



IN THE HIGH COURT OF MALAWI

CRIMINAL DIVISION

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 509 OF 2020

(Being Criminal Case No 122 of 2020 in the First Grade Magistrate Court sitting at Thyolo)

THE REPUBLIC

-V-

PETRO BILIATI

CORAM: HON. JUSTICE AGNES PATEMBA

Mr. Salamba, Counsel for the State

Ms. Mputeni, Counsel for the Accused

Mrs. Mombera, Court Reporter

Mr Amos, Official Interpreter

ORDER ON CONFIRMATION

1. The Convict, Petro Biliati, aged 33 hails from Salijeni village, Traditional Authority Nsabwe in Thyolo district. He was convicted by a First Grade Magistrate on the offence of defilement contrary to section 138 (1) of the Penal Code and was sentenced to 10 years IHL.
2. He pleaded guilty to the charge of defilement which was leveled against him. The State proceeded to narrate the facts that it was on the 12th February 2020, around 8: 00 hours that the Convict sent Marko Mbawa to ask the victim aged 9 years to go to the house of the Convict. The young girl complied and went to the house of the Convict. Whilst at the house, the Convict dragged the young girl into his house and removed her underwear. He had sexual intercourse with her. He gagged the girl so that she could not shout. After defiling the girl, he gave her K70.00 and threatened her not to reveal what had happened to anyone. The young girl decided to reveal to her mother regarding what had transpired at the house of the Convict. The mother reported the matter to the village headman who in

turn reported the matter to Thekerani Police Unit. At the police, the young girl was referred to the hospital for medical examination which revealed vaginal tears on her private parts, the hymen was not intact, it also showed that there were many spermatozoa seen on her private parts and some little fluid was seen on her vulva. HIV test was conducted on the girl and the Convict and the results came out positive for the Convict and negative for the girl. She was given P.E.P to protect her from being infected with HIV.

3. The Convict confirmed these facts as narrated by the State. The Court proceeded to find him guilty on his own plea and convicted him of the offence of defilement contrary to section 138 (1) of the Penal Code and was sentenced to ten years Imprisonment IHL.
4. Upon review, the reviewing judge was of the considered view that the sentence imposed by the lower court was on a lower side and ordered that the matter be set down to consider enhancement of the sentence.
5. At the hearing, the State argued that the sentence should be enhanced from ten years to eighteen years considering the seriousness of the offence, and having in mind the age of the victim that she was only 9 years old when she was defiled, the HIV status of the Convict the he is positive and that these offences are common the Court should enhance the sentence from ten to not less than eighteen years IHL. While defence counsel argued that considering that the convict was the first offender and pleaded guilty to the charge the court should exercise leniency towards him. In her view, ten years was adequate and should be confirmed by the Court.
6. Section 138 (1) of the Penal Code provides that;
Any person who carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life.
7. The penalty imposed under this provision shows the seriousness of the offence and as such the court's decisions should reflect this seriousness by imposing meaningful sentences. I agree with my brother Judge Professor Kapindu as stated in the case of ***Brian Shaba v. Republic*** (Criminal Appeal No. 19 of 2014 where he stated that;

Defilement is a very serious and heinous offence. It is both carnally and psychologically invasive offence....the maximum sentence was imposed for a specific reason; to show the seriousness, public revulsion and society abhorrence for this kind of offence.

8. It should be put on record that in the recent times, Malawi has witnessed the rise of defilement cases which calls for the court to rise up to the occasion when dealing with such offences. The law should not just make sense on the paper and yet in reality vulnerable girls continue to suffer. The State has a constitutional mandate under section 13 (h) (which deals with children) ‘to encourage and promote conditions conducive to the full development of healthy, productive and responsible members of the society.’ This responsibility lies with all the three organs of the State that is, the executive, the legislature and the judiciary. It is imperative therefore that the courts should respond to the outcry of vulnerable children and do what it can within its mandate to protect the girl child from such abuse. The court through its decisions should create an environment conducive for the full development of a girl child to ensure Malawi has responsible girls and women of the society who can contribute to the development of this nation.

9. In the case of **Republic v. Bright Jamali** Confirmation Case No 421 of 2013 (HC) (PR) Mwaungulu J, (as he then was) laid down important sentencing guidelines in cases of defilement. He stated that;

The starting point for defilement should, therefore, based on the maximum sentence of life imprisonment, be fourteen years imprisonment. Sentencers at first instance must then scale up and down the starting point to reflect mitigating and aggravating circumstances and that the sentence must fit the offender.

10. This has been the position of the law for over a decade. I must state that over a decade ago, these offenses were not as rampant as it is in the recent times. A presentation of comparative statistics for convicts of Sexual and Gender Based Violence for the years 2009 and 2020 as at July which was presented during community engagement meetings on Child Justice and efficient handling of Sexual and Gender Based Violence cases by Prison Services reveals that in 2009 they had 183 Convicts of defilement offences in all the prisons in

Malawi. In July 2020, the figures rose to 2,155 Convicts of defilement offences. I must state that the starting point of fourteen years imprisonment in defilement offences has outlived its purpose. This has been the position of the law for too long, it is time we break camp and move forward. The starting point of fourteen years in defilement offences has not sent a message that defilement is a serious offence. The girl child has not been protected. It is high time that the court considers imposing stiffer penalties and move from fourteen years imprisonment as a starting point to twenty years as a starting point in defilement offences, may be a message might be send to the society that defilement is a serious offence. Keeping such people away from the society for longer periods might help to protect the young girls.

11. In the recent years, the courts have moved forward to impose stiffer penalties in defilement cases, disregarding the principle that the worst offender is yet to come hence the maximum sentence should be reserved for worst offenders. In the case of ***Republic v. Aubrey Kalulu***, Criminal Case No. 1503 of 2017 (HC) (LL), a case was referred to the High Court for purposes of sentencing by the Principal Resident Magistrate under section 14 (6) of the Criminal Procedure and Evidence Code. In 2020, Justice Ivy Kamanga (as she then was) imposed a life sentence on the Accused person for the offence of defilement. The Court considered among other things that the Convict was the Victims family landlord, that the Accused person was HIV positive and he was aware about his condition, that he was suffering from syphilis and tinea genitals and as a result of the violation of Victim’s private parts were corroded and she had difficulties walking. The court considered the young age of the victim at 12 years of age and that she was a friend to the convict’s child or sister.
12. In the case of ***Fabiano Maliko v. Republic***, Criminal Appeal No. 13 of 20 (HC), a 43 year man, who on multiple times defiled a 10 year old girl, had his sentence enhanced from 14 years to 40 years. In the case of ***Republic v. Afete Daniel***, Confirmation Case No 2123 of 2020 (HC) (LL), the Convict aged 29 and married defiled a 4-year-old girl. He was sentenced to 10 years IHL. Upon review, Justice Mtalimanja enhanced the sentence from 10 years to 45 years IHL. This was pronounced on the 19th April 2021. And in the case of

Zeeshan Jaral Raja v. Republic Criminal Appeal No. 36 of 2017, the Convict defiled a girl of 15 years old and was sentenced to 16 years by a lower court. On appeal, Justice Kapindu enhanced the sentence from 16 years to 30 years IHL. The judgment was delivered on the 8th January 2021.

13. From the above cited cases, it is clear that in the recent cases, courts are moving away from imposing sentences below 20 years. The more reason to move away from 14 years imprisonment as a starting point in defilement cases.
14. The case at hand, the convict is aged 33, someone who is mature enough to take up the responsibility of protecting the victim. Instead he took advantage of the vulnerability of the young girl of 9 years old and defiled her. He is HIV positive and he didn't mind about his status that he may infect the girl with the disease. He went ahead to defile the girl and threatened her not to reveal to anyone by bribing her with K70.00. It is clear that the convict premeditated the commission of this offence. It is the criminal mind that the Court would want to punish. Such kind of people like the Convict ought to be kept away from the society for longer period to at least create a conducive environment for a girl child.
15. Having discussed the law and highlighting the recent jurisprudence on the subject matter, and having in mind the age of the victim, the HIV status of the Convict, the Court therefore sets aside the custodial sentence of a lower court of 10 years and substitute it with 40 years IHL with effect from the date of arrest. This sentence befits the offender, and in our view, it is justice to the victim.
16. It is so ordered.

Delivered this **7th** Day of **June** 2021.



AGNES PATEMBA,
JUDGE