



**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY**

**CRIMINAL DIVISION**

**CRIMINAL CONFIRMATION CASE NO. 2123 OF 2020**

**(Being Criminal Case No. 81 of 2020 in the First Grade Magistrate Court  
sitting at Nathenje)**

**REPUBLIC**

**Vs**

**AFETE DANIEL**

**CORAM: HON. JUSTICE ANNABEL MTALIMANJA**  
Gamadzi, Senior State Advocate, of Counsel for the State  
Nkosi, Senior Legal Aid Advocate, of Counsel for the Convict  
Mrs. Namagonya, Court Reporter  
Mrs. Choso, Court Interpreter

**ORDER ON CONFIRMATION**

1. Afete Daniel was charged in the First Grade Magistrate Court sitting at Nathenje with the offence of Defilement, contrary to section 138 (1) of the Penal Code, Cap. 7:01 of the Laws of Malawi. After full trial, he was convicted as charged and sentenced to a custodial term of 120 months (10 years) imprisonment with hard labour (IHL). Upon review, the conviction

was confirmed, but the matter was set down for hearing to consider enhancing the sentence on account of the age of the victim, who was 4 years old at the material time.

2. The offence of Defilement is one of the serious offences in our statute book, as evidenced by the maximum sentence of life imprisonment prescribed in section 138(1) of the Penal Code. As my brother Judge Professor Kapindu stated in the case of ***Brian Shaba v Republic (Criminal Appeal No. 19 of 2014)***

*“defilement is a very serious and heinous offence. It is both a carnally and psychologically invasive offence...This maximum sentence was imposed for a very specific reason: to show the seriousness, public revulsion and societal abhorrence for this kind of offence”.*

3. For purposes of reviewing the propriety of the sentence meted by the lower Court, the pertinent facts are that the Convict defiled RM, a 4 year old girl. He is 29 years of age and married. The evidence in the lower Court was that on 6<sup>th</sup> August, 2020, the Convict lured RM into his house with a promise to give her K50.00. When she entered his house, he had his way with her. He penetrated her vagina with his penis. RM told the lower Court that she felt pain when the Convict did this to her. The medical report showed that secondary to the defilement, RM presented with a swollen vulva and a perforated hymen. She was treated with antibiotics. Tests for Human Immunodeficiency Virus and sexually transmitted infections came negative.
4. The Convict contends that the sentence of 10 years is proper as it befits him, the crime and the need to protect the public and our children from would be offenders. Meanwhile the State argues that the sentence is manifestly inadequate and should be enhanced to 40 years IHL.
5. As per Mwaungulu J, (as he then was) in ***Republic vs Bright Jamali, Confirmation Case No. 421 of 2013 (HC) (PR)***, based on the maximum sentence of life imprisonment, the starting point for sentencing in

defilement cases should be 14 years imprisonment. The sentence may be scaled up or down this starting point to reflect mitigating and aggravating circumstances and that the sentence must fit the offender.

6. As indicated, the Convict defiled a 4 year old girl. At 4 years old, the victim, practically a toddler, was nowhere near sexual maturity. She was nowhere near being physically, emotionally and psychologically developed to process a sexual encounter. In defiling her, the Convict stole not only her innocence and childhood, but also desecrated her right to choose her sexual debut. He also subjected RM not only to physical trauma, as evidenced by the medical report, but also to emotional and psychological trauma.
7. Defilement is often associated with psychosocial problems in children. A study in Kenya showed that children who are victims of defilement were found to have significant negative outcomes in terms of poor academic performance, low self esteem, depression and poor social relationships<sup>1</sup>.
8. I observe at this point that the general trend following incidents of sexual violence, including defilement, is that the default reaction by first responders is to take the victim to the Police and a medical facility for physical medical examination. I am yet to encounter a case where the victim was referred for assessment of psychological impact. This Court believes that it is high time the criminal justice system progresses to make the said psychological assessment a routine requirement in sexual violence cases, in particular defilement. This will assist courts to make informed decisions when it comes to sentencing.
9. Presently, RM was not assessed for psychosocial impact. It is therefore difficult to state with exactitude the said impact of the crime upon her. This notwithstanding, it will be remiss of this Court to conclude that the sexual

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<sup>1</sup> Mutavi T, Mathai M, Kumar M, Nganga P, Obondo A. Psychosocial Outcomes Among Children Following Defilement And The Caregivers Responses To The Children's Trauma: A Qualitative Study From Nairobi Suburbs, Kenya. *Afr J Trauma Stress*. 2016;5(1):38-47.

violence inflicted upon RM by the Convict left her without any psychosocial trauma.

10. Contrary to the Convict's submission that the sentence of 10 years is appropriate, it is the considered view of this Court that the aggravating factors in the present case far outweigh the mitigating factors, such that the said sentence is glaringly manifestly inadequate.
11. In the *Brian Shaba* case, a 47 year old teacher who defiled his 12 year old pupil had a sentence of 6 years enhanced to 18 years on appeal. In *Fabiano Maliko v The Republic (Criminal Appeal No. 13 of 2020, HC)* a 43 year old man who on multiple times defiled a 10 year old girl had his sentence enhanced from 14 years to 40 years.
12. Whilst these cases are not on all fours with the facts in the present case, the reasoning behind these decisions that sentences in cases of defilement should be stiff enough to match with the grave seriousness of these offences, particularly in respect of sexual offences against children, resonates with this Court.
13. In the premises, whilst being mindful of the Convict's mitigating factors, the gravity of his actions in defiling a 4 year old girl necessitates enhancement of the sentence from 10 years to 45 years IHL. It is so ordered. The sentence is effective from the date of his arrest, 8<sup>th</sup> August, 2020.

Pronounced in Open court this 19<sup>th</sup> Day of April, 2021.

Annabel Mtalimanja  
**JUDGE**