



**IN THE HIGH COURT OF MALAWI
LILONGWE REGISTRY
CRIMINAL DIVISION**

CRIMINAL REVIEW CASE NO. 30 OF 2022

(Being Criminal Case No. 1371 of 2020 in the Senior Resident Magistrate Court sitting at Lilongwe)

Between:

THE REPUBLIC

VS

LIMBIKANI COSMAS MPOKOSA

CORAM: Honourable Justice Annabel Mtalimanja

Ms. Luckia Jafali, for the State

Ms. Chifundo Jonasi, for the Defendant

Mrs. Choso, Court Clerk

Mrs. Kalumbi, Court Reporter

SENTENCE

Mtalimanja, J

Introduction

1. The Defendant, Limbikani Cosmas Mpokosa, was charged in the Senior Resident Magistrate Court sitting at Lilongwe with the offence of Defilement, contrary to section 138 (1) of the Penal Code (Cap.7:01 of the Laws of Malawi). It was alleged that on or about 27th November, 2020 the Defendant had carnal knowledge of RT, a 4 year old girl. The

evidence before the court below was that on the night of 27th November, 2020, the father of RT observed that she was just crying, until the next morning, 28th November. As he was dressing the girl that morning, he noticed that she had sticky things on her genitalia and her thighs, and that she was walking with difficulties. The genitalia was bruised and swollen. RT disclosed that the Defendant, a person she knew and was familiar with as a neighbour, had given her a wound in her genitalia. Physical medical examination showed that RT had a broken hymen, signifying penetration. After full trial he was convicted as charged. The court below being of the opinion that the offence merits a sentence higher than which it can impose by law, has referred the matter to this Court for sentencing. The court below recommends a sentence of 26 years imprisonment with hard labour.

Issue

2. Having been convicted by the court belowe, the issue presently is determination of the sentence.

The submissions

3. For the Defendant, it was submitted that the starting point in this exercise is that the sentence imposed on him should conform to the Constitution of the Republic of Malawi, particularly section 19 (3) which provides that no person shall be subjected to torture or cruel, inhumane or degrading treatment or punishment. It was also submitted that the sentence must be proportional to the offence which he committed. The Defendant invited the Court to consider the case of *R v Phiri 1997 2 MLR 92 (HC)* for the proposition that regardless of its purported objective, the sentence imposed must be just and fair punishment in relation to the crime and must not offend the prohibition of cruel, inhuman and degrading punishment.
4. The Defendant further invited the Court to take into consideration, as mitigating factors, the fact that he is 34 years old and is a first offender. The Defendant finally invited the Court to consider the cases of *Republic v Albino Confirmation Case No. 979 of 2009*, where an accused person who repeatedly defiled a 4 year old girl was initially sentenced to 10 years imprisonment with hard labour and on confirmation the sentence was enhanced to 12 years imprisonment with hard labour; *Thomson Kalua v Republic Criminal Appeal Case No. 96 of 2014* where an accused person convicted of defilement was initially sentenced to 10 years imprisonment with hard labour for defiling a 7 year old girl but on appeal the sentence was reduced to 8 years imprisonment with hard labour for being manifestly excessive for a first offender; and lastly the case of *Republic v Stephanio Boniface Confirmation Case No. 215 of 2008* where an accused person convicted of defilement was initially sentenced to 4 years imprisonment with hard labour but on confirmation the sentence was enhanced to 8 years imprisonment with hard labour. On the premise of these cases, the Defendant submits that a sentence of 11 years imprisonment with hard labour is appropriate.

5. On its part, the State invited the Court to consider the mitigating and aggravating factors as well as the sentencing trends in defilement matters. In mitigation it has been stated that the Defendant is a first offender. According to the State, the commission of the crime was aggravated by several factors, namely: the fact that the survivor was only 4 years old; the offence is so prevalent in our communities such that there is greater need for deterrence; the offence amounts to the worst form of gender based violence in contravention of the Gender Equality Act, Cap.25:06 of the Laws of Malawi; the conduct of the Defendant was a violation of RT's rights to privacy and dignity and the sexual abuse amounted to subjecting her to inhumane and degrading treatment in contravention of the Constitution of the Republic of Malawi and the Africa Charter on Human Rights and Welfare of the Child, as well as other international conventions to which Malawi is a party.
6. The State further invited the Court to consider the cases of *Republic v Amani* [2003] MWHC 39 where it was stated that for sexual offences, the age of the victim is important; *Kambalame v Republic* [2017] MWHC 30 where it was stated that the younger the victim, the less lenient the court will be towards the offender; *Republic v Godfrey Ndamera Confirmation Case No. 314 of 2001* where a sentence of 5 years was enhanced to 8 years for defiling a 10 year old girl; *Republic v Aaron Mkandawire Confirmation Case No. 2 of 2019* where an 82 year old man was initially sentenced to 8 years imprisonment with hard labour for defiling a 9 year old girl and the sentence was enhanced to 14 years imprisonment with hard labour on confirmation; and *Maliko v Republic* [2021] MWHC 9 where a 40 year old man was initially sentenced to 14 years imprisonment with hard labour for defiling a 10 year old girl on multiple times and on appeal the sentence was enhanced to 40 years imprisonment with hard labour.
7. The Court is grateful to Counsel for both parties for their submissions that have canvassed the pertinent issues to be considered in this matter.

Determination

8. In assessing what would constitute an appropriate sentence to fit both the Defendant and the offence he committed, this Court has addressed its mind to several factors. Firstly, the offence of Defilement is a felony that carries a maximum sentence of life imprisonment. This will be considered subject to the principle that the maximum sentence is reserved for the worst offence. Secondly, the Defendant is a first offender, such that in terms of sections 339 and 340 of the Criminal Procedure and Evidence Code, Cap. 8:01 of the Laws of Malawi, a custodial sentence must only be imposed if it appears to this Court on good grounds, which must be set out herein, that there is no other appropriate means of dealing with him. Third is the gravity of the offence the Defendant committed. In the case of *Brian Shaba v Republic (Criminal Appeal No. 19 of 2014)* the offence of Defilement was described as a very serious and heinous offence that is both carnally and psychologically offensive. This Court fully agrees with this description. Considering the nature and seriousness of the offence with which he stands convicted, it is the considered view of this

Court that it is inappropriate to impose a non-custodial sentence on the Defendant. Doing so will not only trivialize an offence that is as heinous as it is offensively invasive and debilitating to its victims but will also be affront to the public interest. This Court holds the view that for these reasons, a custodial sentence is merited.

9. Regarding the custodial sentence, it was stated in the case of *Republic vs Bright Jamali, Confirmation Case No. 421 of 2013 (HC) (PR)*, that based on the maximum sentence of life imprisonment, the starting point for sentencing in defilement cases should be 14 years imprisonment. The sentence may be scaled up or down this starting point to reflect mitigating and aggravating circumstances and that the sentence must fit the offender.
10. Presently, the Defendant defiled a 4 year old girl, practically a toddler and oblivious to the sexual violence inflicted upon her by the Defendant. The Defendant was known to RT as a neighbour. He abused the familiarity and trust reposed in him by the little girl. These are factors that aggravate the offence. The report of the medical examination performed on RT after the incident showed that she suffered a broken hymen, a permanent marker on her that there was penetration. At 4 years old, RT was nowhere near sexual maturity. She was not physically, emotionally and psychologically developed to process a sexual encounter. In defiling her, the Defendant stole not only her innocence and childhood, but also desecrated her right to choose her sexual debut.
11. The facts of the case show that RT was not subjected to any assessment for psychological trauma. However, in the case of *Republic v Afete Daniel (Confirmation Case No. 2123 of 2020 – unreported)*, this Court observed that:

“Defilement is often associated with psychosocial problems in children. A study in Kenya showed that children who are victims of defilement were found to have significant negative outcomes in terms of poor academic performance, low self esteem, depression and poor social relationships¹.

I observe at this point that the general trend following incidents of sexual violence, including defilement, is that the default reaction by first responders is to take the victim to the Police and a medical facility for physical medical examination. I am yet to encounter a case where the victim was referred for assessment of psychological impact. This Court believes that it is high time the criminal justice system progresses to make the said psychological assessment a routine requirement in sexual violence cases, in particular defilement. This will assist courts to make informed decisions when it comes to sentencing.

¹ Mutavi T, Mathai M, Kumar M, Nganga P, Obondo A. Psychosocial Outcomes Among Children Following Defilement And The Caregivers Responses To The Children's Trauma: A Qualitative Study From Nairobi Suburbs, Kenya. *Afr J Trauma Stress*. 2016;5(1):38-47.

Presently, RM was not assessed for psychosocial impact. It is therefore difficult to state with exactitude the said impact of the crime upon her. This notwithstanding, it will be remiss of this Court to conclude that the sexual violence inflicted upon RM by the Convict left her without any psychosocial trauma.”

12. As in the above case, it is also difficult to state with exactitude the psychological and impact of the crime perpetrated against her by the Defendant, who stood in a position of trust as her neighbour. Again, it will be remiss of this Court to completely dismiss this fact on account of the failure of the system to make available psychological assessment.
13. In this Court’s view, the age of the survivor and the abuse of the position of trust are aggravating factors that overshadow the fact that the Defendant is a first offender. The aggravating factors militate in favour of imposing a meaningful custodial sentence on the Defendant
14. In the *Brian Shaba* case, a 47 year old teacher who defiled his 12 year old pupil had a sentence of 6 years enhanced to 18 years on appeal. In *Fabiano Maliko v The Republic (Criminal Appeal No. 13 of 2020, HC)* a 43 year old man who on multiple times defiled a 10 year old girl had his sentence enhanced from 14 years to 40 years. In the *Afete Daniel* case, a sentence of 10 years imprisonment was enhanced to 45 years for defiling a 4 year old girl. Being current, these are the sentencing trends that will guide the Court presently.
15. From the foregoing, this Court imposes a sentence of 45 years imprisonment on the Defendant with effect from 29th November, 2020, his date of arrest.
16. It is so ordered.

Made in open Court this 20th Day of April, 2023.


Annabel Mtalimanja
JUDGE