



REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CRIMINAL APPEAL CASE NO. 21 OF 2010

(Being Criminal Case No. 46 of 2009 in the SGM Court Chinthenche)

MALOZA MANDA

Versus

THE STATE

Coram : Honorable Mr. Justice D.T.K. Madise

Ms. Hilda Kalua, Counsel for the Appellant

Mr. Isaac Chiundira Counsel for the State

Mr. I.Z. Bondo Official Interpreter

Mrs. F. Silavwe Court Reporter

Madise, J

JUDGMENT

Introduction

The Appellant in this matter Maloza Manda was charged with offence of defilement contrary to **section 138 (1)** of the **Penal Code, (Cap 7:01) Laws of Malawi**. The allegations were that Maloza Manda aged 74 a grand father to the complainant had had unlawful carnal knowledge on two occasions of a female to wit Kettie Mwandira a girl under the age of 13. The first sexual intercourse was not reported to the Police but the second one. He pleaded not guilty and after a full trial he was found guilty and convicted. He was sentenced to 4 years imprisonment with hard labour. The Appellant being unsatisfied with the finding of the lower court now appeals to this court against the conviction.

I'm reminded that appeals in this Court are by way of rehearing. When this Court is considering an appeal from the court below, it proceeds by way of re-hearing of all the evidence that was before the court below, the findings of fact and the law applied and then consider in the light of all that took place during trial whether the court below was within jurisdiction in coming to its conclusion.

Grounds of Appeal

The Appellant filed two grounds of Appeal which we reproduce as follows.

- a) Whether there was enough corroboration of the complainant's testimony which was unsworn.
- b) Whether the conviction was safe considering the circumstances of the case.

Skeletal Arguments.

Both the Defence and the State filed skeletal arguments with the view to persuade Court to follow their line of thinking. I'm delighted and I must confess that both sides argued their cases well and this Court has indeed benefited immensely from the law as researched. In brief the Defence contends that the conviction should be quashed as it was unsafe as there was no corroboration of

the unsworn testimony of the victim's evidence which was circumstantial. That unsworn testimony of two girls cannot corroborate each other. The State on the other hand argued that the conviction was safe as there was enough circumstantial evidence which was corroborated by the other witnesses who gave sworn testimony. They prayed to Court to dismiss the appeal and confirm the sentence.

The Issues

There are basically two main issues for determination before this Court.

- 1) Whether there was enough corroboration.
- 2) Whether the conviction was safe regard being had to the totality of the evidence.

The Evidence

After the *voir dire* examination was conducted Katerina Mwandira aged 6 gave unsworn testimony. She stated that she knew the Appellant as Maloza. That one day she had gone to collect sugar and on the way she met the Appellant under a mongo tree. The Appellant took her into his home while holding her hand. It was about mid day. She stated that a Mr. Chirwa Lubanga was sitting on a table near the Appellant's home.

While inside, the Appellant laid on top of her, removed her skirt and pants and pulled her legs apart. He then undressed himself by removing his trousers and then putting them on the ground. There after he produced his penis and she felt pain. That it was big like her arm and dark. When the Appellant had finished she was told to put on her skirt and pants. She did not cry. She was given a banana and she was told to leave. She then went to report to her grandmother. She was given some herbal medicine in the presence of her mother. She stated that this was the second time for the Appellant to do this. The first time it was in the bush. She was then taken to the police.

That on other occasion the Appellant had stated that "*woli wane zani kuno ndikoleko kabere*". She was with Kondwani Banda but she was left behind. On this occasion she was also laid down and the Appellant came on top of her. He undressed her skirt and pants and also undressed himself. The Appellant then had sex with her (*andigundanga*) with his penis and it was painful. Her mouth was closed. After the Appellant had finished she went where Kondwani was and the Appellant followed. She reported to her mother and then grandmother. She was also taken to the police and then the hospital where she was given two injections. It is clear from the evidence that the witness was confusing the dates and at that point it was not clear as to which occasion was the matter reported to the police.

PW2 was **Kondwani Banda** aged 4. After a *voir dire* examination was conducted she gave unsworn testimony. She stated that the Appellant was Amdala a Maluza her grandfather. She recalled that one day she went with Kettie (PW1) to pick potato leaves. It was mid day and they met the Appellant. The Appellant said he wanted to touch Kettie's breast (*ndikolepo kabere*). He then took Kettie away and she did not know where they went but it was a cassava garden. Then Kettie returned and they went home.

PW3 was **Fidesi NyaTembo**, a grandmother to PW1. She told court the Appellant was married to her young sister. That one day in October 2009 she had sent Kettie to call her uncle that food was ready. When she returned PW3 asked her why she was late. In reply she told her that she was taken by the Appellant into his house and she was undressed and had sexual intercourse with him. PW1 explained how it all happened. PW3 checked her vagina and noticed that it was injured and there was some "semen" in her vagina. She called her sister Nya Mphande who also checked the girl. They also called the Appellant's wife who also saw the girl's private parts. They agreed not to go to the hospital

fearing it was going to damage the Appellant's marriage. PW3 gave Kettie a bath and the matter was reported to the village headman.

PW4 was **Marita Mphande** a mother to PW1. She stated that on one occasion she had sent her daughter Kettie to pick potato leaves from the garden. She was with Kondwani. On her return she reported that she was defiled by the Appellant. She called her in-law Nya Tembo and together they checked the girl and noted that she had semen and her vagina was injured. Other women including the Appellant's wife were also invited and they too checked the girl. The matter was reported to the village headman and then the police. It is alleged the police also confirmed that she was injured. They were referred to the hospital where she was treated.

PW5 was **No. A5824 Sergeant Mkandawire** from Chintheche Police Post. He recalled that it was on 6th October 2009 when PW4 report to his office that her daughter had been defiled by the Appellant. The girl was referred to Chintheche Health Clinic where she was examined and treated accordingly. He opened a case and investigations were commissioned on 14th October 2009. The Appellant was arrested and charged with the offence of defilement. PW5 further tendered in evidence the caution statement, evidence of arrest and a medical report which indicated that the girl had a perforated hymen, with pus and sores on her vulva.

At that stage the prosecution rested its case and the court ruled that the State had established a prima facie case and the Appellant was invited to make a statement in reply and call witnesses if he so wished.

Defence

In presenting his defence the Appellant **Maloza Manda** (DW1) aged 74 told court that he knew Kettie PW1 as her granddaughter as he had married a sister to her grandmother. He denied having carnal knowledge of the girl and that he

was sick and was admitted in hospital at the material time. That he was constructing a house and he fell down and injured himself. On 22nd September 2009 he was admitted in hospital and was discharged on 5th October 2009. The following day at about 7 a.m. his wife approached him while shaking. She accused the Appellant of defiling Kettie. He was shocked and wondered how he managed to walk to defile the girl when he was sick and needed support to walk.

He told court that he was supported by his wife and he went to Kettie's grandmother. He was told the girl had mentioned his name that she was defiled by magic. He then offered the services of a witchdoctor to determine the truth. This was turned down. He then went to the village headman and he was finally arrested by the police.

DW2 was **Jessie Nya Mphande**. She told court that the Appellant was her brother-in-law who had married her fourth sister. She stated that in October 2009 she was called by her sister Nya Mphande to her house. While there she was asked to check the private parts of Kettie as she had been defiled by magical at night. She told court as follows: "I saw things I have never seen before" that she was just harmed and there was nothing suspicious. That the girl was normal and happily working. She then returned to her house. She stated that she did not see any wounds.

DW3 was **Kaula Chima**, a wife to the Appellant. She stated that on 21st September, 2009 the Appellant injured himself at his work place. He was taken to the hospital on 22nd September 2009 where he was admitted. He was discharged on 28th September 2009 but he could not walk without support.

On 5th October he went again for medical check up. They returned around 3 pm. On 6th October 2009 early in the morning she met her sister Nya Mphande who told her she was wanted by Nya Tembo. She was informed that her husband

had defiled Kettie by magic at night. She told the Appellant what had happened. The Appellant cried when he heard this. When her husband wanted the services of a witch doctor the offer was turned down. He was eventually arrested by the police. This marked the end of the of the defence's case.

Law and Evidence.

Burden and Standard of Proof

It is trite that in this matter the State was duty bound to prove each and every element of this offence and the standard required by the criminal law is beyond a reasonable doubt. The relevant provision is **section 187(1)** of the **Criminal Procedure and Evidence Code**.

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

Our own local case is **Namonde** vs. **Rep.** [1993] 16(2) MLR 657 in which my late elder brother **Chatsika, J.** as he was then called, in affirming **Lord Sankey** views in **Woolmington** vs. **Director of Public Prosecution** [1935] AC 462, summed up the law 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.

Section and Law.

The next question is whether the evidence adduced discloses an offence known to our law. The offence charged is defilement under **Section 138 (1), Penal Code**, (Cap 7:01) **Laws of Malawi**. For the state to secure a conviction they must prove the following.

- ❖ Penetration of the male sexual organs into the female sexual organs of the victim. See ***Rep. vs. Mphande*** [1995] 2 MLR P. 586.
- ❖ The fact that the girl was under the age of 13. See ***Chipala vs. Rep*** [1993] 16(2) MLR P. 498.
- ❖ Knowledge. The accused must have known that the girl was under the age of 13 years. See ***Rep vs. Mandala*** [1987-1989] 12 MLR p. 213.
- ❖ Consent is non consequential as girls under the age of 13 are unable at law to give consent.

When dealing with a case of defilement a court of first instance should warn itself of the dangers of convicting the accused in the absence of corroboration. In proving the offence of defilement the State must show that the accused for all intents and purposes had unlawful carnal knowledge of a female under the age of 13 years and that the accused knew at the material time that the girl was under age in terms of Section 138 (1) of the Penal Code. In this case did the State prove the elements of this offence against the Appellant? In ***Rep vs. Msosa*** [1993] 16(2) MLR. P. 734, learned judge ***Chatsika J.*** as he was then called stated that;

At the end of the trial the court must subject the entire evidence to such scrutiny as to be satisfied beyond reasonable doubt that important elements of the offence are proved. Even where the prosecution proves beyond reasonable doubt all elements of an offence, the court must consider the defence evidence. If the defence evidence creates a reasonable doubt as to guilt. The court must resolve the doubt in the favour of the accused.

Penetration

For the charge of defilement to stand the State must prove that there was penetration of the male sexual organs into the female sexual organs (penis into vagina). The slightest and shortest amount of penetration suffices and the male is not required to release semen for the charge to stand. In this case before me, there is evidence laid before court that there an inspection which was carried out by the mother, grandmother and other women. Their findings were that the girl's vagina was torn and they had seen "semen".

It is trite law that older women are well qualified to determine that what they saw was some stuff which looked like semen. Of course, the court in the absence of medical/scientific examination cannot accept any evidence as conclusive where a witness says what she saw was semen. In **Mpingawanthu vs. Rep** [1978-80] 9 MLR 436, **Villiera, J** concluded as follows:

It is not proper for lay witnesses to say categorically that what they say was semen. Only experts can say so after examining the substance. Lay witnesses even if they are elderly and experienced can only say that they saw something that was like or resembled semen, unless they are the victim of the offence.

However the above notwithstanding it should be made clear that sexual intercourse like any other fact can be proved without medical evidence. We surely do need a doctor to prove that sexual intercourse took place. Do we seriously need a doctor to tell us that the red stuff on a person clothing is blood or that the person lying somewhere is dead? I do not think so.

Additionally, to deny justice to victims of defilement on the mere premises that adult Malawian females are the only ones who did the inspection and wrongly concluded that some "stuff" was semen, would undermine the very foundation of the institution of courts of justice in this our Republic. The evidence of the presence of some stuff which resembled semen has been substantiated by the injuries the girl sustained in/on her vagina.

Under the age of 13 years

Further to the above, for the State to succeed they must also show beyond a reasonable doubt that the girl was under the age of 13 years and that the Appellant knew that fact at the time the offence was being committed. Where there is doubt as to age, the State must prove the age through scientific or medical means. But where this is not possible, evidence from the mother or someone who witnessed the birth should suffice. In this matter there is no dispute at all that Kettie was aged 6 years at the time of the alleged offence.

Consent

Once age is determined to be under 13 years under a charge of defilement the State need not show that there was no consent. Consent is non consequential under a charge of defilement. The reason is that girls under the age of 13 years due to immaturity are incapable of giving consent. Therefore a person cannot plead this defence under this charger.

Circumstantial evidence

The evidence before this court is circumstantial. Where circumstantial evidence is entirely relied upon, the State must clearly show the various links in the chain of events and its cumulative effect must leave only one rational and logical conclusion that it is the Appellant who committed the crime and no one else. Therefore after eliminating all possibilities of innocence what must remain is the guilty of the Appellant. In this case before me, can it be said that after eliminating all reasonable hypothesis of innocence, the Court will arrive at one conclusion that it was the Appellant who committed the crime?

In answering the same, we must have recourse to the evidence.

The determination.

There are two allegations of defilement. PW3 Fedesi NyaTembo a grandmother to the victim told court that one day in October 2009 she had told Kettie to call her uncle since food was ready. She was late and when asked she told her that the Appellant had taken her into his house, undressed her and had sexual intercourse with her. That the girl had actually demonstrated how it had happened. When she checked her private parts she was injured and she had "semen" in her vagina. She called Nya Mphande to see and also inform the Appellant's wife. This time the matter was not reported to the police or hospital. The girl was just given a bath.

It is clear that there are two allegations of defilement although the first one has no specific dates. It is also clear that the victim had the dates and sequence of events all mixed up. However justice must be done without unduly demanding that witnesses be accurate and exact with dates. However the second incident which was reported on 6th October 2009 is well documented. There is a medical report dated 8th October 2009 which actually shows that Kettie had a perforated

hymen, and she had pus and sores on her vagina. As I have already stated the fact that the girl was defiled is not in dispute in this case.

The question is who was responsible? I'm mindful that corroboration must be independent testimony which implicates the Appellant by connecting or tending to connect him with the crime. It must be evidence which implicates him or that which confirms in some material sense not only the fact that a crime has been committed but also that it was the Appellant who committed it.

Corroboration

In sexual offences, courts are always called upon to warn themselves of the dangers of convicting an accused in the absence of corroboration. The law demands that the victim's story must be corroborated by some other independent testimony. However, if the victim is of immature age her testimony cannot be corroborated by the evidence of another minor.

As a general rule two young girls cannot give unsworn evidence which can corroborate each other. **Section 6(2) Oaths, Affirmations and Declarations** provides that where unsworn evidence is received from a person of immature age, the accused must not be convicted in the absence of corroboration. Corroboration in sexual offences though not a matter of law is by legal tradition a matter of practice.

It is therefore clear that a victim of immature age who gave unsworn testimony, her evidence cannot be corroborated by evidence of another immature person just because she gave sworn testimony. The genesis behind this principle of law is that courts generally should be cautious when receiving evidence from persons of immature age and that appropriate weight should be attached.

In this matter two girls gave unsworn testimony. Kettie the victim and Kondwani told court they went to pick potato leaves. On their way they met the Appellant who had said *Nikoleko kabere*. Both girls Kettie aged 6 and Kondwani aged 4 confirmed that these words were uttered by the Appellant. Thereafter both girls confirmed that the Appellant took Kettie away and went into the cassava garden. Kondwani said she did not know what had happened with Kettie. Kettie told court the Appellant defiled her.

I'm mindful that the testimony of the two young girls who gave unsworn testimony cannot corroborate each other. However when Kettie returned home her mother queried why she was late. It is when she told her about the defilement. The mother checked her vagina and noted that she was injured and there was semen. She called other women including the wife to the Appellant to bear witness.

Now can we say that the story as told by the two girls especially Kettie that she was defiled was corroborated? It will be a sad day for justice if that were not the case. I'm of the view that the fact that the girl was defiled has been corroborated and substantiated but whether it was the Appellant, who did it, is the very question that this court must answer. Both girls mentioned the Appellant. Is this true?

When the Appellant was confronted by his wife it is alleged he cried in shock. His defence witnesses especially DW2 stated that when she went to check the girl she found nothing suspicious. That the girl was just fine. However this contradicts her own words. *"I saw things I have never seen before and that she was just harmed"*. She alleged the girl was defiled by magic. Similarly DW3 the Appellant's wife denied seeing wounds on the girl's vagina and told court that these were mere allegations. The Appellant himself stated he was not around. That he was in hospital from 22nd to 28th September 2009. Then he went home.

On 5th October he went again to the hospital for a check up. There is no evidence to suggest he was not around the area between 28th September to 5th October or indeed 6th October 2009. The appellant suggested to court that he was unable to walk and that it was his wife who was supporting him. Again no independent evidence has been brought before court to substantiate this allegation. He who alleges must prove.

I find the evidence that was adduced by the State witnesses to be strong beyond a reasonable doubt. I fail to agree with the Appellant that the two young girls of immature age would cook up a story such as this. I see no reason why these two girls would have wanted the old man to be in trouble for the things he did not do. Why would the girls lie? I fail to understand. I further see no reason why the girl's mother or grandmother could have wanted to lie and mislead the trial court below when in fact these people were family. There was no evidence laid before court to suggest that there was bad blood in the family.

Conclusion

I have gone through the evidence and I'm convinced that what PW1 and PW2 said was good evidence unsworn though. I further find that their evidence was corroborated by the evidence of the mother, the grandmother and the medical report. I'm convinced that the lower court properly received this evidence and went ahead to warn itself of the dangers of convicting the Appellant in the absence of corroboration. I'm of the considered view that the lower court was within jurisdiction when it found that the totality of the evidence led to one logical conclusion that an offence had been committed and that it was the Appellant who was responsible.

I therefore find no fault with the determination by the lower court. This conviction was and is still safe. The Appellant having not appealed against his sentence I find it within my powers not to interfere with the finding of the lower

court regard being had to the Appellant's age. This Appeal must therefore fail.
The conviction is upheld and the sentence is confirmed.

This appeal is dismissed.

Pronounced in Open Court at Mzuzu in the Republic this 17th February 2011.

D.T.K. Madise

JUDGE