REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CRIMINAL DIVISION
CRIMINAL APPEAL NO. 78 of 2016
(Being criminal case No. 89 of 2015 in the First Grade Magistrate Court Sitting at Rumphi)

Between

Moses Luwe .....Appellant

-and-

The Republic.....Respondent

CORAM:
HOUNORABLE JUSTICE D. A. DEGABRIELE

Mr. D. Shaibu	Counsel for the State
Mr. N. Mdazizira	Counsel for the Appellant
Mrs. L. Munthali	Official Interpreter
Mrs. J. Chirwa	Court Reporter

DeGabriele, J

JUDGEMENT ON APPEAL

Introduction

The appellant was charged, tried and convicted of the offence of defilement contrary to section 138 (1) of the Penal Code. He was sentenced to 12 and half years imprisonment with hard labour from the date of arrest which was the 14th April, 2015. He is appealing against both the conviction and sentence.

The grounds of appeal are that;

a) the conviction was unsafe because there was no sufficient evidence offered by state of prove the case beyond reasonable doubt.
b) the sentence was manifestly excessive

Appeals in the High Court

The Malawi Supreme Court of Appeal laid down the principles that ought to be followed when hearing appeals in the High Court. The Supreme Court held in the case of ***Pryce v Republic (1971-72) 6 ALR (Mal) 65,*** that

> *"In our opinion the proper approach by the High court to an appeal on fact from a magistrates' court is for the court to review the record of the evidence, to weigh conflicting evidence and to draw its own inferences. The court ... must then make up its own mind, not disregarding it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong".*

Therefore, after perusing the record of the lower court, the High Court would come to a conclusion of whether or not there was sufficient evidence to justify the finding of facts and law of the lower court.

The Evidence

PW1 was the victim, who was defiled when she was 6 years old. She gave unsworn testimony. Her evidence was that the appellant defiled her in a millet garden when she was coming from school. Immediately after, she had told NyaKumwenda of what had happened. She said her private parts were painful. She also told the court that the appellant had done this on three occasions and the appellant had threatened her that if she disclosed what was happening he was going to beat her. There was no cross examination from the appellant.

PW2 was NyaKumwenda who told the court that on the material day she went to draw water and met the appellant and they greeted each other. Immediately after that she saw PW1 and asked her a few questions. PW1 then disclosed that the appellant had defiled her in the millet garden and took PW2 to go and see the place. PW2 stated that she saw marks printed by the knees. She then went and told the mother to take the child to the hospital for a check-up. There was no cross examination from the appellant.

PW3 was the mother of the victim who told the court that the victim was now 7 years old. She told the court that on 28th May 2014 PW2 informed her that her child had been defiled by the appellant. She examined the child's private parts and established that her vagina was wider than her age. She took the child to the hospital. The appellant ran away. The medical officers confirmed that there was penetration. The appellant was in hiding for almost a year. In cross examination, PW3 stated that he had told the appellant that evidence would come from the hospital to confirm what he did and she did not know where the appellant had gone after that.

PW4 told the court that the incident occurred in 2014 but the appellant was at large. He was arrested in 2015 and was brought to court on the charge of defilement. The witness tendered the caution statement and the medical report.

DW1 was the appellant himself who told the court that he had gone to his garden on 28th May 2014 to water his crops and he returned home. He states that he heard that he was being accused of defiling PW1. He waited for the parents of PW1 and the police and nothing happened. After one month he left for Mzuzu for shopping. He said that nothing was done by the police and the parents until the year 2015. In cross examination, he stated that he was at home all the time the incident occurred. He also told the court that he had tried to escaped from a moving vehicle after he had been arrested.

DW2 was Kennedy Luwe, the father of the appellant who told the court that he was not a witness to the appellant but rather he had the appellant arrested because he had stolen a goat from him. He also said that on the material day, he was at his home and he did not know where the appellant was.

DW3 was Isaac Kamanga who stated that he knew the appellant but that he was not a witness to the charge he was facing. DW3 stated that he had reported the issue of defilement to the police and the matter was left in their hands.

The Law and analysis of the evidence

In any criminal matter the State has a duty to prove the case beyond reasonable doubt. In the case of defilement, the State has to prove every element of the offence. Section **187(1) of the Criminal Procedure and Evidence Code** provides that,

> *"The burden of proving any particular fact lies on the person who wishes the court or jury as the case may be to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person. Provided that subject to any express provision to the contrary in any written law the burden of proving that a person is guilty of an offence lies upon the prosecution."*

The law stipulates that the burden of proving that a person who is accused of an offence is guilty of that offence lies upon the prosecution. Further, under sub-section (2) of the above section the law places the burden of proving any fact necessary to be proved in order to enable any person to give evidence of another fact is on the person who wishes to give such evidence. A court of law will, on being satisfied that the case has been proved beyond reasonable doubt, convict a person charged with a crime. Failing to prove a criminal matter to the requisite standard of proof beyond reasonable doubt will lead to an acquittal, see ***DPP vs Woolmington (1935) A.C. 462***

The appellant was convicted on the offence of defilement contrary to section 138 (1) of the Penal Code. The section stipulates that;

> *"Any person who unlawfully and carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life".*

The basic elements for the offence of defilement are that the victim must be below the age of 16 years, that there was unlawful carnal knowledge and that there was penetration of the male sexual organs into the female sexual organs of the victim and that the perpetrator must have known that the victim was under the age of 16 years.

In the case of ***The Republic v Bulaziyo (1997) 1 MLR 212 (SCA)*** the supreme court of appeal said as follows;

> *"let it be remembered lest we lose out on the elements of rape and rape related offences with imaginations that rape and defilement offences are reminiscent of one thing in common for the offences to be sustained. There has to be proof by the prosecution or the complainant of penetration".*

The courts in Malawi have held that medical reports are not the only way through which penetration can be proved. In the case of ***Seda v Republic (1997) 1 MLR 386*** Chimasula Phiri J as he was then, stated that

> *"it was not necessary to prove penetration through a medical report only… there was corroborative evidence from the elder sister of the complainant who examined the complainant's private parts immediately after the rape was committed. There was evidence of penetration and of semen and blood coming from inside the vagina."*

The evidence before the lower court showed that there was penetration which was established by the examination of the victim by PW3. It is trite that penetration, however slight and whether or not there is semen, is sufficient to prove the offence of defilement.

The appellant has argued that the medical report in this case was untrustworthy as the examination was conducted after a year. To begin with, this Court agrees with the statement of Madise J in the case of ***Andrew Phiri v The Republic Criminal Appeal No. 63 of 2009*** where he stated that;

> *"It is trite law that rape or defilement can be proved without the support of medical evidence. Elderly women can easily deduce that a girl has been defiled. This has been the tradition of the law in this Republic. However, the law demands that there must be corroboration of the victim's story"*

This court finds that even if the medical report was done at a later stage, penetration had been proved already. While the request for medical examination was made on

17th April 2015, the court notes that behind the page, there is an explanation and examination that took place on 29th August 2014. Further there is an entry on 9th August 2015. This looks to me as a report that was being used and information was added as the matter proceeded. An examination of the report shows that the face of it was the medical reports of one Zgambo and it shows that some documents had been pinned to the top left-hand corner. The letter of request was then authored later on the backside of the medical report, and the response to that letter of request is dated 9th August 2015. Regardless of the mixed dates and the delays for the examination, I still find that penetration was proved on the day the incident occurred.

The appellant has argued that the evidence of PW1 was not corroborated as required under **section 6 of the Oaths, Affirmations and Declarations Act**. Corroboration is defined as any other independent evidence which supports or confirms the victim story or a particular fact that an offence was committed and it was so committed by the accused, see the case of ***Tinazari v. R 3 A.L.R. Mal. 184.*** The courts are called to warn themselves of the dangers of convicting an accused in the absence of corroboration in sexual offences. A conviction is well founded if there is corroboration. Again, where there is no corroboration and the court has warned itself, and is satisfied that the evidence of the complainant is compelling, the court may still convict and the conviction will be found to be safe.

I have looked at the record of the lower court. I find that the lower court was aware that the testimony of PW1 was given as unsworn testimony because of her tender age of 7 years. On page 14 of the judgement of the lower court, the court held that the evidence of PW2 and PW3 as well as the medical report was corroborative of the victim's evidence. While the lower court did not warn itself of the danger of convicting without corroboration, it did in fact discuss and find that the evidence of the victim was corroborated and therefore convicted the appellant. It must be remembered that corroboration in sexual offences though not a matter of law is by legal tradition a matter of practice. I find that the absence of the actual warning did not prejudice the

appellant because the evidence of PW1 was found to have been sufficiently corroborated.

I find that the evidence of PW2 confirmed the victim's claim that she had been defiled by placing the victim and the appellant at the same time and seeing the scene of crime with the knees imprinted in the sand or soil. The argument by the appellant that in May the ground is hard and dry does not make sense because it still is raining in the Northern Region of Malawi. The ground is normally still soft. The evidence of the victim was further corroborated by the mother PW3 who examined the girl and found out that her vagina was wider than is normally the case for her age group. The evidence of PW3 also corroborated that the victim was indeed 6 years old when the offence happened. The appellant has argued that the victim did not cry or call for help when she was being defiled and that the victim walked without difficult after the ordeal; meaning that she was not defiled. The evidence of PW3 and the medical report shows that there was penetration. Further, it was the evidence of PW1 that the defilement occurred on 3 occasions, an in that case she may have had pain but not as much as the first time it happened. The appellant did not challenge this evidence at all. From this evidence, I find that the unsworn evidence of the victim was sufficiently corroborated and the lower court was right in convicting the appellant.

The appellant argues that the evidence before the lower court was contradictory and cites the case of ***Kagwa v The Republic 14 MLR 138,145*** which held that where the prosecution evidence on a particular matter by two witnesses or more and that evidence is contradictory, any doubt raised by such contradiction must be resolved in the accused person's favour. The applicant claims that the offence was allegedly committed on 28th May 2014 but PW1 did not stated the date when the offence occurred. Further he states that PW2 stated that the offence occurred on 29th May 2014 and PW3 stated she was told 28th May 2014. He argues that the investigator never gave the evidence of when this offence occurred. He also argues that the letter for examination to the District Health Officer was written on 17th April 2015. The

appellant claims that this should have raised doubts in the mind of the court on whether or not the offence had occurred.

I have looked at the evidence and agree that the dates in the whole case are not well articulated. However, the evidence as a whole show that on the material day, the 28th of May 2014, the offence of defilement took place. The appellant stated in his own evidence that after his garden he went home, but his purported witness, his father who was DW2 stated that he was at home but the appellant was not at home. The appellant did not himself question the dates in the evidence of PW1, PW2 and PW3. He acknowledges that on the material day, 28th May 2014, he was at his garden. Therefore, it is clear that there was no doubt as to the date. The appellant himself was able to confirm the date of 28th May 2014 as the right date. Had the appellant disputed the date or shown that he was not in the village on the material day, then there would have been some doubt which the court would have resolved in his favour. I do not find that the lack of clarity on the dates was an irregularity which was fatal as to occasion a failure of justice. The appellant was not prejudiced in any way.

The appellant has attempted to show that he is not the one who committed the offence. The evidence shows that he was in the village and at the gardens on 28th May 2014. He was also aware that he was being accused of defiling the victim. His story that he waited around for a month and nothing was done so he let to go to Mzuzu for shopping was unbelievable. It was more probable than not that after he heard that he was being accused he run away. This is solidified by his evidence in the lower court that when he was arrested he even attempted to escape from a moving vehicle. This shows how desperate he was that he should not be caught. The appellant called witnesses who could not vouch for him at all. His own father stated that he had the appellant arrested from stealing a goat from him. This shows that the appellant was not an honest and upright man. The appellant claimed that he was home but his own father stated that he was home and the appellant was not at home, supporting the fact that the appellant ran away after he was aware that fact of defilement was now known. One wonders how a person can go to Mzuzu for shopping and stay away for a period

of nearly a year without returning with the shopping. I therefore find that the circumstantial evidence is made stronger by the appellant's own evidence and conduct to show that it was the appellant who defiled the victim.

Therefore, I find that the appeal against conviction fails in its entirety and the conviction by the lower court is hereby confirmed.

The appellant has appealed against the sentence, stating that it was excessive in the circumstances. The offence of defilement is punishable by a maximum sentence of life imprisonment. Under **section 340(1) of the Criminal Procedure and Evidence Code** the laws provides that first offenders must be considered for non-custodial sentences as outlined under section 339 of the criminal procedure and Evidence Code, unless such a non-custodial sentence is not the appropriate means of dealing with the convict. The reasons for deciding on a custodial sentence must be well articulated in the record. While it is plausible that a serious felony can be punished by a suspended sentence where there are strong mitigating factors to support such an action, it is rare that courts will impose suspended sentences for serious offences. In the case of ***Rep v Makanjila [1997] 2 MLR 150 HC***, Mwaungulu J as he was then, quoted with approval the words of Ewbank J in the case of ***R v Richardson and Another The times 10 February 1988***, that

> *"there are some crimes so heinous that a plea of youth, a plea that the crime was a first offence or that the prisoner has not been to prison before are of little relevance. Those who participate in them, even if they pleaded guilty, even if they were young, even if they have no previous convictions, even if the victims were not brutalised in the presence of young children, should know that they will be subjected to long and immediate custodial sentences. If the victims are young or old, the sentence would be even longer."*

This is one such a case where a custodial sentence is the appropriate way to deal with the offender. A sentence must fit the offence and the offender but also reflect the general feeling of the public and not outrage the public's sense of morality.

The appellant was 22 years old when he committed the offence and he was a first offender. However, the offence is aggravated by the fact that the victim was 6 years old, the appellant had defiled her on 3 occasions, and the appellant had escaped justice for a period of almost a year. Indeed, it was held in the case of ***The Republic v Kathumba (1997) 1 MLR 390*** that where the offenders are young and first-time offenders, the court must always remember that a shorter sentence could be just as effective as a longer sentence. Looking at the case before me, the aggravating factors outweigh the mitigating factors. In the case of ***Kingstone Kambalame v Rep Criminal Appeal No 39 of 2009*** the appellant was on his own plea of guilty convicted of the offence of defilement and sentenced to 12 years imprisonment with hard labour. His sentence was only reduced to 9 years imprisonment on account of his plea of guilty. The appellant herein did not plead guilty. The appellant herein was sentenced to 150 months imprisonment out of a maximum of life imprisonment. I find that in the circumstances of this case, the sentence was not manifestly excessive. Therefore, I confirm the sentence as passed by the lower court; the appellant will serve 150 months imprisonment with hard labour with effect from 14th April 2015 which was the date of his arrest.

The appeal against the sentence fails in its entirety.

Made in Chambers at MZUZU REGISTRY this 8th day of February 2018

D.A. DEGABRIELE

JUDGE