IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
CRIMINAL APPEAL NO.19 OF 2014
(Being Criminal Case No. 190 of 2013 in the First Grade Magistrate Court Sitting at Mzimba)

BRIAN SHABA.....APPELLANT

VS

THE REPUBLIC.....RESPONDENT

CORAM: HON. JUSTICE R.E. KAPINDU
W. Nkosi, Counsel for the State
W. Chirwa/Chithope Mwale, Counsel for the Appellant
I.Z. Bondo/A Kanyinji, Official Interpreter,
F. Silavwe, Court Reporter

JUDGEMENT

Kapindu, J.

1. BACKGROUND

1.1 This matter has come to this Court by way of appeal against the decision of the First Grade Magistrate Court at Mzimba.

1.2 The Appellant, Mr. Brian Shaba, was, on15 November 2013, after a full trial, convicted of the offence of defilement, contrary to Section 138(1) of the Penal Code (Cap. 7:01 of the Laws of Malawi). He was sentenced to 72 months (i.e 6 years) imprisonment with hard labour (IHL), effective from the date of his arrest, i.e 16 October 2013. He appealed against the sentence only.

1.3 The findings of fact by the Court below are undisputed before this Court, and I will therefore treat them as such.

1.4 The facts of this sad case are outlined herebelow.

1.5 The victim in this case, namely Ms. WN (I have deliberately suppressed the identity of the child, in her best interests), aged 12 years old, is a standard 4 pupil at Mzimba Local Education

Authority (LEA) Primary School. The Appellant herein, a 47 year old man, was her class teacher.

1.6 On 11 October 2013, the Appellant sent WN, along with two other female pupils, U and C (I have also deliberately hidden their names from the record, in their best interests as children), to drop books at his house.

1.7 At the house, the Appellant told U and C to put the books outside the house on the veranda (the Khonde), told them to go away, but instructed WN to take her books inside the house. After she dropped the books, as she was trying to exit the house, the Appellant told her to sit on the chair. He asked what her age was and she told him that she was 12 years old. He then proposed to carry her in his hands, but she refused. The Appellant persisted with his advances. The victim tried to escape from the house but the Appellant, according to the victim's testimony, stoned her. She fell to the ground. He then grabbed her and told her to sit on a chair. He started touching her breasts. She started crying but he told her to stop as he would give her notebooks afterwards. He then dragged her to his bedroom, undressed her, undressed himself and then caused his penis to penetrate into her vagina. She was crying but he told her not to tell anyone. After he had defiled her for the first time, the Appellant went outside to talk to some people. He then came back to the traumatized girl and defiled her again. He once again told her not to tell anyone as his reputation would be damaged.

1.8 After the defilement, he gave her two notebooks which were tendered in evidence.

1.9 As the events unfolded on the material day, a teacher at the same school who was the Appellant's neighbor, Madam NyaKumwenda, saw the three girls come to the Appellant's house, and also saw two of the girls (i.e U and C) leaving whilst WN went inside the Appellant's house. She then saw WN come out of the Appellant's house after a long time. She ran up to WN and asked her what she had been doing at the Appellant's house. WN merely said that perhaps Madam NyaKumwenda mistook her for her sister with whom she resembled so much, but this was a lie as she was too afraid to explain what had just happened.

1.10 Madam NyaKumwenda proceeded to report the matter to the headmaster who directed that a formal inquiry had to be made into the matter. Subsequently, after being asked some questions by a group of teachers at her school, WN explained what had happened

on the fateful day. The school authorities sent WN to hospital for examination and treatment. The Medical Report confirmed that WN had been defiled. The Clinical Officer who examined the child, Mr. Chauncey Kondowe, confirmed during his oral testimony that his diagnosis revealed that WN had been defiled. There was evidence of recent penetration by a foreign object into WN's genitalia that was consistent with the act of defilement. There were also bruises and wounds on her private parts. WN was feeling pain when passing urine and her private parts were itching.

1.11 Based on the evidence adduced, the Court below, as stated earlier, found the Appellant guilty of the offence of defilement and convicted him accordingly. He was sentenced to 6 years IHL.

1.12 The Appellant felt that the sentence was manifestly excessive and has appealed to this Court against the same.

2. ANALYSIS AND ORDER

2.1 Firstly, even though the issue was not raised, I would like to point out that, this mater having come to the attention of the Court, I decided, in terms of Section 362 of the Criminal Procedure and Evidence Code (Cap. 8:01 of the Laws of Malawi), to go through the evidence in exercise of my powers of review. I am satisfied that the conviction in the Court below was safe. The evidence of the victim was corroborated by various witnesses including her school friends, teacher NyaKumwenda, and the medical evidence of the clinical officer, among others. The facts revealed that the Appellant had sexual intercourse with a girl below the age of thirteen years old. There was evidence of penetration. Although consent is an irrelevant consideration for this type of offence, the evidence showed that there was no consent either. Indeed, the evidence showed that the Appellant used physical violence to achieve his criminal ends. The victim's version was corroborated by several witnesses. The conviction could therefore have been upheld if the propriety of the conviction had been contested.

2.2 It is however the question of sentence that falls for consideration before this Court by way of appeal.

2.3 During argument, there was a sudden twist. Counsel Watson Chirwa, appearing on behalf of the Appellant, stated that he would no longer argue for the reduction of the sentence. He informed the Court that he had re-examined the evidence and formed the view that the sentence of 6 years IHL imposed by the Court below was reasonable and proper. He informed the Court that he had a duty

as an officer of the Court to be objective in advancing argument before the Court, and further that he had informed the Appellant about this position. In the premises, Counsel Chirwa invited the Court to simply confirm the 6 years IHL sentence.

2.4 State Counsel, Mr. Waliko Nkosi also stated that he formed the view that the sentence of 6 years IHL imposed by the Court below was appropriate considering the trend of sentencing in this type of offence.

2.5 The Court asked both Counsel what their own professional views were about what they said was the trend of sentencing in defilement cases, regard being had to the seriousness and prevalence of the offence. Both Counsel expressly and without hesitation stated that they considered the trend to be too lenient, and that this trend was not sending the appropriate message to would-be offenders. However, they maintained that their hands were tied by the sentencing trend in the High Court and they seemingly did not feel disposed to challenge it.

2.6 I must start my analysis on the question of sentence in this matter by pointing out that defilement is a very serious and heinous offence. It is both a carnally and psychologically invasive offence. According to Section 138(1) of the Penal Code, a person convicted of this offence is liable to imprisonment for life. This maximum sentence was imposed for a very specific reason: to show the seriousness, public revulsion and societal abhorrence for this kind of offence.

2.7 It has been observed that "obdurate sex offenders are, in modern society, on the increase and becoming a menace to the female folk."[1] This is particularly so in the case of girl children. Sexual offenders in cases of rape and defilement inflict a serious invasion of the victim's right to personal privacy as enshrined and guaranteed under Section 21 of the Constitution of the Republic of Malawi. Indeed, they inflict such a serious invasion of that most private of spaces of any human being's individuality. These offences also seriously violate the victim's right to human dignity, which dignity is inviolable in terms of Section 19 of the Constitution. My sentiments regarding the gravity and grossly

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[1] These words of Kumange J, in the case of ***Republic vs Bulaziyo***, [1997] 1MLR 122, remain as true today as they were in 1997. I must however hasten to add that for the reasons that I advance in the instant case, I regard the 6 months sentence that was passed by Kumange J in ***Republic vs Bulaziyo*** to have been shockingly lenient.

abhorrent nature of this class of offences are best expressed by Andrew Ashworth who states that sexual offences (such as rape and defilement) inflict violence on the human cherished values of "self-expression", "intimacy" and "[consensually] shared relationships"; and that they also engender the disvalues of "shame, humiliation, exploitation and objectification – which are often crucial to understanding the effects of sexual victimization".[2]

2.8 Article 16(1) of the UN Convention on the Rights of the Child of 1989 (the CRC), to which Malawi is a party, provides that: "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation."

2.9 The Conduct of the Appellant in the instant case did violence on the cherished human values of self-expression, intimacy and consensually shared relationships; as well as engendering the disvalues of shame, humiliation, exploitation and objectification of the victim girl child. It is to be recalled that the Appellant committed the offence fully knowing that he was committing a grave wrong and indeed a serious crime. He asked the victim what her age was, was given a clear age demonstrative of the victim's childhood, and yet he still felt it within himself to proceed and sexually violate a girl at such a tender age. He told the victim not to tell anyone because his reputation would be ruined. This was a clear indication of the Appellant's deplorable egocentric attitude, and his selfish disregard for the victim child and the damage he had caused. The defilement herein amounted to an unlawful interference with the victim's privacy, and was indeed a severe attack on her inherent self-worth and honour. The Appellant's conduct was therefore in direct conflict with Article 16(1) of the CRC. The indignity and humiliation suffered by the victim girl child herein could as well remain permanently etched on her psyche and negatively affect her future sexual and other relationships.

2.10 The Appellant as a teacher, a grown man of 47 years old, used his position of trust as the victim's class teacher to sexually humiliate, exploit and objectify the victim girl child in the instant case. He actually had the audacity and callousness to take a break from his indignities, and then returned to repeat the vile act on a helpless and defenceless child.

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[2] A Ashworth, *Sentencing and Criminal Justice* (4th Edition), (Cambridge: Cambridge University Press, 2005), 128.

2.11 As I mentioned earlier, counsel on both sides took the view, during argument, that the sentence of 6 years IHL was consistent with what they opined to be the sentencing trend in the High Court in this class of crime. No authorities were cited to me in support of the arguments on this trend. I have however had occasion to look at some sentences that the courts have meted out in cases of defilement, some of which I regret for their extreme leniency. Sentences that have gone as low as three years imprisonment (which effectively, in the majority of cases entails that the convict spends only 2 years in prison or less) do not send an appropriate message to society and to would-be offenders. Such manifestly lenient sentences might send the undesirable signal to society that we are not taking children's rights seriously. Thankfully, this trend no longer represents the settled position of the High Court. The High Court has now set guidelines on the appropriate starting point for sentencing when it comes to this class of crime. In the case of **Republic vs Bright Jamali**, Confirmation Case No. 421 of 2013 (HC) (PR), Mwaungulu J (as he then was) laid down important sentencing guidelines in cases of defilement as follows:

> The starting point for defilement should, therefore, based on the maximum sentence of life imprisonment, **be fourteen years imprisonment**. Sentencers at first instance must then **scale up and down this starting point to reflect mitigating and aggravating circumstances and that the sentence must fit the offender**. (Emphasis supplied)

2.12 Mwaungulu J continued to state that:

> The following factors will generally be aggravating for defilement: abduction or detention; knowledge that the offender suffers from a sexually transmitted disease; more than one offender involved in the defilement; **breach or abuse of trust**; **persistent attack**; pregnancy involved; disease transmission; transmission of a sexually transmitted disease; the offender ejaculated; **intimidation involved**; **coercion involved**; drugs, alcohol or any depressant drug (barbiturates) used to stupefy the victim; **vulnerability of the child**; defilement done when child is asleep. The following factors will generally be mitigating: **reasonable belief (by a**

> **young offender) that the victim was aged 16 or over**. (Emphasis supplied)

2.13 The learned Judge repeated this guideline in the case of **Republic vs Wyson Alfred**, Confirmation Case No. 152 of 2013 (HC)(PR).

2.14 I have also considered comparative case law from our neighbours, Zambia. In the case of **Mwansa vs People** (91/2007) [2008] ZMSC 24; SCZ No. 35 of 2008 (6 May 2008), the Appellant was charged with two counts of defilement contrary to Section 138 of the Penal Code. The particulars of the first count alleged that the appellant on 20th February, 2006 at Mufulira in the Mufulira District of the Copperbelt Province of the Republic of Zambia had carnal knowledge of a named girl under the age of 16 years. The second count alleged that on the same day at Mufulira the Appellant unlawfully and indecently assaulted another named girl. He pleaded not guilty to both counts. He was tried and convicted of both offences and was committed to the High Court in terms of Section 217(1) of Criminal Procedure Code (Cap. 88 of the Laws of Zambia) for sentencing. The High Court sentenced him to 20 years imprisonment on the first count and 15 years imprisonment on the second count. The appeal was only against the sentence imposed against the appellant in respect of the 1st count. His Counsel argued that as a first offender, the Appellant ought to have been accorded the leniency given to first offenders. He urged the Supreme Court to reduce the sentence to the mandatory minimum sentence of 15 years IHL.

2.15 It should be noted that there is a mandatory minimum sentence of 15 years IHL in Zambia for defilement cases since 2010. This 15 years minimum mandatory sentence comports with the 14 year starting point laid by Mwaungulu, J in **Republic vs Bright Jamali** and **Republic vs Wyson Alfred,** although the difference is that the Malawian Court Court can scale upwards or downwards from starting point. The Supreme Court of Appeal of Zambia held in **Mwansa vs People** that:

> A sentence of 20 years in this case was a bit on the higher side. We are therefore, setting aside this sentence and impose one of 18 years I.H.L. This sentence shall run concurrently to the sentence imposed on him in respect of the second count

2.16 In another more recent Zambian case, **The People vs Kanene**, HPS/24/2014 of 2014, decided in April this year, the High Court

of Zambia sentenced the accused person to 18 years imprisonment with hard labour for defiling a 14 year old school girl.

2.17 In Tanzania, the minimum sentence for sexual offences is even higher, pegged at 30 years for rape or defilement and also for attempted rape, in terms of Sections 131 (for rape and defilement) and 132 (for attempts to commit these offences) of the Penal Code (Cap 16 of the Laws of Tanzania). In Kenya, the minimum sentences for defilement are even more severe than in Tanzania. The minimum sentence for defilement in Kenya is determined according to the age of the child, rather than specific aggravating circumstances. For defilement of children under 12 years of age, the minimum is life; for defilement of children between the ages of 12-15 years, a minimum of 20 years; and for children between the ages of 16-18, a minimum of 15, regardless of other circumstances.[3]

2.18 A lesson that we can glean from this comparative case law and the various legal scenarios in surrounding jurisdictions explored, is that even our neighbours, with similar legal traditions and also with broadly similar social circumstances to ours, have moved towards ensuring that sentences in cases of defilement should be stiff enough to match with the grave seriousness of these offences, particularly in respect of sexual offences against children. It also shows that in any event, sentences in the region ranging from 15 years IHL to 30 years IHL in these cases are not or ought not to be unusual, depending on the circumstances pertaining to each case.

2.19 In the circumstances of this case, the only mitigating factor that Counsel for the Appellant advanced was that the Appellant is a first offender. In terms of the guidelines laid down in **Republic vs Bright Jamali** and **Republic vs Wyson Alfred,** there was no suggestion that there was reasonable belief that the victim was aged 16 or over. In fact, as shown above, the Appellant specifically asked the victim what her age was and he was told that she was 12 years old. I also should say something about the Appellant's age although his Counsel did not raise the point in mitigation. The age of the Appellant, at 47 years, cannot be taken into account for mitigation purposes. At 47 years of age, the Appellant is a thoroughly mature man. He ought to be fully aware of his responsibilities in society, and in particular, of the fact that

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[3] J Thompson, F N Simmonds, *Rape Sentencing Study: A Review of Statutory Sentencing Provisions for Rape, Defilement, and Sexual Assault in East, Central, and Southern Africa* (Lusaka: Population Council, 2012), 12.

children look up to him as an example and they also look up to him for counsel and guidance. As a matter of fact, the age of the Appellant vis-à-vis the crime he committed might as well be considered as an aggravating factor, but I do not count this towards aggravation in the instant case.

2.20 There is however, a chain of aggravating factors that characterized the commission of this offence. It was an offence that was clearly well-planned by the Appellant. Madam NyaKumwenda testified that one of the things that raised her suspicion was that WN entered the Appellant's house when his wife was not there. The Appellant clearly targeted WN for the sexual abuse well in advance. He came up with various excuses at school in order to entice her to come to his house. It is indeed a serious aggravating factor for the Appellant to have planned and schemed to abuse the child, and more so a child who was entrusted under his care as his pupil. There was breach and abuse of trust. Secondly, the Appellant's sexual attack on the victim child was shockingly repeated, further aggravating the crime. In addition, not only did the Appellant use intimidation and coercion against the victim child, he also used physical violence by stoning her to prevent her from escaping. This certainly escalated the aggravation of the circumstances of this crime. Medical evidence also showed that there was injury to the victim girl child's genitalia. Further, as mentioned earlier, the child suffered indignity and humiliation, was sexually exploited and objectified by the Appellant. In the circumstances, she was traumatized. As Mwaungulu J pointed out in **Republic vs Wyson Alfred,** such traumatizing effect might remain with her for a very long time, most probably her life time.

2.21 The Appellant also lacked remorse. He vigorously denied committing the offence and subjected the matter to full trial, exposing the child to the further trauma and the agony of reliving the experience of the sexual attack through being subjected to viva voce testimony and cross-examination by her very assailant, the Appellant himself. The Appellant also had the audacity to question one of the State witnesses, Madam NyaKumwenda who saw WN get into his house, as to whether she had been assigned the job of watching over WN. Surely Madam NyaKumwenda as WN's teacher should mind the business of her pupils, especially where she senses that they are a position of danger, such as the likelihood of being abused. This country needs more such teachers who have the welfare of their children pupils both at school as well as outside school. Only an irresponsible teacher would look the other way and mind her or his own business. I thought that was an

unnecessary and rather arrogant question to ask which further showed the Appellant's complete lack of remorse.

2.22 These Courts must be vigilant in protecting children, particularly girl children in instances of sexual offences such as the instant one, by imposing meaningful sentences that send the appropriate message to society. The Appellant in this case has not expressed any remorse. He has not even apologized to the victim and her family. These Courts will not take lightly the criminal conduct of unremorseful paedophiles that prey on innocent girl children to satisfy their vile sexual desires. Such criminals ought to be kept away from society and from children in particular, for meaningfully long periods of time. As Banda CJ pointed out in **Hayles vs Republic** [2002-2003] MLR 68 (SCA), at pages 72-73, the sentence which the Court imposes must reflect the public revulsion and abhorrence of the kind of offence that the Appellant committed on a young child. As in the **Hayles' case**, the Appellant herein abused "trust which the children [WN and her friends] had reposed in him for the sake of gratifying his deviant sexual urges."

2.23 In the present case, since there are more aggravating factors than there are mitigating factors, regard being had to the **starting point of 14 years imprisonment** as per the guidelines laid down in **Republic vs Bright Jamali** and **Republic vs Wyson Alfred**, from which point the sentence can either go up or down depending on the extent of mitigating and aggravating circumstances; I consider that an enhanced prison term of 18 years imprisonment would be in order. This sentence, in addition to the mitigating and aggravating circumstances that the Court has taken into account, fits the offender. He is aged 47 years old. If he spends the entire 18 years in prison, he will be out of jail at the age of 65. It is an age at which he could come back to society, hopefully as a better man, and still make some useful contributions to society. There is however, from usual practice, a great likelihood that, given good conduct in prison, he could be given a one third remission of his sentence in terms of the Prisons Act, which would entail that he would serve 12 years in prison. At his current age the Appellant would come out at the age of 59. I consider such a stay in prison to be in order considering the nature of the offence he has committed and all the surrounding circumstances.

2.24 Another point that I wish to emphasize is the importance of ensuring that identities of child victims (as well as child offenders) are kept out of the public domain. This is of paramount importance in the best interests of such children. It is in this vein

that Mwaungulu J (as he then was) ordered as follows in **Republic vs Bright Jamali:**

> I…order that the Registrar should do all that is possible to ensure that the name and identity of the victim is obscured or removed from the public records.

2.25 In the instant case, I notice that up to the stage of this Judgment, the name of the victim, WN, has remained unobscured in court and other public records. I similarly order that the office of the Registrar should do all that is possible to ensure that the name and identity of the victim is obscured or removed from the public records.

2.26 I would also like to take this opportunity to make an observation, in the hope that this will provide some guidance to prosecutors and Magistrates in the country. I have noted, through the review process of criminal cases from subordinate courts, that there is a clear trend that once it is found that a person has had sexual intercourse with a statutorily underage child, the offence charged for the offender is that of defilement contrary to Section 138(1) of the Penal Code even in instances where there was clearly no consent. It should be stressed that the law does not prohibit the prosecution from laying a charge of Rape, contrary to section 132 of the Penal Code, in instances where a person has unlawful sexual intercourse with a girl below the age of 16 years where there is no consent. The charge of rape can be competently made.

2.27 According to *Blackstone's Criminal Practice* (2004), the offence of having unlawful carnal knowledge of an underage girl "is one of strict liability as to age (**K** [2002] 1AC 462). The offence does not require an absence of consent, but if the girl does not consent, either this offence [i.e defilement] or rape may be charged (**Howard** [1966] 1WLR 13; **Ratcliffe** (1882) 10 QBD 74)." Indeed, it will be noted that the words used in Section 132 of our Penal Code that creates the offence of rape states in the relevant part: "Any person who has unlawful carnal knowledge of a woman or girl, without her consent…shall be guilty of the felony termed rape." The Sections simply mentions "a woman or girl". It does not limit the age range. Now the importance of making this point is that, according to the authorities, the offence of rape is considered to be a more serious offence than defilement of girl children (I use the term "considered to be" advisedly as I personally would not agree with the philosophy behind such ranking in respect of these offences). As regards the proposition that rape is more serious than

defilement, see the cases of **Republic vs Zobvuta** [1994] MLR 317 (HC) (PR) and **M'mbwana vs Republic** (1975-77) 8 MLR 159.

2.28 With this approach, I opine that the instant case could have been a candidate for the prosecution to have considered laying a charge of rape against the child.

2.29 Another issue that I have considered relates to Section 27(1) of the Penal Code (Cap. 7:01 of the Laws of Malawi.) That Section provides that:

> All imprisonment shall be with or without hard labour in the discretion of the court, unless the imposition of imprisonment only without hard labour is expressly prescribed by law.

2.30 In the present case, I have considered the particular circumstances of the Appellant. Whilst at 47 years old the Appellant most likely still has the energy to do hard labour, I imagine that in a few years time, he will not have the energy of a young man requisite for hard labour. In the premises, it is my opinion that this is a proper case where, in exercise of my discretion under Section 27(1) of the Penal Code, I should order that his prison term herein should be **without hard labour**. For the avoidance of doubt, a prison term without hard labour does not entail that the Appellant will serve the prison term without any labour at all. Prison authorities will remain at liberty to cause him to do any such type of prison work as would reasonably be considered not to amount to **hard** labour.

2.31 In the premises, **the sentence of 6 years Imprisonment with hard labour is hereby set aside, and it is replaced with a sentence of 18 years imprisonment without hard labour effective from the date of his arrest.**

Delivered this 16th day of July 2014 in open Court at Mzuzu.

R.E. Kapindu, PhD
JUDGE