

**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CRIMINAL APPEAL CASE NO. 95 OF 2006**

**JOHN MALENGA..... APPELLANT**

**-vs-**

**THE REPUBLIC..... RESPONDENT**

From the Senior Resident Magistrate Court sitting at Lilongwe,  
being criminal case no. 236 of 2006.

**CORAM: HON CHINANGWA, J.**

Kumange, Counsel for Appellant  
Miss Jere, Counsel for Respondent  
Kaferanthu, Court Interpreter  
Mrs Jere, Court Reporter

**JUDGMENT**

The appellant John Malenga appeared before the Senior Resident Magistrate court sitting at Lilongwe on a charge containing five counts. The first count of incest contrary to section 157 of the penal code. Four counts of rape contrary to section 133 of the penal code. The appellant pleaded not guilty to all five

counts. However, after full trial, he was found guilty and convicted on each count.

The trial court imposed 5 years on 1<sup>st</sup> count, and 14 years on each count of rape, penal servitude. The trial court ordered the sentences to run concurrently.

The appellant through counsel Kumange appealed against both conviction and sentence. There are four grounds of appeal as follows:

1. *That the prosecution did not prove its case beyond reasonable doubt.*
2. *That evidence of Catherine Malenga was not corroborated.*
3. *That the court did not regard the appellant's defence.*
4. *That the sentence is manifestly excessive.*

The line of argument by counsel Kumange is to the effect that the weight of the evidence did not warrant conviction.

Facts show that the complainant Catherine Malenga is a biological daughter of the appellant. According to evidence she is 15 years old. Her mother is Loisi Kalaile Pw2. Sometime in end March and early April, 2005 Pw2 went home in Mulanje for a week to sort out domestic matters. It is alleged that during that time appellant on four separate occasions sexually assaulted the complainant. The complainant first reported the incident to Pw3, who in turn reported to Pw2, her mother. No action was taken.

In July, 2005 Pw2 picked up rumours that appellant was having an affair with another woman. Pw2 sued appellant for divorce in a subordinate court. The divorce was granted. Appellant got married to that woman friend. Pw2 got wind of the marriage. In October, 2005 Pw2 encouraged her daughter to report the matter of the sexual assault to police. Appellant was arrested and prosecuted for the said offences.

The crucial question which has exercised my mind is. Did the alleged incidents actually take place? I do entertain very grave doubt because of Pw2's conduct. Why report after the breakup of the marriage when she had been aware of the incident much earlier. There is no satisfactory explanation. The argument by the state that the delay was due to consultation among family members is unsatisfactory. It would appear that Pw2 used the law as a weapon of revenge because appellant had remarried.

It is my view that Pw2 should not be aided by a court to avenge herself upon appellant. That would be unjustly using the law to perpetrate injustice on an apparently innocent person. In the circumstance, I resolve to quash the conviction on each of the counts and set aside the sentence on each of the counts. Appellant to be released forthwith unless held on other lawful ground. Appeal allowed.

Pronounced in Open Court on this 23rd day of August, 2007 at Lilongwe.

R.R Chinangwa  
**JUDGE**