IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL CASE NO. 65 OF 2008

BETWEEN

MANUEL PETER …… APPELLANT

AND

THE REPUBLIC ……. RESPONDENT

Being Criminal Case No. 9 of 2008 before the Chief Resident Magistrate sitting at the Chief Magistrate's Court – Lilongwe.

CORAM : CHOMBO, J.

: Appellant, Unrepresented, Present
: Mr. Chiundira for the State
: Mrs. Kabaghe, Court Reporter
: Mr. Kaferaanthu, Court Interpreter

JUDGMENT

The appellant was found guilty of defiling Martha Khosa, a girl under the age of 13 years after a full trial. The appellant's appeal is basically on twoe main grounds.

(a) That the sentence is excessive.
(b) He looks after his grand parents and children.

However, when the appellant took the stand in court he stated further that he does not agree with the conviction and that the sentence is harsh.

The appellant contended that when the complainant was medically tested she was found to be infected with sexually transmitted infection and she was tested in his absence. He further queried how it was alleged that he had infected the girl when he and his wife are free from any sexually transmitted infections. He did ask, according to his testimony, the police why he was not tested and he was told that it was his own right to be tested, in other words he could not be tested against his interest. The appellant further challenged the findings of the medical examination when the alleged offence occurred on 16th January and the girl was only taken for medical examination on 17th January 2008.

The State opposed the appeal on all factors. Skeletal arguments were filed to support the stance of the State. The evidence on record is that on the night of 16 January 2008, PW4, the appellant's landlord heard footsteps across her veranda and then she heard voices in her bathroom, she decided to check what was happening and when she opened the door of the bathroom, the Appellant came out. When he was asked what he was doing he said he was relieving himself and he pulled up his trousers and left. PW4 decided to enter the bathroom and when she lit a match she found the complainant huddled up in a corner. When PW4 asked her what she was doing, Martha said she was urinating. PW4 told Martha that she was suspicious about the circumstances and that she would report the same to Martha's father. At the point, Martha fled from the scene and PW4 reported the matter to Martha's father, PW2 and handed over Martha to her father. PW4 went back to bed and the next day she learnt that the matter had been reported to police and she was required to give her statements.

When Martha, PW1, took the stand she testified that she stays in the same location with the appellant who sells shoes. She testified that sometime in March 2007 the appellant enticed her to have sex with him but she refused and continued to do so on a daily basis but she resisted him. Then in November 2007 he finally managed to convince her to have sex with her. Martha's parents had gone to the village and Martha was left alone with her siblings. The sex took place in the same bathroom at 10.00 in the morning and the appellant gave PW1 K50.00 and told her not to reveal to anybody. The wife of the appellant had gone to her village at the material time. PW1 explained that when the appellant called her into the said bathroom he asked her to bend over and he had sex with her whilst she was bent over. This was the beginning of several sexual episodes with the appellant and on each event he would offer her some reward with an admonition not to reveal to anybody what was happening between them. PW1 recalled of a day when the appellant asked PW1 and her relatives to do some piece work at his house. She went ahead of everybody and had sex with the appellant before her relatives arrived and they all did the piece work. Then again he asked PW1 and her relatives to do piece work and she went ahead of everybody but on this day she refused to have sex with the appellant. Then the last incident took place in PW4's bathroom at about 8.00 pm and they were found in the act – this was on 15 January 2008 and PW4 reported the matter to PW2, the complainant's father. Complainant's father asked her what had happened and she explained to him that what had taken place in the bathroom and the matter was reported to the village headman then to police and then appellant was arrested. Then police sent her to hospital.

PW2 testified that he is a pastor at Assemblies of God Church and that he knew the appellant before the incident and was able to identify him as somebody he stayed with in Mtandile.

On 15 January 2008 around 9.00 pm he asked his 4th born daughter to go to the house of the appellant to help him unblock his phone. But before his daughter came back his neighbor, Mrs. Mbavala, PW4, arrived and asked him to go and witness what was taking place behind his house. He went there and found another lady with his daughter Martha. PW4 narrated how she found Martha and the appellant in the bathroom and that the appellant had fled and as they were discussing the issue Martha also fled. PW2 sent someone to call the appellant and when appellant came, PW2 asked appellant what he was doing in the bathroom with Martha. Appellant did not answer the question directly but instead asked who told him about it. He went back to his house and Martha also arrived and she explained that on the night in question PW4's arrival frustrated appellant's plan to have sex with her but that on previous occasions he had sex with her but that she had failed to report to her father because he had threatened her not to tell her father or else he would kill her, and that he used to give her K50.00 to keep her quiet. The appellant's house is about 100 meters from PW2's house.

The matter was reported to the village headman then to police and the appellant was arrested. Since it was late at night police decided to take Martha to hospital the following day. After medical examination it was confirmed that Martha had on several occasions had sex and that she had contracted some sexually

transmitted infection and she was referred to Kamuzu Central Hospital for HIV test and pregnancy test. It was confirmed Martha was infected but that for HIV test she would have to come back after 3 months.

PW3, the Police Officer, testified that on 16 January 2008 he received a report from PW2 that his daughter under the age of 13 years had been defiled by the appellant. He learnt that the complainant had taken advantage of the complainant's parents' absence when they had travelled to Mzimba for a funeral. On 15 January 2008 however, the two were found by the appellant's landlord in her bathroom at night. PW3 interviewed the complainant and appellant together and the complainant confirmed she had been defiled by the appellant on several occasions and money had been given to her to shut her up. Medical examination confirmed that the complainant had been sexual abused several times. When the appellant was charged he denied it. PW3 explained further that he had intended to take the appellant for medical examination but was told that medically it would be improbable to trace the infection in the appellant based on some scientifically proven facts.

PW5 testified that he is the Clinical Officer who examined the complainant on 16 January 2008 and it was found that she contracted sexually transmitted infection, a sure sign that she had been defiled and her vagina was wide open, and she was in pain. He testified that for a girl of her age the vagina is not supposed to be open, further confirming that penetration had occurred. Due to the sexually transmitted infection, PW5 decided to test PW1 for HIV but at the time she was found to be negative but was advised to go for further testing on 22 January 2008.

Three witnesses gave evidence in defense and the first to give evidence was the appellant. It was his evidence that he has two wives. The second wife lives in Area 47 and the first one in Mtandile where he also has his business. He testified, among other things, that on the night in question he was home until 8.00 pm when he decided to go see a film show and he was there until 9.05 pm when he decided to return home and on his way to his house he bid goodnight to PW2 who was with PW1 and another child called Steady. He went via a market to phone his wife and as he got to his house he found Steady waiting for him with a message that PW2 needed help with unblocking his phone. He was with PW2 for about 20 minutes until his phone was unblocked and both Martha and Steady were there with him and PW2.

After appellant left but before he got to his home he was called back to PW2's house where PW2 questioned him about the issue of defiling PW1 – he immediately challenged PW2 about this and asked to confront PW4 but PW2 said things would be sorted out in the morning. However, about 1.00 am he was visited by police and the Village Headman and he was arrested. Police advised that PW1 should not take a bath and that the following day she should be taken to hospital for medical examination. To his surprise the girl was only taken on the 17th after Police had queried PW2 for not taking PW1 to hospital. At Police he denied the charge.

He explained that many times PW2 used to leave his four children with appellant and at times without adequate food and appellant used to provide for them. This

is what made him ask the complainant and her siblings do piece work at his house carrying bricks so that they could get money for their up keep. It was his evidence that he had refused to lend money to PW2, father of the complainant to buy a phone and that it was because of that this charge was looked up this story. It was his evidence that PW1 always spent time at his house because his own home had not food and she would eat vendor's food without paying for it.

DW2 testified that she and others have done piece work for the appellant on several occasions and PW1 was one of them. On all the occasions PW1 did not come earlier than everybody else and there was no time that she saw appellant come to the work site with PW1.

It was her evidence that she and her friend were always the first to arrive at the plot for work. On one occasion PW1 had been hired to do work inside the house of the appellant and DW2 and others raised their concerns about this and queried PW1 about it. PW1 told DW2 that the appellant had sent PW1 to do the work inside his house but the work was completed the same day. PW1 reported to appellant about the concerns raised by DW2 and her friends and the following day appellant addressed them on the issue and the issue was resolved.

DW3 testified that she used to do piece work with DW2 and PW1 and three others and no occasion did the appellant accompany PW1 to the work site, nor did he supervise the work on site and it is impossible therefore to imagine that the appellant had sex with the complainant.

At the close of the day the lower court found that prosecution had proved the case to the requisite standard and convicted the appellant and sentenced him to 8 years imprisonment with hard labour.

In my view, the matter has its genesis from the events of the night of 15 January 2008 in the bathroom of PW4. On this night PW4 heard footsteps across her verandah then she heard voices in her bathroom. She got suspicious about the circumstances and decided to go and check who it was that had occupied her bathroom. This was about 9.00 pm and, in accordance with the evidence of the appellant himself, people in Mtandire walk about long after that hour. As PW4 went towards the bathroom to open the door the appellant opened the door and came out but with his trousers down. PW4 was able to identify him as her tenant and she asked him what he was doing in her bathroom. It was at this point that the appellant pulled his trousers up and told her that he was relieving himself and he left the scene. She was not completely satisfied so she lit a match and found the complainant hurdled up in a corner. PW4 asked PW1 what she was doing and PW1 told PW4 that she was urinating. When PW4 was not satisfied with PW1's answers she told PW1 that she would report the matter to her father. It was at the point that PW1 bolted from the bathroom but PW4 informed complainant's father about this matter. Meanwhile, PW1 was arrested by another woman and brought back to her father and upon being questioned about the matter she revealed that she had had several sexual relationships with the appellant. She further revealed that on the night in question PW4's coming to the bathroom had frustrated appellant's plans to have sex with her yet once again. As the matter occurred at night PW1 could only be taken to hospital on 16th January. The

medical report indicates that PW1 was taken to hospital on 16th and not 17th as submitted by the Appellant.

In analyzing the evidence before me I want to firstly comment on the issue of identification of the parties. PW4 testified that she met the appellant just by the door of the bathroom and the appellant was trying to get out of the bathroom. She has known the appellant as her tenant for over one year and she spoke to him on the night in question. She therefore had no doubt as to the person she talked to. Her evidence was corroborated by PW1 who said that she was with the appellant who was about to have sex with her but for the interruption from PW4. After the matter was reported to the complainant's father, he (PW2) called for the appellant and asked him about the matter, but instead of denying the allegation the appellant asked who had told PW2 about that matter. PW2 informed him that PW4 had informed him and PW4 asked the appellant to leave him and that the issue would be dealt with the following day.

In this I find that the appellant was adequately identified firstly by PW4 whose evidence was corroborated by PW1 as to who was with her in the bathroom. The appellant stated in his evidence that PW2 was jealousy of his financial achievements and that is why these charges were drummed up against him. I find it difficult to accept the appellant's submission on this because if anything he should have maybe alleged that it was PW4 who was jealous about his position because she is the one who first found out what was happening and confronted him then reported the matter to PW2. Incidentally, I found on record that, the appellant did not dispute PW4's evidence about him being found by the bathroom

door with his pants down, nor the fact that he told PW4 that he was relieving himself. It can only be assumed that he failed to challenge this piece of evidence because it was true.

Generally, when a person has been charged with some serious allegations, it is natural to expect that the person will immediately say something to refute the same if indeed the allegation is untrue. Where the accused remains silent or suppresses material facts it is assumed that the accused actually admits the allegation. When PW2 asked the Appellant about being found in PW4's bathroom with PW1, instead of denying the issue he asked who had informed him about the matter. This in my view was suppression of material facts. If indeed nothing had happened between him and Martha his first concern would not have been about the source of information but refuting the allegation. I find therefore that the appellant was properly indentified.

PW1 testified that she had had sexual intercourse on a number of occasions. Her evidence was corroborated by that of the medical report which the Clinical Officer gave evidence about the physical changes that had taken place in the complainant's vagina and the causes for this. He also stated that the maturing period of the sexually transmitted infections, which in my view, as found by the lower court, corroborated the evidence of PW1 as to when she had the several sexual intercourse episodes, is 14 days and above. Since the sexual intercourse of December, more than 14 days had elapsed, I find this as a fact.

What remained to be established was whether it was the appellant who had defiled PW1. What I would look at is whether there was opportunity for him to have sex with PW1. Both DW2 and DW3 stated that they were doing piece work at the Appellant's plot and that one day the complainant was assigned to do work inside the house of the Appellant and that both of them had queried this and the appellant went to meet the women to resolve the matter with them. So, although the women had stated that there was no opportunity for the appellant to have sex with the complainant they actually are contradicting themselves and contradicting the Appellant in this respect because there was that occasion and the complainant had actually been in the house of the appellant. There indeed was an opportunity for the appellant to have intercourse with the complainant as she was assigned duties inside his house. Then PW1 explained that the appellant would get an opportunity to defile her when she went to do piece work at the house of the appellant. The Appellant would have sex with her then she would go and do the piece work.

The lower court discredited the DW2 and DW3 because their evidence contradicted that of the appellant. The two had said that the appellant never found need to supervise the work personally and did not visit the site. The appellant himself stated that he did visit the site and this was also what the two defense witnesses agreed to.

The medical expert testified that it would have been immaterial to have the appellant tested for the sexually transmitted infection because of the time period that had elapsed, and that the appellant could not be forced to be tested. The

appellant has submitted that he and his wife were free from any such infections. Such evidence, however, could only be given by an expert. This would have required a voluntary testing by the appellant to rebut the allegation that he had a sexually transmitted infection.

The appellant had alleged that the prosecution witnesses had been coached to state the evidence that they gave before court and that some of the prosecution witnesses had been given money by the Prosecutor to give their evidence in the manner that they did before court. What is of interest is that when the lower court questioned the witnesses about being given money it transpired that not only were the prosecution witnesses given money but that even the defense witnesses and that this was actually money for their transport home. If indeed prosecution had given money to prosecution witnesses to drum up charges against the appellant, I wonder how the appellant will explain the point of PW4 reporting to PW2 about what she found in her bathroom – who could have paid her money to report the matter to PW2 and for what reasons? The appellant further alleged that the prosecutor, the complainant's father and some other staff at court were all from the North and had connived to corrupt the justice system to ensure that he is put behind bars. The appellant had alleged that the complainant's father had demanded K20,000 from the appellant's relatives so that the case could be withdrawn. It was of interest that the appellant did not call anyone of the said relatives to give evidence in court to substantiate his allegation. This in my view is the worst assault of the justice system. I cannot imagine what the justice system would benefit by having the appellant behind bars. It is not known what the appellant will now say about the Chief Resident Magistrate

about his conviction. Should we also assume, as alleged by the Appellant, that the Chief Magistrate is also from the North or had connived with the Prosecutor to ensure that the Appellant is found guilty of the charge? I very much doubt it. But because of all this one can see that the Appellant is not a man who should be taken seriously in his evidence. What he has submitted has no bases at all and he has not demonstrated where some of his accusations are grounded.

I need to mention lastly that the appellant's original appeal only covered the issues of the sentence being excessive. However, the court felt that there would be no harm to allow the appellant to adduce additional areas of appeal in court. The court has dealt with all the material issues and at the close of the day find that the conviction must be confirmed.

On the sentence being excessive, this court holds a different view. Indeed there are aggravating circumstances in the case. It was reported that the complainant suffered swollen cervix and had contracted sexually transmitted infections as a result. Again the fact that the complainant had been sexually abused on several occasions is an aggravating circumstance. In the case of *Joseph Ndubuisi Nwangu, Nyirenda, J.* (as he then was) considered a sentence of 13 years to be appropriate where the child had been defiled several times by the appellant.

In the circumstances a sentence of 8 years for repeated acts of sexual abuse is not excessive. I must find therefore that the appeal must fail entirely.

MADE in Court this 3rd day of September, 2008.

E.J. Chombo

J U D G E