



**REPUBLIC OF MALAWI**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CONFIRMATION CASE NO. 924 OF 2021**  
**Being Criminal Case No. 266 of 2021**

**BETWEEN**

**THE REPUBLIC.....APPLICANT**

**-and-**

**FELIX BATON.....RESPONDENT**

**Coram: Honourable Justice R.M. Chinangwa**

Mr. Kulesi of Counsel for the State.

Mrs. Masowa, of Counsel for the Convict.

H. Amos, Official Court Interpreter.

M. Josamu, Court Marshall.

**ORDER ON CONFIRMATION**

**Introduction**

1. The convict was convicted on two counts of defilement contrary to section 139 of the Penal Code. After full trial he was convicted and sentenced to 10 years imprisonment with hard

labour on the first count and acquitted on the second count. This court is seized of the matter to consider enhancement of the sentence. Below is the evidence that was before the court.

### **The Evidence**

2. The first prosecution witness was the victim herself. She stated that, 'I know the person in the dock. His name is Mr. Baton. He is my father he married my mother. From January to March, our father used to come to our bedroom and he used to defile us. He used to sleep with three people. Me, my sister and my brother. He used to remove my pant and he used to remove his penis from his trouser and insert it in my vagina. My mother used to be at the garden. He has been doing this for 4 times, First, 3 times, he defiled me in our bedroom, and 3<sup>rd</sup> time in his bedroom. That time my siblings were not at home. On all these occasions he used to threaten to beat me up if I reveal to my mother. My mother came to know about it when I got sick and my mother took me to the hospital. I was admitted. On the day of discharge, my blood was tested and they found me that I am HIV positive. My grandmother asked me if I have had a sex with a man and I revealed that it was my father. That's when he was reported to police'. In cross examination she added that, 'You removed your penis and inserted into my vagina. That time my siblings were not in the room. The first day you called me in the bedroom to take the baby. Before taking the baby, you defiled me. I did not tell my mother. I don't have any boyfriend'. In reexamination she stated that, 'I have never had any boy friend'.

The second prosecution witness was Getrude Namazimbwe. She stated that, 'I know the accused. He is Mr. Baton. He is my Step Father. My Step Father used to come to our

bedroom to defile me. He used to sleep with three people in the room. Myself, my sister and my brother. He used to defile me in the morning while my mother is away. He used to remove my pants, He then used to take his penis and put it in my vagina. He used to threaten to beat me if I reveal to my mother. He defiled me once. My mother knew about it when my sister got sick and was brought to the hospital where she was found HIV positive. When my grandmother asked her, she revealed that it was my Step Father. She also asked me and I told her the truth that my Step Father also defiled me once. My mother reported the matter to police and we were referred to Chisitu Health Centre'. In cross examination she added that, 'No one saw you defiling me. That day my relatives were sleeping but my mother was not at home. You did not give me anything in return. You are the one who told me not to reveal to anyone or else you will beat me'. In reexamination, she stated that, 'When my Step Father was defiling me my relatives were sleeping and they didn't notice anything. I did not tell my mother because he threatened to beat me up'.

The third prosecution witness was Nandiziwa Stanley. He stated that, 'I know Femia Namazimba. She is 14 years old; she was born on 15 December, 2006. She is my daughter. Getrude is also my daughter. She was born on 27<sup>th</sup> June 2009. I know the accused person. He is my husband. My daughter Femia became sick and she was admitted at Mulanje District Hospital. When we were being discharged my daughter was diagnosed with HIV. I asked my daughter if she had a boy friend. She told me that she doesn't have. However, she explained that if that is the case it could be her father who has infected her because her Step Father used to defile her. I asked her why she never reported to me, she told me that her father used to threatened to beat her. When I saw this, I also asked Getrude and she

also revealed to me that she was defiled once. When I heard this, I reported to an NGO who reported to Chisitu Police. We went to police and my daughters confronted each other with my husband. I leave the children when going to the garden and I start off early in the morning because the gardens are far. I used to leave my husband at home. The girls used to sleep in the room with their brother. This is the medical that I took from the hospital'. In cross examination she added that, 'I didn't expect you to defile my daughters'.

The fourth prosecution witness was Morris Charles a Clinical Officer at Mulanje District Hospital. He stated that, 'On 29<sup>th</sup> March, 2021 at 4.30 pm I examined Femia Namazimba aged 4 who complained that she was defiled. I examined her vagina and found that her vagina had bruises and also signs that she contracted sexually transmitted diseases we concluded that the minor was defiled. We also examined Getrude Namazimba aged 11 but we did not find anything to conclude that she was defiled'. The witness was not cross examined.

The fifth prosecution witness was Sub-Inspector Namangale. He stated that, 'It was on 28<sup>th</sup> March, 2021 when Mrs. Stanley came with Child Protection Officer that her daughter (Femia) has been defiled by the accused person. I referred her to the hospital and she came back with a medical report. We then arrested the accused person. He was confirmed and formally charged with the offence of defilement and he denied the charge. In the course of the investigations Getrude Namazimba explained that the accused defiled her once. She is aged 11'. The witness was not cross examined.

At the close of the prosecution case the court entered a finding of a case to answer. The convict entered his defence.

### **The Defence Evidence**

3. In defence, the convict stated that, 'On 3<sup>rd</sup> March, I told my wife that I wanted to go and fetch wood. Every time my wife used to go to the farm while I used to go to work. On 14<sup>th</sup> March our child got sick and she was found with malaria. She was admitted for some days. On the day that she was discharged, I had gone to the hospital and when they were discharged, I was also there. When we reached home, I asked her how the child was and she told me that the child was HIV positive. She told me that she will be getting medicine for the child from Chisitu. The next day, my wife told me that there were issues that they revealed to discuss in their family and that my Ankhoswe has to be told about the issues. I was surprised whilst I was at work that police officers came to arrest me'. In cross examination he added that, 'I know Famia and Getrude Namazimba. They are my step children. Ndaziziwa Stanley is my wife, I don't have any grudges with my wife. They said I defiled my step daughters. I did not explain about the defilement in my evidence. I did not defile Femia. I did not defile Nankhoma. My wife said that she used to go to the garden first before me. Femia said that she was infected with HIV. I did not ask her in anything in cross-examination'.
4. The second defence witness was Blessings Nanyala. She stated that, 'It was on 30<sup>th</sup> March, 2021 when I received information that Mr. Felix Baton was arrested on allegations of defilement of his two daughters. When I heard this, I ordered that Mr. Baton's brother should go to Chisitu Health Centre together with the young girl and their mother. When they went there, they found that the girl was never defiled. Then we heard that the first

born was found HIV positive. I cannot say much about the defilement of the girls. In cross examination she added that, 'He is answering a charge of defilement. I don't know anything about the case of defilement. I don't believe that Mr. Felix Baton defiled his Step daughters'.

### **Issue for Determination**

5. This court has to determine whether the conviction and sentence was proper in law.

### **Analysis of Law and Evidence**

6. Defilement is proved once the state shows that the perpetrator had sexual intercourse with a girl under 16. In this case the court record shows that the girls who were defiled were under the age of 16 with the first and second prosecution witness aged 4 and 11. Prior to their giving evidence the court conducted a voire dire examination which is a requirement at law. It should be noted at the outset that a medical report is not necessary to prove a case of defilement. The lower court found the evidence of the girls credible and corroborated by the medical report which found a HIV positive result. The offence was committed. The next part is to determine the identity of the perpetrator. The identity of the convict was confirmed by the victim who stated the convicted had defiled her on 4 occasions. Being a stepfather, she was in close contact with him and knew him. The victim lived with her. The lower court records that the demeanour of the witness as she spoke about her ordeal left an impression on the court that the victim was a credible witness. This court agrees with the finding of the lower court and sustains the conviction. This court finds the conviction correct in law.

## **The Sentence**

7. The convict was sentenced to 10 years imprisonment with hard labour. The mitigating factors are that the convict is a first offender. The aggravating factors as listed by the parties herein are: breach of trust; use of threats; victim infected with HIV/AIDS; the offence is common and serious crime. The sentencing trends in defilement cases have escalated considering the harshness of the crime on young girls. The aggravating factors in this matter call for a befitting sentence. The HIV /AIDS infection has forever changed the young girl's story.

## **Finding**

8. The convict's sentence is enhanced to 40 years imprisonment. Any aggrieved party has the right to appeal on both conviction and sentence,

Pronounced this .....6.....day of .....December.....2022 at BLANTYRE

  
R.M CHINANGWA

**JUDGE**