HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
Sitting at Balntyre
Criminal Appeal No. 46 of 2018
(being Criminal Cause no.190 of 2017, SGM, Chisenjere Magistrates' Court)

THE REPUBLIC

V

ERNEST CHIKAFA

JUDGMENT ON APPEAL

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nyaKaunda Kamanga, J.,

On 20th June 2017 the 35 years old defendant, who is now the respondent to this appeal, Mr. Ernest Chikafa, appeared before the Second Grade Magistrate, sitting at Chisenjere Magistrates' Court where he pleaded not guilty to a charge of the offence of indecent assault on a female contrary to section 137(1) of the Penal Code. At the case to answer stage of the trial the magistrate acquitted the defendant on the said charge after he had made a ruling on 7th November 2017 that the accused had no case to answer as the prosecution had failed to establish a *prima facie* case against the accused requiring him to enter a defence. The Director of Public Prosecutions being dissatisfied on a point of law with the decision of the Second Grade Magistrate acquitting the defendant on a charge of indecent assault against a female at the case to answer stage of the trial, after obtaining leave of the court on 24th August 2018 which pave way for the filing of the petition of appeal and the hearing. In the petition which was taken under section 350 of the Criminal Procedure and Evidence Code (hereinafter the CP and EC) and the Director of Public Prosecutions appeals to the High Court on the following grounds:

1. That the learned magistrate erred in law by taking age to be an element for the offence of indecent assault on a female.
2. That the learned magistrate erred in law in acquitting the accused person on a charge of indecent assault on a female at the case to answer stage of the trial, the same not being supported by the evidence.

3. That the learned magistrate erred in law in not adding a new charge or charges against the accused person for the offence or offences disclosed by the evidence.

The relief which the prosecution seeks on this appeal are as follows:

1. the decision to acquit the accuse person at the case to answer stage of the trial be reversed.
2. The accused person be found with a case to answer on the charge or other charges and be required to enter his defence.
3. Any other relief that the court may deem appropriate.

The appellant filed skeleton argument in support of the grounds of appeal which the court will subsequently refer to in the judgment. The respondent opposes the appeal, as is shown in the skeleton arguments that were filed on his behalf, and his prayer is that the prosecution's appeal should be dismissed and that the reliefs sought should not be granted.

The arguments of the appellant and respondent

The court acknowledges and appreciates the legal research work that was done by the Senior State Advocate and the legal practitioner for the respondent in preparing the skeleton argument that have been filed in this appeal matter.

On the first issue of whether the learned magistrate erred in law by taking age to be an element for the offence of indecent assault on a female the appellant argues that the magistrate misdirected himself by taking age of a girl to be an element of the offence of indecent assault when the magistrate stated in his ruling that 'the elements of the case are that, the girl be aged 16 years and that the accused indecently assaulted her'. The appellant correctly submits that the section under which the offence of indecent assault on a female is provided for does not have age as an element of the offence.

While the respondent agrees with the prosecution that the offence of indecent assault under section 137(1) of the Penal Code is not age specific he contends that subsection 2 of section 137 is irrelevant in this case as at no point did the respondent plead consent as a defence. The respondent is of the view that the lower court did not regard age as a necessary element of the offence. The respondent submits that if age was regarded as an element, which he submits was not the case, the said error was of no consequence since the respondent's acquittal was based on the lack of evidence for the assault itself therefore age could not affect the conclusion of the court.

In regard to the second issue, of whether the learned magistrate erred in law in acquitting the accused person on a charge of indecent assault on a female at the case to answer stage of the trial, the same not being supported by the evidence the appellant rely on the s 254(1) of the CP and EC and the case of *Hemin v Wheeler* [1948] 2 QB 61 to contend that there is sufficient evidence on the record of the case to establish a *prima facie* case against the defendant/respondent on a charge of indecent assault on a female. The appellant points out some three occasions when the defendant indecently assaulted the victim and asserts that such evidence was not disputed nor discredited during cross examination.

On this same second issue for determination, the respondent asserts that the court did not error in acquitting the respondent because apart from the evidence of the victim herself, the evidence of all other witnesses is hearsay as far as the truth of the alleged assault is concerned. The respondent also contends that the evidence of the victim was so discredited in that she allegedly lacked consistency in her versions and that impeached the reliability of her testimony. The respondent is of the view that as much as the medical evidence may establish that the victim may have been carnally known, the same does not establish the identity of the man nor does it prove that her breasts were touched by the respondent.

The third issue for consideration is whether the learned magistrate erred in law in not adding a new charge or charges against the accused person for the offence or offences disclosed by the evidence. The prosecution asserts that under s 254(2) of the CP and EC the lower court was under a duty to evaluate the prosecution's evidence to establish whether the evidence had proved the offence charged or other offence or offences other than that the defendant was charged with but was disclosed by the evidence subject to the provisions of section 151 of the CP and EC. The appellant is of the view that depending on the finding of the age of the victim witness, the accused person was also supposed to be charged with the offence of defilement or rape as there is no dispute that the defendant had sexual intercourse with the victim witness on three different occasions between 2013 and 2017. The appellant contends that the medical report tendered in evidence indicated that the victim witness was sexually active and that there were bruises in her genitals. That this particular piece of evidence was not discredited in cross examination as the victim stated that she never slept with any other man apart from the accused person. The appellant also submits that the evidence adduced by the prosecution discloses an offence under section 159(A) of the Penal Code as the defendant had sexual intercourse with a female under the age of 21 years who was under his care or protection.

According to the respondent the power of the court to add or alter charges under s 151 of the CP and EC is not mandatory. The respondent asserts that the lower court was not bound to add or alter the charges as the prosecution would like to make the court believe. It is the view of the legal practitioner for the respondent that the lower court did not err in adding or substituting the charges, as a court cannot make a finding of no case to answer on a charge of indecent assault, and then substitute the same with a charge of rape or defilement, the commission of which necessarily involves indecent assault. This court is of the view that it seems that counsel for the respondent has deliberately elected to frame his arguments in a narrow sense in regard to the powers of a court in alteration of charges.

The decision

The major issue for consideration in this appeal is whether at the close of the prosecution's case the prosecution's evidence had been sufficiently made out against the accused person to require him to make a defence. The case of *Gwazantini v Republic* [2004] MLR 75, holds that a *prima facie* case is made if on the evidence adduced, a reasonable tribunal "could convict" as opposed to "would convict" on it. In that it should just be merely possible that a reasonable tribunal may possibly convict on as opposed to evidence that a tribunal will convict on it. It is not disputed that the burden of proving the guilt of an accused person lies in the prosecution in any criminal matter. In that the prosecution is required to prove all the elements of an offence that an accused person is charged with: *Woolmington v DPP* [1935] AC 462; section 187 of the CP and EC. A trial court will make a finding of a case to answer where a reasonable tribunal might convict on the evidence so far laid before it: *DPP v Chimphonda* [1973-74] 7 MLR (Mal) 94 and *Lemos Mpasu v Republic* [2009] MLR 282. On the other hand, the case of *Republic v Mkhondiya and others* [2012] MLR 414 is good authority for the principle that a court will find a no case to answer if there is lack of evidence to prove the essential elements of the offence. The standard of proof at this stage is lower than is required for a conviction. This appeal court has to subject the evidence that was before the subordinate court to a fresh scrutiny and consider if there was evidence proving the essential elements of the offence of indecent assault on a female or if the evidence adduced by the prosecution had been so discredited as a result of cross examination or was so manifestly unreliable that a reasonable tribunal could not safely convict on it: *Namonde v Republic* [1993] 16(2) MLR 657.

The case of indecent assault on a female which the defendant was answering in the magistrates' court is provided for in s 137(1) of the Penal Code and is not age specific. Section 137(1) of the Penal Code is worded as follows:

'Any person who unlawfully and indecently assaults any woman or girl shall be guilty of a felony and shall be liable to imprisonment for fourteen years.'

An examination of the subordinate court's record of the case of this criminal matter, the petition and grounds of appeal, the skeleton arguments filed by the parties for consideration in this appeal process shows that the evidence clearly make out a more than *prima facie* case that the defendant committed the offence of indecent assault on a female contrary to section 137(1) of the Penal Code that he was charged with as well as other offences which will be outlined below. This court finds as follows on the issues that were raised for determination:

1. First, the appellant is correct in arguing that the magistrate misdirected himself on a point of law when on page 9 of his ruling he took age as an element of the offence of indecent assault on a female. This offence can be committed against any girl or woman of any age. The reference to the age of 16 years in s 137(2) of the Penal Code concerns consent not being a defence in respect of girls below the age of 16 years. Still on the issue of age, the magistrate misled himself on the age of the victim when he accepted the analysis of the defence that the victim witness was above 16 years old without making a finding on the evidence in regard to her age. The evidence on record reveals that the institution on admitting the victim on 1st November 2011 completed the child case record, which appears in schedule 3 as form 3A, and is exhibit marked IDD1, which indicates that the victim was born in 1999. This form, which must have been known to the defendant, must be taken to more accurately reflect the year of birth the victim. This court is of the view that the victim must have been 18 years old when the issue of sexual abuse was being reported to police and when she was being examined at the One Stop Centre. When the first incident occurred in 2013 she must have been 14 years old and she must have been 17 years old during the second incident of sexual abuse. The first ground of appeal succeeds.

2. Secondly, the record of case reveals that the victim, PW1, testified that the defendant indecently assaulted her on three occasions starting in the year 2013 when the defendant indecently assaulted the victim at his office, thereafter she was also indecently assaulted in 2016 at a grave yard and then during the night in 2017 when the defendant had called her to his office. These incidents of assault which were clearly sexual in nature and can be regarded as offensive to any standard of modesty and privacy were neither disputed nor discredited by the defendant and are sufficient evidence to establish a *prima facie* case of indecent assault and sexual violence against the female victim in this criminal

matter by the defendant as required by the law and properly explained in the case of *Gwazantini v Republic* [2004] MLR 75. The magistrate's finding in his ruling on pages 9 and 10 that the prosecution had failed to prove that the defendant touched the breasts of the victim are not supported by the evidence on the record as the prosecution did not allege any specific incident of assault.

The evidence of PW2 and PW3 that the victim revealed to them that she was being sexually abused by the defendant is not hearsay as argued by the defendant as these witnesses were stating facts to establish that certain statements were made by PW1 which helps to show the consistency of the conduct of PW1 in making an effort to report the sexual abuse to her friend PW2 and to the head of education and children welfare, PW3: s 232(1) of the CP and EC. The evidence of these two witnesses also corroborates the victim's evidence on the allegations of sexual abuse while she was at the institution: s 232(2) of the CP and EC. Further, the defendant's arguments in regard to the medical report, exhibit marked B1, are without substance since the medical report is directly linked to the defendant because he is mentioned as the perpetrator of the sexual abuse and this court finds that the conditions under s 180 of the CP and EC were complied with as the said report was served on the defendant and he acknowledged receipt of it by appending his name and signature on the document. This court finds that the trial magistrate's finding of no case to answer and the resultant acquittal of the defendant had not basis on the available evidence and in law. The second ground of appeal succeeds.

3. In addition to the above findings, the trial magistrate erred in law when he failed to apply s 254(2) of the CP and EC by neglecting to consider the evidence and any other offence or offences it disclosed. The trial magistrate misdirected himself in holding the view that since the charge was indecent assault he was not required to consider the offences of defilement or rape. As the Senior State Advocate who appears for the appellant has correctly argued, the law placed the magistrate under a duty to alter the charge, subject to section 151 of the CP and EC if the evidence disclosed any offence or offences other than that charged. It is the view that after the magistrate had accurately analysed and considered the evidence he should have made a finding of whether or not alternative offences are disclosed before making a decision of whether or not he could alter the charge.

In regard to the first limb of the exercise, this court having subjected the evidence that was before the lower court to proper scrutiny finds that the prosecution evidence clearly discloses that the defendant committed other offences other than that of indecent assault on a female. All these are offences that are classified to be against morality under Part XV of the Penal Code. As

has already been noted above, medical report strongly corroborates the evidence of the victim witness that she was sexually abused because the defendant was having sexual intercourse with her which resulted in her experiencing pain and sustaining bruises on her genitals. The defence never refuted her evidence that she had not slept with any other man apart from the defendant. Other factors that augment the ongoing sexual abuse are the fact that the defendant advised his wife, who abetted the commission of the crimes, by supplying the victim with family planning pills which the victim was advised to take daily. The fact that the victim was also threatened with eviction from the institution if she revealed that the defendant was sexually abusing her negates any consent on the part of the victim.

The evidence obviously reveals that the defendant, who was the house father of the victim at an orphanage, apart from committing the offence that he was charged he also did commit three other sexual offences: first, that of having sexual intercourse with a female under the age of 21 years old who was under his care and protection contrary to section 159A of the Penal Code during the period that PW1 was at the institution; secondly, the offence of defilement contrary to section 138(1) of the Penal Code during the first incident of sexual abuse and thirdly, the offence of rape contrary to section 133 of the Penal Code during the second and third incident of sexual abuse. This revelation and finding puts into question the prosecution discretion in charging a single count against the defendant when the evidence that was in possession of the prosecution reveals more and serious offences. If the prosecution had conducted a proper evidential test that should have been satisfied that there was enough evidence to provide 'a realistic prospect of conviction' against the defendant on the additional offences that I have been identified and listed above.

The prosecution having missed out on this process it was still left with the magistrate to identify the alternative charges revealed from the evidence that was presented to him, as has just been done above, following which process he should have moved to the second stage of the exercise by assessing whether as a trial magistrate he was competent to alter and amend the charge that had been proffered by the prosecution. This is where the real challenge comes in this criminal factor because the defendant having being charged with a lesser sexual offence of indecent assault on a female the magistrate was in terms of section 155 of the CP and EC constrained from substituting in this criminal matter an alternative charge and verdict of a higher sexual offence, such as that of rape or defilement, that was revealed by the evidence. This constraint was coupled with the fact that the Second Grade Magistrate who

tried this case has no jurisdiction under section 13(2) of the CP and EC to preside over offences under sections 133 and 138 of the Penal Code.

However, the Second Grade Magistrate had jurisdiction to try the offence that was revealed from the evidence that falls under section 159A of the Penal Code and it being a lesser offence from the perspective of maximum punishment of 5 years imprisonment that is provided in the penal provision than the sentence of 14 years imprisonment for indecent assault on female, the magistrate should have invoked section 151(2)(b) of the CP and EC and ordered the alteration of the charge by way of adding a new charge of having sexual intercourse with a female under the age of 21 years old who was under the care and protection of the defendant contrary to section 159A of the Penal Code. Alterations, substitutions, additions of the charge may be done at any stage before the magistrates' court complies with section 254 CP and EC: *Mapopa Msukwa v Rep* Crim App 24 of 2018. The magistrate made a judicial error which has been rectified on appeal as it would have been a great miscarriage of justice and not a fair trial to sustain the trial magistrate's order finding him with no case to answer as well as to fail to make an order of alteration the charge. The magistrate should have seriously evaluated and analysed the evidence of the prosecution and applied his judicial mind before making a finding of whether or not the prosecution has established a *prima facie* case. Generally magistrates should avoid accepting unwittingly and adopting in a wholesale manner submissions of a legal practitioner for an accused person on no case to answer.

Having considered the evidence that was before the trial court this court proceeds to allow the appeal and finds that in terms of s 254(2) of the CP and EC the prosecution had presented sufficient evidence to establish a *prima facie* case against the defendant as an accused person for the offence of indecent assault on a female requiring him to enter his defence. Further, after a careful examination of the evidence and the law and the circumstances of this case this court finds that it will only be fair and just to invoke section 254(2) of the CP and EC as read with section 151(2)(b) of the CP and EC and order for the alteration of the charge by way of addition of the offence of having sexual intercourse with a female who is under twenty years of age and who is under one's care or protection contrary to section 159A of the Penal Code which is disclosed by the evidence.

Having found that in the criminal matter at hand, the evidence received from the prosecution witnesses was strong and linked the accused person to the offence that his was charged with as well as the offences of defilement, rape and sexual intercourse with minors under one's care or protection, in accordance with section 353(2) of the CP and EC this court reverses the decision of the trial court and orders that this criminal matter be and is hereby remitted to the subordinate court with a direction to proceed with the trial and call on the defence case in

accordance with sections 253(3) and (4) of the CP and EC and section 255 of the CP and EC. The trial magistrate must enter a case to answer on the two counts mentioned above, namely the offence of indecent assault on a female contrary to section 137(1) of the Penal Code and having sexual intercourse with a female who is under twenty years of age and who is under one's care or protection contrary to section 159A of the Penal Code, and he must guide the defendant by inviting him to either choose one of the four options mentioned below in defence or find some other appropriate way of conducting his defence. In brief the suggested four options open to the defendant as an accused person include but are not limited to:

1. exercising his right to remain silent by not testifying or calling witnesses;
2. testifying and calling witnesses;
3. testifying and not calling witnesses;
4. calling witnesses and not testifying.

In the meantime it is also ordered that:

1. The defendant is to continue reporting for bail on the terms and conditions that were set out by the trial court.
2. The prosecution should file a notice of directions hearing in the subordinate court so that the trial Magistrate can set down the matter and give appropriate directions for further conduct of this criminal matter and a date for the commencement of the defence case.
3. The Registrar should facilitate the translation of this judgment into braille for the benefit of the Senior State Advocate who appears on behalf of the Director of Public Prosecutions as well as court users in a similar position.

In conclusion then, all the three grounds of appeal succeeds and this court has decided that the finding of not guilty and the resultant acquittal of the respondent following the magistrate making a finding of no case to answer on the part of the defendant/respondent was not supported by the evidence on the record of the case as the prosecution evidence was sufficient to establish a *prima facie* case.

Any party dissatisfied with this judgment is at liberty to appeal.

Pronounced in open court this 28th day of January 2019 at Chichiri, Blantyre

Dorothy nyaKaunda Kamanga
JUDGE

Case Information	:	
Dates of hearing	:	23rd October 2018, 17th December 2018.
Defendant/ respondent	:	Present & represented
Mr. Kuyokwa	:	Senior State Advocate for the appellant.
Mr. Mlambe	:	Counsel for the defendant/ respondent.
Ms. Mthunzi & Ms. Chiusiwa	:	Principal Court Reporter & Court Reporter.
Ms. F. Ngoma	:	Court Clerk.