IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CRIMINAL APPEAL CAUSE NO. 33 OF 2018

EMMANUEL LINO.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: Hon. Justice M L Kamwambe

Salamba of counsel for the State

Maele of counsel for the Appellant

Amos...Official Interpreter

JUDGMENT ON APPEAL

Kamwambe J.

The Appellant was convicted after full trial by Mwanza First Grade Magistrate Court of the charge of defilement contrary to section 138(1) of the Penal Code and was sentenced to 14 years imprisonment. The incident took place on or about the 30th December, 2017. He appeals as follows:

1. The learned court erred in law in convicting the Appellant without having regard to section 337 of the Criminal Procedure and Evidence Code.

2. The sentence of 14 years imprisonment is manifestly excessive

The argument of counsel for the Appellant is that section 337 of the Code is a mandatory provision and equates it to sections 339 and 340 of the Code. He consequently seeks the court to quash the conviction. The State rejects such argument. It is necessary that I bring out section 337 which reads as follows in part:

> *1) Where in any trial for an offence, the court thinks that the charge is proved but is of the opinion that, having regard to the youth, old age, character, antecedents, home surroundings, health or mental condition of the accused, or to the fact that the offender has not previously omitted an offence, or to the nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment,* ***the court may-***
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> ***a)*** *Without proceeding to conviction, make an order dismissing the charge, after such admonition or caution to the offender as the court deems fit;*
> ***b)*** *Convict the offender, and if probation is not appropriate, make an order either discharging him absolutely or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein;*
> ***c)*** *Where the court considers it expedient to release the offender on probation-*
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> *i. If the offender express his willingness to comply with the order, after or without convicting the offender, make a probation order; or*
> *ii. Convict the offender and direct that he be released on his entering into such bond as is referred to in section 53, with or without*

sureties, and, in addition to any other condition that, during such period (not exceeding three years) as the court may direct, he shall appear and receive sentence when called upon and in the meantime shall keep the peace and be of good behaviour.

The wording of section 339 and 340 clearly states that courts should always have regard to sections 339 and 340 when considering an appropriate sentence to be imposed against a convict. Section 340 (1) provides that 'where a person is convicted by the court of an offence and no previous conviction is proved against him, he **shall not** be sentenced for that offence, otherwise than under section 339, to undergo imprisonment, not being imprisonment to be undergone in default of the payment of a reasonable fine, unless it appears to the court, on good grounds, which shall be set out by the court in the record, that there is no other appropriate means of dealing with him. In this regard, the court in exercising its discretion, is **mandated** to consider a non-custodial sentence as a first option unless there are compelling reasons to impose a custodial sentence'. (My emphasis)

On the other hand, section 337 is not mandatory and there is nothing in the language of the section that suggests that it is so. The section uses the word **may**, that instead of recording a conviction, the court may make any of the orders in section 337 against the accused found guilty. Upon conviction, the court is not obliged to consider section 337 at all times, but only if it thinks it fit or necessary, in view of the extenuating circumstances. The language is clearly permissive. (My emphasis)

In view of what has been stated above, the first ground of appeal fails.

On whether the sentence of 14 years is excessive, counsel for the appellant has cited 12 manslaughter cases which keeps me wondering as to why he did so without explaining clearly the relevance. May be he is trying to show that in such cases where life was lost, as low as 7 years term sentences were imposed, but the circumstances of those cases were not like, and cannot be

compared with, this particular defilement case. It is unsafe to compare mangoes with oranges because they are not the same kind even though they all happen to be fruits. In short, it was not fair to the court to compare sentences of such offences different in nature without laying down meaningful correlation. Through my experience, I observe that the philosophy of sentencing in manslaughter cases is different from defilement cases whose objective is to protect the girl child whose future is at great risk of ruination if the offence is not managed well. It is a serious gender issue and some quarters have cried loud that sentences are usually on the lower side. The status of the girl child needs to be enhanced so that she spends long time at school without disturbances by sexual assault of any kind which might bring about psychological trauma and failure to proceed with school. The girl child should have equal opportunity to the boy child. Sexual assault cases tend to hinder that opportunity for the girl child. Courts are enjoined to mete severe sentences to send the right message that society is up in arms to fight this scourge. The usual mitigating and aggravating factors shall be considered accordingly.

Sentencing is supposed to take into account the individual circumstances of the accused person as well as possibility of reform and re-adaptation, public interest and the interests of the victim and her relations **(Republic v Samson Matiti Criminal Case No 18 of 2007)**. Of course courts should exercise a measure of mercy. The ages of the accused person and the victim are relevant in determining on sentence. The younger the victim the harsher the sentence, and the older the accused person the harsher the sentence. The law favours the young and old offenders whereby the young shall be those in the age brackets of 18 and 25 and the old are those over 60 years old (**Republic v Ng'ambi [1971 – 1972] ALR Mal 457)**. It is not unusual today for courts to mete a sentence of 18 years imprisonment depending on circumstances. Evidence of resulting pregnancy or infection are aggravating factors. The starting point of sentencing in defilement cases is 14 years to be increased or reduced according to the aggravating and mitigating factors (**Republic v Bright Jamali Confirmation Case No. 321 of 2013**).

In this case the Appellant was 22 years old while the victim was 11 years old. Where victim is less than 8 years old a sentence of not less than 14 years may be imposed, and where victim is between 8 and 12 years old, a sentence of not less than 10 years may be imposed. Where victim is more than 12 years old a sentence not less than 7 years may be imposed depending on the age of the victim and other mitigating factors. This is a mere guideline which is not compulsory and need not be adhered to strictly. Sentences may vary depending on the peculiarities of each case.

At 22 Appellant was a young offender. He defiled his brother's daughter, his own niece. He was entrusted to take care of his niece and her siblings when their parents went abroad. He breached that duty of trust. The victim was threatened not to shout, was unconscious when she was defiled, and when she wanted to report the incident she was threatened again. I agree with the State that the Appellant may be young and a first offender, but the circumstances of the case were horrible. This is not a proper case for application of section 337 of the Criminal Procedure and Evidence Code. Higher courts are enjoined not to be in the habit of disturbing the lower courts sentences unless such sentences are imposed on wrong principles or are manifestly excessive.

The lower Court considered the case of **Brian Shaba v Rep., Criminal Appeal N O. 19 of 2014 (Mzuzu Registry)** and meted a sentence of 14 years imprisonment after analysing the mitigating and aggravating circumstances. In **R v Wesley Makwangwala Confirmation Case No. 200 of 2007 (unreported)** the convict aged 26 defiled his sister's daughter aged 9 and was sentenced to 14 years IHL. On confirmation the sentence was reduced to 10 years IHL. In the case of **Rep. v Ipyana Mwachande Confirmation Case No. 327 of 2013** the High Court confirmed sentence of 10 years IHL. The victim was 12 years old.

I thought it better to bring out other cases of a similar nature. In **Josphat Mitambo v The Republic Criminal Appeal No. 5 of 2018,** the appellant was 21 years old and the victim was 15 years. The victim agreed that appellant was his boyfriend hence, she joined him in his house as a family. A 14 years term of imprisonment was

reduced to 8 years because the victim was in an intimate relationship with the man and there was no trauma experienced. She participated in sexual intercourse willingly.

In **Davie Nyalapa v The Republic Criminal Appeal No. 8 of 2018** appellant, 57 years old teacher, defiled a 7 years old girl pupil and a sentence to 8 years imprisonment was meted, I think due to the age of the appellant. She felt great pain and he did it again the following day. She was really traumatised. The court refused to disturb the lower court's sentence. In fact, an enhancement would also have been proper in this case.

In **Lackson Mbewe v The Republic Criminal Appeal No. 4 of 2017,** a 40 year old man defiled a 12 year girl and sentence of 18 years imprisonment was reduced to 10 years

Considering all the circumstances of this case and the guideline stated above, I am of the view that sentence was on the higher side and I reduce it to 11 years imprisonment.

Pronounced in open court this 16th day of November, 2018 at Chichiri, Blantyre.

M L Kamwambe

JUDGE