REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL NO. 109 OF 2018

(Being Criminal Case Number 841 of 2016,

From the First Grade Magistrate Court Sitting at Mkukula)

BETWEEN

STEVEN KALIYATI ……..……...……. APPELLANT

AND

THE REPUBLIC …….. RESPONDENT

CORAM : THE HONOURABLE JUSTICE F.A. MWALE.

: Appellant, present unrepresented

: Liness Chikankheni, Senior State Advocate, of Counsel for the Respondent

: Mpandaguta, Court Interpreter

: Mbewe, Court Reporter

Mwale, J

JUDGMENT

1.0 Background and Brief Facts

1.1 The appellant herein, appeals against both his conviction and sentence for the offence of Defilement contrary to section 138 of the Penal Code. The particulars of the offence were briefly that the appellant, on or about the 22nd day of November 2016, had carnal knowledge of a female child aged 9 (nine) months. He pleaded not guilty to the charge and after the prosecution called 3 witnesses, the appellant was convicted and sentenced to 8 years imprisonment with hard labour.

1.2 The appellant denies committing the offence and his summarized grounds of appeal are that the lower court erred in convicting the appellant for the following reasons:

(a) The prosecution did not prove the case against him beyond reasonable doubt.
(b) The evidence of PW1 was uncorroborated and hearsay and should not have been admitted nor relied on.
(c) Commenting on the appellant's right to remain silent was wrongful and unlawful.
(d) The conviction was not supported by the evidence.
(e) The finding that there was corroborative evidence was wrong.
(f) The sentence of 8 years imprisonment is manifestly excessive.

1.3 The appellant also argued during his appeal hearing that the child was only taken to police and hospital after a day and therefore any enlargement of her vagina opening could have taken place after her mother had taken her from him. I have found no evidence in the record to support this and will not be considering it.

2.0 Was the Case Proved Beyond Reasonable Doubt?: Testimony of the Witnesses

2.1 In order to satisfy the requisite standard of proof, the relevant provision is section 187(1) of the Criminal Procedure and Evidence Code which reads:

> The burden of proving any particular fact lies on the person who wishes the court or jury as the case may be to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person.
> Provided that subject to any express provision to the contrary in any written law the burden of proving that a person is guilty of an offence lies upon the prosecution.

There are numerous cases interpreting this provision. One such case is ***Namonde vs. Rep***. [1993] 16(2) MLR 657 in which the Honourable Chatsika, J. as he was then, affirmed Lord Sankey views in *Woolmington vs. Director of Public* Prosecution [1935] AC 462, as follows.

> *It should be remembered that subject to any exception at common law, cases of insanity and to various statutory provisions, the prosecution bears the burden of proof on every issue in a criminal case*.

In another case, ***Chauya and Another v The Republic***, Criminal Appeal No. 9 of 2007, the Honourable Chipeta J (as he was then) stressed that in,

> *Criminal law, it should always be recalled, thrives on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than to err by convicting and sending to an undeserved punishment one innocent soul.*

In the matter at hand, in order to prove the case, the elements of the offence of defilement under section 138 of the Penal Code had to be satisfied beyond reasonable doubt. First, that there was unlawful carnal knowledge of the girl (i.e. penetration of the male sexual organ of the appellant into the female sexual organ of the girl) and secondly that the girl was under the age of 16 years.

2.1 The testimony of the child's mother who was the first prosecution witness (PW1) provides proof that the child was eleven months old and not 9 months old as stated in the charge.

She was therefore only a toddler at the time of the offence, crawling around her homestead when she met her fate. From the judgment, PW1 temporarily went to draw water within hearing range from her house leaving the child. PW1's sister was washing plates in the kitchen outside the house and the appellant lived in the adjoining neighbouring house. According to the testimony of PW1, when she came back home, she found her daughter missing and so she knocked on the appellant's door. The door was locked and the appellant took time before he came to open it. When he finally opened the door, she found the child in his house. As she took the child, the child started crying. Having discovered anomalies in the child's vagina opening as she bathed her, she first told women around who confirmed an enlargement to the opening of the vagina. She also confronted the appellant's wife who told her that she was not surprised as this was the sort of thing her husband would do. She subsequently reported the matter to the police who referred her to the hospital where a medical report was obtained. The medical report which she identified in court recorded that the child was stable, with no fever, no anaemia, no bruises or ulcers and slight enlargement of vaginal os. The child was treated with antibiotics and post-exposure prophylaxis (PEP).

2.2 During cross examination PW1 added that her house and the appellant's house are semi-detached, and it was possible to hear across the walls if someone was crying, and so the child was not crying whilst inside the house in the company of the appellant. The child however started crying after appellant handed the child over to her and had a piece of bread in her hands. Her clothing was intact, there were no tears in the clothing. At the time, the mother's sister was washing clothes. She did not report the incident to the police immediately because she had no transport money to go there at the time and so she waited until her husband came home. The appellant's door was only shielded by a curtain and so the child easily entered. The PW1 also revealed that at some point she reported the incident to the appellant's brother who begged for forgiveness and asked that the matter be withdrawn, and PW1 wanted to withdraw the matter.

2.3 PW1 also added during re-examination that the child was too young to have resisted or struggled against a sexual attack and hence the lack of tears in the child's clothing. She

also stated that her sister was behind the kitchen washing plates and that she was on the veranda washing clothes. The kitchen is located in front and opposite the door to the house. She then stated that she did not find the child when she was coming from drawing water.

2.4 The second prosecution witness, PW2, was a medical officer, but he was not the officer who produced the medical report and counsel for the appellant objected to the tendering of the report by PW2 on account of section 173 of the Criminal Procedure and Evidence Code. The trial court however permitted PW2 to proceed and give evidence even though he did not author the report. The evidence of PW2 was to the effect that the doctor observed that child was okay and was not crying. According to PW2, the doctor who prepared the report noted lacerations on opening of the vagina. It was the doctor's view that because of the lacerations the child had indeed been defiled. The evidence is not easy to follow because during cross examination, PW2 stated that according to the doctor's findings, the child had no bruises and no ulcers and more specifically, he stated that:

> *According to her findings, there was no penetration.*

PW2 was not re-examined.

2.5 The third and last prosecution witness (PW3), Detective Sergeant Khongoza, was the investigating officer from Kanengo Police station. It was his evidence that after the report was received from the complainant, the child was referred for medical examination at Area 25 Health Centre. According to PW3, the results of the medical examination showed that the child had an enlarged and swollen vulva. PW2 took the appellant's caution statement and evidence of arrest, in which the appellant denied the offence. In cross examination he stated that it was impossible for a man to penetrate the private parts of an 11-month-old child hence the swelling. PW3 concluded his evidence by stating that the child could not physically have been penetrated by an adult male and hence the swelling.

2.6 The question that I must determine, is whether from the testimony of the witnesses, there is sufficient evidence, to prove beyond reasonable doubt that there was penetration in this case. Beginning with the testimony of PW1, there is no doubt that the child's sexual organs were enlarged/swollen following the recovery of the child from the appellant. PW1, in the

immediate aftermath of the discovery of the child's condition, informed another woman, Mrs. Mafaiti who apparently observed the same. The problem is that the woman whom Mrs. Mafaiti, was not present in court and any evidence given on her behalf is inadmissible as hearsay. PW1 also testified that she approached the appellant's wife who confirmed that the appellant was in the habit of defiling little children. Unfortunately, the wife was never called as a witness and PW1's evidence in this regard is inadmissible as hearsay. Nonetheless, the evidence of PW1 establishes that the entry to the child's vagina appeared larger than normal, albeit that there was no bleeding.

2.7 Whether this enlargement was caused by penetration or attempted penetration by a man's sexual organ is the next question. Ordinarily, medical evidence is useful in determining whether penetration did indeed take place. It is trite law, as the prosecution have argued, that medical reports are not the only way through which penetration can be proved. On this point, the case of ***Seda v The Republic*** (1997) 1 MLR 386 is instructive. The honourable Chimasula Phiri J., as he was then, stated as follows in that case:

> *It was not necessary to prove penetration through a medical report only ... there was corroborative evidence from the elder sister of the complainant who examined the complainant's private parts immediately after the rape was committed. There was evidence of penetration and of semen and blood coming from inside the vagina.*

In the case before me, not having the benefit of evidence of the other women who observed the child's vagina testifying on what they observed which was consistent with penetration, the medical report or evidence of the medical officer is critical evidence.

2.8 I will find no probative weight in the evidence of PW3 on the issue of penetration. As the investigating officer he was not an eyewitness to the commission of the offence. His assertion in cross-examination that it was impossible for a man to penetrate the private parts of an 11-month-old child hence the swelling is an opinion, and yet he was a witness of fact. PW3 was not a medical expert witness and is therefore barred at law, from giving opinions of this nature.

2.9 The evidence of PW2 who tendered the medical report has been challenged by the appellant as not supporting a finding of penetration. There are a number of other issues that arise from both the testimony of PW2 and the medical report that must be reviewed in order to ascertain whether their evidential value in proving the case against the appellant is warranted. To begin with, the record shows an inconsistency in the evidence of PW2 as he explains the medical report. According to the untyped record, PW 2 starts of by saying that:

The doctor said she did not see any lacerations.

The next sentence recorded however is:

She noted lacerations on opening of the vagina.

Followed by:

It was her view that because of the lacerations she concluded indeed that the girl was defiled.

The same witness in cross-examination went on say:

According to her findings, there was no penetration.

The evidence of PW2, as I have alluded to earlier, was therefore inconsistent and confusing. It is therefore impossible for this court to conclude just from this testimony that there was indeed penetration.

3.0 Corroboration

3.1 The appellant has argued that the evidence of PW1 was uncorroborated and should therefore be disregarded. If the appellant's contention is to be upheld, the evidence of PW1 cannot be used to support any inference drawn from the conduct of the appellant. The starting point on this argument is the premise that the requirement for corroboration of the evidence of the complainant in sexual offences is based on a practice and it is not a legal rule. The practice requiring corroboration in sexual offences has been a long-standing practice that has come into our law from English law as elaborated in 1680 when Lord Chief Justice Hale in *"Pleas of the Crown"* 1680, I, 633, 635 stated as follows:

> *The party ravished may give evidence upon oath and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony.... It is one thing whether a witness be admissible to be heard; another thing, whether they are to*

> *be believed when heard. It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, the never so innocent.*

A number of authoritative scholarly authors in the law of evidence have followed suit and made similar observations. *Wigmore on Evidence*, 3rd ed., explains the requirement of corroboration as a necessity for the following reasons:

> *The unchaste mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straight forward and convincing. The real victim is however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.*

Glanville Williams in his article on "*Corroboration – Sexual Cases*" in the [1962] Crim. L.R. 662, is particularly forthright at attributing the reason for the practice requiring corroboration on the unreliability of women's testimony in such cases. He states:

> *Sexual cases are peculiarly subject to the danger of false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girls refusal to admit that she consented to a sexual act of which she is now ashamed.*

Finally, *Archibold* (39th ed.) Para 1430 also condemns women as being mendacious and hence justifying the requirement for corroboration being necessary:

> *Experience has shown that female complainants have told false stories for various reasons and sometimes for no reason at all.*

It therefore comes as no surprise that over the years this practice which is blatantly discriminatory against women has lodged itself firmly in our jurisprudence and enjoyed elevated status not simply as a practice but an immutable rule.

3.2 The case of ***Kamwendo v Republic*** (Criminal Appeal No. 48 of 2004) is one of many cases that exemplifies the level of deference with which our courts have over the years blindly followed the patriarchal and discriminatory practice without question:

> *In sexual offences proof of penetration however slight is necessary but the r[u]pture of the hymen need not be proved. Corroboration of the complainant's evidence is not required as a matter of law but in practice it is always looked for. It is necessary that a warning of the danger of convicting on complainant's uncorroborated evidence is always essential---*

In view of our current Constitutional dispensation, the practice requiring corroboration in sexual offences based on the fact that women are unreliable witnesses, must be called out for what it is. It is discrimination against women based on their sex and or gender and cannot be sustained. Section 20 of the Constitution expressly forbids discrimination on any ground, including sex and gender.

3.3 Further, the practice requiring corroboration is also unlawful. It is in direct contravention of section 212 of the Criminal Procedure and Evidence Code which provides as follows:

> Subject to this Code and any other law for the time being in force, no particular number of witnesses shall in any case be required for the proof of any fact.

With reference to an identical provision being section 132 of the Uganda Evidence Act, I therefore cite with approval the words of the Honourable Lugayizi J., in the case of ***Uganda v Peter Matovu*** Criminal Session Case No. 146 of 2001, who had this to say:

> *In essence, the above provision lays down a general rule and an exception. In simple terms, the general rule is that the evidence of one witness is enough to prove any fact in any case. The exception to the rule is that where **"any other law in force"** provides so, the evidence of more than one witness may be required, in any ease, to prove an' fact. In Court's opinion the exception to the general rule in section 132 of the Evidence Act only covers **'any other law in force"** which is the creature of the legislature. It does not cover "any **other law in force"** that has come into existence by a of other means outside the realm of the legislature and certainly it does not cover a mere rule of practice that courts may wish **to** observe. To interpret the*

> *exception differently would bring into the picture all kinds of possibilities. For example, that even unwritten customary law, etc. may, legally, furnish an exception to the general rule in Section 132 of the Evidence Act. Court greatly doubts whether that was the intention of the legislature. From that standpoint alone, Court is of the opinion that the said rule is not legally justifiable, for it cannot stand as a valid exception to the general rule in section 132 of the Evidence Act,*
>
> *Secondly, and much more importantly, Court thinks that the above rule discriminates against women who are by far, the most frequent victims of sexual offences and is, therefore, inconsistent with Uganda's international obligations under various conventions and the Constitution.*

These words competently sum up the effect of the practice requiring corroboration when viewed against both section 20 of the Constitution and section 212 of the Criminal Procedure and Evidence Code and it is for this reason that the appellant's insistence on corroboration in this case and every other case of this nature must be disregarded so that the practice is relegated once and for all, to its rightful place which is to non-observance.

3.4 The contemporary gender responsive view with regard to corroboration espoused by the Honourable Lugayizi J., in the Ugandan case above is slowly gaining traction and recently found its way into Malawian jurisprudence. In the case of ***Dyson Nzeru v The Republic***, Criminal Appeal No. 32 of 2018, High Court Principal Registry (unreported), the Honourable Kamwambe J. recognized the discriminatory nature of the practice requiring corroboration and went to great lengths to advocate a departure from it as he stated:

> *Let me take this opportunity to speak on corroboration further as it has developed to be an emotive issue. The requirement of corroboration in rape or generally sexual offences with persons over 16 is a matter of practice which today is causing controversies. Critics say that it has lived its usefulness and they have good and compelling reasons to persuade courts not to rely on corroborating evidence unnecessarily. Why should a complainant woman require corroboration of her evidence in sexual offences only and not in other offences such as theft? It seems women were not trusted to tell the truth in sexual offences only and so corroboration practice was coined to labour women. In* ***Banda -v- Rep 1966-68 ALR Mal. 336*** *Bolt J said that where, in a case in which it is incumbent on a trial court to warn itself to look for*

corroboration, such a warning is not given and no corroboration is apparent, then an appellate court may look at the whole of the evidence and the reasons given by the trial court in order to decide whether it is just and proper (where there is no failure of justice} to uphold the conviction. He went on to say that corroboration is only required by law in exceptional statutory cases but it is desirable as a matter of practice that a court should warn itself as to the danger of convicting without corroboration in sexual cases and cases which depend on evidence of an accomplice.

*In **R-v- Kaluwa 1964-66 ALR Mal. 356 at 364 the court** said that corroboration of the complainant's evidence in a case of rape is not essential but it is the practice to warn the court of the danger of convicting on her uncorroborated testimony. This means that you can convict on uncorroborated evidence so long as the court warns itself of the danger of convicting on uncorroborated evidence. I wish to suggest that a court does not even need to warn itself of the danger so long as there is enough circumstantial evidence to satisfy the legal requirement of proof beyond reasonable doubt. The same case of **Kaluwa** said also that circumstantial evidence may amount to corroboration when this evidence is proved by witnesses other than the one requiring evidence. One may ask what this means. Because there is a practice of requiring corroborating evidence, Judge Cram wanted to marry such circumstantial evidence to corroboration to justify the practice of looking for corroboration evidence. But in my view, today we could be bold enough to ignore corroboration and merely consider if the circumstantial evidence suffices to secure a conviction. The same result will be obtained and the controversial approach of looking for corroboration will have been avoided. We are in a gender sensitive era and therefore should do away with laws, practices and notions which seem biased in favour of one sex. Such practices tend to be discriminatory and likely to be unconstitutional if examined closely. Fortunately, this practice has not been challenged. (Emphasis supplied.)*

3.5 I am in full agreement with Kamwambe J. in the case of ***Dyson Nzeru v The Republic*** (above), the practice requiring corroboration has no place in contemporary legal theory for the reasons given above. If the circumstantial or direct evidence in a case can prove beyond reasonable doubt all the elements of the offence, it is not necessary for a trial court to look for any further evidence to corroborate the complainant's version of events. This court will therefore proceed on the premise that the evidence of PW1 in so far as it is admissible, does not require corroboration.

4.0 The Medical Report

4.1 The medical report was the first piece of documentary evidence tendered in the lower court. Having considered the medical report as presented and the objections raised to it both at the trial stage and during this appeal, there are some observations to be made on its probative weight. The medical report in this matter was not tendered by its maker, but by another medical officer, PW2. At the trial, the defence objected to this as being contrary to section 173 of the Criminal Procedure and Evidence Code. The prosecution did accommodate the appellant's concerns at the lower court by asking the court to grant an adjournment to facilitate the 7 days service. It would appear that defence counsel did not respond. The trial court overruled the objection and the medical officer, PW2, proceeded to tender the medical report because of the defence failure to respond on the issue of the adjournment and because that the matter had already been adjourned countless times at the instance of the defence.

4.2 Section 173 of the Criminal Procedure and Evidence Code is rather lengthy but in essence, it provides for instances in which statements may be received in evidence in the absence of the makers. The said section 173 provides the conditions for the statement of a person "*who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable on a relevant fact*" to be deemed a relevant fact in those proceedings. I believe section 173 was wrongly cited in the lower because the relevant section for medical reports which are tendered in the absence of their maker is section 180 of the Criminal Procedure and Evidence Code. According to the said, section 180(1):

> (1) Whenever any facts ascertained by any examination, including the examination of any person or body, or by any process requiring any skill in pathology, bacteriology, biology, chemistry, medicine, physics, botany, astronomy or geography or any body of knowledge or experience sufficiently organized or recognized as a reliable body of knowledge or experience and the opinions thereon of any person having that skill are or may become relevant to the issue in any criminal proceedings, a document purporting to be a report of such facts and opinions, by any person qualified to carry out such examination or process (in this section referred to as an "expert") who has carried out any such examination or process shall, subject

> to subsection (5), on its mere production by any party to those proceedings, be admissible in evidence therein to prove those facts and opinions if one of the conditions specified in subsection (3) is satisfied.

The three conditions in subsection (3) are:

> (a) that the other parties to the proceedings consent; or
>
> (b) that the party proposing to tender the report has served on the other parties a copy of the report and, by endorsement on the report or otherwise, notice of his intention to tender it in evidence and none of the other parties has, within seven (7) days from such service, served on the party so proposing a notice objecting to the report being tendered

The requirement for seven days service also appears in section 180. In order to rely on a medical report tendered under section 180, the witness who made the statement must be unavailable and the prosecution must lead evidence of a vain search of the witness who does appear and provide evidence of unavailability. A statement by a prosecutor of the unavailability is not evidence (***Mputahelo v The Republic*** 1999 MLR 222). PW2 did give evidence that the presence of doctor who examined the child could not be secured, and therefore, this requirement was satisfied.

4.3 I have noted from my reading of the medical report that it was in fact served on the appellant. The appellant's signature appears on it; however, the signature is not dated and there is no way of telling whether service was effected within the 7 day period required under section 180 of the Criminal Procedure and Evidence Code. Nonetheless, under section 180(3), a report can be tendered in the absence of its maker without service if the other party consents. Considering that counsel for the defence had been afforded the opportunity of an adjournment to remedy this and he chose not to take it up, this can be taken as tacit consent. Besides, service was effected and counsel's silence on the issue of adjournment must have meant there was no prejudice to the appellant's case. Therefore, even if there was an irregularity in procedure at this stage, such irregularity is cured under section 5 (1) of the Criminal Procedure and Evidence Code because it did not occasion any injustice.

4.4 Having determined that the medical report was correctly admitted in evidence, I must now consider whether it provided evidence of penetration. The medical report as alluded to earlier does indicate that there was "*slight enlargement of vaginal os*". No bruises or ulcers were seen. The words "defilement" also appear in the report, preceded by 3 question marks. My understanding of this would be that the doctor who prepared the report was questioning whether there was defilement. I will also reiterate at this point that a finding of defilement is not one that can be made by a medical or clinical officer in a medical report. A finding of defilement is a finding of fact that only a trier of fact, i.e. a court, can make. All medical or clinical personnel can do is make their observations as to the physical and mental condition of the complainant and then conclude whether these observations are consistent with whether penetration could have occurred or not. Defilement is not committed upon penetration alone and is depended on another element (age). It is only when a court is satisfied that both these elements in the absence of any defences have been proved beyond reasonable doubt that a finding of defilement can be made. This position is well articulated in the Ministry of Health's "*Guidelines* for the Management of Sexual Assault and *Rape* in *Malawi*" (2005) and medical officers preparing reports for use in sexual violence cases would do well to abide by it.

4.5 Therefore, the medical report did not provide conclusive proof of penetration. Common sense would lead to the conclusion that the slight enlargement of the vaginal os for a child of 11 months cannot be consistent with penetration by the member of a fully-grown man. There should have been observed, extensive bruising or laceration if a grown man had tried to force himself upon her. Something interefered with the girl's vagina opening, it may have been an attempted penetration by a male member, or some other body part or object. Whether it was actual penetration or not has not been conclusively proved. The medical report does not assist the court in this regard. I therefore disagree with the lower court's conclusion when it found in its judgment that:

> *Counsel further argued that the doctor confirmed that the girl's vagina was enlarged but the doctor did not give any explanation as to what could have caused the enlargement of the victim's vagina. It is the view of this court that there is nothing that can enlarge a girl or woman's vagina except for a males member.*

This sweeping conclusion was not supported by evidence. It is a medical conclusion that must be supported by the evidence of an expert and there was no evidence to that effect. This ground of appeal therefore succeeds.

5.0 Inferences drawn from the Exercise of the Appellant's Right to Silence in the Trial Court

5.1 After the appellant was found with a case to answer he exercised his right to remain silent and did not make his defence. In the judgment the trial magistrate commented about this as follows:

> *However I am at pains to merely to proceed and convict because there is no explanation offered by the accused in defence. I am of the view that evidence sufficient to justify calling the accused person to his defence falls short of evidence beyond reasonable doubt that the accused is guilty but should be sufficient to give grounds for the finding that he committed the offence.*

I do not completely understand the trial court's reasoning in this regard, but the appellant has listed as one of his grounds of appeal that the trial court drew negative inferences from his decision to remain silent.

5.2 The right to silence is enshrined in section 42(2)(f)(iii) of the Constitution which states that the right of an accused person to a fair trial includes the right:

> to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;

The right is based on society's distaste for compelling a person to incriminate him or herself with his or her own words. Therefore, just as a person's words should not be conscripted and used against him or her by the state, it is equally inimical to the dignity of the accused to use his or her silence to assist in grounding a belief in guilt beyond a reasonable doubt (see ***R. v. Noble***, [1997] 1 S.C.R. 874). Therefore, for the burden of proof to remain on the prosecution, the silence of the accused should not be used against him or her in building

the case for guilt. Considering, as I will reason below, that the offence of defilement is not made out on the facts of this case, this ground of appeal succeeds.

6.0 Circumstantial Evidence: Inferences from Conduct of the Appellant and other Evidence

6.1 Having failed to find direct evidence of penetration, the Court must consider whether there is circumstantial evidence which proves beyond reasonable doubt that the appellant had carnal knowledge of the child. Some inferences can be drawn from the conduct of the accused as well as the other facts surrounding the incident.

6.2 Upon arrest, the appellant was recorded a caution statement at the police station in which he denied committing the offence. In his caution statement, which was tendered by PW3, the relevant part of his version of events is as follows:

> *M'mawa pa 22nd November ndinafika kunyumba ndipo ndinangofikira kugona. Panthawiyi nkuti mayi atapita kuntchito ndipo ana atapita kusukulu. Ndili nkugona choncho ndinamva ngati mnyumba mwalowa munthu ndipo nditazuka kukaona ndinapeza kanali kamwana ka woyandikira nawo nyumba komwe kamakwawila pafupi ndi mbaula yamoto. Ndinakanyamula ndinakasiya patali ndi mbaulayo kenaka ndinatenga bread kumupatsa kuti adye. Patapita nthawi yochepa mayi ake anabwela ndinawapatsila mwanayo.*

To translate, the appellant stated in his caution statement that on the morning of the 22nd of November, he arrived home (from work) and went straight to bed. At the time, his wife had gone to work and the children had gone to school. While sleeping, he heard sounds indicating that someone had entered the house and when he woke up, he found that it was the child of the his neighbour who had crawled into the house and close to a charcoal burner which was on at the time. He carried the child and put her down away from the burner. He then went to get bread to give the child to eat. After a short while, the child's mother came and he handed the child over to her.

6.3 When a court is considering the defence version of events, the only question for the court to ask itself according to the case of the ***Republic v Msosa*** (1993) 16(2) MLR 734, is:

> *Is the accused's story true or might it reasonably be true?"- with the result that if the answer is that the appellant might be reasonably be telling the truth, the prosecution would not have in that case discharged the burden of proof beyond reasonable doubt imposed upon it by law*.

If the appellant lied however, that would not necessarily be an indication of guilt but is an issue that goes to the credibility of the defendant (see ***Innocent Phiri v The Republic***, Criminal Appeal No. 199 of 2012 High Court, Lilongwe District Registry (unreported) Mwale, J.).

6.4 The issue for this Court is whether the circumstantial evidence in this case which included inferences drawn from the appellant's conduct and his version of evidence would support a conviction. In order to sustain a conviction based on circumstantial evidence, those inferences must form part of a chain of events leading up to one rational and logical conclusion to the exclusion of all others (see **Nyamizinga v The Republic [1971-72] *6* ALR (Mal) 258**). Further, in considering the inferences arising from the appellant's conduct, it is important to set out the nature of judicial inquiry that must be undertaken before a finding that the case has been proved beyond reasonable doubt using circumstantial evidence can be made. I find the words of the honourable Sardiwalla J in the South African Case of ***Malinga v The State***, Case No. A27/2011, ZAHC, Gauteng Division, instructive in this regard.

> *Circumstantial evidence can sometimes be more compelling than direct evidence. A court is always enjoined to examine all the evidence; it must neither look at evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, nor should it look at exculpatory evidence is isolation to determine whether an accused's version is reasonably possibly true. The correct approach is to consider all the evidence "in light of the evidence of the case'.*
>
> *In drawing inferences from circumstantial evidence it is trite law that:*
>
> *(a) The inference sought to be drawn must be consistent with <u>all proven facts</u>; and*
>
> *(b) Secondly, the proven facts must be such that they exclude every other reasonable inference. (Emphasis supplied.)*

This Court must therefore review the evidence cumulatively with a view to determining what the inferences may be drawn with regard to the conduct of the appellant, whether these inferences are consistent with proven facts (evidence that is relevant and admissible as discussed above) and finally, whether the proven facts exclude every other reasonable inference.

6.5 The fact that the accused was alone behind closed doors with a child who upon being returned to the mother begun to cry is cause for alarm. According to his own caution statement, the appellant was alone in the house sleeping with the front door open. When the child crawled in, he heard a sound and in order to protect her from a burning charcoal burner, he put the child aside and went to get her some bread. I find this behaviour highly suspicious. Why did the appellant not simply walk out the door and hand the child over to her aunt who was right outside doing some chores? When the mother came to look for the child, the door had been locked. In order for the child to have crawled in the door must have been opened. One cannot expect an eleven-month-old child to crawl into a house and then lock the door behind her. Why did the appellant lock the door? Why did he give the child some bread instead of not just taking her back outside where she came from? The appellant's intentions were far from honourable. He took advantage of the fact that a child had crawled into his house, locked the door behind her and enticed her with bread to have his way with her.

6.6 Only the appellant and the child were in the house and when the child came out, the entrance to her vagina had enlarged. Whilst inside the house, whatever the appellant did to the child does not seem to have caused he child pain and therefore, the child did not cry during the process. She only cried when she was returned to her mother which leaves me with a question, why did the child not cry during the activity that enlarged her vaginal opening? Would penetration by a male member not have caused an 11 month old so much pain that she would have cried? These questions leave me with doubt as to actual penetration and that doubt must be exercised in favour of the appellant. From this evidence and the lack of any conclusive medical evidence of penetration, I find that the conviction for the offence of defilement cannot be sustained.

7.0 Findings and Order

7.1 Based on my analysis of the review of the evidence, above, I find that no evidence of penetration and therefore acquit the appellant of the offence of Defilement, contrary to section 138 of the Penal Code and the sentence 8 years imprisonment with hard labour is set aside.

7.2 However, there is sufficient evidence to return a conviction for the lesser offence of indecent assault contrary to section 137 of the Penal Code. The fact that the appellant was alone with a child whose private parts were violated in the immediate aftermath of her contact with him is sufficient circumstantial evidence, beyond reasonable doubt of the commission of that offence.

7.3 The maximum penalty for the offence of indecent assault on females is 14 years imprisonment. Best sentencing practice in accordance with the *Magistrate's Courts Sentencing Guidelines* suggests that the appropriate starting point in sentencing on this offence is 4 years imprisonment. Regardless of the fact that the appellant is a first offender, I find that in view with the seriousness of this offence, especially when perpetrated against a child of very tender years, a mere crawling toddler, a custodial sentence is justified. By way of aggravating factors, the appellant knew exactly what he was doing when he locked the child into the house and gave her bread as an inducement for him to have his way with her. Although blood tests were conducted, results were not returned, and this Court has no way of knowing whether the child was infected with a sexually transmitted disease. We also never know the psychological impact this assault will have on the child.

7.4 There are a number of mitigating factors in the commission of the offence. To begin, with no substantial injury was recorded and when the child was medically examined, she appeared fine overall. It was a crime of opportunity; the appellant seized the opportunity

to indecently assault the child when she crawled into his house and therefore there was no premeditation. I hereby sentence the appellant to 3 years imprisonment with hard labour.

I so order.

Made in Open Court in Lilongwe in the Republic on this 7th day of July 2020.

Fiona Atupele Mwale

J U D G E