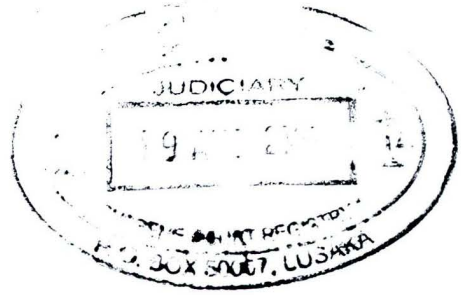
IN THE SUPREME COURT OF ZAMBIA APPEAL NO.003/2019
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:



LEVY NDALUNGA **APPELLANT**

V

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 13th August, 2019 and 19th August, 2019

For the Appellants : Mr K. Katazo, Senior Legal Aid Counsel
For the State : Ms P. Nyangu, Senior State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Zulu v The People (1973) ZR**
2. **Sakala v The People (1972) ZR 35**
3. **Machipisa Kombe v The People (2009) ZR 282**
4. **Musole v The People (1963-1964) ZR and NRLR 171**

When we heard this appeal on 13th August, 2019, we allowed it and set the appellant free. We said then that we would give our reasons later. We now do so.

The appellant and the victim were father and daughter, respectively. They ordinarily lived in Solwezi, together with the appellant's wife, who was also the victim's mother. It appears that at some point while the three lived in Solwezi, the child had contracted genital warts on her private parts. She was taken to hospital in Solwezi. The treatment administered, it seems, did not effectively cure the child of those warts.

In February, 2014, the appellant's wife (the victim's mother) died. For reasons not clear on the record, the funeral was held in Luanshya, at a relative of the deceased. The appellant and his child went to Luanshya to attend the funeral. It is then that the aunts of the child, on her mother's side, noticed the genital warts on the child's private parts. According to them, when they asked the child about the warts, she alleged that they had come about when her father had had carnal knowledge of her in Solwezi. The child's aunts reported the matter to the police in Luanshya. The appellant was apprehended and placed in custody. Medical examination of the child confirmed that she had, hitherto, been defiled. The appellant was charged with the offence of defilement and tried in the subordinate court within Luanshya. At the end of the trial, he

was convicted. On committal for sentence to the High Court, he was sent to prison with hard labour for 35 years.

For the purpose of this judgment, we would like to highlight three issues in the trial of the appellant: First when the child, who by then was nine years old, was called upon to present her testimony, the trial court conducted a *voire dire*. The record shows that only the child's answers to the court's questions were recorded. The court then went on to rule that the child appreciated the nature of telling the truth. The child's testimony was received on oath.

Secondly, as soon as the child finished presenting her testimony, the appellant, who was in custody, made an application to the court. This is how the application was recorded:

> **"Accused: - I AM ASKING THAT I BE EXAMINED BY A DOCTOR BECAUSE if at all I had suffered from warts because warts don't leave like that. They leave a mark".** (underlining by us for clarification)

The trial court granted the application in the following terms:

> **"ORDER: under your circumstances, the clerk of court working with officer-in-charge at Luanshya Remand Prison is hereby ordered to take you to nearest available hospital to be examined for all sexually transmitted diseases namely genital warts. To be made available by a doctor to this court, under a report before closure of trial"**

The appellant was eventually put on his defence. He testified on oath and was, then, cross-examined by the prosecutor. We reproduce hereunder the conversation that took place between the prosecutor, the appellant and the court on this issue.

> **"Accused – I don't have a document to say I am free of warts.**
> **P.P: May I have the document now**
> **Accused – I didn't inform officer –in-charge prisons**
> **P. Prosecutor: Then how do we believe your story?**
> **Accused – I haven't been tested**
> **P. Prosecutor: On 21st May, 2014, accused person applied to be tested to show if he suffered from warts or not. Up till now, his application was granted and there and then on oath, he says he never informed officer-in-charge.**
> **Accused Person: I did not get the court that I should inform officer-in-charge. Court should have organized my medicals.**
> **Court : What interest do I have as a court?**
> **Accused Person: None. It's my defence**
> **XXd**
> **Rexn – None but I still insist that I be taken. I want help.**
> **Rexd**
> **P. Prosecutor: We object to that**
> **Court: My order was clear and you haven't brought the medical yourself, even given time under an order. We have gone to defence and this hasn't been produced. You haven't laid a background to your medical status"** (again the underlined words supplied by us for clarification).

Thirdly, there is the issue of corroboration. At the beginning of the judgment, the trial court warned itself of the danger of convicting on uncorroborated evidence in sexual matters. When she came to apply that rule, however, the court only pointed at evidence corroborative of the fact that the child was defiled. As to corroboration supporting the child's allegation that the father was the person who defiled her, the trial court treated the issue as, generally, one of credibility; the court believed the testimony of the child that it was her father who had defiled her and hence convicted the appellant on her testimony.

Now, unsurprisingly, the appellant's two grounds of appeal are on two of the above three issues, namely the *voire dire* and the issue of corroboration. The first ground of appeal states:

> **"The learned trial court erred in law and in fact in receiving the evidence of PW3 a child on oath after a defective voire dire and ruling thereof".**

The second ground states:

> **"The learned trial court erred in law and in fact in convicting the appellant in the absence of corroborative evidence or evidence of something more to exclude the danger of false complaint and false implications."**

Making submissions on the first ground, Mr Katazo, learned counsel for the appellant, referred us to our decision in the case of **Zulu v The People**[1]. But it is the judgment of the Court of Appeal (this court's predecessor), delivered by Boron, J.P. in the case of **Sakala v The People**[2], that we wish to quote in part. In fact, in **Zulu v The People**[1], cited by the appellant, we merely stressed the point that was made in **Sakala v The People**[2]. The relevant portion states:

> **"This matter has been considered by the Federal Supreme Court in the case of Makhanganya v R where Forbes, F.J. explained why it was essential that not only should the voire dire be conducted and the record show this but also that the record show, in addition, the actual questions put to the juvenile and the answers received, and the conclusions reached by the court. Forbes, F.J. concludes his judgment with this passage:**
>
> *'Unless a voire dire is carried out as I have indicated, a trial court cannot be satisfied that a child is fit to be sworn, or even to give evidence unsworn, and unless a voire dire is recorded an appellate court cannot be satisfied that the trial court has appreciated and carried out its duty*".

In his submissions on the second ground of appeal, Mr Katazo particularly argued that the child's aunts were her relatives, and that their testimony was based merely on what the child had told

them. Counsel then argued that, consequently, this was not a case where there was *"something more"* as was held by this court in **Machipisa Kombe v The People**[3].

Ms Nyangu, counsel for the State did not support the conviction. This was a correct position to adopt, in our view.

From the case of **Sakala v The People**[2] cited above, it is clear that where, on the record, both the questions asked and the answers received are not reflected then the *voire dire* is defective. And so in this case, since the questions that the court asked the child are not reflected on the record, then the *voire dire* was defective.

Coming to corroboration, we have pointed out that the Magistrate did not particularly address her mind on corroboration of the child's allegation that it was her father who defiled her. There was a witness whose testimony could have provided the corroboration required: In her testimony, the child said that, when her father defiled her, she told *"Bana Grace"*. This witness was said to be in Solwezi, at Maheba. In a complete exhibition of naivety, the prosecutor, during cross-examination of the appellant, shifted the burden of calling that witness onto the appellant by asking questions which suggested that the appellant should have called

the witness to back his claims. Similarly, the Magistrate expressed naivety when she said in her judgment that the prosecution cemented their position when it was shown that the said *"Bana Grace"* was not in Luanshya but in Solwezi, at Maheba as a refugee.

The testimony of that witness was actually very vital to the prosecution because it would have brought out issues such as early complaint: And, depending on what else the witness would have said, elements of corroboration such as opportunity may have been established. All these would have gone to show that the child was telling the truth when she alleged that it was her father who defiled her. No reason is discernible from the record for the failure by the prosecution to call that witness, other than sheer neglect or dereliction of duty. The fact that *"Bana Grace"* was shown to be in Solwezi, at Maheba, was not an excuse for the prosecution's failure to make her available at the trial. To the contrary, it destroyed the prosecution's case; so that the second element of the corroboration required in sexual offences, that is, corroboration of the identity of the suspect as the perpetrator, was not established: As we have said, this was through sheer dereliction of duty by the prosecution. On that ground, the appellant was entitled to be acquitted.

The third issue was not canvassed by either side in this appeal. However the approach adopted by the Magistrate undermines the very root of a cardinal principle in our criminal justice system; the burden of proof. We therefore feel compelled to comment on it. Under this principle, one general rule is that, if a defence is raised, the onus is on the prosecution to disprove it; and not for the accused to prove it. This rule was stated by the Court of Appeal (the predecessor of this court) in the case of **Musole v The People**[4]. In this case, by asking to be examined for genital warts, the appellant had raised a defence. It was for the prosecution to disprove it. On the part of the court, by this application, the appellant had raised an issue which the court needed to resolve and render its conclusions on it: this would involve examining the results and determining what bearing they had on the prosecutions' case. In this case, the Magistrate, realizing the fact that the appellant was in custody, rightly ordered the clerk of court to ensure that the appellant was taken for medical examination. Sadly, however, as the trial came to a close, the Magistrate forgot her own order: so, instead of taking the clerk of court to task for dereliction of duty, she imposed a burden on the appellant to prove

the defence that he had raised, as can be seen from the conversation that we have quoted. That was an error.

Now, we cannot speculate as to what bearing the results of the medical examination would have had on the prosecutions' case. However, the fact that there is a possibility that it could have weakened the prosecutions' case means that the case was not proved beyond reasonable doubt; and for that reason, the appellant was entitled to an acquittal.

We therefore conclude by saying that it is for the above reasons that we set the appellant free. And now we quash the conviction by the trial court, set aside the sentence imposed by the High Court and acquit the appellant.

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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