REPUBLIC OF MALAWI

IN THE SENIOR RESIDENT MAGISTRATE'S COURT SITTING AT BLANTYRE

CRIMINAL CASE NUMBER 787 OF 2020

BETWEEN

THE STATE ----------PLAINTIFF

AND

CHARLES GONDWE ----------DEFENDANT

CORAM: Elijah Blackboard Dazilikwiza Pachalo Daniels, SRM.

S/Insp. Kambazale, Police Prosecutor

Accused Person Present/Unrepresented

Chikweza, Clerk/Official Interpreter

JUDGMENT

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1. They enjoyed the company of each other with no sense of restraint or guilt. When at it; they manifested pleasure and passion for each other's person. They crafted their own twisted, misguided and untimely sexual drive and amusement. Alas! the accused person was not the first in line neither was he the second nor perhaps the last, this I cannot say for certainty. He caused his penis penetrate into what I would ordinarily say an immature vagina of the victim in this case. However, young as they both are, but I am unable to use the term "*immature*" as I am not sure whether that would be a proper word to use in the prevailing circumstances. If I would, I must admit that, I would grudgingly so write. Perhaps, such precious words of passion must be reserved for appropriate cases. I am unable to acknowledge this as one such a case. It is sad, the victim's conduct leaves a lot to be desired. Ordinarily, sexual offences have a tendency of leaving lasting psychological pain to victims of sexual abuse. Per Lord Justice Prof. Kapindu, in the case of *Fabiano Maliko vs Republic Criminal Appeal No. 13 of 2020*. But as courts, we are enjoined to meticulously decide matters on

merit and yet without losing sight to the need for protecting the rights of the victim and also balancing the rights of the accused persons as it were. This is a peculiar case and it must be decided based on its peculiarity.

2. The lamentations as to the conduct of the victim in this case as well as that of the accused person, must not be misconstrued as mere verbose or insensitivity to the issues before me. It is not her conduct however that entirely informs the mind of this court but the entirety of the case deeply informs the spirit of this court. The two had their secret times together in merry. Moral restraint would have been the medicament to control their predatory sexual appetites but they both hardly understood the consequences of their actions and society's disapproval of their unbecoming conduct. To them, they were innocently conducting themselves in what has proved to be an illicit common conduct of our young generation. It was a sexual enterprise of two misguided young souls.

3. The brutal fact remains; our society is brutally and excruciatingly raped morally, and is left devoid of restraint measures against indulgence of criminal deportment by our young men. It is a sad case and mine lamentations are as loud as I can passionately fathom. I am at pains to understand what has happened to our once celebrated and morally upright and conscious society. Perhaps, we believed in an illusion that our young men and girls would properly wait for their proper time to enjoy the fruits of their bodily hungriness. But alas! We believed in a myth. The soul of this court is crushed and bruised to the core indeed. Thus, we must make sure that we rise to the occasion and properly be part of the change in our society by teaching the young generations that come of the consequences of indulging in criminal traditions. Hardly is our society going through that direction. At times, it is hard to notice who among the cases are the victims. Without losing sight to the need for the protection of a girl child and her legitimate rights under the constitution, in our society it could be argued in my view, that even our young boys are victims of moral decadence. We are a society that throws stones at moral uprightness with ease.

4. The society's fundamental unit of family, is under siege and it is hard to raise the very generation of law abiding young ones. However, we have the law whose intendment is to protect, instruct and engineer our society. Where appropriate, the wrath of the law must be exerted without any show of weakness. When at it, we must so do to show that courts take the rights of children seriously. Suffice to mention that courts must remain objective and

free from emotions, as courts we must guide ourselves within the confines, circumference or better yet the perimeters of the law.

5. It is not surprising that in the instant case, the accused person stands charged with the offence of defilement contrary to section 138(1) of the Penal Code. The accused person pleaded guilty to the charge but entered a defence as is provided for by statute. The question I now have is to establish whether his defence suffices at law or not. In any case, the accused person is only 18 years old and the victim was born on 7th day of September, 2005. The offence herein is a serious offence and it is termed a felony in our laws. That is no decoration at all. However, to establish the offence herein there has to be established the following elements: firstly, there has to be penetration of a male organ into the vagina of a girl. Secondly, the victim must be below the age of 16 years old. Per Justice Mwale in the case of *Steven Kaliyati vs Republic Criminal Appeal No. 109 of 2018(Unreported)*. Lastly, there must be no defence available to the accused person as it were. What then? Was there penetration of the accused's manhood into the vagina of the victim herein? I vehemently answer in the affirmative. The young souls were in a sexual relationship, it was not unusual for them to have sexual intercourse with each other. Both the victim and the accused person confirmed of their sexual unison. As it were, it is also without dispute that the state established the fact that the victim herein was 15 years old at the time of the alleged commission of the offence.

6. Besides my immediate finding in the above, the accused person entered a statutory defence and my duty will be to ascertain whether that defence could be deemed to be available for the accused person. As I understand the law, this statutory defence suffices where the accused person operates under a mistaken but reasonable belief that the victim was beyond the age of 16. Hence, when an accused person is not presented by counsel, it is the duty of a trial court to advise the accused person of this available defence. As it were, in making this point, Justice Kamwambe in the case of *Yamikani Paul -vs- Republic Criminal Appeal No. 16 of 2017* (As he was then) had this to say;

> *"The offence of defilement is a unique offence in that it has a statutory defence namely that the offence is not committed where the accused has a reasonable belief that the girl was above the age of 16."*

The able and most learned court continued further in it's articulation of the law:

> *"It is not expected that lay persons would easily know about this defence. Unrepresented accused persons, therefore, cannot easily avail themselves of this defence."*

Again, Justice Kamwambe quoted with approval a case from Botswana, in the matter of the *State v Baleki [1979-1980] B.L.R 35* and this was his exact extract:

> *"The court apparently noted that the accused should be alerted of the defence, since having regard to the evidence he stood the risk of being convicted of defilement if the victim was in fact below the age of 16 years."*

The court further went to town, and rightly so in my view and quoted with approval yet another case from Botswana, the case of *Gare v The State [2001] 1 B, L, R 143, CA at p 148* which is a similar case of defilement, it was held by a majority of 2: 1 that:

> *"the Appellant in the case did not have a fair trial where the trial Magistrate did not take any steps to appraise the Appellant of the special statutory defence available to him as to whether he believed that the girl was above the age of 16."*

The conviction for defilement was quashed.

Zestsman JA stated that;

> *"the question that arises is whether the magistrate should, in the circumstances, have drawn the Appellant's attention to the special defence set out in subsection 147(5) of the Penal Code and whether his failure to do so means that the Appellant was not given a fair hearing at his trial."*

7. Again, my elder sister at law, Justice nyaKaunda Kamanga in the case of *Sosten Sipolo-vs- Republic Criminal Appeal No. 36 of 2016 (Unreported)* enunciated this very point in this way:

*"Further, the appellant being unrepresented During the trial the court had **a duty** to draw him, as an accused, to the special Defence that was available to him and is set in in the proviso to section 138 of the Penal Code." [Emphasis Added].*

8. As it were, I take notice that it is a matter of duty for us junior courts to advise accused persons of this available defence when they are charged with the offence of defilement. I further take notice that the essence of this duty is so the accused person is aware of this available defence. Where for instance the accused person understands the availability of this defence either by his own understanding of the law, or by any other means, the defence still stands, so far as he erects it whether the court advises or not. Thus, in my considered opinion, it would be redundant and illogical for the court to advise the accused person who has already manifested knowledge over this available defence. I say this with the greatest of caution. Suffice to say that, this duty must be taken seriously as it forms the hub of a fair criminal justice process. This I shall bind on my judicial neck and biblically follow, lest I fall into the penumbra of judicial misguides. I shall advise and re-advice an accused person for the avoidance of doubt where appropriate and indeed with no show of intellectual laziness and of course irrationality.

9. In any case, in the instant case, this matter was first before my brother court, perhaps the court before me had a slip of a tongue or indeed a finger or a perhaps a pen whichever caused the omission to so act. Suffice to say that, although the court was under duty to advise the accused person, of this defence, the way this court understands this duty is simply put, the accused person must know of this available defence. Otherwise what would be the purpose of advising someone who already knows what you advise them? That would create an absurdity, because the essence of the advice is so that the accused person has knowledge of this statutory defence.

10. Where for instance the accused has already qualified his admission or guilty plea with the very essence of this defence, then the court should not be faulted in my considered opinion. It was correct and abundantly skillful for my learned brother His Worship Mwanyongo to promptly enter a plea of not guilty when the accused on his own, entered this defence to the offence levelled against him. So, my view is that the accused person was subjected to a fair process before my learned and respectful noble man of the bench. He knew of this defence available for him.

11. Be that as it may, let me say at the outset that the duty to prove a case of this nature lies in the hands of the state and this court is alert to the fact that that duty must be discharged beyond reason doubt. See section 187(1) of CP & EC. This is a well settled principle of law which has been echoed in most of the criminal cases that I only take judicial notice of. In any case, where there is any doubt as to the commission of the offence by any accused person, such a doubt must be resolved in favour of an accused person. Per Lord Justice Prof Kapindu in the case of *Zeeshan Jaral Raja-vs-Republic Criminal Appeal 36 of 2016.* This principle is not only cardinal but one that will exercise the mind of this court as it were.

12. It is trite law that it is better to set free a criminal into the streets than it is to send an innocent soul to prison. That must indeed be a principle founded in good reason and fair criminal process which makes more sense in cases of this nature. As it were, similar sentiments where loudly echoed by Honourable Justice Chipeta (As he was then) in the case of *Chauya & Another-vs- Republic Criminal Appeal No. 9 of 2007,* where he had the following to say:

> *"Criminal law it should always be recalled, thrives on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than to err by convicting and sending to undeserved punishment one innocent soul."*

13. Moreover, considering the current judicial attitude towards this cancerous offence, we must always be double sure before we can convict any person lest we condemn an innocent soul by an invitation of the court of public opinion. As it were, the record has it that the accused person lamented before this court that the parents for the victim at several times engaged him on a possible marriage arrangement between him and the victim. It was further his unimpeached testimony that during all this time, no issue as regards the age of the victim surfaced from her parents. He advised the court that the parents only wanted the custom to the followed if he were to marry the victim herein.

14. Again, during cross-examination of the victim of this case, whose evidence by herself as to her age remains hearsay and inadmissible, the court was able to establish that it remained unverified and unimpeached by the state that the victim told the court that she had told the accused person that she was 17 years old at the time she volunteered herself for a sexual pact with

the accused person herein. She confirmed to this court that they had sex three times at the home of the accused person where the victim went and remained there for a period of three days before she went back to her place.

15. Again, when she was further examined by the accused person she confirmed before this court that she had had two boyfriends before him and that they both had had carnal knowledge of her. One would note that the accused person already knew that he was not the first person to have had carnal knowledge of the victim. I conclude as such from the very direct questions that the accused person eloquently paused to the victim when she testified in court.

16. As it were, like observed in the recent above, the sexual behaviours of the victim were in the knowledge of the accused person and it became apparent that the young and tender age of the victim in this case did not stop her sexual craving for boys. Needless to say, the victim further confirmed that a boy only known as Chisomo had carnal knowledge of her before the accused person had his share of the forbidden fruit and she also confirmed that she also had a boyfriend only known as Tiyamike who also had his day with her in bed. It is sad indeed.

17. Nonetheless, and not to the amazement of this court, the victim further advised the court when she was cross-examined by the accused person that she used to sleep at the homes of all the boys she had been in active sexual relationships with.

18. She told the court that she had slept at Tiyamike's house for two times and also that she slept at Chisomo's place one time. She confirmed that at all these visits she engaged in consensual sexual intercouse with the different boys including the accused person herein whom she confirmed being her boyfriend at the material time.

19. Now this court understands that the issue of consent does not matter. In fact, the offence hinges on the very fact that a young girl is incapable of understanding what consent is in the first place and that she cannot give what she does not understand. That is well understood by this court.

20. However, it would be a grave Injustice for the criminal justice system to give a blind eye to the available defence of mistaken belief as to the age of the victim in an appropriate case. I must admit that the conduct of any person speaks volumes to the age or supposed age of that person. This is basic

common sense. I find the conduct of the victim in this case so reckless and that it would for all intents and purposes make the accused person believe that indeed she was 17 years old.

21. Actually, the record shows that she told the accused that she is as 17 years old and that she appears to have discussed with the accused person about her sexual past prior to her sexual encounters with the accused person herein. I say this because the questions from the accused person were exact.

22. I must say, any reasonable person would have operated under a mistaken belief that the victim was indeed beyond the age of 16 years and that with her conduct no one would be stretching anything if he was to operate under a mistaken belief that the victim in this case was not 15 years old as she truly is. This is a sad case for the state.

23. I find that the accused person was mistaken as to the exact age of the victim mainly from the conduct of the parents of the victim and also the unmatched sexual conduct of the victim which made it possible for the accused person to mistakenly believe and reasonably so in my view, that the victim was not of the age of 15 but rather 17 years as she claimed. Her sexual experience outlived her age and she made a representation to the accused person as regards her age, which the accused person had no reason to doubt as to its veracity.

24. I must Further admit that I had the occasion of looking at the victim at first instance and I must further admit that any reasonable person in the circumstances of the accused person, would have acted under the mistaken belief that the victim was not so young a person considering that she had had moments of sneaking out from her parent's house and sleep outside at her many boyfriends' homes where she had had her person carnally known with her unequivocal blessing.

25. It must be noted that if we hold the view of having a conviction every time we are faced with cases of this nature for the sake of it, then the criminal justice system would have failed to achieve its goals which are not only stretched to the victims but also to the accused persons where the circumstances permit as is in this case.

26. Additionally, I must clearly articulate herein and let me warn myself that this finding is in no way the attitude of this court to downplay the importance of the protection of child rights, but the iniquities of child improper

upbringing by parents have severe consequences and this court will not relent more so considering the current and correct judicial attitude towards the sentencing of defilement offenders to the advancement of the protection of child rights. I announce that we must only convict when we are double sure because the sentences that are coming are not only scaring but deserving in dealing with the vice that has crippled the soul of our society and ruthlessly attack the very fabric of our moral pride.

27. Assuredly! Assuredly! I say, we must only convict deserving offenders where the facts permit and we must not hesitate to so do and where there is a defence available as is provided for by statute, we must resolve that in favour of the accused person.

28. This junior court has always maintained the view that as courts we are courts of law and not courts of public opinion, we must be influenced by the law at all material times. To this was the oath taken by this court. I am far from betraying that noble and sacred oath. It must be defended at all times for it breathes life into the very heart of the law and the law must be followed and defended irrespective of the result.

29. As it were, it is not for the court to venture into judicial activism. It is important for the courts in my view to achieve justice according to law and that the presumption of the law cannot be overstated in the circumstances. The law presumes that he who has defence for the offence of defilement as to the mistaken belief as regards the age of the victim, he must be declared that he did not commit the offence. Put differently, the offence of defilement is not established where the defence of mistaken but reasonable belief as regards the age of the victim being more than 16 years old has been established, like it is in this instant case. See *Yamikani Paul -vs- Republic (Supra).*

30. It is from the foregoing that this court does find as a matter of fact that there is a defence available to the accused person and that the state failed to dismiss that the accused person herein acted under a mistaken but reasonable belief that the victim was not 15 years old as she truly is at the time when he carnally knew her with her ready consent, which consent was not as fresh but somewhat granted in the past to other boyfriends she had before the accused herein charged.

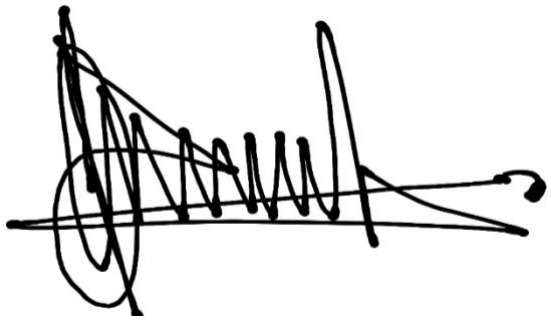
31. Therefore, in the prevailing circumstances, the state has failed to establish the offence of defilement against the accused person herein. Consequently, I find the accused person not guilty of the offence of

defilement contrary to section 138(1) of the Penal Code. Accordingly, I proceed to acquit the accused person from the charge of defilement contrary to section 138(1) of the Penal Code. Hence, I order the immediate release of the accused person herein from custody of which he has been bound for a period of 8 months since the date of his arrest. The young man is a free man as he stands innocent in the face of the law.

32. It is so decided.

Any party aggrieved by the decision of this court has the right to appeal to the High Court within a period of 30 days from the date of pronouncement.

PRONOUNCED this 21st June, 2021 at the Senior Resident Magistrate Court Sitting in Blantyre.



Elijah Blackboard Dazilikwiza Pachalo Daniels.

SENIOR RESIDENT MAGISTRATE