

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
(CRIMINAL DIVISION)**

Criminal Review Case No. 7 of 2021

(Being Criminal Case No. 152/2021-before the Senior Resident Magistrate at Lilongwe)

THE REPUBLIC-V-BESTER KAMAYANIKA

CORAM: HON JUSTICE DR. CJ KACHALE, Judge

Trevor Mphalale, Senior State Advocate for the Prosecution
Molly Nkosi (Ms.), Senior Legal Aid Advocate for the Defence
Choso (Mrs.), Court Clerk and Official Interpreter
Mbewe (Mrs.), Court Reporter

ORDER IN SENTENCE

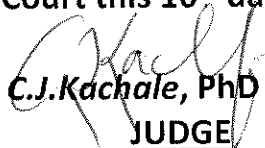
1. On 8th February 2021 the offender Bester Kamayanika (a male aged 55 years) was charged before the Senior Resident Magistrate court sitting at Lilongwe for the offence of defilement contrary to section 138 (1) of the Penal Code. Initially he denied the charge and the victim was summoned as the first prosecution witness on the 16th February 2021. At the conclusion of the victim's testimony Bester decided to change his plea (as permitted under law). After the relevant facts were adduced by the prosecution, a guilty plea and conviction were duly entered.
2. In summary, it came out from the prosecution narrative that the victim of this offence was aged 13 years and was in fact the offender's stepdaughter. There was more than one episode of abuse. She is now pregnant as a result of these illicit sexual encounters. The confession from the offender further disclosed that the family had tried to procure an abortion at Banja LaMtsogolo in order to conceal the ordeal (but this failed because the pregnancy is already quite advanced).
3. In the opinion of the trial magistrate, the circumstances of this case warranted a penalty beyond her 21 years sentencing threshold as provided in the law. In terms of section 14(6) of the Criminal Procedure and Evidence Code (CP&EC), the lower court referred the matter with an opinion proposing a sentence of 26 years imprisonment.

4. In order to inform its sentencing discretion this court has heard from both the defence and the prosecution through elaborate written submissions as well as oral argument in court yesterday. On the authority of **Rep-v-Nkhoma (Confirmation Case No. 3 of 1996 (3 of 1996) [1996] MWHC 7** the defence has reminded the court to bear in mind the distinction between sentencing principles and the purposes for sentencing. In that decision the judge emphasized that the sentencing court cannot attain any of the purposes of sentencing (such as retribution, deterrence, incapacitation, reformation and rehabilitation) at the expense of the sentencing principles. In that regard it has further been highlighted that an appropriate sentence must achieve proportionality, equality as well as restraint. In that vein the defence has argued that a sentence of 26 years imprisonment is rather harsh and vengeful. Instead, on the basis of **Rep-v-Mkandawire (Confirmation Case No. 2 of 2019, Mzuzu Registry)** a term of 16 years imprisonment has been proposed for Bester.
5. On its part the state has invoked the recent decision of my very learned brother *Prof Kapindu, J* in **Fabiano Maliko-v-Rep, Criminal Appeal No. 13 of 2020 (unreported)** where the court articulated some very sound and expansive principles which courts must apply in dealing with cases of child abuse and defilement specifically. In his usual judicial eloquence, the learned judge outlined the gravity of the offence of defilement from physical, physiological as well as psychological perspectives. The court also censured counsel for raising very flimsy arguments about the purported mitigation by reason of age.
6. It was the view of that court that such petty arguments have the risk of trivializing what is otherwise a very serious occasion, bearing in mind the nature and gravity of the offence of defilement itself. In the final analysis the court underscored the principle that the seriousness of the offence was reflected in the maximum penalty set out in the law (which is life imprisonment). It was the conclusion of the court in *Fabiano Maliko* that the sentencing court should properly account for such social revulsion to defilement by imposing correspondingly meaningful penalties upon conviction. With reference to what was described as a reasonable estimation of expected life span of the offence, a sentence of 40 years was imposed on *Fabiano Maliko*. On that basis, the state has proposed a sentence of 35 years for Bester Kamayanika.

7. Before pronouncing its determination in sentence my court feels duty bound to register its shock and disbelief (similar to what my learned brother in **Fabiano Maliko (above)** felt): it has been proposed from defence counsel that somehow because the offender is an ordinary rural citizen who supposedly lives according to what has been acknowledged to be wrong cultural beliefs and values (in this context pertaining to the purported approval from his own wife, the biological mother of the victim, that it was permissible for him to have sex with his stepdaughter as opposed to having extramarital affairs) then the court should somehow exercise some leniency towards the offender.
8. As *Prof Kapindu, J* observed in the decision cited earlier, it would be more fitting for counsel to weigh the reasonableness and appropriateness of certain arguments before even committing them to paper or even voicing them from the bar. In the considered opinion of this court, the argument from the defence misses the whole point of sentencing: in this instance an underage child (whom the law has deemed incapable of consenting to sexual acts) was taken advantage of by her stepfather (as it turns out with the tacit approval of her own mother). The victim is the girl child. No such culture or belief would be countenanced as somehow diminishing the responsibility which the offender bore in that scenario; that counsel would even suggest displays the real depth of vulnerability such girl children are exposed to in our jurisdiction. In considering the appropriate penalty this court would rather mete out an order that clearly says to the offender that one cannot hide behind such gross and abusive values to plead for mercy or lenience when the law has finally caught up with you.
9. Based on all these considerations, it is the determination of this court that a penalty of 30 years imprisonment with hard labour effective would be appropriate. Thus **Bester Kamayanika is hereby condemned to serve a term of 30 years imprisonment** with hard labour for his conviction for the offence of defilement contrary to section 138 (1) of the Penal Code. The penalty will run from **16th February 2021**, the date of his conviction.

Order accordingly.

Pronounced in Open Court this 16th day of April 2021 at Lilongwe.


C.J. Kachale, PhD
JUDGE