



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA REGISTRY
CONFIRMATION CASE NUMBER 518 OF 2020
(Being Criminal Case Number 103 of 2020 Before FGM sitting at Phalombe)

THE REPUBLIC
VS
MADALITSO BRAKE

CORAM: Honourable Justice T. Masoamphambe

G. Msume, of Counsel for the State

Z. Ndeketa (LAB), of Counsel for the Defendant

Innocent Mukhula, Official Interpreter

Mrs Gloria Amosi, Court Reporter

ORDER ON CONFIRMATION

Madalitso Brake was, on 11th September, 2020 convicted and sentenced to 96 months' imprisonment with hard labour for the offence of Defilement contrary to section 138(1) of the Penal Code. The particulars were that the prisoner, on the 19th day of April, 2020 at Namalawe Village in the District of Phalombe had unlawful carnal knowledge of SM, a girl under the age of sixteen.

The prisoner pleaded not guilty to the charge. The prosecution paraded four witnesses to prove its allegation that the prisoner had carnal knowledge of SM, a 12-year old girl. After full trial, the learned Magistrate was satisfied that the prosecution had proven the case against the prisoner beyond reasonable doubt. He consequently found him guilty, convicted him and sentenced him to 96 months' imprisonment with hard labour. The learned Magistrate had this to say:

"In this regard therefore, it is clear that a first offender is liable to be committed to prison but then the court should not impose on him the maximum sentence as provided by the contravened section.

As a court, I am aware that defilement is one of the serious offences in our country."

The reviewing judge set this matter down to consider enhancement of sentence. For all intents and purposes the judge was of the view that the sentence of 96 months' jail term was on the lower side.

Counsel for the convict asked the court not to tamper with the sentence of the lower court as the mitigating factors are so strong. Among other cases he cited the case of **Republic vs Felix Kholoviko [1996] MLR 355**, in which the court held that section 340 of the Criminal Procedure and Evidence Code states that where a court convicts a person with no previous convictions he shall not be sentenced for that offence otherwise than under section 339 of the Criminal Procedure and Evidence Code. He also cited the case of **Republic v Lawrence Chipatala, Confirmation Case number 524 of 2008** where a sentence of 13 years in the like offence, was reduced to 8 years upon confirmation.

The Counsel for the convict therefore invited the court not to enhance the sentence of 96 months' passed by the trial court as it was appropriate in the circumstances.

On his part Counsel for the State prayed to this court to enhance the sentence to at least not less than 14 years' imprisonment with hard labour. He drew the attention of the court to a number of cases including the case of **Republic, v Brian Matiya, High Court, Confirmation Case Number 161 of 2008**, where a young first offender was sentenced to 60 months' imprisonment with hard labour. Upon confirmation, the sentence was enhanced to 8 years' imprisonment with hard labour; and **Republic v Albino Antonio, Confirmation case number 979 of 2009**. In this case, a convict repeatedly defiled a 4-year old girl. He was found guilty and was sentenced to 10 years' imprisonment with hard labour. The convict was a first offender. On confirmation, the sentence was enhanced to 12 years' imprisonment with hard labour.

Defilement is a serious offence. It attracts a maximum penalty of life imprisonment. In the present case, the little SM, aged 12 years was defiled by the convict. She is epileptic. On the material day, the girl was asked by her mother to go to the garden to pick up leftover grain of maize. The prisoner found her there and told her to lie down so that he should have sex with her (*tagona ndikuchinde*). She was all alone. She had no choice but

to comply with his order. He undressed her and then undressed himself and then caused his penis to penetrate her vagina. He ejaculated in the vagina. He thereafter got some tree leaves and wiped the sperms from her vagina. He then went away. She continued with gleaning. She went home. She was bleeding from her vagina. She reported to her mother. Her mother took a piece of cloth and wiped the blood. Thereafter, the matter was reported to police and then she was taken to the hospital.

Men who prey on young girls are dangerous to the society. They need to be kept away from the society for a long time so that young girls should live in peace.

I am mindful of the fact that the prisoner is a first offender, and he was 29 years old at the time of the commission of the offence. In **Republic v Chikakuda [1997] 2MLR 288 (HC)**, the court quoted with approval the passage in the case of *Republic v Makanjila, Confirmation Case number 597 of 1996* where the court had this to say:

"...there are some crimes so heinous that a plea of youth, a plea that the crime was a first offence or that the prisoner has not been to prison before, are of little relevance. Those who participate in them ... should know that they will eventually be subjected to long and immediate custodial sentence. If the victims are young or old, the sentences would be even longer."

Again, in the case of **Brian Shaba v Republic, Criminal Appeal Case Number 19 of 2014**, a teacher defiled a school girl. He appeared before a magistrate court where he was convicted and sentenced to 6 years' imprisonment. Brian Shaba appealed against the gravity of the sentence. He held the view that 6 years was on the higher side. Honourable Justice Dr Kapindu enhanced the sentence to 18 years on the ground that a teacher is in the position of a caretaker who is supposed to protect the girl and not sexually abuse her or take advantage of her. This was a breach of trust which should not be condoned.

The present prisoner was 29 years old when he was committing the offence. The victim was only 12 years and she was not going to school because she was epileptic. He took advantage of the absence of the mother and sexually preyed on a girl that was supposed to be protected by him. The present convict is a dangerous first offender, a heartless man, and to say the least, and for lack of better description, he is a monster. The sentence of 96 months' imprisonment handed out by the lower court, does not reflect the desired justice in the circumstances. This is a clear case where the offender has to pay adequately for his wrong irrespective of the fact that he is new to crime.

ORDER

In the circumstances, a sentence of 96 months' imprisonment with hard labour is set aside and it is substituted by a 21-year jail term effective 30th April, 2020.

Made in Open Court this 11th day of November, 2021 at Blantyre



Textious S Masoamphambe
JUDGE