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JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
Criminal Appeal No. 36 of 2016
(eCMS 3585 of 2016)
(being criminal case 1105 of 2016, SRM, Blantyre Magistrates' Court)

SOSTEN SIPOLO

V

THE REPUBLIC

JUDGMENT

nyaKaunda Kamanga, J.,

The appellant, Mr. Sosten Sipolo, appeared before the Senior Resident Magistrate sitting at Blantyre Magistrates' Court where upon pleading guilty to a charge of the offence of defilement contrary to section 138(1) of the Penal Code he was found guilty and convicted. On 3rd August 2016 the court imposed a sentence of 18 years imprisonment on the offender.

On 9th August 2016 the legal practitioners for the appellant filed in the High Court a notice of intention to appeal against the judgment that was delivered by the magistrate. The grounds of appeal against conviction are as follows:

1. That the lower court erred in law in convicting the appellant of defilement on a plea of guilty when the appellant had qualified the plea by mentioning that the girl was 16 years old.
2. The lower court erred in law in failing to advise the appellant of the statutory defence for the offence of defilement especially where the appellant had indicated that the girl was 16 years old.

The grounds of appeal against sentence are as follows:

1. The lower court erred in sentencing the appellant to 18 years IHL.

The appellant prays that the conviction herein be quashed. It was request of the appellant that in the event that the conviction is upheld the sentence of 18 years

IHL should be reduced to such a sentence as will lead to the immediate release of the appellant from prison.

Arguments for the Appellant

The appellant argues that the conviction herein cannot stand as the accused person qualified his plea hence the court could not enter a plea of guilty. The qualification was in the form that the accused mentioned that the girl who was allegedly victimized by the appellant was 16 years old. The appellant relies on the cases of *Republic v Benito* 9MLR 211 and *Gama v Republic* [1997] 2MIR 34 to assert that a court can only enter a plea of guilty on an unequivocal plea.

Secondly, the appellant argues that the trial court erred in law in failing to advise the appellant of the statutory defence for the offence of defilement, especially where the appellant had indicated that the girl was 16 years old. The appellant has cited several foreign cases such as the cases of *Alipate Karikari* [1999] 45 FLR 310, *State v Bareki* [1979-1980] BLR 35, *Gare v The State* [2001] 1 BLR 143,CA, *Goosenkwe v The State* [2001] (1) BLR 324, *Pillay v R* [2013] SLR 249 and others to argue that the special defence available in the defilement charge was not brought to the attention of the unrepresented accused. To support his arguments the appellant has also referred to the local case of *Allan Willard v. Republic* Criminal Appeal No. 33 of 2016.

Thirdly, the appellant argues that the lower court erred in law in entering a plea of guilty without having regard to the proviso to section 251 of the Criminal Procedure and Evidence Code. In support of this argument the appellant relies on the cases of *Thokozani Malenga v Republic* Criminal Review No.19 of 2016; *Daniel Chikapenga v Republic* Criminal Appeal No. 21 of 2016 and *Isaac Sitole and Emmanuel Cosmas v. Republic,* Criminal Appeal No. 37 of 2016.

The appellant prays that the conviction for the offence of defilement be quashed and the sentence of 18 years IHL be set aside.

The Respondent's arguments

The Respondent filed their skeletal arguments on 12 February 2018, although they did not attend the hearing of the appeal itself. The Respondent agrees with the appellant that the lower court should have entered a plea of not guilty as the appellant told the court that the girl was 16 years old, thereby qualifying the plea. The prosecution are of the considered view that magistrate should also have ordered a full in order to ascertain if the accused had reasonable belief that the girl was 16 years old. The respondent rely on two of the same foreign case authorities, that of *Alipate Karikari* [1999] 45 FLR 310 and *Gare v The State* [2001] 1 BLR 143,CA , that have been cited by the appellant which hold that the failure of a court to inform an unrepresented accused person of the statutory defence before the plea renders the trial unfair and result in quashing the conviction. Similar to the appellant, the respondent has also referred to the case of *Allan Willard v. Republic* Criminal Appeal No. 33 of 2016.

The prosecution is of the view that the court should order a retrial as the record shows that the appellant admitted to have had carnal knowledge of the girl; the girl was under the age of 16 years; the appellant has only been in custody for 21 months when recent sentencing trends for offence of defilement which has no aggravated factors are in the range of 8 years to 14 years.

The decision

This court agrees with the appellant and the respondent that the plea was qualified and cannot be cured by the narration of the facts by the prosecution. This is due to the fact that the trial court failed to inform the unrepresented accused person and enforce two important provisos. Namely the statutory defence contained in the proviso to section 138 of the Penal Code before the plea taking process as well as the proviso to section 251(2) of the Criminal Procedure and Evidence Code. As was noted in the case of *Marvellous Masamba v Republic* Criminal Appeal No. 21 of 2017 the proviso to section 251(2) of the Criminal Procedure and Evidence Code 'must be respected religiously because it is plays an important role in the administration of the criminal justice system'. The trial court was had an obligation to explain to the accused the consequences of the nature of the admitting the charge before a guilty plea was entered: *Yamikani Paul v Republic* Criminal Appeal no. 16 of 2017. The omission on the part of the court to ascertain that the appellant understood the nature of the plea and that he intended to admit without qualification the truth of the charge against him rendered the plea taking irregular and the sexual offence trial unfair. Further, the appellant being unrepresented during the trial the court had a duty to draw him, as an accused, to the special defence that was available to him and is set in in the proviso to section 138 of the Penal Code: *Yamikani Paul v Republic* Criminal Appeal no. 16 of 2017. The special statutory defence is to the effect that the offence of defilement is not committed where an accused had reasonable belief that the girl victim was of or above the age of 16 years. It is surprising that in the present criminal matter the court did not appreciate the legal effect of the response to the plea when unrepresented accused during plea taking stated that the child who happened to his stepdaughter was '16 years old'. This statement which came from the appellant when the court asked him about the age of the child should have been noted and recorded by the trial magistrate as an entry of the special defence to the offence of defilement as well as a qualification of the plea. The judge in the case of *Stephen Lyton v Republic* Criminal Appeal no. 15 of 2017 made a pertinent observation in regard to the handling of a similar case, which is worth repeating here, when His Lordship noted in the abovementioned case that

> 'It is very clear that the lower court did not use this piece of evidence in the form of statutory defence and I keep wondering why. This evidence should not have been ignored by the court and the prosecution… I find it unfair that it was not taken into account.' at page 3.

When this Court is sitting on appeal it has very wide powers should include the following: to 'reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction or commit him for trial, or direct that he be retried; or alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence; or with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence': *Rep v Mphande* [1995] 2 MLR 586 at 588.

This court agrees with the appellant and the prosecution that the conviction should be quashed and the sentence set aside and a retrial ordered. As has been ably noted by the prosecution this criminal matter satisfies the requirements for ordering a retrial which are stipulated in the case of *Banda & ors v Rep* 10 MLR 142. First, this court has already found that there was an error of law and procedure in the plea taking process which has caused a failure of justice. Secondly, the evidence discloses a case against the appellant in respect of offence charged or some other offence as the appellant admitted having carnal knowledge of the girl victim: *Rep v Phiri* [1992] 15 MLR 441 (HC).

In the meantime the accused is remanded in custody pending the retrial.

The plea of autrefois convict will not be open to the appellant when the matter is called for re-trial. The case must be set down for plea taking within 30 days from the date that the lower court receives the record of this case.

The counsel for the appellant is to serve this order on the Chief Resident Magistrate (South) as well as the Chief State Advocate within 7 days hereof.

Pronounced in open court this 12th day of April 2018 at Chichiri, Blantyre.

Dorothy nyaKaunda Kamanga
JUDGE

Case information:

Date of hearing	13th February 2018.
Mr. F. Maele	Counsel for the Appellant.
Respondent	Served/ Absent.
Mrs. Msimuko	Court Reporter.
Mrs. Munthali	Personal Secretary.
Ms. Million	Court Clerk.