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IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

APPEAL Nº 126/2018

BETWEEN:

EMMANUEL CHIBWE CHANDA Appellant

vs

THE PEOPLE Respondent

CORAM: **Chishimba, Lengalenga** and **Siavwapa, JJA**
on 22nd January and 22nd February, 2019

For the Appellant: Mr. H. M. Mweemba – Principal Legal Aid Counsel

For the Respondent: Mrs. M. C. Mwansa – Deputy Chief State Advocate
(standing in for Mrs. Kachaka)

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

1. **EMMANUEL PHIRI v THE PEOPLE (1982) ZR 71**
2. **EMMANUEL CHOLA v THE PEOPLE – CAZ APPEAL Nº 152 OF 2017**
3. **MACHIPISHA KOMBE v THE PEOPLE (2009) ZR 282**
4. **NDAKALA v THE PEOPLE (1974) ZR 19 (SC)**

5. **TRAMPA MOONGA v THE PEOPLE – CAZ APPEAL Nº 19 OF 2018**
6. **SALUWENA v THE PEOPLE (1965) ZR 4**
7. **CHRISTOPHER LUSHINGA v THE PEOPLE – SCZ JUDGMENT Nº 15 OF 2011**
8. **JOSEPH MULENGA & ANOR v THE PEOPLE (2008) 2 ZR 1**
9. **MWAMBONA v THE PEOPLE (1973) ZR 28 (CA)**
10. **DONALD FUMBELO v THE PEOPLE – SCZ APPEAL Nº 476 OF 2013**

Legislation referred to:

1. **THE PENAL CODE, CHAPTER 87 OF THE LAWS OF ZAMBIA**

This is an appeal against conviction and sentence of twenty (20) years imprisonment with hard labour effective from date of arrest imposed on the appellant for the offence of incest contrary to section 159 of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of offence were that the appellant, on unknown date in July, 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, had unlawful carnal knowledge of Joyce Chibwe who to his knowledge was his niece.

The prosecution case was anchored on the evidence of PW1, PW2, PW3 and PW4 whilst the appellant testified in his defence and called three witnesses.

PW1, was the prosecutrix who is a niece to the appellant who is a young brother to her father. She was aged sixteen (16) years at the time of trial, and so there was no need for a *voire dire* to be conducted. Her evidence was to the effect that she used to stay with her mother Joyce Sinkande in Sinazongwe and in 2012, her uncle, the appellant herein, got her and she went to live with him in Kalingalinga while she was in grade 6.

According to her evidence, when she was in grade 8 in 2015 she had a boyfriend and when the appellant became aware of that, he told her that he needed to protect her from getting infected with a disease, such as HIV/AIDS. He never mentioned what kind of protection he was talking about at that time.

She testified that on a Saturday, in July, 2015 around 20:00 hours the appellant picked her from home where she lived with the aunt, his wife and three cousins. He told her that they were going to see his friend and when they arrived in Helen Kaunda, he left her in the car and shortly afterwards he went back and told her that his friend was not there. However, according to PW1's evidence he told her to accompany him to what she initially thought was a house but she realised that it was a lodge. She said that they passed through a black gate and went to a room that had only a bed.

According to PW1's testimony, she tried to run away but he chased her and locked the door. As she sat on the bed before he switched off the lights, he showed her a plastic containing medicine and he told her that her grandparents and mother were behind it. When she started crying, he told her that on Friday she had to go to Sinazongwe to sleep with her grandfather. She said that he was referring to the father to her mother. Thereafter, the appellant had sexual intercourse with the prosecutrix and she said that they spent one hour at the lodge.

It was PW1's further evidence that afterwards they went to her grandmother, that is, the appellant's mother's sister. She said that she did not tell her anything because she was not close to her. She testified that after a week, however, she told her grandmother in Kabwata what happened after her aunt complained to her that she had gone home late with her uncle that night. PW1 said that her grandmother recorded their conversation when she narrated that her uncle slept with her.

PW1 further testified that after four days, whilst she was at Vera Chiluba School, she was called by the guidance teacher to go to the Deputy Headteacher. When she went there, she found two police officers, a male and a female and the male officer asked her about the story he heard. She tried to

hide the truth by telling him that she had gone home late the previous day but he rejected the story. Thereafter, she tried to refer them to her grandmother but they told her that they had already heard from the grandmother.

After she narrated what had transpired, she was taken to University Teaching Hospital (UTH) where a blood sample was taken and a doctor examined her private parts. She said that it was her first time to have sex and that after that she never had sex with anyone.

The prosecutrix further testified that she was taken to the Young Women's Christian Association (YWCA) after the medical examination. She identified the appellant in court as the uncle who had sex with her.

When she was cross-examined by Defence Counsel, PW1 confirmed that she is Joyce Chibwe and that she was a grade 10 student. She reiterated that it was true that the appellant had sex with her when he discovered that she had a boyfriend. She insisted that her first sexual encounter was with the appellant at Maila Lodge in Helen Kaunda.

PW1 said that she could not recall the date when that happened but she said that it was in July and that schools were open. She also said that it was between 20:00 to 21:00 hours, she did not go to school as the next day was Sunday. She said that she prays on Saturday and that she was at church with

the appellant and two cousins and that they knocked off at 16:00 hours. PW1 explained that after church, they went home and that they left the lodge around 21:00 hours. She also said that they did not pass through the reception when the appellant took her to the lodge and she noticed that there was one man at the reception.

In re-examination, PW1 explained that she did not cry out for help because he told her that nothing would happen. She further stated that she also did not report the matter to the police since she was told that nothing would happen as in all families a father chooses one and she was the chosen one.

In conclusion, the prosecutrix told the court that she liked her uncle but she did not love him the time he started telling her bad things.

PW2, Joyce Sinkande informed the court that she recalled being called on the phone by the appellant's wife that Joyce, her biological daughter was not home and that Chanda, the appellant was in custody. She asked the reason he was in custody but she told her that she did not know. Thereafter, PW2 asked her young brother to check where Joyce, prosecutrix, was.

PW2 identified Chanda, the appellant in the dock, as the father to Joyce. She elaborated that the appellant and Joyce's father are brothers and that they

have the same biological father. She testified that in 2012 she was staying with her daughter, Joyce when the appellant asked for her from her father. She explained that she and Joyce's father had earlier separated in 2001 and that they were already divorced when Joyce was taken.

In cross-examination by Defence Counsel, PW2 confirmed that she was no longer with Joyce's father. She, however, denied being bitter with her husband's family. She said that she and the appellant were on talking terms. She said that she was not aware that Joyce had an affair with a boy.

PW3, Petronella Ngambo Nguvu, a teacher, informed the court that Joyce Chibwe (P1) was her former pupil from grade 8 to 9, from 2015 to 2016 at Vera Chiluba School. She testified that she received a call from her church mate who informed her that there was a student at her school who was being abused by her uncle.

She said that she reported the matter to the school management. They noticed that PW1's performance at school had gone down and when she approached and asked her, she told her that she had problems with her stepmother. PW3 informed the court that when she talked to her father about PW1's declining school performance, he told her that the girl had a lot of boyfriends and that she was playful and that they should help her.

PW3 at a later date approached PW1's grandmother who revealed what she had told her. After being told, PW3's informer reported the matter to the police and the police interviewed PW1 at the school until she reluctantly revealed everything. She also told them that the uncle was protecting her from HIV and according to PW3's evidence, PW1 revealed to the police officers that her uncle had been sexually abusing her at a lodge and she promised to take them there.

PW3 identified the appellant as Mr. Chibwe, the father to Joyce who she said was aged sixteen (16) years.

In cross-examination by Defence Counsel, PW3 told the court that she did not visit the lodge. She explained that she did not physically examine PW1 because she was not a nurse.

In re-examination, PW3 said that at first there was bitterness in the family because although the appellant had said that he loved PW1, he later threatened to send her to the village. She concluded that even PW1 was bitter if she could decide to sleep in class as opposed to going home.

PW4, Sergeant Bowas Moonga of Chilenje, Victim Support Unit in September, 2015 investigated the matter of suspected child sexual abuse. He informed the court that he went to Vera Chiluba School in the company of

W/Sergeant Chilufya. According to his evidence, upon arrival at the school where the prosecutrix was a student, they introduced themselves to the Head Mistress, Miss Chanda who called Joyce Chibwe and her teacher, Petronella Nguvu. After explaining the reason why they were there, he was allowed to interview the prosecutrix who later broke down and admitted that she was sexually abused by her father, the appellant in July, 2015 in Helen Kaunda.

PW4 testified that he, thereafter, took her to the University Teaching Hospital (UTH) for medical examination and that while she was there, he phoned the appellant and told him that his daughter, Joyce Chibwe had fallen sick and that she was at UTH. When he arrived at UTH he was apprehended and taken to Chilenje Police Station and detained. According to PW4's evidence, the appellant was interviewed and he denied having carnal knowledge of the prosecutrix. PW4 later charged and arrested the appellant for incest after he confirmed from PW1's mother that the appellant is the brother to PW1's biological father. The appellant is alleged to have freely and voluntarily denied the charge after he was warned and cautioned.

PW4 further testified to the effect that the results from PW1's medical examination were consistent with the allegation that she was sexually abused. The medical report was later admitted in evidence as exhibit **"P1."** PW1 later

led PW4 to Helen Kaunda to a building where there were flats or rooms and she showed him the first room that had a bed and a metallic chair as the place she was sexually abused in. He was told by the person who was at the reception that different people went there to rest.

In cross-examination by Defence Counsel, PW4 stated that he was also in the company of Inspector Magayi and Woman Sergeant Chilufya and that Woman Sergeant Chilufya did not check the victim's private parts. In relation to the medical findings, he said that PW1 had a tear at 3 o'clock of the hymen. He conceded that the prosecutrix was not a minor and he said that she was sixteen (16) years old at the time of the incident.

DW1, Emmanuel Chibwe Chanda, the appellant herein, testified on oath and called three witnesses. He testified that the prosecutrix is his elder brother's daughter who went to live with him when she was in grade 6. He said that she became so promiscuous to the extent that she used to go home late. He mentioned that on unknown date in 2015, after the general elections, she went home around 04:00 hours and he beat her up and she was bitter and threatened to deal with him. DW1 further testified that on 25th July, 2016 he told her that he would send her back to the village because two boys were fighting for her. He told the court that PW1 was a prostitute and he said that

Natasha's mother told him that she was pursuing her son, Bobo who agreed that he had sex with her twice.

DW1 told the court that he was shocked when he heard that he had been accused of having sex with his niece. He denied sleeping with her or taking her to the lodge. He claimed that he was implicated for a number of reasons among them being that PW2, the mother to the prosecutrix does not want her children to visit her former husband's relatives, he had beaten and chased PW1 from home and also stopped her from seeing her boyfriends. The appellant further alleged that the prosecutrix sent him messages that she was influenced and that she wanted to go back home.

When he was asked how old his niece was when she allegedly slept with Bobo, he said that she was fourteen (14) years. He was further asked whether he was familiar with defilement issues, he said that he was and that he knows that he was supposed to report the matter to the police. The appellant denied having taken PW1 to her grandmother in Kabwata.

DW2, Joseph Mpule testified that he knew the prosecutrix who is his cousin because in 2015, he used to stay with his uncle in Kalingalinga. He said that he was told by his uncle that he used to see PW1 going out with men and return late at night. He, however, said that he did not know the names of the

boys or men. DW2, further testified that one night while he was with his uncle, he found his cousin with a man while dressed in school uniform and that he threatened to send her back to the village. He said that he left his uncle's home in December, 2015 but he never expected his cousin, Joyce to carry out her plans against the appellant to fabricate a story against him. He, however, agreed that he would not feel good if the appellant was sent to jail.

DW3, Pillan Siambunda's evidence was to the effect that in 2015, he was employed as a tutor for PW1 and that she used to reveal what was going on with her boyfriend. He said that she used to knock off from school at 13:00 hours but she would only arrive home at 17:00 hours. He claimed that her friends used to tell him that she used to go to Mtendere to do bad things and have sex with her boyfriend, Bobo. He also said that at one time PW1 said that she would implicate her uncle if she got pregnant that he was the one who was responsible.

When DW3 was cross-examined about PW1's alleged sexual encounters with her boyfriend, he said that he did not have proof that she was having sex with her boyfriend. He also said that he had a good relationship with the appellant and that he would not feel good if he went to prison.

DW4, Rodwell Chibwe testified that the appellant is his young brother and that the prosecutrix is his biological daughter. He said that he heard about the allegation of the appellant having sex with her on the pretext that she would not get HIV/AIDS. He acknowledged that he would feel bad if the appellant was sent to prison for a thing he did not do. He further stated that PW1 had a boyfriend she used to be found with, according to the information he received as he does not stay in Lusaka.

After the trial court's consideration of all the evidence, it found that there was a dereliction of duty on the part of the police in the investigations as some of the vital corroborating evidence was left out, such as PW1's grandmother's. However, it was satisfied beyond reasonable doubt that the prosecutrix told the truth about the appellant having carnal knowledge of her in July, 2015 and that there was no motive for her to have deliberately and dishonestly implicated the appellant in the commission of the offence. The trial court convicted the appellant for the offence of incest.

Dissatisfied with the said judgment, the appellant now appeals against the conviction and sentence meted out by the High Court. He advanced the following grounds of appeal:

1. **The learned trial court erred both in law and in fact when it convicted the appellant in the absence of corroborative**

evidence as to both the commission of the offence as well as identity of the offender.

2. **The learned trial court erred both in law and in fact when it discounted the evidence of the defence which was reasonably possible.**

The appellant's heads of argument and respondent's submissions were filed into court. Both Counsel entirely relied on the said arguments and submissions.

In support of ground one, Mr. Humphrey Mweemba, Principal Legal Aid Counsel submitted that the record indicates that the evidence of incest against the Appellant came from PW2, PW3 and PW4 and was based on the reports from PW1. He drew this Court's attention to the fact that there was no independent evidence to corroborate PW1's evidence. He submitted that even PW1's grandmother who is the appellant's aunt was not called to corroborate her story.

He also took up issue with the fact that the offence allegedly occurred in July, 2015 but that the prosecutrix was only medically examined in September, 2015. He submitted that he could not personally see the medical report on record and that he could not comment on the doctor's findings. In support of his argument, Mr. Mweemba relied on the Supreme Court's guidance in the case of **EMMANUEL PHIRI v THE PEOPLE**[1] where it held *inter alia* that:

"for sexual offences, 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."

He also relied on the case of **EMMANUEL CHOLA v THE PEOPLE**[2] in which this Court adopted with approval, the principles in the case of **MACHIPISHA KOMBE v THE PEOPLE**[3] where the Supreme Court emphasized the need for corroboration in cases involving sexual offences.

Mr. Mweemba argued that even though the prosecutrix alleged that the offence occurred in Maila Lodge in Helen Kaunda, there is no evidence on record of any other person who saw the appellant with the prosecutrix. He submitted that as such, there is no corroborative evidence to support PW1's allegation that the appellant sexually assaulted her.

He submitted that there are no special compelling grounds to rule out the inherent dangers of false implication of the appellant by the prosecutrix.

Mr. Mweemba drew the court's attention to PW1's evidence in cross-examination that her sexual encounter with the Appellant was the first and last sexual experience. He also noted that it was her further evidence that her pantie and beddings were not soiled and that there was no blood. From that

evidence, he wondered whether it is possible for a virgin not to have a blood flow from the first sexual encounter.

He submitted that from PW1's evidence it is clear that she was a girl who had multiple sexual relationships that led to the appellant constantly rebuking her and her falsely implicating him.

Mr. Mweemba contends that PW1's recordings in her book are clear indications that she was sexually active. He reverted to the issue of the time of the alleged offence and he pointed out that no specific date of when the alleged offence occurred was given apart from the month of July 2015.

He further submitted that from the evidence on record, it is clear that the prosecutrix failed to make an early report of the occurrence of the alleged offence. He relied on the case of **NDAKALA v THE PEOPLE**[4] which is instructive on the failure to make an early report and effect thereof. In the cited case, the Supreme Court held *inter alia* that:

> **"The corollary to the principle that evidence of early complaint is admissible to show consistency is that the failure to make an early complaint must be weighed in the scales against the prosecution case."**

He also referred to this Court's recent case of **TRAMPA MOONGA v THE PEOPLE**[5] in which we followed the principle in the **NDAKALA** case.

Mr. Mweemba contends that on the balance of the evidence, there is a serious lack of corroborative evidence and that there are serious dangers of false implications which should weigh the appeal in the appellant's favour.

He humbly requested this Court to allow the appeal and to quash the conviction, set aside the sentence and release the appellant.

In support of ground two, Mr. Mweemba argued that it is for the defence to give a reasonable explanation and not prove his innocence and that the appellant's case was reasonably possible though not probable. He submitted that the prosecution could not be said to have discharged its burden of proof as was held in the case of **SALUWENA v THE PEOPLE[6].**

In this case, he argued that the appellant had given a proper account of a story that was consistent with what he had told the school authorities. He submitted that other witnesses gave a similar version even though none of them gave an account about the alleged incest. He submitted that it is clear that the prosecutrix had a propensity to lie and that she could have lied against the appellant.

Mr. Mweemba further submitted that in the absence of corroborative evidence of both the offence and the perpetrator, it will be unsafe for the Court to confirm the conviction.

He, therefore, prayed that this Court allows this ground of appeal, quashes the conviction, sets aside the sentence and sets the appellant at liberty forthwith.

By way of introduction of the Respondent's submissions, Mrs. Kachaka submitted that the appellant's conviction for the subject offence is on firm ground and she implored this Court not to interfere with the conviction.

She responded to ground one by submitting that there is corroborative evidence in relation to the commission of the offence as well as the perpetrator's identity. She submitted that the Court considered the need for corroboration in sexual offences.

She drew the Court's attention to the fact that the trial court indicated that the appellant and the prosecutrix are related and are uncle and niece respectively. The Court also considered the fact that the appellant kept the prosecutrix at his home from 2012 to September, 2015. It further observed that, therefore, the appellant is a person who is well known to the prosecutrix such that the question of mistaken identity does not arise. The appellant is a person that she regarded as a parent. To support that position, Mrs. Kachaka relied on the case of **CHRISTOPHER LUSHINGA v THE PEOPLE**[7] which she

said is similar in some material aspects with the present case. In that case, the Supreme Court agreed with the trial court when it stated that:

> **"Firstly, the accused person in this case is a well known person to the victims such that his identity cannot be mistaken. He was a person they regarded as a parent and so it is true that they feared to disclose what was happening to their mother."**

On the issue of corroboration as to commission of the offence, it was submitted that the prosecutrix testified in very clear terms and had an excellent demeanour, according to the trial court that it was the appellant who took her to Maila Lodge in Helen Kaunda and had sex with her. She said that she narrated details which are unnecessary to recount but which were not challenged. She noted that PW1 was not challenged in cross-examination about what the appellant told her that it was her grandfather who was behind everything. To support her argument, she called in aid the case of **JOSEPH MULENGA & ANOR v THE PEOPLE**[8] where the Supreme Court observe that:

> **"During trial, parties have the opportunity to challenge evidence by cross-examining witnesses ..... when prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts that are disputed. Leaving assertions which are incriminating to go unchallenged diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial."**

In response to the allegations that the prosecutrix had many boyfriends and that Bobo had agreed to have sex with her, she submitted that he was not called to testify to that effect. She argued that the prosecutrix agreed that she had a boyfriend but she denied having sex with him except with the appellant. She submitted that this was corroborated by the medical report that indicated an old hymenal tear at 3 o'clock which is consistent with the fact that she had sexual intercourse two months before the examination was done.

Mrs. Kachaka argued that it is irrelevant to this charge that whether PW1 had sex with someone else or not because the charge is not about proving her virginity. She said that it is about the fact that the appellant being a relative to the prosecutrix had sex with her.

In response to the appellant's contention that the prosecution should have called PW1's grandmother to corroborate her evidence, she agreed. She, however, submitted that the record clearly indicates that the woman became elusive to the extent that the prosecution found it difficult to secure her attendance. She further submitted that, however, PW3, who was told the same thing by PW1, testified.

She further submitted that there are incidences in this case which provide something more. She referred to these as the noticeable decline in PW1's

performance at school, her bitterness towards the appellant to the extent of avoiding to go home after school and sleeping in the class room, the appellant's failure to inform her mother of what he termed as promiscuous behaviour.

Mrs. Kachaka argued that these amounted to something more or supporting evidence even if the trial court did not specifically mention **"corroboration"** she was nevertheless mindful of the need for corroboration in sexual offence cases.

With regard to the appellant's argument that the prosecutrix failed to make an early report of the alleged sexual abuse or assault, she argued that according to the evidence, she reported the matter to her grandmother and PW3 after some days. She submitted that there was no contention on that in cross-examination of either, PW3 or the prosecutrix. It is her contention that even if she reported after two months, she found solace in the Supreme Court's observations in the case of **CHRISTOPHER NONDE LUSHINGA v THE PEOPLE** where it stated that:

> **"He was a person they regarded as a parent and so it is true that they feared to disclose what was happening to their mother. However, their action of telling their friend showed that they were distressed about the whole issue. The medical reports for both victims confirm that they were both defiled. The accused only makes a general denial in his defence."**

She submitted that in the present case, PW1's position was difficult but she managed to inform her grandmother and teacher.

She dismissed the appellant's allegation that the prosecutrix was bitter with the appellant as being baseless.

With regard to the issue that no one saw the appellant and PW1 going out together, she submitted that according to PW1, they did not pass through the reception but the back gate.

In response to the issue of PW1's pantie and beddings being clean after her sexual encounter, she submitted that according to evidence on record, PW1 narrated that the appellant released on her stomach where he rubbed the medicine. She said that this therefore explained the mystery of the clean pantie and beddings.

She urged this Court to dismiss this ground for lacking merit.

With regard to ground two, Mrs. Kachaka acknowledged that it is the prosecution's duty to prove a criminal allegation against an accused beyond all reasonable doubt. She submitted that such duty was ably discharged in this case.

She submitted that the appellant failed to discredit the prosecution evidence and that it is on record, whereas his witnesses contradicted

themselves and provided no proof to the issue the appellant raised. She further submitted that DW2 and DW3 contradicted themselves on the time that the prosecutrix used to go home. Hence the trial court found them to be untruthful witnesses.

She relied on the case of **MWAMBONA v THE PEOPLE**[9] where the Court of Appeal said that:

> **"In evaluating the evidence of the appellant, the learned trial judge referred to certain contradictions ..... For these and other reasons, the learned trial judge held that the appellant's story could not reasonably be true, and we agree, the appellant was patently lying on material points going to the root of his story and the learned trial judge had no alternative but to reject his evidence."**

She submitted that in the instant case, the Court accepted the prosecution evidence because it was cogent and it found that the prosecutrix was a stable and consistent witness.

To support this position, Mrs. Kachaka relied on the case of **DONALD FUMBELO v THE PEOPLE** [10] where the Supreme Court gave guidance that:

> **"In trying to ascertain what weight should be attached to the testimony of a witness on a particular issue, an important factor that should be considered is the consistency of the testimony. Hence a lot of weight will be attached to the testimony if the witness starts showing at the earliest opportunity, his version on the issue.**
> .....

When an accused person raises his own version for the first time only during his defence, it raises a very strong presumption that the version is an afterthought and, therefore, less weight will be attached to such version. Therefore, in a contest of credibility against other witnesses, the accused is likely to be disbelieved. This is the approach which the trial court took. We find no fault in it."

In the present case, she finally submitted that the prosecution proved its case beyond all reasonable doubt in the court below and that the trial court was on firm ground in convicting the appellant.

She implored this Court to dismiss both grounds and to uphold the conviction.

We have considered the evidence on record, the judgment appealed against, the sentence passed by the court below, the submissions by both Counsel, together with the authorities cited.

The appellant was charged and convicted for the offence of incest contrary to section 159(1) of the Penal Code, Chapter 87 of the Laws of Zambia which provides that:

"Any male person who had carnal knowledge of a female person who is to that person's knowledge his grandmother, mother, sister, daughter, granddaughter, aunt or niece commits a felony and is liable, upon conviction for a term of not less than twenty years and may be liable to imprisonment for life."

In view of the foregoing provision, what is evident is that the offence of incest is committed when the evidence establishes that there has been sexual intercourse between two people who are related.

With regard to ground one, we accept that in sexual offences, corroboration of the identity of the perpetrator and commission of the offence is cardinal for purposes of securing a conviction. In this case from the evidence on record, we observed that the trial court dealt with the issue of identity of the perpetrator when it considered the fact that the appellant is a well known person to the prosecutrix, whose identity cannot be mistaken. The court went further to consider the fact that she lived in the appellant's house for two years in addition to her being the appellant's niece by reason of being the appellant's elder brother's daughter. Those pieces of evidence considered by the trial court in our view amounted to **"something more"** or supporting evidence such that there cannot be mistaken identity in this case.

We, therefore, find that the **CHRISTOPHER LUSHINGA** case cited by Counsel is relevant to this case.

We turn to the second limb of the requirement of corroboration. We accept that the medical report merely confirmed that the prosecutrix had sexual intercourse as she was found to have an old hymenal tear at 3 o'clock.

Although there was no witness to the commission of the offence as PW1 was sneaked into Maila Lodge through the back entrance, her narration of the details of what transpired in the room were accepted by the trial court as having been unchallenged by the defence.

We are of the considered view that the defence's failure to challenge PW1's evidence on that aspect, fortified her evidence and elevated it to amount to **"something more"** or supporting evidence of the commission of the offence.

The issue of the prosecutrix's failure to make an early report of the sexual assault in our considered view was well articulated in the respondent's submissions and the cited case of **CHRISTOPHER LUSHINGA v THE PEOPLE** relied on. Compared to period of delay in reporting of about nine months in the cited case, we do not consider PW1's delay of two months in reporting to be inordinate and unreasonable in the circumstances.

We find no merit in ground one and we, accordingly, dismiss it.

We turn to ground two. Upon perusal of the record and the defence evidence, we observed that the trial court considered the demeanor of the appellant and his witnesses when it noted the reluctance by the appellant and

DW3 to answer all the questions put to them in cross-examination. We also noted the contradictions in the appellant and his witnesses' evidence, especially DW2 and DW3, as highlighted in the respondent's submissions.

We are of the considered view that the trial court discounted the defence evidence because of the contradictions and inconsistencies in the said evidence.

The trial court also discounted the defence evidence due to the lack of credibility of the said evidence because of the untruthfulness of the witnesses.

We also observed from the defence evidence that the appellant DW2 and DW3 focused on trying to show and convince the trial court that the prosecutrix is a person of loose morals rather than telling the truth. In view of the ingredients of the offence of incest, we find that it is irrelevant that the prosecutrix had a boyfriend that she could have had sex with because as Mrs. Kachaka properly submitted, this case is not about proving PW1's virginity, it is about establishing that the appellant knowingly had a sexual encounter with his niece, irrespective of the number of times.

In the circumstances, the entries in PW1's note book or diary about her sexual fantasies are irrelevant to discounting the charge.

We equally find no merit in ground two and we dismiss it.

The appellant being unsuccessful on both grounds, the net result is that the appeal fails and it is, hereby, dismissed.

Consequently, both conviction and sentence are, accordingly upheld.

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F. M. CHISHIMBA
COURT OF APPEAL JUDGE

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F. M. LENGALENGA
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE