

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 116 OF 2008**

BETWEEN

ANDY VICTOR KANYINJI APPELLANT

AND

THE REPUBLIC RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA

- : Unrepresented, counsel for the Applicant
- : Thabo Chakaka Nyirenda, counsel for the Respondent
- : Mrs. Kabaghe, Court Reporter
- : Mr. E.B.Kafotokoza, Court Interpreter

JUDGMENT

The appellant first appeared before the First Grade Magistrate sitting at Ntchisi on an amended charge of defilement of an imbecile contrary to Section 139 of the Penal Code. He pleaded not guilty to the charge. He was nonetheless found guilty and convicted of the offence charged following full trial. He was sentenced to seven years imprisonment with hard labour. He now appeals against both conviction and sentence.

The allegation against the appellant is that in or about the months of June to September, 2006 at Khuwi Village in the District of Ntchisi, the appellant had unlawful carnal knowledge of a female imbecile Miss Madalo Tchauya without her consent. The evidence shows that the victim is a known imbecile who lives in the same area as the appellant. Although the appellant challenges the fact of imbecility on the part of the victim, he alleges that the victim suffers from epilepsy from time to time. All the witnesses who testified on the condition of the victim stated categorically that she was an imbecile. I am aware of the case of M'bwana v Rep 8 MLR 159 where Chatsika, J as he then was, having observed that the broad ingredients of the offence of defilement of an idiot (or an imbecile) are

- (a) That there must be defilement, and
- (b) That the complainant must be proved to have been an idiot (or an imbecile) his Lordship went on to note that evidence of idiocy or imbecility must be positive and that mere history or reputation of mental unsoundness was not sufficient. In that case it was observed that in order for the charge of defilement of an idiot C/S 139 of the Penal Code to succeed it had to be proved

that the complainant was an idiot. Although the evidence showed that the complainant had a history of mental unsoundness and even ended up at Zomba Mental, it was not shown that she was an idiot. She appreciated what happened the material night and gave her evidence well following every event. I do not understand positive proof of idiocy or imbecility to require medical evidence only. If there are persons who can positively testify as to the idiocy or imbecility of the victim as in this case where the mother and the chairman of the Trading Centre did that should be sufficient proof of idiocy or imbecility. While it is observed that the complainant testified of having sexual intercourse with the appellant at least seven times before she became pregnant, that in my view does not negative state of imbecility. In any event degrees of imbecility should vary just as degrees of unsoundness of mind would vary. In this case I am satisfied that the complainant was an imbecile at the time the appellant had sexual intercourse with her.

The appellant concedes to have had the sexual relation with the complainant which resulted in the pregnancy of the complainant. The circumstances of this case are such that the appellant knew or must have known that the complainant was an imbecile. The

appellant's house was near the house of the complainant. The way these sexual encounters began was that the appellant pulled the complainant into his house and after the sexual act gave her money. According to the appellant's own caution statement, the complainant approached him and requested him to marry her where upon he told her a love affair precedes a marriage. He thus in turn invited her to have an affair with him to which she agreed. Then he began to have sexual intercourse with her. The lower court found that the appellant had knowledge that the complainant was an imbecile at the time he had sexual intercourse with her.

There can be no defence of consent available on a charge of defilement of an imbecile or an idiot for the policy of the offence is to protect mentally deranged girls or women. (See Republic v Peter Jasi, Confirmation case No. 1026 of 1994; Rep v Andreyo William, Confirmation case No. 565 of 1994). The appeal against conviction fails.

As to the appeal against sentence it must be observed that the maximum term of imprisonment under S139 of the Penal Code is fourteen years. In sentencing the prisoner in this case the lower court said:

“I sentence the accused to 7 years Imprisonment with Hard Labour without an option of a fine because this is a very serious offence whose maximum penalty is 14 years Imprisonment with hard Labour. These offences of defilement in general are on the increase. We are deterring offenders from these.”

It is obvious from the above that the lower court did not consider the mitigating circumstances in the case including that the prisoner was a first offender at 28 years of age. Had the lower court balanced the aggravating circumstances present in the case with the mitigating circumstances it should have imposed a lower sentence than it did in Rep. v Peter Jasi Conf case No. 1026, the prisoner who had been sentenced by the lower court to 18 months imprisonment with hard labour had his sentence enhanced to 30 months imprisonment with hard labour for defilement of an imbecile. The facts of that case interesting. The defendant and the family of the complainant were neighbours and the defendant used to visit the house of the complainant often. One evening, at around 8.00 O'clock he went to the house of the complainant as he returned from a drinking spree. The mother of the imbecile or idiot went into the house to prepare a bed

leaving the imbecile and the defendant outside. When she returned she found both missing. She called out for the imbecile without a response. In the immediate search that followed the defendant was found on top of the imbecile making love in a bathroom. The defendant was completely naked. He clung to the imbecile such that it had to take two people to separate him from the imbecile. He was taken to his wife in his birthday suit. He said he could not remember a thing as he was drunk. Chimasula Phiri, J. as he then was observed that the facts of the case presented a sad picture of a mentally deranged young girl who instead of getting sympathy got exploited by a selfish family man. The judge also observed that the risk which the imbecile was exposed to included sexually transmitted diseases and unwanted pregnancy.

In the case at hand the complainant in fact became pregnant at the hands of the appellant who incidentally was also a family man. I take note that the lower court observed that these offences of defilement are on the increase. Peter Jasi was decided in 1994, more than a decade ago. The need to protect imbeciles and idiots has become greater in recent times in the face of the rise in defilement cases. I set aside the sentence of 7 years imprisonment with hard labour and impose in lieu thereof a sentence of 4 years imprisonment with hard labour. The appeal succeeds to this limited extent.

PRONOUNCED in Open Court this 16th day of December, 2008 at
Lilongwe.

R.R. Mzikamanda

J U D G E