



IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY
CONFIRMATION CASE NO. 344 OF 2018
(Being Criminal Case No. 96 of 2018 in the FGM Court sitting at Rumphi)

REPUBLIC
VERSUS
HENDERSON GONDWE
ANNUEL NGWIRA

CORAM: HON. JUSTICE T.R. LIGOWE
D. Shaibu, of Counsel for the State
C. Chithope Mwale, of counsel for the Respondents
G. Msukwa, Official Interpreter
J.N. Chirwa, Court Reporter

JUDGMENT

Ligowe J

1 This is a case of defilement arising out of a cultural practice which in some places in Northern Malawi is called *kupoka* or *kusomphola*. The practice is basically elopement. A young woman will agree with her loved one to secretly take her away into marriage and follow required formalities with her parents and relatives later afterwards. This court has dealt with so many such cases of defilement in confirmation for the past two years. I have no idea how many women statistically get married through this process but the case statistics are an indication that the practice has led so many girls into early marriages and some at tender ages as below 16. It is a practice I would recommend to be banned. Committal occurs before the formalities required to celebrate the marriage have been followed. As a result, it is often too late that it is realised the girl was too young to enter

into marriage and that the man committed defilement. Without this practice, hopefully, in the process of the marriage formalities, questions could be asked about the ages of the parties intending to get married. If one of them is under age, obviously the process will be stopped. This way, girls will be saved from early marriage and defilement. And men, from possible lengthy imprisonment. Banning the practice will also save all of us in this country from having to solve many complex issues arising after defilement committed in the process of marriages conducted in this manner. One of them which has bothered me on the bench for so long now is the dilemma of having to imprison the offender for a long period when the girl has been made pregnant and has no one else with the capacity to care for her and the baby while the man is in prison.

- 2 The present case is a classic example. The girl was aged 13. She was sent to a grocery shop at Mulyezi trading centre on 9th February 2017 to buy salt after knocking off from school. On her way home, a certain lady from her neighbourhood, NyaMwandira Caroline, called her to her house. The girl resisted to enter the house after she sensed danger in it. She was however forced to go in and there NyaMwandira said “this is the man for you,” referring to Henderson Gondwe. There was also NyaMwandira’s husband, Annuel Ngwira in the house. These three struggled with the girl until sunset to convince her to get married to Henderson Gondwe. Henderson Gondwe was about 29 years old at the time. Anyone can see how vulnerable the little girl, faced with the situation, was and felt among the three adults.
- 3 Henderson Gondwe it appears is from Chivungulu in Rumphi, so he had to take the girl to that place. Because she was resisting, around 9.00 pm, Annuel Ngwira literally had to carry her on his shoulders while Henderson Gondwe held her hands and NyaMwandira followed behind telling her to keep quiet as they took her via a shortcut to South Rukuru Bridge to board a motor vehicle to Phwezi. The shortcut was to avoid being seen by people at Mulyezi trading centre. From Phwezi onwards she could not resist anymore but kept crying and allowing anything Henderson Gondwe required her to do. From Phwezi she was taken to Mhulunji at NyaGondwe’s house and stayed there for three weeks. Thereafter she was taken to Chivungulu. It is while she was at Chivungulu that Henderson Gondwe sent people

to the girl's home to start the process of formalising the marriage. In this period she had been told to sleep with her said husband by his sister. She said nothing but cry. That is when Henderson Gondwe defiled her many times. He admitted having had sex with her from February to April 2017.

4 While all this was happening, the girl's family realized she was not coming back from buying salt on 9th February 2017. Her father sent her brothers to look around for her and they searched up to 7.00 pm to no avail. They eventually reported the matter to the Community Policing Forum but they also failed to find her. It was on or about 24th February 2017 that Michael Mhango was approached by Henderson Gondwe's family to be the advocate for his marriage with the girl and he came to the girl's home to report that she was with them. It appears there was no consensus between him and the girl's family regarding the issue because Michael Mhango testified that the discussions went on so well and he was charged K20 000 as *Chiphala* and he paid K10 000 with the balance to be paid later. However, Lighton Manyera, the girl's brother testified that they returned him so as to bring their daughter, Henderson Gondwe, his father and other elderly people in their village. The K10 000 he paid was for reporting that the girl was with them.

5 Two weeks passed without Henderson Gondwe's family coming and so Lighton Manyera and his younger brother followed. They found that Henderson Gondwe had hidden the girl, but he admitted having eloped her. Thus they reported to the Community Police for him to be arrested because their daughter was so young to be married. It was around 4th April 2017 when Henderson Gondwe was arrested. The girl was sent for medical examination at Rumphu District Hospital and was found pregnant.

6 Henderson Gondwe was brought to court first and charged with defilement contrary to section 138 (1) of the Penal Code. After hearing evidence of the girl and noting that she had been defiled with the help of Anuel Ngwira and his wife NyaMwandira, the lower court ordered the two to be arrested and to be jointly charged with Henderson Gondwe. The charge sheet on record shows they were all charged with defilement and they pleaded not guilty. On the next date of hearing however, Caroline Mwandira was discharged under

section 81 (a) of the Criminal Procedure and Evidence Code as she was reported sick and admitted to Mzuzu Central Hospital. Trail continued with the remaining accused persons and they were both convicted. In his finding against Annual Ngwira, the Magistrate said he had not physically had sex with the girl but assisted Henderson Gondwe to elope her and thereafter defile her. He assisted Henderson Gondwe in committing the offence and under section 21 (1) (b) and (c) of the Penal Code he is deemed to have taken part in committing the offence and to be guilty of it. The provision states: -

“When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence.”

7 This is a provision about parties to a criminal offence and it considers everyone who aids or abets either by commission or omission as though they took part in committing the offence and guilty in committing the offence and should be charged with actually committing the offence. This is to say, if a person aided or abetted another in stealing, he is guilty of theft and has to be charged with theft. We get the same sense from David Ormerod, *Smith and Hogan Criminal Law*, (11th Ed.) p. 170 where the author states:-

“Where D aids P in the commission of say a murder, P’s *actus reus* and *mens rea* as the principal will be prescribed by the law of murder (killing a human being with malice aforethought, etc). D’s liability as a secondary party comprises the *actus reus* of aiding, abetting, counseling or procuring, with the relevant *mens rea* of a secondary party (intention to assist, knowledge of the relevant circumstances rendering P’s act criminal). The contrast between the conduct sufficient to satisfy these elements and the requirements of the principal offence will often be stark. In a case of murder, D may have aided and abetted by driving the get-away car, being aware that an armed robbery was to take place. P will only be liable if he has killed with intent to kill or commit grievous bodily harm. Both will be convicted as murderers, labelled as such and punished as such.”

- 8 The aider or abettor will not be charged with and convicted of aiding and abetting the commission of the offence but charged with and convicted of actually committing the offence. This sense is in several other provisions like: S 45(8) of the Fisheries Conservation and Management Act where any person who aids, abets, counsels or procures an offence under the Act or conspires to commit such offence is guilty of the offence so aided, abetted, counselled or procured or conspired to be committed; and S 101(2) of the Liquor Act, any person who aids or abets another person in the commission of an offence under the Act is himself guilty of the offence committed by such other person.
- 9 There are however other provisions under the laws of this country where the aider or abettor may be charged and convicted of aiding and abetting the offence other than actually committing the offence. The examples are: Regulation 25 (2) of the Hotels Regulations under the Tourism and Hotels Act where apart from the offences against regulations 12, 13, 14, 16, 17, 18, 19 and 21, it is a separate offence for any person to aid, abet, counsel, procure or assist in the commission of, or attempt to commit, any offence against the Regulations; Regulation 49 of the Tourism and Hotels (Licencing of Hotels) Regulations also has a similar provision; S 42 of the Penal Code, it is a misdemeanor to aid or abet soldiers or policemen in acts of mutiny; S 43 of the Penal Code it is a misdemeanour punishable with imprisonment for six months to procure or attempt to procure or aid or abet soldiers or policemen to desert; S 44 of the Penal Code it is also a misdemeanor to aid a prisoner of war to escape; S 228 of the Penal Code, aiding suicide is a felony punishable with imprisonment for life. S 36 of the Immigration Act, every person who aids or abets another person gain unlawful entry into Malawi is liable to a fine of K500 or to imprisonment for twelve months; S 14 of the Local Land Boards Act, any person who aids or abets a transaction which is unenforceable under section 6 of the Act is liable to a fine of K200 and to imprisonment for one year; S 66(c) of the Environment Management Act, any person who aids or abets the illegal trafficking in wastes, chemicals, pesticides or hazardous processes, wastes or substances, is liable to a fine of not less than 20,000 and not more than K1,000,000 and to imprisonment for ten years; S 42 (d) of the Money Financial Crimes Act, it is an offence to aid or abet the commission of any act or omission

referred to in paragraphs (a), (b) or (c); and S 29 (f) of the Public Audit Act, it is a separate offence to aid, abet, counsel or procure the commission of an offence under the Act.

10 It means therefore that our parliament made specific provision for circumstances where a person may be charged with and convicted of aiding or abetting the commission of an offence apart from the actual offence and they are what I have cited above. In any other case the aider or abettor has to be charged with and convicted of actually committing the offence.

11 Knowing what defilement involves, I submit, it would not make sense to charge and convict Annel Ngwira of actually committing the offence of defilement in the present case. That is why the lower court had to specifically state that Annel Ngwira had not physically defiled the girl although he was charged and convicted of it. It practically makes sense to charge and convict a person who aids and abets murder as murderer and label him and punish him as such but not defilement and other sexual offences. The better way in my view is to provide for specific offences for aiding and abetting such offences, punishable as much as actually committing the offence.

12 Understandably, the convicts conduct in eloping her in this case amounted to forcing her into marriage contrary to section 81 (a) as read with section 83 of the Child Care, Protection and Justice Act. After discussing the offence under section 81 (a) in relation to Annel Ngwira and his wife, the Magistrate made two misleading statements in his judgment: -

“I therefore find that the prosecution has best proved this offence of forcing a child into marriage under the said section. I accordingly find the 2nd accused person guilty and convict him for the said offence.”

13 This would mean that Annel Ngwira was also convicted of forcing the girl into marriage, but it would not be proper to do because he had not been charged with that offence. The conviction could not even be deemed an alternative verdict because Annel Ngwira had already been convicted of defilement. State Counsel was actually misled and made written submissions as though Annel Ngwira had been convicted of forcing a child into marriage.

The conviction as already noted is for the offence of defilement in view of section 21 (1) (b) and (c) of the Penal Code.

14 Henderson Gondwe was sentenced to imprisonment for 12 years and Annuel Ngwira, seven years with hard labour. Justice Ivy Kamanga, then in the High Court, reviewing the matter set it down to consider enhancing the sentences. While the convicts are first offenders deserving leniency, the lower court however considered that the girl was actually forced into it and was carried in an undignified manner as goat going to board a motor vehicle at South Rukuru Bridge.

15 Counsel for the State submitted with regard to Henderson Gondwe that although the victim was forced to drop out of school and made pregnant, 12 years' imprisonment with hard labour is adequate and should be confirmed. Counsel had in mind the case of *Kingstone Kambalame v. Rep.* (Criminal Appeal Case No. 39 of 2009) [2017] MWHC 30 (04 January 2017)¹ (unreported) in which a 33 year old man defiled a 12 year old girl and impregnated her. He pleaded guilty to the offence and upon conviction, the Magistrates' Court sentenced him to imprisonment for 12 years. This was reduced to nine by the High Court because of the plea of guilty and that he was a first offender. He also had in mind *Yona Kamowa v. Republic* (Criminal Appeal No. 12 of 2016) [2017] MWHC 26 (06 January 2017)² (unreported) where a young man of 23 years but married defiled a girl of 15 years. He apparently had an affair with the girl in which he had been forcing her to have sexual intercourse with him. This happened for 36 times and she eventually got pregnant. The High Court upheld a sentence of nine years on conviction after a full trial.

16 As for Annuel Ngwira, Counsel's submission as earlier said was that he was convicted of the offence of forcing a child into marriage contrary to section 81 (a) as read with section 83 of the Child Care, Protection and Justice Act. In view of the maximum penalty of

¹ <https://malawilii.org/mw/judgments/high-court-general-division/2017/29>

² <https://malawilii.org/mw/judgments/high-court-general-division/2017/28>

imprisonment for ten years for that offence, Counsel's view was that seven years is excessive for being so close to the maximum. As already noted, Annuel Ngwira was not convicted of that offence, but defilement.

17 Defence Counsel also submitted the sentences should be reduced. He referred to *Wyson Ngulube v. Rep*, Criminal Appeal No. 63 of 2011 (High Court, Mzuzu Registry) (unreported) where a 25 year old man grabbed an 11 year old girl from his neighbourhood around 7 pm and with his hand on her mouth took her to some hedges where he took off her dress and underwear and defiled her. The man gave the girl K50 but she threw it down because she was hurt. She felt pain and was bleeding. After a full trial the Magistrate sentenced him to nine years, but the High Court reduced it to seven because he was a first offender and the case was in the mind of the Judge, not worse compared to other similar cases.

18 He also referred to *Rabson Gama v. Rep*, Criminal Appeal No. 44 of 2017 (High Court, Mzuzu Registry) (unreported) where a girl missed from home for three days because the appellant had taken her in for marriage without the knowledge of her parents, a week after he had proposed to her. The appellant was convicted of defilement upon a plea of guilty and sentenced to imprisonment for 16 years by the lower court. The High Court reduced it to seven years on appeal.

19 Finally Counsel for the defence referred to *Yona Kamowa v. Republic* (supra). He argued that although there is an element of abduction in the manner the victim in the present case was taken by respondents, the precedents cited show that a sentence less than 12 years is appropriate for Henderson Gondwe. Counsel acknowledged that the conduct of Annuel Ngwira was tantamount to forcing the child into marriage, but seven years is manifestly excessive for it.

20 In my view, the present case is far more aggravated than any of the cases cited by Counsel. *Kingstone Kumbulame* impregnated the girl, but he pleaded guilty and the circumstances in which he committed the offence were not as Henderson Gondwe did. *Yona Kamowa* was

in a consensual affair with the girl at age 15 which is on the higher spectrum of girls who may fall victim of defilement. *Wyson Ngulube* in my view, was sentenced inadequately compared to the gravity of his offence. *Rabson Gama* committed the offence after abduction, but unlike the present case, he did not force it on the girl, he had not made her pregnant and he pleaded guilty. My view is that indeed the sentence for Henderson Gondwe as given by the lower court is manifestly inadequate. Consider the undignified manner in which she was carried as the convicts went away with her without her consent and without the consent and knowledge of her parents and relatives. Consider also, the trauma this whole experience caused on her. She testified that kept on crying for most of the period. I therefore increase it to imprisonment for 18 years with hard labour.

21 As for Annuel Ngwira, he should have known that the girl was too young. Commenting on the age of the girl, the lower court said: -

“PW1 came to testify in court. I saw her. To say the truth, just upon looking at PW1’s face, I doubt if there was anybody who could have said that PW1 was even above 15 years of age. She looked quite under age.”

22 He and his wife ~~forced~~ really forced her into marriage and by this act aided Henderson Gondwe in defiling her. My view is that he cannot compare with others who may aid an offender during the very act of defilement. His involvement in aiding the defilement in the present case is less culpable. But, if it were forcing a girl into marriage, it was aggravated because it was done in unison of three people in a very disgraceful manner. I think that seven years imposed on him is adequate and I confirm it.

23 Delivered in open court this 8th day of January 2021.

T.R. Ligowe

JUDGE