



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 19 OF 2018**

**(Being Blantyre Magistrate Criminal Case No. 316 of 2018 Before H/W  
Nyimba)**

**BETWEEN:**

**KONDWANI HAMBEYANI.....APPELLANT**

**AND**

**THE REPUBLIC.....RESPONDENT**

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

Mr Chisanga, Principal State Advocate, of Counsel for the Respondent

Mr Maele, of Counsel for the Appellant

Mrs Chanonga, Official Interpreter

Mrs Msimuko, Court Reporter

**JUDGMENT**

***Kalembera J***

The Appellant, Kondwani Hambeyani, appeared before the Blantyre Senior Resident Magistrate Court charged with the offence of Defilement contrary to section 138 of the Penal Code. The particulars of the offence alleged that Kondwani Hambeyani on the 24<sup>th</sup> day of October 2017 at around 15:00 hours at Mwachande Village in Chirimba Township in the City of Blantyre had unlawful

carnal knowledge of Tryness Samanyika a girl under the age of 16 years. On his own plea of guilty he was found guilty, convicted and sentenced to 7 years imprisonment with hard labour (IHL). Being dissatisfied with the conviction, the Appellant do hereby appeal against the same. The Respondent opposes this appeal.

The Appellant filed the following two grounds of appeal:

1. The trial was a nullity as the Prosecutor is not under law entitled to prosecute criminal cases.
2. The lower court erred in law in entering a plea of guilty when the Appellant had qualified his plea.

This being an appeal from the subordinate court, I am mindful that it is trite that such appeals be dealt with by way of rehearing, that is, I must look at and analyze all the evidence in the court below. However, the Appellant having pleaded guilty in the lower court, there was no evidence from witnesses.

The main issue for consideration is whether the Appellant's conviction be quashed and the sentence set aside.

In the first ground of appeal, it is contended that the trial was a nullity as the Prosecutor is not under law entitled to prosecute criminal cases. It is argued that the Appointment of Public Prosecutors G.N. 85/1962 deemed to be made under section 79 [made under section 85 of the Criminal Procedure Code, 1929 (now repealed) provides that *'all police officers of or above the rank of Sub-Inspector have been appointed to be public prosecutors in all criminal cases before subordinate courts in Malawi.'* The Prosecutor, in the matter at hand, was a Sergeant, which is a rank below that of Sub-Inspector. Thus, the Appellant argues that the Prosecutor was not, by law, authorized to prosecute the case and that the prosecution was therefore null and void.

On the other hand, the Respondent argues and contends that the law the Appellant is basing his argument on, to wit, section 85 of Criminal Procedure Code of 1929, was repealed long time ago. The Appellant agrees that this law was indeed repealed but further argues that G.N. 85/1962 is deemed to have been made under the said section 79 of the Criminal Procedure & Evidence Code. It is unfortunate



that none of the parties has cited in full the repealed section 85 of the Criminal Procedure Code of 1929. However, section 79 of the CP&EC provides as follows:

*“s. 79 –(1) The Director of Public Prosecutions may, by writing under his hand, appoint generally, or in any case or any class of cases, any person employed in the Public Service or such other legally qualified person to be a public prosecutor.*

*(2) Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions.”*

Considering that the said G.N. 85/1962 is deemed to have been made under section 79 of the CP&EC, and it was not specifically repealed when the said section 85 was repealed, I would agree with the Appellant that the prosecutor herein was not qualified to prosecute this matter. Does that lead to the nullification of the prosecution herein?

It must be noted that according to section 3 of the Criminal Procedure & Evidence Code (CP&EC) the application of the CP&EC shall at all times be premised on the principle that substantial justice should be done without undue regard for technicality. And according to section 5 (1) of the same Code, subject to section 3 and to other provisions of this Code, no finding arrived at, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal of complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless such error, omission or irregularity has in fact occasioned a failure of justice. The Blantyre Senior Resident Magistrate Court, was a court of competent jurisdiction. The fact that the prosecution was conducted by a Sergeant did not, in my considered view, lead to any miscarriage of justice. In that regard, this first ground of appeal cannot be sustained and is hereby dismissed.

In the second ground of appeal, it is contended that the lower court erred in law in entering a plea of guilty when the Appellant had qualified his plea. The plea taking was recorded as follows:

*I understand*

*I admit*

*I agree I had sexual intercourse with Tryness Samanyika*

*I do not know her age*

*But she could be under 16 years*

*She was my date for 3 months*

*It was consensual sex*

*We booked a room in a rest house*

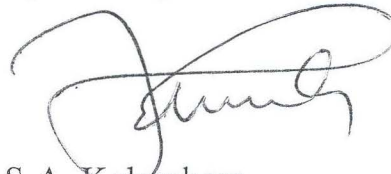
*She phoned me to have sex with her*

*Ct Plea of guilty entered*

The Appellant admitted the substance of the narrated facts as correct. The particulars of the charge~~d~~ expressly stated that the Appellant had unlawful carnal knowledge of a girl under the age of 16 years and he pleaded guilty to the charge. The Appellant clearly formed a view that the victim could be below 16 years. His main issue was that they were in a sexual relationship, which does not matter and is not a defence in a case of defilement like this one. It cannot therefore be heard that he did not know that the victim was under the age of 16 years. It could have been different had he told the court that he truly believed that she was above 16 years. Likewise, this ground cannot be sustained and is hereby dismissed.

All in all, the Appellant's appeal is hereby dismissed in its entirety. The Appellant's conviction and sentence are hereby upheld.

**PRONOUNCED** this 27<sup>th</sup> day of September 2018, at the Principal Registry, Criminal Division, Blantyre.



S.A. Kalembera

**JUDGE**