REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CRIMINAL APPEAL CAUSE NO. 73 OF 2013

(Being Criminal Case No. 18 of 2013 in the FGM Court at Chitipa)

MATTHEWS KAYIRA

Vs

THE STATE

Coram : Honorable Mr. Justice D.T.K. Madise
Mr. W. Chirwa Counsel for the Appellant
Mr. W. Nkosi Counsel for the State
Mr. I.Z. Bondo/A. Kanyinji Official Interpreter
Mrs. F. Silavwe Court Reporter

Madise, J

JUDGMENT

1.0 Introduction

1.1 The Appellant in this matter was arrested and charged with two offences of defilement contrary to section 138(1) Penal Code under count one and indecent assault contrary to section 137(1) Penal Code under count two. He pleaded not guilty and after a full trial he was found guilty on both counts, convicted and sentenced to 6 years imprisonment with hard labour under count one and 2 years imprisonment with hard labour under count two. The sentences were to run concurrently from 20 March 2013. Being unsatisfied with the decision of the court below he now appeals to this Court against both convictions and sentences.

2.0 Appeals

2.1 Criminal appeals are provided for in section 346 Criminal Procedure and Evidence Code.

> *(1) Save as hereinafter provided, any person aggrieved by any final judgment or order, or any sentence made or passed by any subordinate court may appeal to the High Court.*
> *(2) An appeal under subsection (1) may be upon a matter of fact as well as on a matter of law.*

3.0 Grounds of Appeal

3.1 The Appellant filed two grounds of appeal as follows:

1) Whether the conviction of the Appellant was proper regard being had to the circumstances of the case.
2) Whether the sentences were manifestly excessive considering the mitigating factors.

4.0 The Issues

1) Whether the convictions were safe.
2) Whether the sentences were merited.

5.0 <u>The Facts</u>

5.1 The State called four witnesses. The story as told by the state witnesses including the victim's father (PW1) is that the Appellant was a health worker at Wenya Health Center. The victim is Sarah Kalua aged 15 who was a student at Wenya Community Day Secondary School before she was transferred to Kameme Community Day Secondary School. According to Sarah's father, he was informed by his wife that the Appellant was having an affair with his daughter Sarah which was disturbing her education.

5.2 Then the father received posting instructions to move from Wenya to Kameme and took his daughter Sarah with him. In December 2012 he received reports that the Appellant was following Sarah to Kameme. On 24 March 2013 the Appellant was found in a maize garden having sexual intercourse with Sarah. The matter was reported to the police and Sarah was examined at Kameme Health Center the following day.

5.3 Sarah Kalua (PW2) told the court that the Appellant was her husband as the two were in love with each other since June 2011. She stated that she was the Appellant's second wife and on the material day she was just playing with the Appellant when some little children rushed to report that she was having sexual intercourse with the Appellant in the maize garden. She denied having sexual intercourse with the Appellant on 24 March 2013 but on 1 February 2013 in the some bush. She also admitted having sexual intercourse with the Appellant so may times while at Wenya and when she moved to Kameme but that during all these times the Appellant was using a condom.

5.4 Sub Inspector Mulenga of Ipenza Police Unit confirmed receiving a report of defilement on 24 March 2013. On 26 March 2013 the Appellant was arrested and a caution statement was recorded from him. The Appellant did admit that he had sexual intercourse with the Victim on several occasions.

The medical officer who examined Sarah Mr. Lindani Katumbi did not find any evidence of forced penetration only that Sarah's hymen was broken meaning that she was not a virgin.

5.5 At the close of the prosecution's case the court found that the Appellant had a case to answer on both counts and he was invited to make a defence. In his defence the Appellant admitted going to Kameme on 23 March 2013 to sell goats and chickens. On his way he met Sarah and they chatted for a while. Later he was told that Sarah had been beaten by her parents because some children reported to her them that she was having sexual intercourse with some men.

5.6 Being afraid that he might be attacked by Sarah's parents he decided to run away to Isongole in Tanzania but finally returned to Malawi and surrendered himself to the police. He denied to have ever slept with Sarah.

5.7 Mr. Fermie Kayira told the court that Sarah had confided in him that she was seventeen years at the time the trial had started and not fifteen years. That it was her parents who had forced her to lie about her age. It is in evidence that Sarah gave him her immunization card showing that she was of mature age in4terms of section 138(1) Penal Code. The court below found that Sarah had doctored the immunization card by changing the date she was born.

6.0 Burden and Standard of Proof

It is trite law that the State is 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 any offence lies upon the prosecution.

6.1 Lord Chancellor Sankey pronounced the law in the following fashion in *Woolmington vs. DPP* [1935] A.C. at 481;

Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to
statutory exception. If at the end of and on the whole of the case, there is reasonable doubt created by the evidence given either by the prosecution or the prisoner, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

6.2 Our own local authority is the case of *Namonde vs. Rep* [1993] 16(2) MLR. 657 in which late Chatsika, J as he was then called stated the law in the following terms;

The prosecution bears the burden of proof on every issue in a criminal case. The court should not call

upon the accused to enter his defence hoping that in the course of his adducing evidence, the accused may say something which might give strength to the prosecution's case.

6.3 There are exceptions however under various statutory provisions (e. g section 32 Corrupt Practices Act and section 283 Penal Code) and at common law in cases of insanity. To the contrary, the accused at all times must lead evidence on a preponderance of probabilities to the satisfaction of the court just like in civil cases.

6.4 It is not the duty of the accused to prove his innocence. The State through the prosecutor must prove beyond a reasonable doubt that an offence was committed and that it was the accused who committed it. There must be no doubt as to the guilt of the accused. In the event that there is the slightest amount of doubt, that fortunately or unfortunately must be ruled in favour of the accused and an acquittal must be entered without hesitation.

7.0 Finding based on law and evidence

7.1 The Appellant was charged under section 138(1) and section 137(1) Penal Code which provides that:

Section 138(1)Penal Code

Any person who unlawfully and carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life.

Section 137(1)Penal Code

Any person who unlawfully and indecently assaults any woman or girl shall be guilty of a felony and shall be liable to imprisonment for fourteen years.

7.2 This is a straight forward case. The Appellant herein was apparently in "love" with the Victim Sarah Kalua. The girl herself has admitted this. They have been having sexual intercourse (penetration of male sexual organs into the female sexual organs without consent) while at Wenya and later at Kameme. The girl has revealed this. She stated that she was in love with the Appellant and had accepted to be his second wife. The Appellant denied this. In a desperate attempt to save her lover the Victim tried to change her age so that she can be above the age of 16 years.

7.3 The evidence is so clear. The two have been having sexual intercourse on divers days and at divers places. On 1 February 2013 according to Sarah the two had sexual intercourse. However both the Appellant and Sarah have denied that they had sex on 24 March 2013. Sarah told the medical officer that the Appellant was only playing with her private parts. When Sarah admitted the incident of 1 February 2013, the State amended the charge to read 1 February 2013 as the date the offence was committed.

7.4 Sarah took oath and according to the record she was old enough to say what really happened and lower court believed her. Unfortunately for the Appellant Sarah was under age in terms of section 138(1) Penal Code. For that reason alone, he committed an offence. He cannot plead consent as girls under the age of 16 are incapable of giving consent due to immaturity. He was therefore rightly convicted by the court below and I uphold the conviction under count one.

7.5 The State also charged the Appellant with indecent assault. Sarah stated that she did not have sexual intercourse with the Appellant on 24

March 2013. But she admitted that the Appellant was only playing with her private parts. If she was an adult who had consented and the act was done in private, the Appellant could have walked free. However the Victim was under age and incapable of giving consent in terms of section 138(1) Penal Code.

7.6 *Any person who unlawfully and indecently assaults any woman or girl shall be guilty of a felony…….*unlawfully because the girl was under the age of 16 years. Indecently because he had touched the private parts of a girl under the age of 16 years in public. For that reason he committed an offence under section 137(1) Penal Code. I see nothing wrong with the decision of the court below. The State had proved its case beyond a reasonable doubt. I uphold the conviction under count two.

8.0 Sentencing Principles

8.1 When passing a sentence the court must look at the objective to be achieved. Whether deterrence, public protection or reformation is the objective, courts must first of all have regard to the nature and circumstances of the offence, the offender, the victim and the public interest. In simple terms, courts look at the aggravating and the mitigating factors of the offence as well of the offender. The sentencing court must therefore weigh the two and come to an informed conclusion as to the type of sentence to impose.

8.2 It is important to note right at the outset that the policy of the law is not to imprison first and young offenders unless circumstances dictate otherwise. Subordinate courts are specifically called upon by the law to desist from sending first offenders to prison unless otherwise. The law as provided for under section 340 (1) Criminal Procedure and Evidence Code generally does not promote the imprisonment of first offenders unless otherwise stated by law or precedent. Where a court intends to forego the

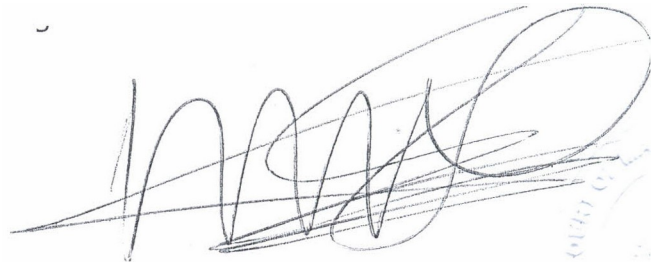
provisions of section 340 (1) CP&EC good reasons must be given as to why a non custodial sentence was inappropriate.

8.3 In this matter before me, it is clear that the girl Sarah Kalua was really in "love" with the Appellant who was 24 years at the time. During trial she did all she could to save her so called husband but to no avail. She admitted that the Appellant was having sexual intercourse with her because he considered her as his second wife. Sarah did not accuse the Appellant of forcing her to have sexual intercourse. She allowed him to enter her body voluntarily. The medical report showed no injuries inside the walls of her vagina. Unfortunately for both "lovers", Sarah was under the age of 16 years and therefore an offence was committed.

8.4 But looking at the circumstances of the Offender, the offence and the Victim, I'm of the view that 6 years under count one and 2 years under count two was manifestly excessive. I'm mindful that as an appellate Court it is not my duty to tamper with sentence unless the same is excessive or wrong in law. I therefore proceed to reduce the two sentences to 4 years for defilement and 1 year for indecent assault with effect from the date of arrest. The sentences are to run concurrently. I so order.

This appeal must partly succeeds.

Pronounced in Open Court at Mzuzu in the RePublic on 20th February**,** 2015.



Dingiswayo Madise

JUDGE