



**IN THE HIGH COURT OF MALAWI**

MZUZU REGISTRY

REFERRAL CASE NO. 1 OF 2020

(Being Criminal Case No. 493 of 2019 in the CRM Court sitting at Mzuzu)

**REPUBLIC**

**VERSUS**

**THOMAS CHAVULA**

CORAM: HON. JUSTICE T.R. LIGOWE

**SENTENCE**

Ligowe J

- 1 The Chief Resident Magistrate referred this case to the High Court for sentencing pursuant to section 14 (6) of the Criminal Procedure and Evidence Code. The provision states: -  
“Where in a trial by a subordinate court a person is convicted of an offence, if the court is of the opinion that greater punishment should be inflicted for the offence than it has power to inflict, the court may, for reasons to be recorded in writing on the record of the case, instead of dealing with him in any other manner, commit him to the High Court or to another subordinate court of higher grade than itself for sentence.”
  
- 2 The Chief Resident Magistrate has power under section 14(1) of the Criminal Procedure and Evidence Code, to pass any sentence, other than a sentence of death or a sentence of imprisonment for a term exceeding twenty-one years, authorized by the Penal Code or any other written law.

- 3 In this case, the Chief Resident Magistrate convicted Thomas Chavula of three counts of defilement contrary to section 138 (1) of the Penal Code. In the first count, Thomas Chavula between 2016 and 2019 at Ching'ambo location in Mzuzu City, had carnal knowledge of TP, a girl aged 11. The lower court found that TP was a step-daughter to Thomas Chavula and he was used to defiling her, whenever her mother and siblings were away from home since 2016. One incident TP described in court was when her mother and grandmother had gone out for prayers. The father called her into his bedroom to move some things, but he laid her on the bed, took his penis and inserted it in her vagina. She felt pain with this, but she could not scream because he had immersed his mouth in hers. Afterwards her vagina was sore and she saw some whitish discharge. She did not report the incident because the convict was intimidating her and she was weary of destabilising her mother's marriage.
- 4 In the second count, Thomas Chavula in the month of March 2019, at Ching'ambo location in Mzuzu City had carnal knowledge of CN, a girl aged three years and four months. She was a child of Thomas Chavula's neighbour at the location. The girl's own evidence was that the convict did "vauzeleza" to her in his bedroom, meaning "silly things." The Chief Resident Magistrate found that the girl could use that word for a wide range of sexual activities apart from penetration. But medical examination concluded that she had bruises indicative of penetration. Since the hymen was intact, the medical practitioner who examined her testified that her opinion was that penetration was likely partial.
- 5 In the third count, Thomas Chavula, on 11<sup>th</sup> August 2019, at Ching'ambo location in Mzuzu City, had carnal knowledge of MN, a girl aged nine. She was a child of a tenant at Thomas Chavula's house at the location. In her evidence she told the court that the convict invited her to his house. He then got hold of her and placed her in between his legs and defiled her. Later, she noticed some fluid and blood from her vagina. Her medical examination a week later, showed that she had bruises surrounding her genitalia and that the hymen was torn.
- 6 It was submitted before the Chief Resident Magistrate by the prosecutor that although the convict is a first offender, the court has to consider the seriousness of the offence as shown

by its maximum penalty, and its prevalence in the City. No week passes without the court registering a case of defilement. The prosecutor also submitted that the convict planned to commit the offences as he used his bedroom to defile the girls. The girls were traumatized and may not get over the experience. The convict had the duty to protect them, especially TP, being his step-daughter.

7 The convict prayed for forgiveness and lenience, citing his three children born in 2003, 2006 and 2009 respectively, staying alone at his home.

8 The Chief Resident Magistrate agreed with the submission of the prosecutor. Regarding the seriousness of the offence, she cited *Emmanuel Lino v. Rep*, Criminal Appeal No. 33 of 2018 (Principal Registry) (unreported) where it was held that the objective of the offence is to protect the girl child from ruining her development. She also agreed that the convict pre-meditated and planned to defile the girls as he craftily sent them to his bedroom as though to perform some task for him, leaving them with no reason to suspect any foul play. She further notes that the girls were obviously vulnerable because of the trust they had in him as a step-father, neighbour and landlord. He betrayed this trust by his conduct. The Magistrate also considers the trauma the girls suffered physically and emotionally and states: -

“The victims in the second and third count sustained bruises in their vagina due to penetration. Due to the repeated penetration, the body of the victim in the first count may have possibly adapted to the trauma hence the absence of bruises. It also came out in evidence that a long time had elapsed between the last incident and the date of examination. The convict has robbed them of that very choice regarding sexual debut. The offences are quite prevalent these days. This is the reason courts ought to impose meaningful sentences which take into account all relevant factors.”

9 The Magistrate also considered the convict is a first offender entitled to consideration of non-custodial sentences under section 340 of the Criminal Procedure and Evidence Code. She also considered his age at 37 when he started defiling his step-daughter and opined that he was fully matured to face the full rigour of the punishment as held in *Rep v. Keke*,

Conf. Case No. 404 of 2010 (Principal Registry) (unreported). She did not consider his plea for the plight of his children in view of the fact that he in the first place had no regard for the children he defiled and that they were much younger. His step daughter was eight years old when he started to defile her. I can only add the views of Chimasula J in *Rep v. Asidi and another*, Conf. Case No. 955 of 1999 where he said: -

“Imprisonment certainly involves hardship to family and dependants. Courts always hear these pleas. They are matters that defendants must expect if they commit crimes. If courts listen to these pleas more often, they will be preoccupied with the plight of the defendant’s relations and ignore the crime the defendant has committed. It is only where there is prospect of serious hardship to family that courts out of mercy allow domestic considerations.”

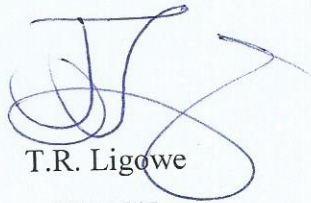
- 10 The Magistrate then considered a few case authorities that prompted her to commit the case to the High Court for sentencing. The first is *Brian Shaba v. Rep.* Criminal Appeal 19 of 2014 (High Court, Mzuzu Registry) (unreported). The appellant had been sentenced to imprisonment for six years by the Magistrate’s Court after a full trial. He was a teacher and 47 years old. He defiled a girl from his class 12 years old. He had asked three girls to take his books to his house. He instructed two girls to leave the books on the veranda and go back, but the victim to proceed into the house. As she walked out after dropping the books, he asked her to sit on the chair and asked for her age. When she answered he proposed if he could carry her in his arms but she refused. He persisted with his advances until the girl tried to escape, but he stoned her and she fell down. He then grabbed her, told her to sit on the chair and started touching her breasts. She started crying but he told her to stop as he would give her notebooks afterwards. He then dragged her to his bedroom, undressed her, undressed himself and defiled her. She was crying. Afterwards he told her not to tell anyone. He went outside to talk to some people and then came back to defile her again. Afterwards he repeated that she should not tell anyone, for the sake of his reputation, and gave her two notebooks. In view of these circumstances, and considering the case of *Rep v. Bright Jamali*, Conf. Case No. 421 of 2013 (High Court, Principal Registry) (unreported), which set out imprisonment for 14 years as the starting point for defilement, the High Court enhanced the sentence to 18 years.

- 11 The next is *Rep v. Aaron Mkandawire*, Conf. case No. 2 of 2019 (Mzuzu Registry) (unreported). An 82-year-old man who defiled a girl aged nine, had been sentenced to imprisonment for eight years but this court enhanced it to 14. The girl was his step-daughter in that he was once married to her mother. He used to provide her with school needs and she would help him with fetching water sometimes. The day he defiled her, he called her with a friend to draw water for him. When they came, he sent the other girl to buy Cafenol for him. Meanwhile, he pulled the girl he defiled into his house and while she was standing on the door to his bedroom, opened the zip for his trousers. When she tried to run away, he tripped her by the legs, climbed on top of her and penetrated her through the vagina and the anus. He stopped when he heard the footsteps of the other girl coming. He warned her against reporting the incident to anyone threatening that because he was an herbalist, his charms would kill her. The girl had problems walking home because of pain. She walked legs apart with the friend supporting her all the way home. Medical examination revealed a whitish foul discharge and bruises on the labia and lacerations around the anus.
- 12 The last case is *Andrew Mwanja v. The State*, Criminal Appeal No. 85 of 2018. This court confirmed a sentence of imprisonment for 10 years for a 34-year-old man who defile a girl aged 13. The man was a cousin to the girl as he was the girl's mother's nephew. He took the girl and her brother on a motorbike to the grocery shop to buy them some things. The girl had denied his proposal for love at the shop and on the way back he defiled her. He also had planned to commit the offence because he had to stop the motorbike and cause the girl's brother to wait for it while he pushed the girl into the bush to defile her. She felt pain and was bleeding from her vagina as a result, and she developed sores.
- 13 For the Chief Resident Magistrate to commit the case to the High court for sentencing it means her view was that a sentence beyond imprisonment for 21 years is appropriate for this case. I do not think that upon such committal then the High Court should impose the expected penalty without scrutiny of the circumstances of the case. At this point the High Court assumes jurisdiction of the case and should, like in all other cases, weigh the aggravating and mitigating factors, to determine whether indeed the sentence suggested by the lower court is appropriate.

- 14 In this case it has to be remembered that there are three separate counts on which the offender was convicted. He has to be sentenced on each of them. Then the court has to determine whether the sentences should run concurrently. Section 17 (1) of the Criminal Procedure and Evidence Code provides: -
- “Where a person is convicted at one trial of two or more distinct offences the court may sentence him, for such offences, to the several punishments prescribed therefor which such court is competent to impose; such punishments, when consisting of imprisonment, to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.”
- 15 Regarding the first count, Thomas Chavula defiled the girl repeatedly over a period of three years from when she was nine years old to when she was 11. In the instance mentioned by the girl, he used a deceptive tact to get her into his bedroom. The girl was injured in her private parts. At his age and her relationship with her, he indeed breached her trust in him and his duty to protect her as a child and as a girl. I see no much difference in this instance from the case of *Brian Shaba v. Rep.* Criminal Appeal 19 of 2014 (High Court, Mzuzu Registry) (unreported). What aggravates this case more than *Brian Shaba* though, is that Thomas Chavula defiled the girl repeatedly over the three-year period. At the age of 41 he was matured enough to appreciate the consequences of his acts. Considering that he defiled three girls in his vicinity, it seems some kind of habit had developed in him. He is therefore dangerous to society. He should really be kept away for a long time. I order imprisonment for 24 years with hard labour.
- 16 Regarding the second count, it is so difficult to understand what he was up to in having sex with a three-year-old girl. However, because it was once, I sentence him to imprisonment for 18 years with hard labour.
- 17 In the third count, the girl is younger than in the first count, but older than in the second count and he defiled her once. I sentence him to imprisonment with hard labour for 16 years.

18 It remains to decide whether the sentences should run concurrently. There is a discussion of the principles to apply in *Republic v. George Nthambo*, Conf. Case No. 275 of 2018 (Mzuzu Registry) (unreported). To allow the sentences to run consecutively results in him being in prison for the next 58 years. That is obviously too much and tantamount to inhuman and degrading treatment. I order the sentences to run concurrently.

19 Pronounced in open court this 6<sup>th</sup> day of November 2020.



T.R. Ligowe  
**JUDGE**