IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL APPEAL CASE NO. 24 OF 2017

PETER BENDALA

V

THE REPUBLIC

Coram: Hon. Justice M L Kamwambe

Chisanga of counsel for the State

Maele of counsel for the Appellant

Amos.....Official Interpreter

Pindani.....Chief Court Reporter

JUDGMENT

Kamwambe J

This is an appeal by Peter Bendala against the decision of the Mwanza First Grade Magistrate court convicting him of the offence of defilement contrary to section 138 (1) of the Penal Code and sentencing him to 12 years imprisonment after full trial. The grounds of appeal are as follows:

1. The lower court erred in law in admitting the evidence of PW2, the victim, without conducting a voir dire.
2. The lower court erred in law in misapplying the defence of alibi.
3. The sentence of 12 years imprisonment is manifestly excessive for a first offender.

Section 6 of the Oaths, Affirmations and Declarations Act provides as follows:

> *"Before giving evidence in a judicial proceeding, a witness shall make an oath or affirmation set out in the second schedule. The court or the person authorised by law or by the court in that behalf, shall ask such witness if he believes in the Almighty God and if so whether he agrees to make oath. If he answers both questions affirmatively he shall be required by such court or the person authorised, as the case may be to make the oath holding his right hand uplifted. In all other cases he shall be required by court or the person authorised to make the affirmation.*
>
> *Provided however that where, in any proceedings against a person for any offence, any person of immature age, before the court as a witness, does not in the opinion of the court understand the nature of either an oath or an affirmation the court may receive his evidence, though not given on oath or affirmation, if, in the opinion of the court, he is possessed of such intelligence to justify the reception of such evidence. "*

Section 210 of the Criminal Procedure and Evidence Code provides that:

> *"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by immature or extreme old age, disease, whether of mind or body, or any cause of the same kind, subject however in the case of persons of immature age to section 6 of the Oaths, Affirmations and Declarations Act, relating to the reception of their unsworn evidence."*

The question to determine is the age limit of an immature age. Unfortunately, it seems the term immature age has not been defined anywhere as such it presents a problem of deciding whether the victim girl, PW2, at 15 years and 11 months was of immature age so as to give unsworn evidence in accordance with section 6 of the Oaths, Affirmations and Declarations Act. Counsel for the State has brought in section 14 of the Penal Code to support the view that an immature person is one under 14 years of age. It reads as follows:

> *"A person under the age of 14 years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or omission he had capacity to know that he ought not to do the act or make the omission."*

The side notes refer to this section as 'immature age' being a defence to criminal liability. For the purposes of criminal liability, the law has imposed this cut off point of persons of immature age which does not or may not include all persons of immature age.

The Child, Care, Protection and Justice Act makes no mention of immature age anywhere but mentions a 'child' as being a person below the age of 16 years. It may be possible that not every child is a person of immature age. The question is where do we look for the real meaning of immature age? Which age group do we refer to as immature age?

Section 23 (6) of the Republican Constitution which addresses rights of children does not use the term persons of immature age, instead it mentions 'children being those under the age of 16 years'. The Electoral laws have put the majority age for voting at 18 years, meaning that those under 18 years are not eligible to vote. Further, the age of consent in sexual offences is 16 years. This would mean that above 16 the girl is mature enough to understand what she is doing and therefore does not require the protection of the law.

The Marriage, Divorce and Family Relations Act provides for the age of marriage at 18 years, but permits a girl over the age of 15 years to marry with the consent of the parents. It defines 'a child' as a person below the age of 18 years. This should be reconciled with the constitutional provision for the sake of uniformity and consistency.

Looking at the various Legal provisions exposed above, we may say that even if the use of the term immature age is only unique to the Oaths, Affirmations and Declarations Act which does not reveal age range, and section 14 of the Penal Code which provides a defence of immature age to those below 14 years, the widely used terminology is 'child' meaning one below 16 years of age. It is still debatable though whether a child between 16 and 18 years of age would fit in as of immature age. The law needs to be reconciled so as to clear this confounding situation and reach consistency.

My brother judge, Kalembera J handled two matters on the issue of voir dire in which the absence of voir dire caused the evidence of the victim child to be excluded. These cases are **Yamikani Letasi v The Republic Criminal Appeal Case No. 14 of 201** and **Charles Kusanama and Alfred Mataka v The Republic Criminal Appeal Case No. 20 of 2014.** The witnesses were 14 years and 10 years of age respectively. It was conclusive in these cases that the children were of immature age. There was no question whether they were of immature age or not. In my view, a person of 'immature age' is synonymous with 'child'. If the Oaths, Affirmations and Declarations Act intended to have a different meaning it would have specifically provided for age range it envisaged.

In our present case the witness was 15 years and 11 months old which brings her in the bracket of a person of immature age or child requiring special treatment according to law because she had not yet attained the age of 16 years when one is considered

not a child anymore. This is supported by our very Constitution. I observe that there was no compliance with section 6 (2) of the Oaths, Affirmations and Declarations Act, because *voir dire* was not conducted. Upon conducting a *voir dire*, the court is in a position to elect whether to swear the child before giving evidence or to permit the child to give unsworn evidence. The proviso to section 6 (1) is very clear that unsworn evidence is permitted where the court makes an opinion that the witness child does not understand the nature of either an oath or an affirmation. In the event that the child understands the nature of the oath or affirmation and the difference of truth and falsehood, the court may order the child to be sworn. After *voir dire*, it is not automatic that the evidence of the child shall be unsworn. The unsworn evidence of a child ought by law to be corroborated. This unsworn evidence of a child requires the child firstly to undergo a *voir dire* examination, which means, an inquiry as to the age of the child, whether the child understands the **meaning** of an oath and if yes, whether he understands the difference between truth and falsehood, and the need to speak the truth **(Makhanganya v R [1961-63] ALR (Mal) 491).** How a child responds to the inquiry determines whether the child should give sworn or unsworn evidence. It is noteworthy that the term used in England is '*of tender years*' even if sworn. The court was not comfortable to state at what age a child ceases to be of tender age, but concluded that a child of 14 years should be regarded as 'of tender years'.

In view of what I have said above, the evidence of PW2 the victim child, ought therefore to be excluded from record due to the absence of *voir dire*, the effect of which is to make the prosecution case not proved beyond reasonable doubt.

The second ground of appeal is about the lower court's misapplication of the defence of alibi as provided by section 193A of the Criminal Procedure and Evidence Code.

Without bothering to embark on the technicalities of the law of alibi, I find that it may be a futile exercise since the evidential burden has already failed to prove the case beyond reasonable doubt after the exclusion of PW2 evidence. May be the identification parade which was conducted thrice successfully disproved the alibi and is possible to corroborate the evidence of PW2, but the problem is that excluded evidence is not capable of being corroborated since it does not exist any longer. You cannot corroborate what does not exist. This is an unfortunate case as it might appear that justice has not been occasioned. I would suggest that sexual cases be prosecuted by learned counsel only before learned magistrates so that girls are not seen to be fighting a cruel society which is making their lives difficult. This may turn out to be a gender issue. Sexual cases against girls/women are more sensitive than most other cases. It exercised my mind whether to send back the file for retrial but I thought that this would be putting the Appellant under double jeopardy, hence, I concluded it to be unwise to do so as it would seem as if we want at all cost to secure a conviction.

I have observed that it will not serve any useful purpose to determine on the issue of alibi at this stage. The appeal is allowed and sentence is set aside.

Pronounced in open Court this 24th January, 2018 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE