



IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY, SITTING AT RUMPHI

CONFIRMATION CASE NO. 360 OF 2013

(Being Criminal Case No. 60 of 2013 in the FGM Court sitting at Rumphi)

REPUBLIC

VERSUS

DAVID GONDWE

CORAM: HON. JUSTICE T.R. LIGOWE

W. Nkosi, of Counsel for the State

W. Chirwa, of counsel for the Respondent

G. Msukwa, Official Interpreter

J.N. Chirwa, Court Reporter

JUDGMENT

Ligowe J

- 1 David Gondwe was convicted of the offence of defilement and sentenced to imprisonment with hard labour for 12 years by the First Grade Magistrate sitting at Rumphi.
- 2 It was alleged before the Magistrate that David Gondwe aged 46 had carnal knowledge of a girl below the age of 16 on 5th February 2013 at Chatumbwa in Rumphi.
- 3 The evidence for the prosecution was given by a brother of the girl, Charles Chavula, aged 6; her grandmother Twasange Nyirongo; her mother Queen Gondwe; Shadreck Ngwira, a

clinician at Rumphu District Hospital; and Constable Teputepu, a police investigator. David Gondwe testified on his own in defence.

- 4 What comes out from the evidence that was before the Magistrate is that the girl was three years and eight months at the material time. Her brother was six years old. David Gondwe was well known to the children because he referred to them as his nephew and niece in his evidence. On that day, their mother left them with their grandmother as she went to work. At some point the children went to the respondent's house without their grandmother's knowledge. Charles Chavula testified that the respondent cooked nsima and he ate with the children. Afterwards, he went with them to a grocery shop and came back to the house where he slept with the little girl. It was Charles Chavula's testimony that as they went out of the house this time, his sister said that the respondent had done "something stupid." This referred to a sexual act and it appears it was understood as such by the accused person also. It comes out from Charles Chavula's evidence in cross examination, that after noting his sister had been so dealt with by the respondent, his only hope was his father, as he told the sister that they should go to their father.
- 5 Meanwhile, the grandmother was looking for them. She found them at the accused person's house and the girl told her what happened. It would appear she did not respond immediately as she repeated it when they arrived at their house. There upon, she examined the girl's private parts and noticed semen all over. The matter was then reported to police and the girl was taken to hospital.
- 6 Shadreck Ngwira testified that he is the one who examined the girl at the hospital. He exhibited his medical examination report in which he states that he noticed semen on the child's underwear, vulva and inside the vagina. He also noted bruises on the anterior vaginal canal and that the hymen was completely perforated. To him this indicated penetration. It was his testimony that thereupon, the girl was given medication to prevent her from contracting HIV and she was treated for STIs.

- 7 In his defence the respondent admitted being with the children on the material day. Later, a Shepherd came to visit and he was still with the children. He cooked food for them. On one hand, his evidence is that their father came to collect them. On the other hand he appears to admit that their grandmother is the one who collected them.
- 8 On this evidence the Magistrate found the offence proved. He noted that the girl herself did not give any evidence beyond her name and that the boy had given unsworn evidence and that his testimony required corroboration as a matter of law. He found the evidence of the grandmother who took the children away from the respondent's house corroborative. As well as the medical examination report.
- 9 The Judge reviewing the matter in 2015 set it down to consider reducing the sentence.
- 10 At the hearing however, Counsel for the respondent first contended that the conviction is not safe because, in his view, reading the context of Charles Chavula's evidence, he was not there when her sister was defiled, so he gave hearsay evidence, and his evidence had not been corroborated sufficiently. The medical evidence did not identify the offender. It is possible the Shepherd who visited the respondent committed the offence.
- 11 On this, State Counsel responded that Charles Chavula's statements indicate that he was there, much as he might not have seen it. At the age of six, he might not have expressed himself as much as he wanted. The sperm found on the genitalia of the girl corroborates Charles Chavula's evidence. That the Shepherd may have committed the offence is just a scapegoat.
- 12 Having considered the arguments of both sides, I confirm the conviction. Ordinarily, it would not be expected that Charles Chavula was watching as his sister was being defiled. However, the context of the whole story is that he was there at the respondent's house. Combining Charles Chavula's testimony and the respondent's own testimony, it was after eating nsima that the girl was defiled and this was after the Shepherd had visited and left.

The grandmother found the children right at the respondent's house. There is no indication that someone else could have defiled the girl.

- 13 As for the sentence, it is submitted in the State's written submissions that the appropriate sentence for the respondent in this case is imprisonment for nine years. There is cited *Kingstone Kambalame v. Rep* (Criminal Appeal Case No. 39 of 2009) [2017] MWHC 30 (04 January 2017)¹ (unreported) in which a man of 33 years old defiled a 12 year old girl and impregnated her. He pleaded guilty to the offence and upon conviction, the Magistrates' Court sentenced him to imprisonment for 12 years. This was reduced to nine by the High Court because of the plea of guilty and that he was a first offender. There is also cited *Yona Kamowa v. Republic* (Criminal Appeal No. 12 of 2016) [2017] MWHC 26 (06 January 2017)² (unreported) where a young man of 23 years but married defiled a girl of 15 years. He apparently had an affair with the girl in which he had been forcing her to have sexual intercourse with him. This happened for 36 times and she eventually got pregnant. The High Court upheld a sentence of nine years on conviction after a full trial.
- 14 While State Counsel was addressing the Court, I referred to him the cases of *Rep v. Bagala, Conf.* Case No. 24 of 2011 (Principal Registry) (unreported) and *Republic v. Alfred, Conf.* Case No. 152 of 2013 (Principal Registry) (unreported). In these cases Mwaungulu J., as he then was, came up with a guide in terms of the starting point for sentencing in cases of rape and defilement with the aim of ensuring consistency. The Judge determined the starting point at the usual level of the crime, i.e. the minimal level of the mental condition *viz-a-viz* the minimum action. He considered this to be an act between indecent assault or an attempt and minimal penetration. Considering that the maximum punishment for indecent assault under S. 137(1) and attempted defilement under S. 138(2) of the Penal Code is fourteen years imprisonment, he determined that the starting point for defilement should in view of the maximum of life imprisonment be fourteen years. The judge reasoned

¹ <https://malawilii.org/mw/judgment/high-court-general-division/2017/30>

² <https://malawilii.org/mw/judgment/high-court-general-division/2017/26>

that it is only when the indecent assault results into penetration, however slight, that defilement is committed.

- 15 I also referred Counsel to *The Magistrates' Courts Sentencing Guidelines* (Blantyre, Malawi Judiciary 2007) which suggest a starting point of imprisonment for ten years for defilement.
- 16 Upon this Counsel was of the view that the sentence of 12 years in this case is in order considering the age of the girl and that she was the respondent's niece.
- 17 Defence Counsel however submitted that the 12 years imposed by the Magistrate are manifestly excessive for a first offender. They have to be reduced so as to result to the convict's immediate release, considering the period he has so far served the sentence since 2013. He cited *Bamusi v. Republic*, Criminal Case No. 29 of 2010 (unreported) where a man with disability was sentenced to imprisonment for eight years by the trial magistrate but the High Court reduced it to five. *Republic v. Mbewe* 7 MLR 125 where a suspended sentence of imprisonment for two years was enhanced to six years by the High Court because defilement reduced the dignity and humiliated the victim. *Republic v. Pius Mbewe*, Conf. Case No. 123 of 2010 where the High Court reduced a 13 year sentence of a first offender who pleaded not guilty to seven years. *Rep. v. Maluni Machilika*, Conf. Case No. 736 of 1992 where both the victim and the offender were pupils, and the High Court confirmed a sentence of 24 months. *Rep. v. Yasin Jackson*, Conf. Case No. 1161 of 1994 where two years were enhanced to four years. *Rep. v. Mavuto Nyondo*, Conf. Case No. 115 of 2010 where the High Court reduced 13 years for rape to seven years. And, *Rep. Lazarus Mwasangwale*, on 26th April 2010, the High Court in Mzuzu confirmed a sentence of seven years for rape.
- 18 I was not able to read any of the other cases cited by Counsel except *Republic v. Mbewe*, 7 MLR 125 because they are unreported and he did not provide any copy at all. By the way, advocacy is about persuasion and if counsel provides no basis for any argument made, that argument is bound to fail. *Republic v. Mbewe* 7 MLR 125 was decided before the

sentencing guidelines referred to above were made and the girl was about 13 years old. In the present case, the victim is a girl child of three years and eight months. It is advisable to use the guideline, so as maintain consistency in sentencing. Between a man aged 46 and a child age six, there cannot be said to have been the minimum level of mental condition and the minimum level of action for defilement, so as to attract anything below the starting point. It was all evil. I confirm the sentence of imprisonment for 12 years.

19 Delivered in open court this 16th day of September 2020.



T.R. Ligowe

JUDGE