



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA REGISTRY
CONFIRMATION CASE NUMBER 553 OF 2020
(Being Criminal Case Number 92 of 2020 Before FGM sitting at Phalombe)

THE REPUBLIC
VS
ALEXANDER MTALIMANJA

CORAM: Honourable Justice T. S. Masoamphambe
G. Msume, of Counsel for the State
Z. Ndeketa, of Counsel for the Defendant
Innocent Mkhula, Official Court Interpreter
Mrs. Gloria N. Amos, Court Reporter

ORDER ON CONFIRMATION

Masoamphambe J:

On 30th day of October 2020, the First Grade Magistrate Court sitting at Phalombe convicted Alexander Mtalimanja of the offence of Defilement contrary to section 138(1) of the Penal Code. He was convicted after full trial. He was sentenced to 90 months' imprisonment with hard labour with effect from 4th April, 2020.

The particulars of the offence were that the prisoner, on the 22nd day of March, 2020 at Njobvu Village in the District of Phalombe, had unlawful carnal knowledge of BZ, a girl-under the age of 16.

On 30th November 2020, the reviewing judge confirmed the conviction. The matter was however, set the down to consider enhancement of the sentence.

The Legal Aid Bureau prepared and filed submissions in opposition of the position taken by the reviewing judge. The state filed submissions in support of the fact that the sentence should be enhanced.

The state asked the court to hand out an 18-year jail term. According to the state, the victim was only seven years old, the prisoner pleaded not guilty, the offence is inherently

serious one, and these cases are common in our society. For these reasons, the state asked the court to adjust upwards the sentence handed out by the lower court. In support of its position, the state cited the cases of **Ayami v Republic**, [1990] 13 MLR 19 (MSCA); and **R v Ng'ambi** [1971-1972] ALR Mal 457, among other cases.

On its part, the Legal Aid Bureau submitted that the 90 months' sentence meted out by the trial court was sufficient in the circumstances and therefore should not be enhanced. The convict is first offender and he is 52 years old. They drew attention of the court to sections 339 and 340 of the Criminal Procedure and Evidence Code which dissuade courts from sending to jail first time offenders unless there is a good reason to do so. They cited the case of **Republic v Kholoviko** [1996] MLR 355 to support this position. They asked the court to confirm the sentence handed out by the lower court.

Section 138(1) of the Penal Code provides as follows:-

"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."

The maximum penalty for the offence of defilement therefore is life imprisonment. The prevailing sentencing guidelines peg the starting point at 10 years' imprisonment with hard labour.

In the present case, the convict asked the 7-year old victim to take a palm mat into his house and spread it. The prisoner then gave her a blanket to spread it on the said mat. He then asked her to lie on that mat. The prisoner took off her skirt and pants. The prisoner then produced his penis, spread her legs and thereafter inserted his penis into the girls' vagina.

After he had defiled her, she wanted to go home but he did not allow her to do so. However, she nevertheless left. She just got out of the house. After eating pumpkins at home, she went to the toilet to answer to the call of nature. She noticed that she was bleeding from her vagina. She reported to her mother who took her to police and thereafter proceeded to the hospital. The prisoner is married to the young sister of the mother to BZ.

Should the court confirm or reduce the sentence? This court is minded of the fact that the offender is new to crime. In terms of sections 339 and 340 of the Criminal Procedure and Evidence Code, offenders of this nature should not willy-nilly be sent to prison unless

there is very good reason to do so. In the case of **Republic v Manyamba, 2 MLR 39** the court had this to say in respect of first offenders:

"A sentencer faced with a first offender must first decide whether a prison sentence is appropriate. To arrive at that decision, the court must by a process of elimination, decide that the other non-custodial sentences are not appropriate way of dealing with the offence. The court must rule out non-custodial sentences such as fine, probation, conditional discharge and the like..... Once the court concludes that a prison sentence is deserved, it must pass a prison sentence that fits the crime, the offender, the victim and the public interest."

It is very clear that the convict carefully schemed his evil enterprise. He invited the innocent young girl to bring a palm mat into his house. Then he asked her spread the blanket on the said mat and thereafter defiled her. The prisoner was 52 at the time of committing the offence. He cannot be said to be old. He is an offender that should surely be sent to prison for a long period. In **Brian Shaba vs The Republic, Criminal Appeal Case Number 19 of 2014**, the Court had this say:

"it has been observed that "obdurate sex offenders are, in modern society, on the increase and becoming menace to the female folk". This is particularly so in the case of girl children. Sexual offenders in cases of rape and defilement inflict a serious invasion of the victim's right to personal privacy."

Further in the case of **Republic v Chikakuda, 2 MLR 288** the court said:

"... that there are some crimes so heinous that plea of guilty, 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 sentences. If the victims are young or old, the sentences would be even longer."

The present offender is a menace to the young girls. He cannot think of benefiting from sections 339 and 340 of the Criminal Procedure and Evidence Code. Although he is a first offender, he qualifies to be kept away from girl children for a long time so that they should feel safe.

ORDER

Having regard to all the relevant considerations in the instant case, it is my conclusion that the sentence of 90 months' imprisonment with hard labour is manifestly inadequate in the circumstances. It is accordingly set aside and substituted with a sentence of 300 months' imprisonment with hard labour. As a husband to the sister to the mother of the

young girl, he was one of the people that was supposed to protect this innocent 7-year old girl. Sadly, he saw a woman in her and went ahead to do with her things he does with his wife within the confines of their matrimonial house. He is a threat to young girls. For avoidance of doubt, the 300 months will be calculated from the day he was arrested.

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


Texidus S Masoamphambe
JUDGE