



THE REPUBLIC OF MALAWI

**IN THE HIGH COURT OF MALAWI
SITTING AT ZOMBA**

CRIMINAL CASE NUMBER 11 OF 2023

Between

**THE REPUBLIC
Vs
EMBEKEZENI MATOTSA**

CORAM **THE HONOURABLE JUSTICE TEXIOUS MASOAMPHAMBE**
Counsel Longwe for the State
Counsel Ching'anda for the Apellant
Tweya, Official Interpreter

SENTENCE

Embekezeni Matotsa was convicted, by the First Grade Magistrate sitting at Ntcheu, of the offence of defilement contrary to section 138 of the Penal Code. The allegation of the state was that Embekezeni Matosa on the 11th day of February, 2022 at Kampepuza Area in the District of Ntcheu had carnal knowledge of S J, a girl under the age of sixteen years. The victim was 14 years at the time of the incident. After full trial, Embekezeni Matosa was convicted accordingly. The case was referred to the Senior Resident Magistrate sitting at Ntcheu for purposes of sentencing. The lower court considered that the convict requires a sentence that is above its jurisdictional powers and as such referred the matter to this court.

This court has to determine the appropriate sentence in this matter.

The state is of the view that the convict deserves a sentence of more than 21 years imprisonment with hard labour based on the following reasons: firstly, that the convict is a repeat offender who was also convicted of the offence of defilement in 2013 before the First Grade Magistrate sitting

at Ntheu and he was sentenced to 156 months' imprisonment with hard labour under Criminal Case Number 106 of 2013. He committed the present offence after having served the sentence in that case. Secondly, the convict used threats of violence with a panga knife in committing the offence. Further to that, the seriousness of the offence which attracts a maximum sentence of life imprisonment calls for a stiffer sentence for the convict. The sentencing trends oscillate between 20 and 40 years and the prevalence of the offence calls for a deterrent sentence. They prayed for a maximum sentence of life imprisonment.

Counsel for the Convict pleaded with the court to exercise mercy when sentencing a convict and have regard to the mitigating factors. In mitigation, they submitted to this court that the convict is relatively young, being 37 years old and given an opportunity, he would still be a reliable member in his society. He was cooperative with the state after his arrest and they prayed for a sentence of 14 years' imprisonment adding that he would be 55 years old at the time of his release and will be able to fend for himself. Anything above 18 years he would be too old and dependent on other people. However, the state considers him a danger to society and did not agree that he was cooperative since he did not even plead guilty to the offence.

When passing a sentence, a number of things have to be considered. This may include but not limited to, the reason or objective that the sentence has to achieve, the circumstances of the offence, the offender and even the condition of the victim.

The offence committed by the convict attracts a maximum sentence of life imprisonment. This in itself speaks to the seriousness of the offence the convict committed. Both the state and counsel for the convict agree that the convict deserves a custodial sentence. In recent years, courts have been imposing stiffer sentences in these offences. It was noted in the case of *R vs Bandedcha, Confirmation Case Number 511 of 2020* that, to an extent, disregard has been had to the principle that the worst punishment is reserved for the worst offender. Examples being the cases of *R vs Aubrey Kalulu, Criminal Case Number 1503 of 2017*, where a life sentence was imposed on the offender and the case of *Fabiano vs Republic Criminal Case Number 13 of 2020* where the court enhanced a sentence of 14 years' imprisonment to 40 years' imprisonment on confirmation. This court is mindful of the seriousness of the offence.

Justice Mwaungulu in the case of *R vs Bright Jamali, Confirmation Case Number 421 of 2013* had this to say with regard to sentencing:

“...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.”

In that regard, this court will take into consideration the facts that the offender is relatively young, the offender’s possibility of being reformed, the circumstances of the offence and the effect of the offence on the victim.

In the case of ***Zeeshan Jaral Raja vs Republic, Criminal Appeal Number 36 of 2017***, in which the convict defiled a 15 years old girl, Justice Kapindu enhanced a sentence of 16 years imprisonment with hard labour to 30 years’ imprisonment with hard labour. Similarly, in the case of ***Republic vs Aubrey Kalulu, Criminal Case Number 1503 of 2017***, the matter was referred to the high court for purposes of sentencing and in 2020, the convict was sentenced to life imprisonment for having defiled a 12-year old girl who was a friend of the Convict’s child. The court took into consideration the age of the victim, the effect of the violation on the victim, the fact that the convict had multiple sexually transmittable diseases which he was aware of and he was the victim’s family landlord.

In the case of ***Shauti vs Rep, 8 MLR 69***, the court quoted with approval the passage in the case of ***State v Kumalo, 1973 (3) S.A. 697*** at 698 where the court said:


“Punishment must fit the criminal as well as the crime, be fair to the society, and be blended with a measure of mercy according to the circumstances.... The last of these four elements of justice is sometimes overlooked.”

It is true that it is in the interests of justice that crime should be punished. However, punishment that is too excessive serves, in my considered view, neither the interests of justice nor those of society.

In the present case, the convict is 37 years old, is a repeat offender having being convicted of a similar offence in 2013. Further to that, the convict used threats of violence with a panga knife when committing the offence. The aggravating factors outweigh the mitigating factors in this case. I therefore sentence the convict to 30 years’ imprisonment with hard labour, effective from the date of arrest. This sentence, as I see it, has both deterrent and retributive force as the convict will

be well over 60 years old at the expiry of 30 years. Whilst deterrence is a legitimate element of punishments, courts must not be seen to sacrifice a convict before them on the altar of deterrence.

Pronounced in open court on the 21st day of December, 2023, at Zomba.



Texlous S. Musoamphambe
JUDGE