IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO.38 OF 2018

THOMAS MZUNGA.....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

Kamwambe J

The Appellant was charged with the offence of defilement contrary to section 138 (1) of the Penal Code. It was alleged that he had unlawful carnal knowledge of a girl under the age of 16 years. The Appellant was a primary school teacher to the victim who was in standard 6. Upon pleading not guilty the State paraded 8 witnesses to prove the charge. He was convicted after full trial and sentenced to 14 years imprisonment.

Being dissatisfied with the conviction the Appellant appealed against both conviction and sentence on the following grounds:

1. The trial court erred in law in convicting the Appellant of defilement when there was no evidence proving the age of the victim.
2. The lower court erred in law in convicting the Appellant of defilement when there was no evidence corroborating the testimony of PW 1 who was the victim and gave unsworn testimony.
3. The sentence of 14 years imprisonment is manifestly excessive in the light of the facts.

The Appellant prays that the conviction be quashed.

I have looked at the evidence so far given in this case and I am compelled to start dealing with the second ground of appeal which I find to be the most contentious one. In the event of unsworn evidence of a child, corroboration is required as a matter of law and not just as a matter of practice (see section 6 of the Oaths Affirmations and Declarations Act) . Facts that corroborate the evidence of a child must be visible and highly conclusive or suggestive of the fact that sexual intercourse took place between the two parties, and not just speculative.

There should be specific findings of corroborative facts and not generally making remarks that point at nothing corroborative. This is what the trial court did in its judgment when it made the following remarks:

> *"Lastly, we have no doubt in the credibility of the evidence of the victim and that we had examined before she could give evidence in this case and found her to be of sufficient intelligence and hence she was able to understand the nature of the proceedings before this court and her unsworn testimony has been corroborated in various respects in this case through circumstantial evidence. We believe the victim told us the truth of the matter and we have no doubt in her testimony".*

I have considered the evidence of the Senior Clinician PW 7 who said that he examined PW 1 and the finding showed that there was an indication of penetration after finding scars and tears of the hymen after some weeks or months had gone by. The findings were in the medical report and therefore excluded from the hearsay rule under section 180 of the Criminal

Procedure and Evidence Code. This evidence should be linked to other evidence to make a strong case of circumstantial evidence. This other evidence is evidence of undue and close familiarity which would highly suggest that there was something more happening between the two. Coupled with undue familiarity is the opportunity that he had as her teacher which led to undue influence. The letters of gifts to the Appellant on his birthday day when no one else sent him gifts and strangely his asking her why he was not sent such gifts. PW 5 also testified that the Appellant called the victim "madamu akunyumba", the buying of the valentine card, the birthday gift and more so, contents of a letter from PW 1 which showed that the appellant had had a serious relationship with the girl.

The meaning of corroboration evidence is what is may be clouding our minds. I have appreciated what counsel for the Appellant says that what is stated as corroborative evidence as pointed out above is not evidence to show that there was penetration or sexual intercourse, for instance. I kept asking myself as to whether that is what the corroborative evidence should do, that is, prove the act. Let not be blind of the fact that such sexual intercourse is done in privacy and therefore no eye witness is available. I agree with the State that the corroboration necessary in sexual offences need not be and usually is not the evidence of a third party who witnessed the act. Corroboration evidence is supposed to comprise an indicator/s (pointers) that the victim's assertion that she was defiled sometime in the past was true or was more likely to be true; not necessarily that there was sexual intercourse. Hence, acts of undue familiarity of the Appellant and the victim, statements made by the Appellant in reference to the victim, gifts that passed between them, tears and scars in the vagina and opportunity to have sex will pass as corroboration evidence. Of course the letter written by the victim cannot be corroboration evidence if tendered by the victim in that it is part of her evidence anyway. However, it becomes admissible as independent corroboration evidence when it is introduced by PW 5 who found the letter on which basis she reported to police. Corroboration evidence by way of being

pointers to an offence does not have to be direct evidence but will reveal that an offence was likely to have taken place as stated by the victim who said that the Appellant had sex with her in February, 2018. It is this court's view that there was enough corroboration evidence to support the act of defilement.

On the issue of there being no evidence of age, I have observed that the medical report mentions the age of the victim as 14. Under section 180 of the Criminal Procedure and Evidence Code, the report is excluded from being hearsay evidence, as such, it is admissible. See the cases of **Chipala v Rep [1993] 16(2) MLR 498 (HC)** and **Rep v Zobvuta]1994[MLR 317** where it was said that age could be proved by those who have seen the child or even by a teacher, and that the medical report containing evidence of age of the victim can be admissible under section 180 of the Code as long as the conditions of admission of such evidence as exception to the rule on hearsay evidence set out in subsection (3) of the section are satisfied, for example, if the accused was served with the report or has consented to its admission, (see also **Chimbanga v Rep Criminal Appeal No. 3 of 2016**). It is the finding of this court that age was appropriately proved.

Coming to sentence being excessive, let me say that the starting point in sentences for defilement is 14 years. In **Brian Shaba v Republic Criminal Appeal No. 19 of 2014** a teacher defiled a school girl and upon conviction he was sentenced to 18 years imprisonment by Justice Dr Kapindu. That a teacher has defiled a school girl is a serious aggravating matter. A teacher is in a position of a caretaker who is supposed to protect the girl child and not to abuse her or take advantage of her. This is breach of trust which should not be condoned. In **Emmanuel Lino v The Republic Criminal Appeal Cause No.33 of 2018** it was suggested that where the girl child is below 8 years of age, a sentence of not less than 14 years is imposed. Where the girl is less than 12 years of age but more than 8 years, a sentence of not less than 10 years imprisonment may be imposed, and where the girl victim is more than 12 years old, a sentence not less than

7 years may be imposed. Due to the teacher to pupil relationship, I do not wish to tamper with the sentence.

This appeal fails in its entirety.

Pronounced this 20th day of December, 2018 at Chichiri, Blantyre.

M L Kamwambe
JUDGE