



**MALAWI**

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY  
CRIMINAL APPEAL NO. 48 OF 2004  
PAIPUS KAMWENDO  
Vs**

**THE REPUBLIC**

From the First Grade Magistrate's Court Sitting at Mulanje  
Being Criminal Case No. 139 of 2003

CORAM: HON. JUSTICE F.E. KAPANDA  
Chimbe (Miss), of Counsel for State Advocate Chambers  
Dr. Mtambo, of Counsel for the Applicant  
J. Ngware, Recording Officer

Date of hearing : 8<sup>th</sup> October 2004  
Date of Judgment: November 2004

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JUDGMENT

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**Kapanda, J**

**Introduction**

The matter before me is an appeal by the convict against both conviction and sentence. The Appellant was convicted of the offence of rape and sentenced to a custodial term of imprisonment of 18

months. He alleged, as is shown in the grounds of appeal, that the lower court erred in convicting him in clear contraction of Medical Report which indicated that the rape was fabricated.

### **Facts of the case**

The Appellant was at all material times a Medical Officer at Nkando Health center in Mulanje District of the Republic of Malawi. The complainant, Ruth Sichinga, is 15 years old and was at material times a pupil at Malira F.P. School in Malawi.

In the writ below the complainant's story was that on 20<sup>th</sup> May 2003 she went to Nkando Health Centre to enquire about family planning. At the said Health Centre she met and was attended to by the Appellant. It was her further evidence that upon making the said enquiry she was taken inside an examination room by the appellant whereupon they had sexual intercourse without her consent. After two days she filed a report with Mulanje police that she had been raped. The police referred her to Mulanje Hospital for an examination. The hospital advised, inter alia, that it was difficult to prove penetration and made a conclusion that the allegation of rape was false. For a proper perspective of findings I must reproduce some parts of the Medical Report which were as follows:

"I have examined the client (the complainant) and below are my findings:

Mentally – Sound  
Physically – High vaginal swab taken to laboratory for sperm check and  
gram staining and attached are results

### **Vaginal Examination**

Non tender during vaginal examination  
- No tear or laceration traced  
- Vaginal discharge observed  
- Difficult to prove penetration as per laboratory and physical  
examination  
= Fabricated rape

Signed”

It is to be observed though that the person who prepared the Medical Report was not called to testify before the court in quo. Further, the report does not show the name of the person who examined the complainant. The Appellant does not dispute that he attended to the complainant. However, he said that the complainant did not visit the Health Centre for family planning but rather to be treated on some sexually transmitted disease. The court decided to believe the story of the complainant and not that of the Appellant. As regards the law on the believability of witness on appeal I will adopt the position this court took in **Silasi Anderson Sakala and Others vs Rep**<sup>1</sup> to the effect that:

“Quotation-----

<sup>1</sup> Criminal Appeal No 38 of 2001 [High Court] unreported decision of 1<sup>st</sup>.10.01

## **The Appeal**

### **The Grounds of Appeal**

There is essentially one ground of appeal filed by the Appellant. The said ground of appeal being that it is the view of the Appellant that the lower court erred in convicting him in clear contradiction of the Medical Report which indicated that the rape was fabricated.

### **Issue For Consideration**

As I see it, there is only one issue for consideration in this appeal. The court must determine whether indeed the lower court erred in convicting the Appellant.

### **Consideration of the Issue**

It is obvious that the Appellant's appeal rests on the contracts of the

Medical Report tendered in evidence. It is the contention of the Appellant that the said Medical Report shows there is doubt about penetration which happens to be one of the essential elements of the offence of rape. Accordingly, the defendant ought to have been acquitted of the offence of rape. Further, the Appellant is of the view that there was no corroboration evidence. Thus, the conviction of the Appellant was unsafe. Moreover, Counsel thinks that was wrong in relying on circumstantial evidence.

I must at the outset say that the Appellant's contentions are without merit. Indeed, I disagree with him when he says that he was wrongly convicted.

As a starting point, it must be put here that this case should not

have rested on the Medical Report. I am saying this because it is well to remember that that the examination of the complainant was done three days after the incident. It therefore follows that one would not have expected the Medical Report to be conclusive about such matters as penetration or indeed the breakage of the hymen or presence of laceration. It does not come as a surprise that the Medical Report indicated that on examination of the complainant it was difficult to prove penetration. This notwithstanding it does not follow, as put in the Medical Report. That the rape was fabricated. At this point it might be useful to quote the following illustrative dictum of Band, CJ, as he then was in **Simplex James Mzungu vs Rep**<sup>2</sup>:

“In sexual offences proof of penetration however slight is necessary but the rapture of the hymen need not be proved. Corroboration of the complainant’s evidence is not required as a matter of law but in practice it is always looked for. It is necessary that a warning of the danger of convicting on complainant’s uncorroborated evidence is always essential--- circumstantial evidence can also amount to corroboration of the complainant’s evidence.—Indeed, a Medical Report is not necessary to prove penetration which can be proved by other evidence---“

I adopt these observations and conclude that the fact that there were

<sup>2</sup> Crim. App. 139 of 1997 [High Court] unreported decision]

no laceration does not mean the complainant's allegation that she was raped was a fabrication. Indeed, as earlier on observed the absence of a tear or laceration is not proof that there was no penetration. I am saying this whilst being alive to the fact that the absence of tear or laceration could have been because of the length of time it took between the intercourse and the examination. Actually, the examination was done after three days. Accordingly, one would not expect the tear or lacerations to be observed after a period of three days. Moreover, it is possible to have an intercourse and not have the tear or laceration because of the smallness of a man's organ or indeed it might well have been the case due to the fact that there was no violence used during the act or that the girl's organ healed after the incident.

Furthermore, it must be repeated here that the Medical Report should not be treated as contained the whole truth when it indicates that since there was no tear or laceration then therefore there was no penetration or that it follows then that complainant's that she was raped was fabricated. It is well to remember that there is uncontroverted evidence that the complainant and the appellant were alone in an examination room. There was an opportunity for the defendant to have unconsensual sex with the girl. As a matter of fact there was sworn evidence of the girl that the defendant had full and

complete sexual with the girl. That is enough proof of penetration without relying so much on the Medical Report clearly shows that the examination of the complainant was not done on the same day but three days after the event.

As regards the issue of corroboration this court finds that the court in quo warned itself of the danger of convicting the appellant without corroboration. Indeed, at pages 57-58 of the handwritten the Magistrate observed:

“Having examined all the evidence as well as my fact finding I am satisfied that there was no failure of justice. Although that there is no corroboration and that I am well of the danger of convicting in such circumstances, but despite this defect it is nonetheless that I am satisfied beyond reasonable that the complainant is telling the truth and I entirely accept her evidence as the truth that it was the accused (the appellant) who had raped her in the course of going there to know about family planning methods and was undressed in that for him to examine her thoroughly he had to have sex with her---”

As mentioned earlier on believability of a witness this court is not well suited to find otherwise. Further, there was a warning given. In any event, there was actually corroboration of the testimony of the complainant. This is from the fact that there was an opportunity for

the Appellant to have sex with the complainant and that the Appellant's own witness says that he was there at the Health Centre when the complainant visited the Health Centre and later identified the Appellant as the one who raped her.

There is naturally evidence that there was penetration and that the intercourse that the Appellant had with the complainant was non-consensual. Furthermore, it is observed that the Appellant fraudulently obtained consent from the complainant. The Appellant cheated the girl that what they were doing in the examination room was part of family planning, in sum, the Appeal must fail. It is without merit when the totality of the evidence is considered.

Pronounced in open Court this..... Day of November 2004 at the Principal Registry, Blantyre.

F.E. Kapanda

**JUDGE**



