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IN THE HIGH COURT OF MALAWI

CRIMINAL DIVISION

MZUZU REGISTRY

CONFIRMATION CASE NO. 373 OF 2018

Being Criminal Case No. 67 of 2018 in the FGM's Court Sitting at Karonga

REPUBLIC

VERSUS

PATRICK MWAFULIRWA

CORAM: HON. JUSTICE T.R. LIGOWE

W. Nkosi, of Counsel for the State

C. Duke, of Counsel for the Respondent

G. Msukwa, Official Interpreter

R. Luhanga, Court Reporter

JUDGMENT

Ligowe J

1. Patrick Mwafulirwa and his friends had in January 2018 requested to be studying at his sister's house, Grace Mwafulirwa, in preparation for MSCE examinations. On or about the night of 23rd February 2018, he came alone to study. Around midnight his sister found him in her 14-year-old daughter's bed naked with the daughter. He ran away but was arrested and charged with defilement contrary to section 138 of the Penal Code. Before the First Grade Magistrate's Court sitting at Karonga, the girl testified that Patrick Mwafulirwa had done stupid things with her that night, and that he had done it seven times before. This meant Patrick had been having sex with the girl and the court convicted him of the offence and sentenced him to imprisonment for nine years with hard labour.

2. For aggravating factors, the court considered that Patrick Mwafulirwa was uncle to the girl and had by the offence, failed to discharge his parental responsibility towards her. And, he had taken advantage of his studying at the house to find his way into the girl's bedroom. For mitigating factors, the court considered that he was youthful and about to write MSCE examinations that year. He had been in custody since arrest and had always been cooperative. The court also considered that society abhors sexual abuse of girls and courts need to be sensitive to this, and meted out the imprisonment for nine years.
3. The review Judge set down the matter for enhancement of the sentence.
4. At the hearing of the review, counsel for both sides submitted that imprisonment for nine years in this case is neither manifestly excessive nor manifestly inadequate.
5. In his written submissions, State Counsel referred to *Rep. v. Godfrey Ndamera* Conf. Case No. 314 of 2001 (Principal Registry) (unreported) where Chimasula Phiri J. adopted the starting point of six years to be adjusted upwards or downwards, for a sentencing guideline in rape and defilement cases. He also referred to *Rep. v. Pius Mbewe* Conf Case No. 123 of 2010 (unreported) where imprisonment for 13 years for defilement was reduced to seven.
6. In his written submissions, Defence Counsel referred to *Rep. v. Pose* [1997] 2 MLR 95 where the court said: -

“At the end of the day, however, the court must pass a sentence that meets the justice of the case. A disproportionately excessive sentence might be a violation of a defendant's fundamental right not to be subjected to cruel, inhuman and degrading treatment or punishment. The sentence passed must be equal to the crime. This implies two things. Firstly, that the sentence passed for a particular offence must compare with sentences imposed on offences more or less heinous. Secondly, the court has to look at the instance of the offence before it and decide whether it is such that deserves heavy punishment. A trivial infraction of the law does not require a heavy sentence. The court has also to look at the circumstances in which the offence was committed. The sentence passed must be just to the offender. The court

must consider the personal circumstances of the offender. The court has also to consider the effect of the crime on the victim. The criminal law is publicly enforced to prevent crime. Sentences must be passed with this in perspective.”

7. Defence Counsel also referred to *Langton v. R*, 1923-60 ALR Mal 975 where it was held that a court may not reject matters put forward in mitigation of sentence without fully examining them.
8. This case has drawn me thinking deeply on whether indeed it is appropriate to enhance the sentence.
9. First, it is to note that defilement is a very serious offence. Justice Prof. Kapindu put it so elaborately in *Brian Shaba v. Rep.* Criminal Appeal No. 19 of 2014 (High Court, Mzuzu Registry) (unreported), paragraphs 2.6 to 2.9 of the judgment. The sum of it all is in paragraph 2.6 where he said: -

“... defilement is a very serious and heinous offence. It is both a carnally and psychologically invasive offence.”
10. Defilement has always been a serious offence in Malawi as it has always been punishable with imprisonment for life. It is punishable with imprisonment for life under section 138 of the Penal Code (Cap 7.01) of the Laws of Malawi, and it used to be punishable with imprisonment for life with or without corporal punishment under section 144 of the Penal Code (Cap 23 of the Laws of Nyasaland 1957). The sentencing trend however, seems to give the impression that the seriousness the courts attach to it now is more heightened than before. The cases of *Rep. v. Goliati*, 1971-72 ALR Mal 251, *Rep. v. Austen*, 9 MLR 238, *Rep. v. Godfrey Ndamera*, *Brian Shaba v. Rep.* Criminal Appeal No. 19 of 2014 (High Court, Mzuzu Registry) (unreported), *Republic v. Aubrey Kalulu*, Criminal Case No. 1503 of 2017 (HC) (LL), *Republic v Billiati* (Conf. Case No. 509 of 2020) (unreported), and *Rep v Daniel* Conf. Case. No. 2123 of 2020 (unreported) (Lilongwe), illustrate the point.

11. In *Rep. v. Goliati*, 1971-72 ALR Mal 251, two boys aged 19 and 20 defiled a 10-year-old girl at a village dance having agreed to give her 5t each. She did not complain until morning when she was seen walking abnormally. The boys pleaded guilty to the offence. They had been sentenced to a fine of K50 each by the lower court but on review the High Court replaced that sentence with imprisonment for 12 months each, suspended for 12 months.
12. In *Rep. v. Austen*, 9 MLR 238, in 1979, the accused 19, years old, defiled a granddaughter of his cousin who was then about five years old. Her grandmother saw her crying but when asked what had happened, she could not explain. Consequently, the grandmother beat her and then put her to bed. She was unable to go to school the following morning and told her grandmother she had been injured below the abdomen by the accused. Her private parts were swollen. The man was convicted of defilement and sentenced imprisonment for 15 months with hard labour and nine strokes. The High Court confirmed the imprisonment but not the corporal punishment.
13. In *Rep. v. Godfrey Ndamera* (op cit), the convict, 26 years old had defile a 3-year-old girl. He had been sentenced to imprisonment for five years by the lower court, but on review, it was enhanced to eight. Chimasula Phiri J, referred to the sentencing guideline then at page 2 of the order. He said: -

“The general trend nowadays, is to pass stiff sentences for rape and defilement. The courts have seen the dire need to protect the girl child from sexual abuses. I adopt previous cases which have set down guidelines for rape and defilement that the starting point should be 6 years IHL and adjust upwards or downwards depending on the circumstances.”

Note that the starting point for sentencing in defilement during this period was six years.

14. Today, cases like *Brian Shaba v. Rep.* Criminal Appeal No. 19 of 2014 (High Court, Mzuzu Registry) (unreported) and *Republic v Billiati* (Conf. Case No. 509 of 2020) (unreported) are what demonstrates the paradigm shift.
15. In *Brian Shaba v. Rep* the appellant had been sentenced to imprisonment for six years by the Magistrate’s Court after a full trial. He was a teacher and 47 years old. He defiled a girl from

his class 12 years old. He had asked three girls to take his books to his house. He instructed two girls to leave the books on the veranda and go back, but the victim to proceed into the house. As she walked out after dropping the books, he asked her to sit on the chair and asked for her age. When she answered he proposed if he could carry her in his arms but she refused. He persisted with his advances until the girl tried to escape, but he stoned her and she fell down. He then grabbed her, told her to sit on the chair and started touching her breasts. She started crying but he told her to stop as he would give her notebooks afterwards. He then dragged her to his bedroom, undressed her, undressed himself and defiled her. She was crying. Afterwards he told her not to tell anyone. He went outside to talk to some people and then came back to defile her again. Afterwards he repeated that she should not tell anyone, for the sake of his reputation, and gave her two notebooks. The matter came before the High Court on appeal to reduce the sentence. There are two paragraphs in the judgment which indicate dissatisfaction with the sentencing trend before it, which I think are relevant to reproduce. The Judge said: -

2.3 During argument, there was a sudden twist. Counsel Watson Chirwa, appearing on behalf of the Appellant, stated that he would no longer argue for the reduction of the sentence. He informed the Court that he had re-examined the evidence and formed the view that the sentence of 6 years IHL imposed by the Court below was reasonable and proper. He informed the Court that he had a duty as an officer of the Court to be objective in advancing argument before the Court, and further that he had informed the Appellant about this position. In the premises, Counsel Chirwa invited the Court to simply confirm the 6 years IHL sentence.

2.4 State Counsel, Mr. Waliko Nkosi also stated that he formed the view that the sentence of 6 years IHL imposed by the Court below was appropriate considering the trend of sentencing in this type of offence.

It is after this that the Judge discussed the seriousness of the offence, and in view of the circumstances, and considering the case of *Rep v. Bright Jamali*, Conf. Case No. 421 of 2013 (High Court, Principal Registry) (unreported), which set out imprisonment for 14 years as the starting point for defilement, enhanced the sentence to 18 years.

16. In *Republic v Billiati* the convict was sentenced to imprisonment for 40 years. He was 33 years old and he defiled a girl of nine years old. He called for the girl to come to his house and upon arrival dragged her into his house and removed her underwear to defile her. He gagged her so she could not shout. He afterwards gave her K70.00 and threatened her not to reveal what had happened to anyone. She however revealed and upon medical examination, it was found she had tears on her private parts, the hymen was not intact, there were spermatozoa seen on her private parts and some little fluid on her vulva the Convict tested positive of HIV test but not the girl. In the sentence Patemba J makes mention of the responsibility of the courts towards encouraging and promoting conditions conducive to full development of healthy, productive and responsible members of society as a principle of national policy for children under section 13 (h) of the constitution. She also opines that the sentencing guideline in *Republic v. Bright Jamali* Confirmation Case No 421 of 2013 (HC) (PR) has had no sufficient deterrent effect, considering the prevalence of the offence currently. The prison had 2,155 Convicts of defilement in July 2020, compared to 183 in 2009. She therefore proposes a starting point of imprisonment for 20 years. In the same case she refers to the case of *Republic v. Aubrey Kalulu*, Criminal Case No. 1503 of 2017 (HC) (LL), where the court imposed a life sentence on a man who defiled a 12-year-old girl and was the victim's family's landlord, father of the victim's friend, HIV positive, suffering from syphilis and tinea genitals and as a result, the Victim's private parts were corroded and she had difficulties walking.
17. In *Rep v Daniel* Conf. Case. No. 2123 of 2020 (unreported) (Lilongwe), a 29-year-old man defiled a four-year-old girl. He lured her into his house with a promise to give her K50.00 and when she entered, he had his way with her. She testified in court that she felt pain when he did this to her. The medical report showed that she presented with a swollen vulva and a perforated hymen. He was sentenced to imprisonment for 45 years.
18. For sure, the prevalence of the offence today as compared to the old times, justifies the sentencing trend. High prevalence of an offence after all is usually considered an aggravating factor. No doubt, considering the circumstances in *Brian Shaba v. Rep. Republic v Billiati*, *Republic v. Aubrey Kalulu* and *Rep v Daniel*, the offenders deserved the punishments they were

given. I concur, in their sentences the courts must reflect the seriousness, public revulsion and societal abhorrence for this kind of offence. But consider the present case.

19. Yes, Patrick Mwafulirwa is uncle to the girl, but how many among 18-year-old boys would hold in their mind that they are a parent to their 14-year-old sister's daughter? Admitted, he had defiled the girl seven times over the period, and the girl testified that she had not told her mother all along, because he threatened to assault her. Consider however, that at the age of 18, Patrick Mwafulirwa as an offender, had just graduated from being a child, under the Constitution and the Child Care, Protection and Justice Act. See *The State v. The Second Grade Magistrate's Court (Thyolo) and Malawi Prison Service, Ex parte Stanford Kashuga*, Misc. Civil Cause No. 129 of 2012 (Principal Registry) (unreported). At any age below 18, he was not supposed to be imprisoned for any offence, according to section 140 of the Child Care, Protection and Justice Act, and it would not be justifiable at an age a few months older, to be imprisoned for nine years for defilement, in the manner it was committed in the present case. I am therefore convinced with Mwaungulu J (as he then was) in *Rep v. Keke*, Conf. Case No. 404 of 2010 (Principal Registry) (unreported) when he said: -

“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.”

20. It is my considered view, that the sentence in the present case should be reduced.

21. In *Yamikani Paul v. Rep*, Criminal Appeal No. 16 of 2017 (Principal Registry) (unreported), a young man of 19 years and 10 months was in a sexual relationship with a girl of 15 years at school. He pleaded guilty to the offence of defilement. The lower court had sentenced him to six years, but the High Court discharged him under section 337 (1) (b) of the Criminal Procedure and Evidence Code. The reasoning was that there were no power imbalances

between the offender and the victim, looking at their ages and their 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, very little girls. The Judge acknowledged the offence the young man committed but found the situation unique and called it an innocent affair. It reminds of *Langton v. R*, 1923-60 ALR Mal 975 where a boy of between 15 and 17 years old defiled a girl of between 10 and 11 years old. The High Court sentenced him to 12 months' imprisonment and 12 strokes, but the Federal Supreme Court reduced it to imprisonment for four months. The court considered that case "one of the least serious types of the offence" because, although the appellant was technically an adult, he was very young, and the girl was only five or six years younger and there was no element of violence or compulsion.

22. The other case to consider is that of *Felix Joseph v. Rep*, Criminal Appeal Case No. 3 of 2015 (unreported) cited in *Yamikani Paul v. Rep*. A 22-year-old man was sentenced to imprisonment for four years by the High Court for defilement of a 15-year-old girl with whom he had been in an affair and impregnated.
23. The cases of *Langton v. R* (supra), *Rep. v. Goliati* (supra), and *Rep. v. Austen*, (supra) seem to show that in the old times it was mostly young men involved in defilement with relatively older girls, while *Rep. v. Godfrey Ndamera*, *Brian Shaba v. Rep*, *Republic v Billiati*, *Republic v. Aubrey Kalulu* and *Rep v Daniel* demonstrate that today so many old men are involved with very young girls. It also appears that the treatment for the young offenders has not changed as much, as can be seen from *Yamikani Paul v. Rep* and *Felix Joseph v. Rep*.
24. Comparing the present case with *Yamikani Paul v. Rep*, it is in my view a little more aggravated as there was no sexual relationship between Patrick Mwafulirwa and the girl, but the blood relationship and that he threatened her not to reveal it to her mother. It is however less aggravated when compared with *Felix Joseph v. Rep* as there is no impregnation.
25. Patrick Mwafulirwa's imprisonment was from the date of his arrest, 26th February 2018. He has therefore served three years and seven months as of now. His sentence need not go beyond

that in *Felix Joseph v. Rep.* He so far has been punished enough for him to think twice next time before engaging with another girl. I therefore reduce his sentence so as to result to his immediate release.

26. Pronounced in open court this 27th day of October 2020 at Mzuzu.


T.R. Ligowe
JUDGE