



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL CASE NO. 12 OF 2022
THE REPUBLIC
VS**

ANDREW NGOMWA.....CONVICT

CORAM: HON. JUSTICE R.M. CHINANGWA

Msume	Counsel for the State
Masanjala	Counsel for the State
Maele	Counsel for the Convict
Amos	Official Interpreter

SENTENCE

Introduction

1. The accused was convicted by the Chief Resident Magistrate South of the offences of rape contrary to section 132 of Penal Code; defilement contrary to section 138(1) of the Penal Code and Indecent practices in the presence of a child contrary to section 160C (b) of the Penal Code. The first two offences attract a sentence of life imprisonment and the third offence attracts fourteen years imprisonment with hard labour. The matter was referred to the High Court under section 14(6) of the Criminal Procedure and Evidence Code for sentencing.

The Brief Facts

2. On or about the night of 9th July into 10th July 2020 at Lilongwe Sunbird Hotel, the convict had carnal knowledge of WM a girl aged 15th years 11 months. On this day, WM and the convict had travelled to Lilongwe Sunbird Hotel where she slept on the same bed as the convict. TN, a biological child of the convict aged 13 years old, firmly and consistently explained that at the time they arrived in Lilongwe, the convict went into a pharmacy near Lilongwe Sunbird Hotel and purchased a box which he gave to WN. TN tried to see the contents of the box but the convict shouted at her. TN then asked WM during their night bath about the contents of the box and she said that it was a menstrual pill. During the night, the accused slept on the same bed with WM whilst TN slept in the same room on a mattress put on the floor. In the course of the night TN decided to switch off the air conditioner. It was at that time that she saw the bed on which the convict slept with WM shaking and she also heard WM crying, shaking and breathing.
3. On 16th August 2020 at Magalasi area in Blantyre District, the convict and other family members had a 16th birthday party for WM at the convict's residence. After that party WM informed TN that she was going to extend a word of appreciation to the convict who is her uncle for throwing a birthday party for her. At this point, TN left WM who went to the TV/living room where the accused was watching TV. At the time WN was thanking the convict, he pushed her down and undressed her skirt. He in turn undressed himself and then inserted his penis into her private part. At this point WN informed the convict that he was going to make her pregnant because she was about to start her menses. The convict was not bothered with that but proceeded with what he was doing. The following morning the convict gave WN albendazole tablet which she took. As she was going to school, she was given Phansida to prevent malaria, metronidazole, Panadol-paracetamol, ciproflaxin,

omeprazole and magnesium-antacid suspension for ulcers. WM had persistent stomachache. It was later established by medical evidence that WN was 5 weeks and 5 days pregnant and was showing signs of a miscarriage.

Issue for Determination

4. This court has to determine the appropriate sentence for the convict herein?

The Arguments From the Parties

5. The mitigating factors as submitted by the convicted are that he is a first offender; he is advanced in age at 50 years old; there is no evidence of transmission of any disease and no evidence of violence towards the victim. It is argued by the defence that comparable cases of murder, manslaughter, robbery and burglary show that the court has passed lenient sentence even where a life is lost. It is further argued that in comparable cases of defilement where the victims were very young the courts have passed sentences of 8 years where the victim was 5 years old. Thus, for elder victims the sentence should be lower than 8 years old.
6. Regarding the aggravating factors the State submitted three factors. First, that the victim was made pregnant at 16 years old. This forced the victim out of school as she was about to sit for her end of high school examinations causing physical and psychological challenges to the victim. Second, the convict forced himself on the victim who is his niece; living in the same house and fatherly figure to the victim. It is argued that this demonstrates a clear abuse of trust on the victim and her parents who entrusted the convict to raise their daughter. Third, the convict was not remorseful throughout the trial as he denied having committed the offence and did not bring a doctor as his witness having committed to do so. Fourth, the convict committed the offence whilst knowing he was HIV positive putting

the victim at risk of contracting a sexually transmitted disease. Fifth, the victim lost her virginity and virtue. Sixth, the convict having had sexual intercourse, an act done in private, in the presence of his biological 13-year-old daughter is unthinkable. Seventh, the convict herein was aged 49 years, an adult, at the time of committing the offence thus he intended the probable and natural consequences of his actions. Eighth, being a first offender is of little relevance as the crimes the accused has been convicted of are serious offences and call for a long custodial sentence.

Analysis of the Law

7. In arriving at the appropriate sentence, the court considers the mitigating and aggravating factors. 'This will always involve a consideration of the extent and the circumstances in which the crime was committed, the personal circumstances of the defendant, the impact of the crime on the victim and the public's interest in the prevention of crime': *Rep v Nazombe* [1997] 2 MLR 105 (HC). In addition, the court also considers sentencing trends: *Rep v Kampingo and others* [1995] 2 MLR 754. Further the court considers the principles of sentencing which amongst others state a Court should pass sentences that equal the crime; a sentence must compare with sentences imposed on more or less heinous offences; a sentence must take circumstances of offence, circumstances of accused and effect on victim into account.
8. Section 340 (1) of the Criminal Procedure and Evidence Code allows the Court to sentence a first offender to a prison term where there are good grounds to do so. This court is of the view that there are good grounds to order a prison term. First, the current sentencing trends reflect that in most sexually related offences the perpetrators are sentenced to serve a prison term. The exception would be where the perpetrator and victim are within the same age

bracket of say a year or two years age difference. Consistency in the sentencing trends would demand that this trend be applied in this case. Second, the circumstances in which the offence herein was committed and the ripple effect of the crime on the victims calls for a prison term. As explained in *Brian Shaba v The Republic* (Criminal Appeal No. 19 of 2014) the Court stated that '*defilement is a very serious and heinous offence. It is both carnally and psychologically invasive offence.... the maximum sentence was imposed for a specific reason; to show the seriousness, public revulsion and society abhorrence for this kind of offence*'.

9. The question is how many years should the convict spend in custody? The parties have made submissions on the same by providing the court with different case authorities which had varying prison terms. Having read the submissions, this court observed that the defence had provided the court with case authorities most of which were decided over 10 years ago and which do not reflect the current sentencing trends. The sentencing trends have since changed to reflect the seriousness of sexually related offences and as a gender based crime. In *Republic v Petro Biliati* Confirmation Case no. 509 of 2020, Justice Patemba observed that the sentencing trends have scaled upwards following prison statistics which record that defilement cases have risen following the rise in the number of convicts imprisoned for defilement cases. In the year 2009 to 2020, the number of convicts rose from 183 to 2,155.
10. It is also interesting to note that the defence has shared case authorities on sentencing for offences of burglary; robbery; manslaughter and murder for purposes of comparison. It is this court's view that each case is peculiar in its own way. As such cases authorities on sentencing are merely guidelines. In addition a sentence case authority is not binding but

merely persuasive. Thus, the sentencing court has to exercise the right balance in arriving at the appropriate sentence.

11. The court has considered the following factors to arrive at the appropriate sentence: the convict was aged 49 and had victims aged 13; just under 15 and 16 years of age; though the victim was not infected with an STI she surely was put at high risk of infection by having sexual intercourse with an infected person; having sexual intercourse with an HIV positive person is traumatic; the convict had planned the offence. WN became his prey having been sexually attacked twice. The first time the convict preyed on the girl he had planned his move. He took the young girl to a hotel about 311kilometers away from her home. She was at the mercy of her predator. On the second occasion the girl WN was more or less attacked by the convict. He seems to have pre meditated the offence and was waiting for the right time to strike as he waited for his victim in the house. The convict knew exactly what he was doing and for a reason unknown to the Court. One can only deduce wickedness. The convict, a father, sexually preyed on a child whom he raised from age 3 and had sex in the presence of his child; WN was given medical drugs without doctors prescription in undisclosed amounts which made her fall sick; WN was pregnant and miscarried. This is a devastating story for a young girls life.
12. The mitigating factors as submitted by the defence cannot outweigh the aggravating factors spelt outs. As earlier said, there are reasons for ordering a prison term despite the convict being a first offender as explained above. At age 50 the accused cannot be said to be advanced in age and not to deserve an appropriate prison term. He cannot claim clemency when he was the villain at around the same age. The proverb *you cannot have your cake and eat it* fits well at this point.

13. In *R v Lamilton* (Confirmation Case 169 of 2021) [2021] MWHCCrim 8 (28 July 2021) the court enhanced the sentence from 14 years to 40 years IHL. The brief facts were that the Convict an adult person over 30 years old enticed a girl of 10 years to be sleeping with him by giving him money. He did this not just once but several times. The court noted that the offence was well-planned as the convict always lured his victim to his house'.
14. In *R v Banda* (Confirmation Case 516 of 2020) [2021] MWHCCrim 18 (14 June 2021) the Court had in mind the age of the victim, the Convict infected the girl with STI, breach of trust because the Convict was a neighbor and a father to the friend of the young girl. Taking all these factors into consideration, the Court set aside the custodial sentence of a lower court of 10 years and substituted it with 40 years IHL.
15. There are a mammoth of cases which indicate the sentencing trends have risen due to the rise in sexual offences. In addition to the above, one would just have to read cases such as *Zeeshan Jaral Raja v Republic* Criminal Appeal No. 36 of 2017; *Republic v Aubrey Kalulu* Criminal Case No 1503 of 2017 unreported.
16. In this case, this court finds that the aggravating factors outweigh the mitigating factors. The convict is sentenced to
- a) 35 years for the offence of defilement
 - b) 25 years for the offence of rape
 - c) 4 years for the offence of indecent practices in the presence of a child.
17. The sentences are to run concurrently from the day of arrest.

Pronounced this^{8th}.....day of March 2023 at BLANTYRE


R.M CHINANGWA

JUDGE