



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL REVIEW CASE NO. 7 OF 2016**

**(Being Criminal Case No. 12 of 2016 Before the Second Grade Magistrate
Court Sitting at Midima)**

**THE REPUBLIC
VS
LAMECK KATETE**

CORAM: THE HON. JUSTICE MR. S.A. KALEMBERA

Mr Salamba, Senior State Advocate, of Counsel for the State

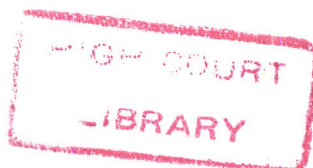
Mr Kaliwo, of Counsel for the Appellant

Miss Chimang'anga, Official Interpreter

JUDGMENT

Kalembera J

INTRODUCTION



The convict, Lameck Katete, was charged and convicted of offences of kidnapping and assault occasioning actual bodily harm on the 17th June 2016. He was sentenced to 2 years imprisonment with hard labour on the first count suspended for 6 months; and K60,000 fine on the second count in default 6 months imprisonment with hard labour and K50,000 to be paid to the complainant as compensation. The convict paid the fine. The State was not satisfied with the sentences and moved this court to expeditiously review the propriety of the sentences imposed. In the interim, the convict filed an appeal which was withdrawn at the hearing and the court proceeded with the review. This then is the court's order on review.

GROUND OF REVIEW

That the suspended sentence meted out by the lower court on the charge of kidnapping was too lenient considering the aggravating factors available against the convict, which included the seriousness of the offence and the age of the victim.

EVIDENCE

This being a review of criminal proceedings from the lower court, it must be dealt with just like an appeal, that is, I must look at and analyze all the evidence before the lower court.

Prosecution's Case

PW I was Sara Kansaru of Chide Village, T/A Bvumbwe, Thyolo District. It was her sworn testimony that she didn't know the suspect in the dock, the convict. It was on the 10th of January 2016 when she went to the nearby Catholic Church with her two children. After church she proceeded to pay rent and told the children that she would meet them at 12:00 noon. She came back home around 1:00 pm and found one child only, 6 years old, eating nsima. Upon inquiry about the other child, Takondwa, she was told that he had gone to his Aunt's church for prayers. She looked for the child until evening, in vain. The next day before she could report the matter to the police, she received a phone call from Zomba Police that there was a child found. She went to Zomba Police and found her son who explained what had happened to him the previous day, that is, that he had been kidnapped, his legs tied

and placed under back seat. They tried to sell him to some Europeans, later they took him to the bush where he was sodomized after piercing him with sticks. Later they dumped him beside the road where a certain man found him and took him to Zomba Police.

He was referred to the hospital, where after examination they were not sure whether he was sodomized or not. She further told the court that the child led the police to the house of suspect in the dock who is a businessman at Bvumbwe Trading Centre. Takondwa is 9 years old.

In cross-examination by the accused she told the court that her child has never missed before. This was the first time he went missing. In cross-examination by the court she told the court that he mentioned the suspect in the dock as the one who kidnapped him.

PW II was Takondwa Patel who gave unsworn testimony. It was his testimony that on the material day he decided to pray at his aunt's Roman Catholic Church, other than his Assemblies of God Church. On the way he met the convict who was in his blue car, he stopped and asked him to get into the car and escort him to Ligowe Primary School. When he reached the school he just sped past it. Whilst in the car three men had emerged from under the back seats. They tied his hands, closed his mouth and put him under the seat. They wanted to sell him to two Europeans but in vain. They later brought him to the bush where they pierced him with sticks and sodomized him. They left him there. He went near the road and a certain man who was in a vehicle picked him up and brought him to the police. Later the police called Bvumbwe police, and his mother picked him and brought him to Bvumbwe police where he was referred to the hospital, where he was treated and given some drugs.

In cross-examination by the accused/convict he told the court that he cannot know the place where he took him. He dumped him in the bush after sodomizing him in the anus and later assaulted him. He further stated that the accused kidnapped him when he was going to church. At the hospital they stated that he was not injured but he was feeling pain.

In cross-examination by the court he reiterated that he was kidnapped at 7 am. He brought him to a European who said not this one, and the second European also said the same. It was the accused who sodomized him.

PW III was Detective Inspector Mdzinga from Bvumbwe Police. He told the court that it was on 4th January 2016 when they received a phone call from Zomba Police that they were keeping a young boy, Takondwa Patel, and told us to look for his parents. His parents were informed and upon their return they came to Bvumbwe Police. After going to church he was kidnapped by four people and the accused was one of them. The boy stated that the people used a saloon car, he was tied, sodomized and later assaulted. Later he was dumped in Zomba and good Samaritans took him to the police. He was issued a medical report to hospital for treatment. And he led them to the suspect's bench as he knew him. A case of kidnapping was opened against him of which he denied. The medical report indicated that the complainant had swollen hands, ankle and his genitalia was normal, that is, normal anus, no bruises, no swollen area and no evidence of anal penetration.

In cross-examination by the accused, he told the court that anyone without a licence can drive a car provided he doesn't meet with traffic officers.

In cross-examination by the court he told the court that the boy's parents did not report to the police about his missing. The boy's mother stated that she was checking with her relatives. The call from Zomba Police was received around 2pm on the 4th of January 2016, but the boy missed on 3rd January 2016.

After this witness the State closed its case. The court found that a prima facie case had been made out against the accused requiring him to enter his defence. The accused opted to defend himself and indicated that he was also going to call three witnesses.

DW I was Lameck Katete, the accused himself, from Kamkhomba Village, T/A Bvumbwe, Thyolo. It was his testimony that on the 5th day of January 2016, while at the garden, at around past 2 he got a missed call from his wife. He called her back and she informed him that the police had come looking for him. He went to the police where he was asked about his movements on the 3rd of January 2016. He explained that he did not go to church but was applying chemicals on his crops in

the garden. He later went to buy sticks to support the tomato plants. He was locked up, and the next day a statement was recorded from him and he denied the charges.

In cross-examination by the prosecutor he told the court that indeed the boy led the police to his shop. He has never met the boy.

DW II was Davie Ndau of Chide Village, T/A Bvumbwe, Thyolo. It was his testimony that on 3rd January 2016 he met the accused driving a three ton vehicle carrying sticks. He was going to the garden to support tomatoes. After chatting he went to the barbershop. Later he heard that the accused committed the offence of abduction.

In cross-examination by the prosecutor he told the court that he met him at past 8 am. He couldn't know if he diverted and went somewhere else.

DW III was Grey James from Maggie Village, T/A Bvumbwe, Thyolo. It was his testimony that on the 3rd of January 2016, in the morning, whilst on his way to water his crops in the garden, he met the accused who was also going to his garden as they are neighbours. After watering his crops he went home.

In cross-examination by the prosecutor, he told the court that he arrived at the garden around 9 am. He was driving a vehicle carrying sticks to support the tomatoes. It was a three tonner. He could not take an hour to drive to his garden. He did not know where he had been at 7 am.

After this witness the defence closed its case.

LAW AND ANALYSIS

I have noted that the State mostly finds fault with the sentence imposed on the 1st count of kidnapping contrary to section 258 of the Penal Code as read with section 260 of the Penal Code. The lower court imposed a sentence of 2 years, suspended for 6 months because the convict was a first offender. The written skeletal arguments from the State are, thus, on the impropriety of the said sentence. In the State's verbal submission, the State supports the convictions. On the other hand, counsel for the convict challenges the convictions. Counsel has strongly submitted that the convictions are unsafe, albeit, because the lower court did not conduct voir

dire examination of the complainant, and relied on unsworn testimony of the said complainant without corroboration.

The importance of a *voir dire* examination being conducted, and findings recorded was explained by Forbes F.J. in **Makhanganya v R [1961-63] ALR (Mal) 491** at p. 497 as follows:

“In my view the duty of a court when faced with a child witness is (a) to inquire as to the age of the child and, if necessary assess its age; (b) to investigate, by questioning the child, whether the child understands the meaning of an oath; and (c) if the answer to (b) is negative, to investigate whether the child understands the difference between truth and falsehood, and the need to speak the truth. The record should show these inquiries (which, depending on the circumstances, need not be lengthy) and the conclusion reached by the judge. Unless a voir dire is carried out as I have indicated, a trial court cannot be satisfied that a child is fit to be sworn, or even to give evidence unsworn and, unless the voir dire is recorded, an appellate court cannot be satisfied that the trial court has appreciated and carried out its duty.”

The court went ahead and quashed the conviction and set aside the sentence.

And in the case of **Jackson v Republic [1971-72] ALR (Mal) 440**, the Appellant was charged in the First Grade Subordinate Court, Blantyre, with theft from the person of another contrary to section 282(a) of the Penal Code. The case against the Appellant was founded on the unsworn evidence of a six-year old boy. Edwards, J had this to say on p.442:

“The child gave unsworn evidence.....It is clear that the appellant’s conviction rests upon the evidence of the child. In cases where unsworn evidence is received from a person of immature age under the proviso to sub-s.(1) of s.6 of the Oaths, Affirmations and Declarations Act (Cap 4:07), sub-s.(2) of the section provides that an accused person shall not be liable to be convicted on such evidence unless it is corroborated by some other material evidence implicating him.”

The court went further to apply with approval the **Makhanganya case**. The conviction and sentence were set aside.

Furthermore in the case of **R v Campbell (1956) 2 ALLER 272** (Criminal Court of Appeal) it was stated, at page 276:

“To sum up, the unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children the judge must stop the case. It makes no difference whether the child’s evidence relates to an assault on him or herself or to any other charge, for example, where unsworn child says that he saw the accused person steal an article.”

In the matter at hand, there is no evidence that voir dire examination was conducted on PW II. Rather the learned magistrate just stated thus on page 8 of the record: **“PW 2 is Takondwa Patel giving unsworn evidence after voir dire done. I am 9 years.”** As is required, there is no recording of the questions put to PW II and his answers to those questions. It is therefore difficult and impossible for this court to conclude that a proper voir dire examination was conducted. Furthermore, PW II, as has been observed was a boy aged 9 years, and the complainant in this matter, gave unsworn evidence without any corroboration. And this fact is further conceded by the learned magistrate where the learned magistrate stated as follows on page 35 of the record:

“The boy gave unsworn evidence and there was no corroboration and I have warned myself the dangers of convicting the accused on uncorroborated evidence. I therefore find him guilty on the two offences of kidnapping and assault occasioning actual bodily harm and I convict him accordingly.”

I do agree with the learned magistrate that there was no independent evidence corroborating the unsworn evidence of PW II. However I do not understand how then, the learned magistrate, having so rightly observed that the unsworn evidence of PW II was uncorroborated, went ahead and convicted the convict. Corroboration of unsworn evidence of a child is required as a matter of law, and the learned magistrate could not do away with the law by simply warning himself of the dangers of convicting the convict on the uncorroborated evidence of PW II. The magistrate was supposed to follow and uphold the law. Section 6 of the Oaths, Affirmations and Declarations Act (Cap 4:07) of the Laws of Malawi provides as follows:

“s.6-(1) Before giving evidence in a judicial proceeding, a witness shall make the oath or affirmation set out in the Second Schedule. The court, or a person authorized by law or by the court in that behalf, shall ask such witness if he believes in Almighty God and, if so, whether he agrees to make the oath. If he answers both questions affirmatively he shall be required by such court or person authorized as the case may be, to make the oath holding his right hand uplifted. In all other cases he shall be required by the court or person authorized to make the affirmation:

Provided however that where, in any proceedings against a person for any offence, any person of immature age, before the court as a witness, does not in the opinion of the court understand the nature of either an oath or an affirmation the court may receive his evidence, though not given on oath or affirmation, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence.

*(2) Where evidence is received by a court in accordance with the proviso to subsection (1), **the accused shall not be liable to be convicted on such evidence unless it is corroborated by some other material evidence implicating him.***
(emphasis supplied)

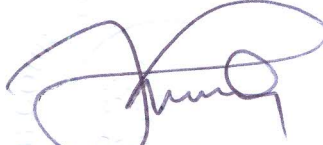
As earlier observed herein, there is/was no corroborating evidence to the unsworn evidence of PW II. The unsworn evidence of PW II cannot therefore be relied upon in the absence of corroborating evidence. In the absence of the evidence of PW II, there is no evidence before the court to warrant the conviction of the convict. The learned magistrate should have done the needful, by conducting a proper voir dire examination and recording the same. Other than that the learned magistrate ought to have acquitted the convict. The convict's convictions are unsafe and cannot be sustained.

CONCLUSION

It is the finding of this court that unsworn testimony of a child requires corroboration as a matter of law. The learned magistrate erred in law in convicting the convict on unsworn and uncorroborated evidence of a child. The learned magistrate could not therefore rightly come to the conclusion reached and convicting the convict on such evidence. All in all, the convict's convictions are

unsafe and cannot be sustained. I therefore quash the convictions and set aside the sentences imposed.

PRONOUNCED in open court this 27th day of September 2016, at the Principal Registry, Blantyre.



S.A. Kalembera

JUDGE