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**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE No. 905 OF 2020**

(Being Criminal Case Number 71 of 2020 before the FGM sitting at Neno).

**BETWEEN:
THE REPUBLIC
AND
DONITH JAILOSI**

CORAM: THE HONOURABLE JUSTICE J. CHIRWA

Ms. Kulesi, Senior State Advocate for the State.

Mrs. Masowa, Senior Legal Aid Advocate for the
Convict.

R. Chanonga, Official Court Interpreter.

Mrs. Msimuko, Court Reporter.

JUDGMENT

1. Background:-

Donith Jailosi, the Convict herein, was charged in the First Grade Magistrate's Court sitting at Neno with the offence of defilement contrary to Section 138 (1) of the Penal Code. He was convicted after a full trial and was sentenced to 5 years' imprisonment with hard labour.

The conviction was confirmed by the Reviewing Judge. The case was however, set down to consider enhancing the sentence which the confirming Judge felt needed to be enhanced.

2. The Facts:-

The facts of the case are that the Convict herein on or about the 18th of September, 2020 at Chiomba Village in the district of Neno had unlawful carnal knowledge of Carolyn Jackson, a girl under the age of 16 years.

3. The positions of the parties hereto:-

(a) The position of the State:

It is the submission of the State that the sentence of 5 years' imprisonment with hard labour imposed by the lower court on the Convict herein was indeed on the lower side and should thus be enhanced to a sentence of not less than 18 years' imprisonment with hard labour considering the many aggravating factors against the Convict herein.

It is the case of the State that the facts of the case clearly show that (i) the Convict herein had planned for the offence and took advantage of the Victim; (ii) he pleaded not guilty to the charge; (iii) the Victim was aged 13 years and thus young; (iv) the Victim stands to carry with her the traumatic experience for the rest of her life; (v) the offence of defilement is a serious offence; (vi) the cases of the defilement are on the increase in our society, a stiff custodial sentence is thus appropriate in the circumstances in order to send a strong message to other men and hence protect the girl child from sexual exploitation.

(b) The position of the Defence:

It is, on the other hand, the submission of the Defence that albeit a custodial sentence was appropriate in the circumstances of this case however, considering the following mitigating factors: (i) the Convict herein is a first offender, (ii) he was aged 20 years at the time of the offence and thus young and (iii) that there was consent on the part of the Victim as they were in a love affair, the sentence of 5 years' imprisonment with hard labour should thus be confirmed and not be enhanced by this Court.

4. Issue for Determination:-

The issue for determination by this Court is: whether or not the sentence of 5 years' imprisonment with hard labour imposed by the lower court on the Convict herein should be enhanced as recommended by the reviewing Judge.

5. Determination:-

The question of sentencing is a matter within the discretion of the Court. It is however, trite that in the exercise of its discretion the Court ought to exercise the same judiciously and not capriciously. It is also a settled principle of law that when considering an appropriate sentence to be imposed on a convict a court of law should ensure that the same befits the crime as well as the convict whilst at the same time being fair to the society and be blended with a measure of mercy – see: **Republic v. Shautti**, Confirmation Case number 175 of 1975 (unreported). It is also trite that the maximum sentences permitted by the legislature should be reserved for the worst instances of the offence and that it is a very grievous example of the crime which calls for the imposition of such a sentence on a person of previous good character: see; **Namate v Republic** [1975-1977] MLR 132 at p.135.

From the submissions made by the parties hereto, it is evident that the factors aggravating the sentence herein very much outweigh the factors mitigating the sentence. The available mitigating factors seem to be only that (i) the Convict herein is a first offender and thus deserves the leniency of the court when sentencing him - see: **The Republic v Leonard Chinguwo**, Criminal Case No. 53 of 2008 (unreported) and (ii) he was at the time of the commission of the offence aged 20 years and thus still within the youthful group. Against the foregoing mitigating factors are however, the following aggravating factors: (i) the Convict herein pleaded not guilty to the offence and thus wasted the court's precious time and resources; (ii) the offences of defilement are very common in our society, a fact which necessitates the imposition of stiff sentences in order to deter would-be offenders; (iii) the offence of defilement is a serious offence as evidenced by the maximum sentence of imprisonment for life reserved therefor; (iv) the victim was

aged 13 years and thus still of a very tender age; (v) the psychological trauma which the victim stands to live with for the rest of her life as a result of being defiled by the Convict herein and (vi) the commission of the offence had been planned by the Convict herein.

This Court is in agreement with the submission of Counsel for the Defence that although consent is not a defence to a charge of defilement, the same may be relevant when sentencing the convict, (vide: **Republic v Goliati and Jonasi** (1971–72) A.L.R. (Mal) 251 at p.253. However, with due respect to counsel this Court has found no evidence in the present case to show either that the victim herein had consented to the defilement or that the victim herein and Convict herein were in a love relationship. To begin with DW1, the Convict herein, did not in his evidence in chief say anything about such a relationship. And during his cross examination DW1 confirmed that he heard the victim denying the allegation that the convict and her were lovers. The convict however, made no attempt to contradict her. The only evidence available before the lower court about such a relationship is that from DW2. However, since the evidence of this witness is the evidence of what he alleges to have been told by the convict and thus hearsay, the same cannot be relied upon by this Court. In the premises, this Court would not be inclined to put any weight on Counsel's submission in this regard.

This Court has considered the current sentencing trend in the cases of defilement and has noted the courts' inclination to impose stiff custodial sentences in such offences. The courts have imposed sentences of up to 40 years' imprisonment with hard labour in some instances. Be that as it may, it remains an indisputable fact that all cases are never the same, A consideration of the facts of each case thus still remains a relevant factor when determining an appropriate sentence for the convict.

It is worthy of note that the offences of this nature are really on the increase in our society for reasons which can not be explained hence the courts' inclination to impose stiff sentences on the convicts in such offences. The girl child, is no doubt, at a very high risk. Thus, unless deterrent sentences are imposed by the courts, the offences of defilement will continue to be on the increase in our society. And having considered the sentencing trend in cases of this nature and the aggravating factors obtaining in the present case, this Court is inclined to concur with the Reviewing Judge that the sentence of 5 years' imprisonment with hard labour imposed on the Convict herein by the lower court errs on the lower side. It thus ought to be enhanced.

This Court has found the following facts (i) that the victim herein was aged only 13 years at the time of the commission of the within offence, (ii) the prevalence of such offences and (iii) the plea of not guilty by the Convict herein most aggravating factors in the circumstances of the within offence.

It is, in the premises, the view of this Court that a sentence of 18 years' imprisonment with hard labour would fit the Convict herein, the offence of defilement, the circumstances of the said offence and the society.

5. Conclusion:-

In conclusion, this Court now proceeds to enhance the sentence of 5 years' imprisonment with hard labour imposed on the Convict herein by the lower court to 18 years' imprisonment with hard labour. It is so ordered.

Dated this Twentieth day of June, 2022.



CHIRWA J.
JUDGE