



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CONFIRMATION CASE NO. 995 OF 2021

Being Criminal Case No. 237 OF 2021, SRM Court, Limbe

THE REPUBLIC

V

WITNESS PAUL.....CONVICT

Coram: JUSTICE R. M CHINANGWA

Kulesi Public Prosecutor

Penama Legal Aid Advocate

Accused Present

Amos Court Clerk/ Official Interpreter

ORDER ON CONFIRMATION

1. Introduction

The convict was charged and convicted on two counts namely: robbery contrary to section 300 as read with section 301(2) of the Penal Code and rape contrary to section 132 as read with section 133 of the Penal Code. After full trial the convict was convicted and sentenced to 8 and 12 years respectively. Below is the evidence that was before the lower court.

2. The Evidence

a) The State Evidence

The first prosecution witness was Felia Samson, aged 17. She stated that, 'I know the accused, he raped me and before the offence, I never knew the accused. On 16th March 2021, we were three of us escorting one: we were Chisomo, Zione, Phelia Simon. On our return before escorting Zione, we met the accused and nine others, they threatened us with a Panga and asked us to give them K10,000.00. We told them that we did not have the money. Chisomo gave them MK6,500.00 (she gave the money to the accused). Then the accused also took away headsets and a touch cell phone. Then, the accused asked us to seat there and take different routes. By that time the nine accused's accomplices had hidden in nearby bushes. We returned to where we were coming from by being forced by the accused to give (show) Chisomo another route to take. He then escorted me and, on the way, he asked me to stop. He threatened me, "ukuyenera kupanga ineyo ndikufuna". Meaning, "you must abide by my demands". And that if I fail, he would kill me. In the course of refusing, he got hold of me and fell me to the ground and then raped me. Before ejaculating sperms, I managed to push him and then, I ran away. In the course of running his nine friends joined chasing me and I managed to run away from them up until I got home. Then, I informed the elder sister to my mother and she in turn, informed my mother who reported to the Chairperson of BCA (Mr Kazembe) who gave us a letter to Police. At Limbe Police station, they gave us a medical report form to take to Queen Elizabeth Central Hospital – One stop Centre. They took samples and found that I had no STDs but found that I had been raped. They gave me an injection and some medication and we went back to Limbe Police Station

where they took a statement before me. Then, we left for our home. After two weeks, I went to Lonrho Ground to play football where I apprehended the accused as he was passing by the ground heading towards the place, he raped me and I rushed for him. I recognised him because at the time, he raped me, we stayed together for a long time but also, he was putting on the same clothes and also carrying the same bag. I asked the accused if he recognised me and he said, "no". I got hold of him and shouted for help. My cousin (Flora Dyson) and Blessings Kadzuwa (my brother / biological) helped me to apprehend him. Then, we took him to my home. My mother managed to lock him up in our house then we went to inform the Chairperson of BCA – Mr Kazembe. When quizzed, the accused admitted to have raped me. Then, my mother called Limbe Police station since the police were delaying to come, she just hired a car and took the accused to Limbe Police Station. In cross examination she added that, 'I know you because you raped me. You did not propose to me. You never gave me any money but you took money from us. I do not know the person whom you sent to call me. It was the first time to see you. On this day, you were with nine friends. As you raped me, you were alone and you raped me close to BCA Cemetery. I never said to you that my mother would shout at me. I never asked you to escort me. Your friends started chasing me when I pushed you off my top'. In re-examination she added that, 'It is not true that the Accused is my boyfriend. None of his friends called me and he has never given me money. I do not know the accused and never met him before the incident'.

The second prosecution witness was Chisomo Lavason, aged 18. She stated that, 'I know the first accused for he robbed me of a Samsung phone at around 18:00 hours when I was escorting a girl who stays at Mthandizi. He asked for money from us and we told him that we did not have. Then he produced a Panga that he would cut our throats and I only gave him MK6,500.00. Then he told us that he would not leave us until we gave him K10,000.00. He told me that I would have to go my own way and that him and his friends would go away with the girl. I left the accused with the girl. When I got home, I was told that the accused had raped the girl. The accused is the one who snatched the phone from me and he is also the one who was armed with the panga knife. The phone, MK6,500.00, head set and memory Card (4 GB) have not been recovered'. In cross examination she stated that, 'We met you at around to 18:00 hours, there were no people but you were ten in total. You are the one who approached me and produced a panga knife. It was close to Lonrho Cemetery. Then, you asked me to start running in a different direction. When I went, I then met your friends. You are the leader of the group of robbers. I started running and your friends chased me. You were alone when you told us that we would learn the dangers of walking at night. The victim (girl) told me that you raped her. We were with you for a long time on this evening and your voice also led us to identify'. In re-examination she stated that, 'At the time I was assaulted, his nine friends hid in the fields. I recognised the accused because we spent more time with him and was also the first to approach us'.

The third prosecution witness was Paulo Kazembe. He stated that, 'I am Chairman for Community Policing Forum. As chairman, on 1st April 2021 at around 18:00 hours, mother to the victim called and asked me to go to her house for the girl's assailant had been arrested. Then, we took into the house of the victim's mother's house and locked him up. She explained how the girl apprehended the Accused. When, quizzed, the accused admitted to have raped the victim and also had with Pangas and a broken touch before and there was MK1,700.00. I called the Police between 19:00 and 20:00 hrs the Police did not come and took him to the stage and boarded a Mini bus. At Limbe Police Station, I met Mr Malidadi and I informed them of the offense. He then called Madam Mwawa. The Police asked him and he admitted that he raped the girl for she was his girlfriend'. In cross examination, he stated that 'Yes, I asked you if you raped the girl. I was protecting you before the angry mob. The angry boys / relatives for the girl wanted to kill you. I found the Panga Knife in the laptop bag for the accused.

The fourth prosecution witness was Edina Kaliati, she stated that, 'I know Felia Samson, she is daughter to my younger sister. I came to know the Accused on the day he was apprehended by Felia. On this day, she came to my home angry and walked into my house and began crying that she had been raped on the way to the grave yard on her return before escorting another girl. I went and informed her mother. Then, the mother came, questioned the girl. Later, they went together to the house for Mr Kazembe (the Chairman). I remained at home with the time. I was outside the house restraining angry mob before assaulting the Accused. In

cross examination she added that, 'I was outside the house when you were taken into the house. At first mother to the victim was the one who protected you before I came'.

The fifth prosecution witness was Detective Sub Inspector Joyce Mwawa. She stated that, 'On 16th March 2021 we heard a complaint before Felia Samson 4m BCA about a rape Case. By then, it was again unknown he gave her a MR form and was treated at QECH. The following day the case file of rape was opened. After two weeks, I heard a call between the victim's mother informing that they had apprehended the suspect. They brought the suspect to our office i.e., the victim and her relatives. The following, I made a confrontation between the suspect and victim. The suspect admitted to have had sex with the complainant but it was based on condition that they agreed that he pays the victim MK3,000.00 but instead paid MK 2,000.00. He denied to have committed the offence of rape. The matter then was brought before this Court. Yes, I communicated with Mr Kazembe (the Chairperson of BCA. He told me that at the time of arrest, the suspect had a bag, a Panga and a phone. The chairperson brought these items to our office. At the time I interviewed the Accused, I never used any force'. In cross examination, she added that, 'The evidence I have given is true. The accused was found with one panga knife but was received by another investigator, Malidadi who is off duty'. Upon the state closing its case the lower court entered a finding of a case to answer. The accused entered his defence as below.

b) The Defence Evidence

The convict was the only defence witness. He stated that, 'It was on a Saturday I met up with the victim (girl) and we agreed that we should have sex in the bush and the girl acquiesced. We failed have sex at one place and we went to another place and we had sex. Then, I escorted the victim (girl) close to her home and I gave her MK2,000.00 and remaining with a balance of MK1,000.00. I used to meet the victim at Lonrho Ground after the sexual encounter and used to ask for the balance but I used to tell her that I did not have the money. Then, one day, her usual friend asked, "Kodi ndalama mumakumbutsanayi ndi ya chiyani"? Then, I told her that it is a balance after our sexual encounter and in turn, that friend asked the victim to forget about the said balance. Then, we parted. On another day, the victim began telling her relatives about our sexual encounter. Then, she came over to where I was and said, "Lero lokha ndiye uwola". Then, her relatives descend up and arrested me and took me to their home. Then, her aunt and recognised me but the victim (girl) denied having knowledge of me. Then, the chairperson for BCA (Mr Kazembe) came and took me to Limbe Police Station. In cross examination he added that, 'I admit that I met up with Felia (victim) on 16th March 2021. I remember Chisomo and Felia testified in this Court. I remember that Chisomo testified that I used force to chase him but I denied that. Felia caught me at Lonrho ground me because she was looking for the balance of MK 1,000.00 for our sexual encounter. Yes, Mr Kazembe testified in this court. Yes, I had carnal knowledge of Felia. I do not know that Felia is 17 years. I remember Mr Kazembe testifying that at the time of arrest I had a Panga knife but I refuted it. I did not

refute the fact that I robbed Chisomo of money and Cell Phone, head sets and 4 GB memory Card. I only know of one offence and not two counts. In my evidence, I did not mention the name of Chisomo because I do not know him and he was not there on this day'.

3. Issue for Determination

This court has to determine the propriety of the conviction and sentence at law?

4. Analysis of Law and Evidence

a) Is the conviction correct in law?

The convict was convicted of both robbery and rape. Regarding the offence of robbery, the charge sheet records that the convict robbed Chisomo of a cell phone and ear set. The State had to prove beyond reasonable doubt that the convict had stolen from Chisomo using violence. The lower court had this to say at page 9, '*Both victims positively identified the defendant herein on the basis that they stayed longer with him at the time of their ordeal but also, they were guided by his voice while his other nine accomplices holed themselves up in a nearby bush. On the day of his arrest at Lonrho football ground, out of all the people who went past this place, the victim singlehandedly pinpointed the defendant herein, they might have full reasons for choosing him. Further the defendant himself admitted to have had sexual intercourse but that they had agreed that he pays the victim mk3,000 for their sexual encounter and not that he had raped her, a piece of evidence which the victim*

vehemently denied. Moreover, the defendant was not putting on a mask which would have shielded his face from virtual recognition'. From the above the lower court though note specifically mentioning that the Turnbull guidelines on identification were being followed, the reasoning does show that the lower court had subjected the evidence to the same as the lower court notes in the analysis of the evidence before it that the defendant was not masked; the victim and perpetrator had been together for some time. However, it is good practise where issues of identification arise that a court should clearly subject the evidence to what is called the Turnbull guidelines. These have been applied in many cases such as **Sanudi v The Republic** [2002–2003] MLR 211 (SCA). The cell phone and ear set belonging to Chisomo were taken from her without her consent and under threat of a panga knife which was before her. The panga knife having been found by the Chairman when the convict was arrested does corroborate the evidence of Chisomo who said that the convict produced a panga knife during the robbery. The conviction of robbery can only be sustained.

On the offence of rape. This court notes that the victim is recorded to have been 17 years of age. Rape is defined as sexual intercourse without consent. The question that arises was rape proved beyond reasonable doubt. The lower court at page 9 states that, *'the defendant himself admitted to have had sexual intercourse but they had agreed that he pays the victim mk3,000 for their sexual encounter and not that he had raped her...'*. This comes out clearly from the convict's caution statement. The victim and the convict

were alone at the time of rape as the evidence does not give an account of any other person who witnessed the crime. The identification as shown above was correct in law in the totality of the evidence. It is trite law that rape need not be proved by medical report only. In this case the victim's story is corroborated by the confession that was made to the community Chairman and in the caution statement. The convict in defence states that he had consensual sex with the victim. Rape is non-consensual sex. The victim's story does show there was non-consensual sex as she reported her ordeal immediately it happened. Her reaction to the ordeal does not support the idea that there was consensual sex. The conviction on rape is sustained.

b) Is the sentence appropriate in law?

The convict was sentenced to 8 years for robbery and 12 years for rape. During the hearing for enhancement of sentence the mitigating factors advanced were that the accused is a first offender. The aggravating factors were listed as follows: the offence is common; the offence is serious; violence was used; the offence was planned and there was no recovery of stolen items. In **Rep v Phiri and another** [1997] 2 MLR 92 the court held that 'the court should pass a sentence that is equal to the crime, to the offender and take into account the public interest in the prevention of crime. The court should pass a sentence that compares well with sentences usually passed for offences more serious, less serious or comparable'. This court observes that much as the convict is a first offender and youthful, should only be considered at a limited extent because of the seriousness of the crime. The convict knew

exactly what he was doing. He had two female victims before him. He was simply heartless. Rape is the highest form of intrusion on one's privacy. In addition, it is an indicator of moral decadence in society. The State and defence have cited cases before the court where sentence for robbery averages 7 years. However, the cases cited were not recent. It would help the sentencing court if the court had empirical evidence of the prevalence of the crime; impact of the crime on the victim and a psychosocial report of the convict. This would assist the court in arriving at an appropriate sentence. The convict was armed at time of robbery. Both robbery and rape call for life imprisonment. It is this court's view that the appropriate sentence for the convict is 9 years for the offence of robbery and 20 years for the offence of rape sentences to run concurrently. Any aggrieved party has the right to appeal against both conviction and sentence.

Pronounced this 6 day of December 2022 at BLANTYRE


R.M CHINANGWA

JUDGE