



**IN THE HIGH COURT OF MALAWI**

**MZUZU REGISTRY**

**CONFIRMATION CASE NO. 319 OF 2019**

Being Criminal Case No. 30 of 2019 in the FGM's Court at Rumphi

**REPUBLIC**

**VERSUS**

**PATRICK MILLION**

CORAM: HON. JUSTICE T.R. LIGOWE  
W. Nkosi, of Counsel for the State  
C.K. Phiri, of Counsel for the Respondent  
F. Mwakhwawa, Official Interpreter  
J.N. Chirwa, Court Reporter

**JUDGMENT**

Ligowe J.

1. Patrick Million was convicted of defilement and sentenced to imprisonment with hard labour for 60 months. Upon review of the sentence, the Judge handling it set the matter down to consider whether the sentence should be enhanced.
2. Patrick Million committed the offence on 1<sup>st</sup> January 2019 at Kategha area in Mzimba and he was 23 years old. The girl was 12 years old. The facts as narrated by the girl were that she was in Standard 4 at the time. She knew the offender as he had introduced himself to her on that day as Phadi (Paddy). He was working for Mr Kaphulabundi as a tobacco tenant farmer. She had been invited for celebrations at her grandmother's home on 1<sup>st</sup> January 2019. It was when she was chatting with friends around 7 pm that the offender came and started touching her. When she asked what was wrong for him to touch her, he was not intelligible. At that time, she had a child on her laps. As she went to leave the child to sleep and her friend went out to pass urine, the offender fell her down as she walked and undressed her underwear and, according to the girl, "did his stupid things." She tried to shout for help but he threatened to stab her with



a knife he had in his hands. And that if she revealed it to anyone, he would stab her wherever he would find her. So, she never reported the incident to anyone until her brother heard about it and reported to her parents and then eventually the offender was arrested.

3. In mitigation Patrick Million said that he is married and has a child. He also was responsible for assisting his parents. He is a patient and only uses herbs but did not specify what he suffers from. He could not manage to stay in prison and so, he prayed for a suspended sentence.
4. In meting out 60 months of imprisonment the First Grade Magistrate considered the offender's youthful age, that he is a first offender, and that the victim was tall and one could mistake her for a 16-year-old. The Magistrate however said he was not going to be lenient because the offender was married and had a child, the offence remains serious, and young girls need to be protected.
5. The rule for dealing with review of a lower court's sentence is the same as when dealing with an appeal against a sentence. This was stated in *Rep v. Kholoviko* [1996] MLR 355 and *Rep v. Mkoma* [1995] 2 MLR 598 that, since sentencing is a matter of discretion for the sentencing court, the appellate or reviewing court will not interfere with the discretion unless the sentencing court erred in principle, or the court overlooked a material fact or the sentence arrived at is manifestly excessive or inadequate as to comport that there was an error of principle.
6. There are written and oral submissions of Counsel for both sides on the file. The manner to handle them is to see which of them and how it demonstrates an error in principle by the First Grade Magistrate in sentencing the offender, or that the Magistrate overlooked a material fact or that the sentence is manifestly excessive or inadequate as to comport that there was an error of principle.
7. State Counsel submitted that the sentence should be enhanced as a way to protect the girl child. He further submitted that although it is the offender's first time, it will continue to play on the mind of the victim. That the offender threatened her life by saying he would stab her if she



revealed to anyone about it. That he was old enough to know the consequences of his actions. And, the offence of defilement is so prevalent.

8. State Counsel referred to *Rep. v. Godfrey Ndamera*, Conf. Case No. 314 of 2001 where Chimasula Phiri J is said to have adopted a starting point of six years for sentencing in defilement cases. He also referred to *Rep. v. Pius Mbewe*, Conf. Case No. 123 of 2010 where he said the court reduced a 13 year sentence to seven for a first time offender who had not pleaded guilty in the lower court. He also referred to *Mcvert Banda v. Rep.* Criminal Appeal No. 111 of 2013 where an offender who pleaded guilty and considered the victim her girlfriend and made her pregnant had his sentence reduced from 10 years to six years. And, he referred to *Rep. v. Akimo Ng'ambi*, Conf. Case No. 2017 of 2010 where the appellant at 19 years of age defiled a 12 year old girl and had his sentence reduced from 13 years to six.
9. Unfortunately Counsel did not provide the court with copies of the judgments in the cases he made reference to and I was not able to find them by myself.
10. Defence Counsel on the other hand implored upon this court to consider the youthful age of the offender and that it was his first time to offend. He referred to a statement by Mwaungulu J (as he then was) in *Rep v. Keke*, Conf. Case No. 404 of 2010 (Principal Registry) (unreported) that: -

“One most critical consideration about the offender is age. For ages between 19 and 25, commission of a crime may be a result of impetuous, immaturity, youth or adventure. A severe sentence may be perceived by a young offender as reflecting a harsh society on which to avenge. Long prison sentences for young persons may actually delay social integration to enable a young life to start a new life and lead a meaningful life. For young offenders, therefore, a short, quick and sharp sentence may achieve the ends of justice and deter future offending.”
11. Defence Counsel also referred to *Rep v. Kathumba* [1997] 1 MLR 390 where at page 393 the Judge said:

“... where the court is dealing with a youthful first time offender, it must be remembered that a shorter imprisonment may be just as effective as a longer one.



12. Defence Counsel further referred to *State v. John Kamanga*, Conf. Case 413 of 2012 where he said the respondent who pleaded guilty had his sentence reduced from 12 years to one year upon review. He also referred to *Rep. v. Doctor Mhango*, Conf. Case No. 512 of 2015 where he said the respondent had his sentence reduced from seven years to one year. He also referred to *Mathews Kayira v. The State*, Criminal Case No. 73 of 2013 where he said the respondent had been sentenced to six years and two years' imprisonment with hard labour for defilement and indecent assault respectively but were reduced to four years and one year respectively. He also referred to *Rep. v. Pius Mbewe*, Conf. Case No. 123 of 2010 where he said the court reduced a 13 year sentence to seven for a first time offender who pleaded not guilty. I have not been able to confirm the facts in the cited cases because Counsel did not provide the court with copies of the judgments and I did not manage to find any one of them by myself.
13. Defence Counsel further referred to *Yamikani Paul v Rep.* Criminal Appeal No. 16 of 2017 (Principal Registry) (unreported) where a young man of 19 years and 10 months old was in a sexual relationship at school with a girl of 15 years. He pleaded guilty to the offence of defilement and the lower court sentenced him to imprisonment for six years. The High Court however, discharged him under section 337 (1) (b) of the Criminal Procedure and Evidence Code because there were no power imbalances between the offender and the victim, looking at their ages and classes at school. The girl had not been forced into having sex with the young man. His situation could not be compared with others who actually use force and threats to defile girls, and in some instances, little girls. The Judge found that the commission of the offence was a unique and innocent affair.
14. The High Court in *Rep v. Bright Jamali*, Conf. Case No. 421 of 2013 (High Court, Principal Registry) (unreported) determined that the starting point for sentencing in offences of defilement should be imprisonment for 14 years, envisaging girls at the lower age of the spectrum for which the Penal Code proscribes sexual intercourse. To arrive at 14 years the court said: -
- “Starting points generally are determined at the level of the usual crime: the minimal level of the mental condition *viz-a-viz* the minimum action, except for cases of strict liability, as



in defilement, to commit the offence. In relation to rape and defilement, where that implies, minimal penetration, that action must be between the indecent assault or the attempt and actual minimal penetration, to which is added the fact that there is penetration, however slight. Under sections 137 (1), and 138 (1) of the Penal Code, the maximum sentence for indecent assault and attempted defilement is fourteen years. The starting point for defilement should, therefore, based on the maximum sentence of life imprisonment, should be fourteen years imprisonment. Sentencers at first instance must then scale up and down this starting point to reflect mitigating and aggravating circumstances and that the sentence must fit the offender.”

15. The court further said: -

“In relation to defilement, there might be need for consideration of the lower and upper end of the age for which the Penal Code proscribes sexual intercourse. In this regard, the starting point must be understood as envisaging the worst scenario, girls at the lower age. This is justified in that at the upper age group it is more likely for the accused to successfully plead the defence in the proviso in section 138 (2) of the penal code. Consequently, sentences, *ceteris paribus*, will be lower for those at the upper age of the spectrum. I would put the age at the upper end of the spectrum as being between thirteen to sixteen years.”

16. Regarding how to apply a starting point, the case of *Rep v. Chimimba* Conf. Case No. 138 of 2013 (High Court, Principal Registry) (unreported) is very instructive. The Judge said:-

“Prudence requires that a sentence, when scaling up and down the starting point, to start going upwards. It may also be prudent to indicate a value to the aggravating. If there are two aggravating factors, for example, in a house breaking, namely, seven people were involved in the burglary in the course and which there was a rape and rape was not included in the charge the sentence would say for each of these a year each is required. ...

The sentencer must then do the same as what the sentence did with the aggravating factors to scaling down for mitigating factors. It must be remembered that a plea of guilty will attract almost a third reduction from the determined sentence. In any instance the mitigating



factors, however, must not be overplayed as to arrive at lower sentence that are in principle and in fact inadequate as to comport an error of law or principle.”

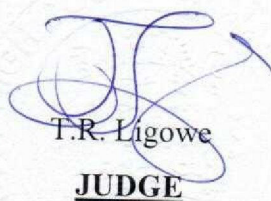
17. The sentences in the cases referred to this court by Counsel for both sides are way below 14 years’ imprisonment because that was the sentencing trend around the period those cases were decided. Justice Kapindu lamented about that trend in *Brian Shaba v. Republic*, Criminal Appeal No. 19 of 2014 (High Court, Mzuzu Registry) (unreported) as follows:

“I have...had occasion to look at some sentences that the courts have meted out in cases of defilement, some of which I regret for their extreme leniency. Sentences that have gone as low as three years imprisonment [do] not send an appropriate message to society and to would-be offenders. Such manifestly lenient sentences might send the undesirable signal to society that we are not taking children’s rights seriously. Thankfully, this trend no longer represents the settled position of the High Court. The High Court has now set guidelines on the appropriate starting point for sentencing when it comes to this class of crime.”

18. *Yamikani Paul v Rep* (supra) is clearly distinguishable from the present case. The age difference between the offender and the victim is much wider in the present case. The age of the girl at 12 is on the lower end of the spectrum as determined in *Rep v. Bright Jamali* (supra). And, the offender in the present case used force and was violent towards the victim.

19. Considering that the Respondent was 23 years old at the time he committed the offence, I consider his offence at the level of the starting point and enhance his sentence to imprisonment for 14 years.

20. Delivered in open court this 23<sup>rd</sup> day of June 2022.

  
T.R. Ligowe  
**JUDGE**