

**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE NO. 329 OF 2021**

(Being Criminal Case Number 73 of 2021 before the SRM sitting at Mwanza)

**BETWEEN:
THE REPUBLIC
AND
SYMON MACHESO**

CORAM: THE HONOURABLE JUSTICE J. CHIRWA

Ms. L. Kulesi, Senior State Advocate for the State.

Mrs. L. Masowa, Senior Legal Aid Advocate for the
Accused.

R. Chanonga, Official Court Interpreter.

Mrs. Msimuko, Court Reporter.

JUDGMENT

1.0 Background:-

Symon Macheso, the Convict herein, was charged in Senior Resident Magistrate's Court sitting at Mwanza with the offence of defilement contrary to Section 138(1) of the Penal Code. He was convicted after a full trial and was sentenced to 20 years' imprisonment with hard labour.

The case was set down to consider the propriety of the conviction and sentence.

2.0 Facts:-

The facts of the case are that the Convict herein in the year 2020 at Kulima Village in the district of Mwanza had unlawful carnal knowledge of "DM", a girl under the age of 16 years.

3.0 The positions of the parties hereto:-

(a) The State's position;

It is the submission of the State that the facts of the case fit well under the offence of Incest under Section 157 of the Penal Code since the perpetrator was a very close relation with the Victim. It is the further submission of the State that the offence of Incest, unlike simply defilement, requires that the offender must have known that the Victim was a close relation. It is thus the contention of the State that the prosecution was supposed to have charged the Convict herein with the offence of Incest which requires the consent from the Director Public Prosecutions under Section 160 of the Penal Code.

It is the further submission of the State that despite the irregularity in the charge, the defect does not and could not have affected the findings of the lower court because the elements required in proving defilement under Section 138(1) of the Penal Code are similar with the elements required in proving incest under Section 157 of the Penal Code. It is still further, the submission of the State that the sentence in both the offences is life imprisonment and that the only difference is that the latter offence requires the State to prove further a higher degree of consanguinity between the perpetrator and the victim. It is still further the submission of the State that the conviction of the Convict herein was safe as the

prosecution managed to prove beyond reasonable doubt all the elements of the offence of defilement, to wit, that the Victim was under the age of 16 years and that there was unlawful carnal knowledge of her by the Convict herein. It is thus, the contention of the State that the defect in the charge is an irregularity curable under Section 3 of the Criminal Procedure and Evidence Code.

On the question of the sentence it is the submission of the State that the sentence of 20 years' imprisonment with hard labour was proper and did not produce a shock as it had not been based upon incorrect principles.

(b) The Defence's position;

It is on the other hand, the submission of the Defence that it was open for the lower court to charge the Convict herein with either the offence of Incest contrary to Section 157 of the Penal Code or Defilement contrary to Section 138(1) of the Penal Code because both offences deal with a minor and the maximum sentences reserved for both is also the same. It is thus, the contention of the Defence that there was no irregularity in charging the Convict herein with the offence of defilement contrary to Section 138(1) of the Penal Code. The conviction, it is further contended, was thus proper.

And as regards the sentence of 20 years' imprisonment with hard labour, it is the submission of the Defence that considering the decided cases and the fact that the Convict herein is a first offender the said sentence was thus appropriate.

4.0 Issues for Determination:-

The issues for the determination by this Court are as follows:

- (a) whether or not the conviction of the Convict herein with the offence of defilement contrary to Section 138(1) of the Penal Code was proper;
- (b) whether or not the sentence of 20 years' imprisonment with hard labour was appropriate in the circumstances of this case.

5.0 Determination:-

It is evident from the facts of the case as recorded by the lower court at page 2 of the lower Court's Record that the Victim was a biological daughter of the Convict herein. This being the relationship between the Convict herein and Victim, the most appropriate offence the Convict herein ought to have been charged with is that of Incest contrary to Section 157(1) of the Penal Code. The sub section provides as follows:

“(1) Any male person who has carnal knowledge of a female person,

who is to his knowledge his granddaughter, daughter, sister, mother or grandmother, shall be guilty of a felony and shall be liable to imprisonment for five years;

Provided that if it is alleged in the information or charge and proved that the female person is under the age of sixteen years, the offender shall be liable to imprisonment for life."

It is not in dispute in the present case that the Convict herein and the Victim are within the prohibited degree of consanguinity, the Victim being the daughter of the Convict herein. In the premises, this Court is inclined to concur with the submission of both the parties hereto that the proper charge to have been made against the Convict herein ought to have been that of Incest contrary to Section 157(1) of the Penal Code and not defilement contrary to Section 138(1) of the Penal Code. However, and as correctly, in this Court's view, contended by the State the offence under Section 157(1) of the Penal Code could not have been commenced without the sanction of the Director of Public Prosecutions (vide: Section 160 of the Penal Code).

This Court does not, however, fully subscribe to the contention of the State that despite the irregularity in the charge herein, the defect does not and could not have affected the lower court's findings on grounds that the elements required in proving the offence of Incest under Section 157(1) of the Penal Code are similar to those of the offence of defilement under Section 138(1) of the Penal Code. It is the considered view of this Court that the offence under Section 157(1) of the Penal Code unlike the offence under Section 138(1) of the Penal Code requires the prosecution to prove that the accused person and the victim are within the prohibited degrees of consanguinity. Further, the maximum sentence reserved for the offence under Section 157(1) of the Penal Code is only 5 years while that under Section 138(1) of the Penal Code is imprisonment for life. It is only when the victim is under the age of 16 years that the two offences can be said to be somehow similar because the maximum sentence is then also imprisonment for life.

In the present case since the Victim was under the age of 16 years and that the maximum sentence that the court could have imposed on Convict herein had he been charged with offence of Incest under Section 157(1) of the Penal Code is imprisonment for life. In the premises, it is the considered view of this Court that no injustice be held to have been occasioned to the Convict herein as a result of being charged with the offence of defilement contrary to Section 138(1) of the Penal Code. And as again, in this Court's view, correctly contended by the State, the irregularity herein would be curable under Sections 3 of the Criminal Procedure and Evidence Code. The section provides as follows:

“ The principle that substantial justice should be done without undue regard for technicality shall at all times be adhered to in applying this Code.”

For the reasons given above, this Court is thus inclined to find that the conviction of the Convict herein with the offence of defilement contrary to Section 138(1) of the Penal Code is thus proper and safe.

Turning to the question of whether the sentence of 20 years' imprisonment with hard labour was appropriate, this Court is mindful that the question of sentencing is a matter within the discretion of the Court. It is, however, trite that in the exercise of its discretion the Court ought to exercise the same judiciously and not capriciously. It is also a settled principle of law that when considering an appropriate sentence to be imposed on a convict a Court of law should ensure that the same befits the crime as well as the convict whilst at the same time being fair to the society and be blended with some measure of mercy - see: **The Republic v Shautti**, Confirmation Case Number 175 of 1975 (unreported). It is also a settled principle of law that the maximum sentences permitted by the legislature should be reserved for the worst instance of the offence and that it is a very grievous example of the crime which calls for the imposition of such a sentence on a person of previous good character - see: **Namate v Republic** (1975-1977) M.L.R. 132 at page 135.

In the present case the only mitigating factor in favour of the Convict herein is that he is a first offender and thus deserves the leniency of the court when sentencing him - see: **The Republic v Leonard Chinguwo**, Criminal Case No. 53 of 2008 (unreported). However, against the said mitigating factor are the following aggravating factors: (i) the Convict herein pleaded not guilty to the charge and thus wasted the court's precious time and resources; (ii) the offences of defilement are very common in our society hence the need to arrest the commission of the same by imposing stiff sentences which would deter would-be offenders; (iii) the offence of defilement is a serious offence as evidenced by the maximum sentence of imprisonment for life reserved therefor; (iv) the psychological trauma which the Victim stands to live with as a result of being defiled by the Convict herein, her own biological father and (v) the Victim had been made pregnant by the Convict herein which means that the Victim had to become a mother at a time when she was not fully prepared to be one.

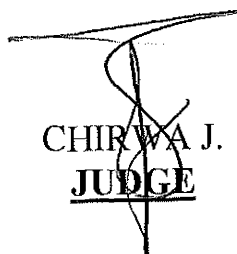
With the foregoing aggravating factors obtaining against the Convict herein the sentence of 20 years' imprisonment with hard labour does not thus come to this Court with any sense of shock. It is the view of this Court that the same fits the

Convict herein, the offence of defilement, the circumstances of the offence and the society.

6.0 Conclusion:-

In conclusion, this Court now proceeds to confirm both the conviction of the Convict herein with the offence of defilement contrary to Section 138(1) of the Penal Code and the sentence of 20 years' imprisonment with hard labour imposed in respect thereof. It is so ordered.

Dated this Twelfth day of October, 2021.


CHIRWA J.
JUDGE