and Others v The People**[4],

where we held that:

> **"The evidence of an accomplice or of a person with a possible interest needed to be corroborated at least by evidence of "something more" which though not constituting corroboration as a matter of strict law, yet satisfies the court that the danger that the accused is being falsely implicated has been excluded."**

She also relied on the case of **Machipisha Kombe v The People**[5], where it was stated that *"odd coincidences"* can, if unexplained, be supporting evidence of identification. In particular, we observed in that case as follows:

> **"Law is not static; it is developing. There need not now be a technical approach to corroboration. Evidence of "*something more*", which though not constituting corroboration as a matter of strict law, yet satisfy the court that the danger of false implication has been excluded and that it is safe to rely on the evidence implicating the accused.**

Counsel further referred us to the following observations of this court in the **Machipisha Kombe**[5] case:

> **"Odd coincidences constitute evidence of "something more". Odd coincidences represent pieces of evidence which the court is entitled to take into account. They provide support of the evidence of a suspect witness, or an accomplice, or any other witness whose evidence requires corroboration. This is the less technical approach as to what constitutes corroboration."**

It was also submitted that the prosecutrix testified that on the

material day she, together with PW2, sold sour milk to the appellant and Mr. Shinyimbo; and that she was transported on a motor bike to her home when she failed to walk. It is thus odd, counsel argued, that of the three male persons the prosecutrix and PW2 had interacted with, only the appellant was singled out and named as the perpetrator of the offence.

Ms Mulenga submitted further, that it is odd that the appellant who was the officer-in-charge at Nangoma police station, did not take action against Mr. Kajoba when he destroyed the docket relating to this case. According to counsel, this behaviour is not consistent with that of an innocent person. That the above stated odd coincidences which remained unexplained are supportive evidence confirming the identity of the perpetrator of the offence charged. That the evidence stated above is further supported by the appellant's belief that his officers had *"sold him"*. This belief, according to counsel, is not consistent with a man who knows that he is innocent.

Ms Mulenga further submitted that using the less technical approach to corroboration, the above pieces of evidence constitute something more which confirms that the prosecutrix was telling the truth when she testified that the appellant is the one who defiled her.

Regarding the appellant's argument that the evidence of the prosecutrix lacked detail, counsel submitted that not every detail must be presented in evidence but only particulars essential to proving the elements of the offence must be adduced in evidence. She contended that the evidence presented before the trial court disclosed the following material particulars which were relevant for proving the salient elements of the offence: the age of the prosecutrix being below 16 years; the sexual act as testified by PW1, PW3 and PW4 and confirmed by the medical report (exhibit P1), and the evidence of DW3, Dr. Kalota. That PW3 and PW4 testified that on the material day, the prosecutrix was limping when she returned home. That in addition, the findings of the medical examination as indicated in exhibit P1 were consistent with the allegation of defilement.

Ms Mulenga submitted further, that details relating to the date and time of the incident is contained in the evidence of PW3 who testified that the date in issue was 22nd December, 2013. That the evidence of this witness confirms that the offence was committed during the day between 07.00 hours and 14.00 hours. That the prosecutrix also stated that the offence was committed during the day, in a bush near Kasalu. It was counsel's argument that there was no need for the

arresting officer to visit the crime scene as it was already visited by PW5. That this notwithstanding, the prosecution's case was not prejudiced in any manner as there was already sufficient evidence to prove the commission of the offence. She contended therefore, that the description of the crime scene under the circumstances of this case would have only confirmed the defilement which was established by other evidence.

Counsel further submitted that whilst it is trite law that evidence of an early complaint in sexual offences is admissible to show consistency and that failure to make such a complaint must be weighed in the scales against the prosecution's case, this case must be distinguished from other cases where the principle has been applied. That in this case the prosecutrix who is a child aged 10 years only, was threatened by the appellant whom she knew to be not only a police officer but also in charge of a police station.

Ms Mulenga finally contended that there was adequate evidence to prove both the commission of the offence and the perpetrator. Accordingly, we were urged to uphold the trial court's conviction and sentence.

At the hearing counsel for the respective parties indicated that they were entirely relying on their written heads of argument.

We have considered the evidence adduced before the trial magistrate, the judgment appealed against and the arguments advanced by the parties.

The appellant was convicted of defilement, a sexual offence. The case of **Emmanuel Phiri v The People**[3] provides guidance to the courts when dealing with such an offence. One of the principles enunciated in that case is that:

> **"In a sexual offence, there must be corroboration in order to eliminate the dangers of false complaint and false implication."**

In the first ground of appeal, the appellant's grievance is that his conviction by the trial magistrate was based on unreliable evidence. The appellant argues in this ground, that there is no evidence of corroboration of the defilement or sexual act. We do not accept this argument. In our view there was ample evidence before the trial magistrate to support the finding that PW1 was defiled. The unchallenged testimony of PW1 and PW2 was that on their way to Kasalu they were approached by the appellant who gave them a ride.

He subsequently stopped and parked his car. He told them to wait for him near a bush. When he found them, he directed PW2 to undress PW1 after which he lay on top of her. He removed his manhood and inserted it in PW1's private part. When she felt pain and cried the appellant told PW2 to close her mouth. On their way back home, PW1 was limping and eventually failed to walk, until a good Samaritan (PW4) gave her a ride on his motor bike. And according to the medical evidence, the doctor's opinion as stated in the medical report was that his findings were consistent with defilement because of absence of hymen, presence of spermatozoa on high vaginal swab, puss cells of RBS on high vaginal swab and features and signs of pelvic inflammatory disease, i. e., vaginal discharge. The doctor (DW3) who was called by the appellant confirmed this in his oral testimony when he said that: **"My conclusion was that the girl was defiled."** We posit that when the foregoing factors are considered together with the rest of the evidence, there can be no doubt that the trial magistrate was on firm ground when he found that PW1 was defiled.

In the second ground of appeal, the appellant attacks the trial magistrate's decision to convict him because according to him, his identity as the defiler had not been proved beyond all reasonable doubt.

We must state from the outset that on the facts of this case, there can be no question of mistaken identity. Firstly, the appellant's identity is quite obvious from the evidence of PW1 and PW2 as well as the appellant himself. In their testimony, PW1 and PW2 stated that when they reached Nangoma Police Station, the appellant called them and he bought one container of sour milk. A while later on their way to Kasalu, the appellant found them and he gave them a ride. They were with him up to the time he defiled PW1. All this was happening in broad day light. Without doubt, it is obvious to us that during the whole period PW1 and PW2 had an encounter with the appellant, they were not dealing with a stranger. They were dealing with some one they had been with not too long ago when the appellant bought milk from PW1 and PW2 at Nangoma police station.

Secondly, the appellant himself under cross-examination stated in reference to PW1 and PW2 that:

"I have seen them before, they used to sell sour milk."

There can be no doubt that the appellant was known to the prosecutrix before he committed the offence. The possibility of mistaken identity is therefore, inconceivable. We entirely agree with

counsel for the respondent that it is odd that of the three men the prosecutrix and PW2 interacted with, only the appellant was singled out as the perpetrator of the offence. On the facts of this case, we are satisfied that there was no motive by PW1 and PW2 to falsely implicate the appellant. In other words, the question of mistaken identity cannot arise. We also accept the respondent's submission that there was in this case sufficient evidence to prove both the commission of the offence and the identity of the perpetrator. The appeal against conviction is, therefore, dismissed as it is devoid of merit.

We now come to the sentence of 25 years imposed by the High Court judge. The evidence shows that the appellant was the officer-in-charge for Nangoma police station. In that capacity of a police officer, he was occupying a position of trust. However, he abused his position with impunity and inflicted incalculable harm on an innocent child, who he had a duty to protect. We deprecate the appellant's conduct in the strongest terms. We consider the appellant's conduct to be so aggravating that we are compelled to disturb the sentence imposed by the High Court judge as it is grossly inadequate for the crime committed by the appellant. Consequently, the sentence of 25 years is set aside and in its place, we impose a sentence of life imprisonment.

The net result is that we find no merit in this appeal which we accordingly dismiss.

E. M. HAMAUNDU
SUPREME COURT JUDGE

R. M. C. KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE