

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL APPEAL NUMBER 3 OF 2007**

BETWEEN:

FRANCIS MANGANIAPPELLANT

AND

THE REPUBLICRESPONDENT

CORAM: HONOURABLE JUSTICE M L KAMWAMBE

Mr Kamkwasi of Counsel for the Appellant

M/S Ng'ong'ola of Counsel for the Respondent

Mr Kamanga – Official Interpreter

JUDGMENT

Kamwambe, J

The appellant was charged and convicted of the offence of abduction contrary to section 136 of the Penal Code and was sentenced following his own plea of guilty to 21 months imprisonment.

Even after a plea of guilty the appellant was trying to justify why he should appeal against conviction. He states that under the Constitution marriage of a 14 years old girl is lawful, and that especially under customary law it is quite in order for a 14 year old girl to enter into marriage.

Generally an appeal against conviction should not lie following a guilty plea. One can therefore only appeal against sentence. I do not know whether counsel for the appellant was trying to suggest that section 136 of the Penal Code is unconstitutional for going against the spirit of section 22 of the Constitution. But I wish to correct that these two sections are not contradicting each other nor are they contradicting marriage practices at custom. The Constitution has given guidelines that marriage of persons between 15 and 18 years old persons shall be entered into with consent of their parents or guardians and that marriages of persons under 15 years should be discouraged. In my view, by way of extension marriages of persons under 15 years shall require the consent and blessing of the parents or guardians.

Customary practice will normally discourage marriages under 15 years old because they are still immature and not capable of managing a family properly. They are children themselves. This does not mean that a young girl under 15 can not enter into marriage. Let them do so but the parents or guardians must bless the marriage through proper procedures of contracting a marriage. This is why the offence of abduction under section 136 has the parents or guardians as the victims and not the abducted girl. This is so because in any case the girl is a willing partner to join the man or accused. I would not be wrong to say that she is also a party to the offence as an aider and abettor, hence the girl is not the complainant but the guardian.

Section 136 as an offence is there to protect the girl child under 16 years old. [Even policy would require that such a child continue attending school rather than rush into marriage. All that has to be proved is that the girl was unmarried and under 16, that she was under the custody of someone else and that that someone else (guardian) did not give his consent to the taking away of the girl. All these are proved to the satisfaction of the accused himself. It does not matter that the reason of the appellant to take away the girl from the guardians is a noble one, such as, it was a marriage, so long as the appellant never sought the consent of the guardians. So one is punished for taking short cuts in contracting a marriage. The appellant should learn to respect the guardians otherwise he takes the risk of being prosecuted and being imprisoned. It is foolish to assume that every parent or guardian will condone the eloping and allow the marriage to be regularized later. This should be discouraged. The conviction is hereby upheld.

On the issue of sentence, the State also is of the view that it is manifestly excessive and that it should be reduced and not suspended. In mitigation I have considered the fact that he pleaded guilty and that both the girl and the appellant intended their union to be a marriage. I know that proof of this is difficult to be demonstrated as not much time has elapsed before the man was arrested. The appellant was already married. However, African marriages are potentially polygamous. The maximum sentence of this offence is 24 months if read together with section 34 of the Penal Code. 21 months was really excessive. I have exercised extreme leniency on the appellant to give him another chance to conduct himself properly. I understand he is a 1st young offender at 24. This case is a misdemeanor and a strict liability one. I therefore substitute the sentence of 21 months with one of 3 months which would result in his immediate release.

Made in Open Court this 22nd day of March, 2007.

M L Kamwambe

JUDGE