



**IN THE HIGH COURT OF MALAWI**

**CRIMINAL DIVISION**

**PRINCIPAL REGISTRY**

**CONFIRMATION CASE NO. 516 OF 2020**

**(Being Criminal Case No 59 of 2020 in the First Grade Magistrate Court sitting at Chikwawa)**

**THE REPUBLIC**

**-V-**

**BANDA SMART**

**CORAM: HON. JUSTICE AGNES PATEMBA**

Mr. Salamba, Counsel for the State

Mr. Panyanja, Counsel for the Accused

Mrs. Msimuko, Court Reporter

Mr Amos, Official Interpreter

**ORDER ON CONFIRMATION**

1. The Convict, Banda Smart, aged 45 from Nyamphota village, Traditional Authority Lundu in Chikwawa District. He was convicted by a First Grade Magistrate on the offence of defilement contrary to section 138 (1) of the Penal Code and was sentenced to 10 years IHL.
2. He pleaded not guilty to the charge of defilement which was leveled against him. The State paraded three witnesses who testified against the Convict. From the evidence recorded in the lower court, this is what the Court picked from the court record;
3. PWI was the young girl aged 11 years who gave her testimony under oath after conducting *voire dire*. She testified that on the 24<sup>th</sup> March 2020, around 20;00 hours, her mother sent her to get a cloth. On her way she met with the Convict who is her neighbor and that he is

the father of her friend. The Convict was standing under a tree and when she was passing through, the Convict grabbed her and gagged her mouth so that she should not shout for help and defiled her.

4. She reported the matter to her grandmother who took her to the hospital. The hospital confirmed she was defiled and was infected with STI's. Thereafter, the matter was reported to police. In answering questions from the Convict she said that she knows the Convict because they stay in the same village and that the Convict is the father of her friends.
5. PW2 was the father of the young girl who was defiled and testified that his daughter is 11 years old and is in standard three. On the 24<sup>th</sup> March 2020, he came back home in the afternoon and was informed by the mother of the young girl that their daughter has been defiled by the Convict and they took her to the hospital where the results came out positive. The accused was arrested on the 24<sup>th</sup> March 2020.
6. Pw3 was Detective Inspector Kulemeka who testified that on the 27<sup>th</sup> March 2020 he received a report from PW2 about the defilement of her daughter. They were referred to the hospital and the accused was arrested by the public and surrendered to Nchalo Police. He tendered caution statement of the Convict and medical report. In defence the Convict exercised his right to remain silent.
7. After full trial the Court found him guilty and convicted him of the offence of defilement contrary to section 138 (1) of the Penal Code and was sentenced to 10 years IHL.
8. Upon review, the reviewing judge was of the view that the sentence imposed by the lower court was on a lower side and ordered that the matter be set down to consider enhancement of the sentence.
9. At the hearing, the State argued that the sentence should be enhanced from 10 years to 21 years considering the seriousness of the offence, and having in mind the age of the victim that she was infected with STI and there was breach of trust being a neighbour to the child and a father of the friends of the young girl, the Court should enhance the sentence from

ten to not less than eighteen years IHL. While Defence Counsel argued that considering that the convict was the first offender the Court should enhance the sentence from 10 years IHL to 12 years IHL.

10. Section 138 (1) of the Penal Code provides that;

*Any person who carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life.*

11. The penalty imposed under this provision shows the seriousness of the offence and as such the court's decisions should reflect this seriousness by imposing meaningful sentences. In the case of **Republic v. Bright Jamali** Confirmation Case No 421 of 2013 (HC) (PR) Mwaungulu J, (as he then was) laid down important sentencing guidelines in cases of defilement. He stated that;

*The starting point for defilement should, therefore, based on the maximum sentence of life imprisonment, be fourteen years imprisonment. Sentencers at first instance must then scale up and down the starting point to reflect mitigating and aggravating circumstances and that the sentence must fit the offender.*

12. This has been the position of the law for over a decade. I must state that over a decade ago, these offenses were not as rampant as it is in the recent times. And in the recent years, the courts have moved forward to impose stiffer penalties in defilement cases, disregarding the principle that the worst offender is yet to come hence the maximum sentence should be reserved for worst offenders. ( **Namate v Rep** Crim Appeal No. 11 of 1975 ). In the case of **Republic v. Aubrey Kalulu**, Criminal Case No. 1503 of 2017 (HC) (LL), a case was referred to the High Court for purposes of sentencing by the Principal Resident Magistrate under section 14 (6) of the Criminal Procedure and Evidence Code. In 2020, Justice Ivy Kamanga (as she then was) imposed a life sentence on the Accused person for the offence of defilement. The Court considered among other things that the Convict was the Victims family landlord, that the Accused person was HIV positive and he was aware about his condition, that he was suffering from syphilis and tinea genitals and as a result of the violation of Victim's private parts were corroded and she had difficulties walking. The

court considered the young age of the victim at 12 years of age and that she was a friend to the convict's child or sister.

13. In the case of *Fabiano Maliko v. Republic*, Criminal Appeal No. 13 of 20 (HC) (Unreported), a 43year man, who on multiple times defiled a 10-year-old girl, had his sentence enhanced from 14 years to 40 years. In the case of *Republic v. Afete Daniel*, Confirmation Case No 2123 of 2020 (HC) (LL) (Unreported), the Convict aged 29 and married defiled a 4-year-old girl. He was sentenced to 10 years IHL. Upon review, Justice Mtalimanja enhanced the sentence from 10 years to 45 years IHL. This was pronounced on the 19<sup>th</sup> April 2021. And in the case of *Zeeshan Jaral Raja v. Republic* Criminal Appeal No. 36 of 2017, (HC) (ZA) (Unreported), the Convict defiled a girl of 15 years old and was sentenced to 16 years by a lower court. On appeal, Justice Kapindu enhanced the sentence from 16 years to 30 years IHL. The judgment was delivered on the 8<sup>th</sup> January 2021. In the case of *Rep v Petro Biliati* Confirmation Case No. 509 of 2020 (HC) (PR) (Unreported) a Convict aged 33 defiled a girl of 9 years, he was HIV positive and was sentenced to 10 years by a lower court. Upon confirmation, this Court enhanced the sentence from 10 years to 40 years.

14. Having discussed the law and highlighting the recent jurisprudence on the subject matter, and having in mind the age of the victim, and that the Convict infected the girl with STI, there was 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 therefore sets aside the custodial sentence of a lower court of 10 years and substitute it with 40 years IHL with effect from the date of arrest.

Delivered this 14<sup>th</sup> Day of June 2021.



AGNES PATEMBA,  
JUDGE