REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CRIMINAL APPEAL NO. 96 OF 2014

(Being Criminal case no 100 of 2013 Rumphi FGM Court)

THOMSON KALUA

VS

THE STATE

Coram : HON. MR. JUSTICE D.T.K. MADISE

Mr. W. Chirwa, Counsel for the Appellant

Mr. W. Nkosi, Counsel for the State

Mr. I.Z. Bondo/Chaupe Chawinga, Interpreters

Mrs. F. Silavwe (Mrs.), Court Reporter

Madise, J

JUDGMENT

1.0 Introduction

1.1 The Appellant in this matter was arrested and charged with the offence of defilement contrary to Section 138(1) of the Penal Code. The allegations were that the Appellant on or about the 15th day of March, 2013 at Chatumbwa Village in the District of Rumphi had unlawful carnal knowledge of a girl under the age of 16 years. The Appellant pleaded not guilty and after a full trial he was found guilty, convicted and sentenced to 10 years imprisonment with hard labour. Being unsatisfied with the decision of the court below he now appeals to this court against both conviction and sentence.

2.0 Appeals in this Court

2.1 In criminal matters appeals to the High Court from subordinate courts are provided for in section 346(1) Criminal Procedure and Evidence Code.

> *(1) Save as herein 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.*

2.2 Suffice to say that appeals in the High Court are by way of re hearing of all the evidence, the law applied and all that which took place in the court below so that the appellate court is fully satisfied that the trial court was within the parameters of the law in arriving at its conclusion.

3.0 Grounds of appeal

3.1 The Appellant filed five grounds of appeal which we reproduce as filed

1. **THAT** the prosecution did not discharge its burden of proving the case to the requisite standard.
2. **THAT** the court erred by convicting the appellant when there was no corroborating evidence against him.
3. **THAT** the lower court erred in using circumstantial evidence in the case.

4. **THAT** in all the circumstances of the case the findings of the magistrate were wrong in both law and fact and were against the weight of the evidence.

IN THE ALTERNATIVE the sentence of 10 years IHL for defilement is manifestly excessive regard being had to the circumstances of the case.

WHEREFORE the appellant prays before this Honourable court:-

1. **THAT** the conviction of the appellant be quashed.
2. **THAT** the sentence imposed by the magistrate court be reduced.

4.0 The issues

4.1 There basically two issues for determination in this appeal.

(a) Whether the conviction was safe regard being had to the totality of the evidence.
(b) Whether the sentence of 10 years was justified.

5.0 The evidence

5.1 Girl X's story was that on 15 March 2013 the Appellant took her to his home on her way home. While inside the Appellant took her into his bedroom where he inserted his penis into her vagina. After the incident she returned home where she told Fiskani Mtambo about the incident and Tionge Gondwe was also present. Girl X was 7 years at the time.

5.2 Tionge Gondwe a neighbor to Girl X told the court that on the material day at around 17 00 hours they were playing bawo and Girl X sat carelessly exposing her vagina. PW 2 noticed some whitish discharge coming from Girl X's vagina. PW 2 later reported to Girl X's grandmother about what she had seen. The grandmother, Rosemary Mtambo stated that she was approached by PW 2 a day after the incident about the whitish stuff she had seen on Girl X's vagina. The grand mother took Girl X to the hospital where it was confirmed that she had been defiled. In conclusion the state summoned A/D Constable Teputepu of Rumphi Police. He stated that he had received a

report on 16th March, 2013 about an incident where the Appellant had defiled Girl X.

5.3 The Appellant was arrested by members of the community policing forum and later taken to the police where he was cautioned and charged with the present offence which he denied. The medical report (Ex P3) was tendered in evidence by Shadreck Ngwira a Clinical Officer at Rumphi hospital. He stated that he examined Girl X on 18th March, 2013. He found traces of semen on her vulva and her hymen was torn. The vulva was also inflamed. At the close of the prosecution case, the trial court found that there was a prima facie case which called upon the Appellant to give a defence.

5.4 In his defence the Appellant stated that on 15th March, 2013 at around 16 00 hours, he went to school to write examination. He finished the examination around 20 00 hours. The following day he was at home studying and he was arrested on 17th March, 2013. He denied defiling Girl X.

6.0 The law

6.1 The burden and standard of proof in criminal matter is set. It is beyond a reasonable doubt. The relevant provision is Section 187(1) of CP&EC. The relevant case authorities are Woolmington vs. DPP [1935] AC 462 and Namonde vs. Rep [1993] 16(2) MLR 657. Section 187(1) of the Criminal Procedure and Evidence Code provides:

> *The burden of providing 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 providing*

that a person is guilty of an offence lies upon the prosecution.

6.2 The charge Section is 138(1) of the Penal Code which provides as follows;

Any person who unlawfully and carnally knows any girl under the age of 16 years shall be guilty of a felony and shall be liable to imprisonment for life.

6.3 The elements of the offence are that there must be penetration of the male sexual organ into the sexual organ of a girl under the age of 16 years. Consent is not consequential as girls under the age of 16 years are incapable of giving consent due to immaturity.

7.0 <u>The finding</u>

7.1 Girl X aged 7 did not take oath but gave evidence after a *voir dire* examination. She told the court below that the Appellant was her neighbor. That on the material day the Appellant invited her into his home where she was defiled. PW 2 another girl aged 13 told the trial court that at around 17 00 hours she had noticed that her friend Girl X was discharging some white stuff from her vagina. She reported to her grandmother the following day. The medical report confirmed that indeed Girl X was defiled. There was semen on her inflamed vulva and her hymen was torn. All this confirms that indeed Girl X was defiled. The question before me is by whom?

7.2 Girl X told the court that she was defiled by the Appellant. When her grandmother took the stand she confirmed that she was alerted by PW 2 about the white stuff on Girl X's vagina. When she went to confront the Appellant he had apparently run away. The next question is whether there was corroboration of Girl X's story?

7.2.1 Corroboration

7.2.2 It is trite that evidence in corroboration must be independent testimony which affects the accused by connecting or fending to connect him to the crime. It is evidence which implicates the accused and confirms in some material way not only that a crime has been committed but that it was the accused who committed it. This type of evidence can be direct or circumstantial depending on the facts of the case.

7.2.3 I am mindful of the need for a trial court to warn itself of the dangers of convicting an accused in the absence of corroboration. Where there was no such warning a conviction is normally quashed on appeal. The operative word is normally and not always. As a judiciary and I say this in obiter that we need to rethink the need for such a warning. Should a conviction be quashed on the mere premises that the trial court did not give a warning even if the case is proved beyond reasonable doubt? The law seems to be in conflict with itself.

8.0 Conclusion

8.1 In this matter the trial court convicted the Appellant without necessarily giving a warning in the strictest sense of the dangers of convicting the Appellant in the absence of corroboration. However, the trial magistrate stated in his judgment that he believed the story Girl X had said in court. He concluded that the girl was saying the truth based on her demeanor in court. The trial court made this statement.

I m again mindful of the requirement of the law that unsworn evidence of a child and also evidence in sexual offences need to be corroborated.

8.2 I think this was a warning enough as the trial magistrate was clearly aware of the need for corroboration in sexual offences. I m of the considered view that the evidence of PW 2, PW 3 and PW 5 had corroborated Girl X's story that she had been defiled. Girl X neighbor to the Appellant she knew

him very well and there was no way she could have made a mistake about the identity of the Appellant.

8.3 This sad story indeed took place on 15 March 2013. It is very unfortunate that the Appellant aged 52 decided to release his sexual pressure and desire on a girl aged 7 years. It is the duty of courts of this Republic to protect young girls such as these. I therefore see nothing wrong with the decision of the trial court. The trial court had rightly found that there was corroboration of the victim's story. I further find that State had proved this case beyond a reasonable doubt. I now uphold the conviction. This appeal must fail.

9.0 Sentence

9.1 The maximum sentence for defilement is life imprisonment. 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.

9.2 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 there is no any other sentence to fit the offender and the offence. The law as provided for under section 340 (1) of the 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) good reasons must be given as to why a non custodial sentence was inappropriate.

9.3 In the present case the trial court imposed a sentence of 10 years imprisonment. The court stated that the offence of defilement was on the increase in Rumphi and that in this particular case the Appellant had planned this offence with the view to cause mental and physical harm to the little girl.

9.4 Looking at the aggravating and mitigating circumstances of this case, I m of the view that 10 years was manifestly excessive for a first offender and a person of advanced age. I therefore proceed to reduce it to a prison term of eight (8) years Imprisonment with effect from the date of arrest. This ground of appeal must succeed.

I so order

Pronounced in open Court at Mzuzu in the Republic on 30 March 2015

Dingiswayo Madise

Judge