REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CRIMINAL APPEAL CASE NO. 63 OF 2011

(Being Criminal Case No. 88 of 2010 in the SRM Court at Mzuzu)

WYSON NGULUBE

Versus

THE STATE

Coram : Honorable Mr. Justice D.T.K. Madise
Mr. N. Msowoya Counsel for the Appellant
Mr. Makato. Mr. Nchawani Counsel for the State
Mr. I.Z. Bondo Official Interpreter
Mrs. F. Silavwe Court Reporter

Madise, J

JUDGMENT

1.0 Introduction

1.1 The Appellant in this matter was arrested and charged with the offence of defilement contrary to section 138(1) Penal Code. The facts as alleged by the State were that the Appellant on or about the 12th day of November 2010 at Mchengautuwa township in the City of Mzuzu had unlawful carnal knowledge of a female girl X under the age of 13. He pleaded not guilty and after a full trial, he was found guilty, convicted and sentenced to 9 years imprisonment. Being unsatisfied with the finding of the court below, he now appeals to this Court against both conviction and sentence.

2.0 Appeals

2.1 It is settled law in this Republic that appeals in this upper Court are by way of rehearing. When this Court is considering an appeal from the court below, it proceeds by way of re-hearing of all the evidence that was before the court below, the findings of fact and the law applied and then consider in the light of all that took place during trial whether the court below was within the ambit of the law when it reached its conclusion.

3.0 Grounds of Appeal

3.1 The Appellant filed two grounds of appeal which we reproduce as filed.

1. There was not enough evidence to support the conviction.
2. The sentence of 9 years meted out for the offence was manifestly excessive regard being had to the mitigating factors.

4.0 The Issues

4.1 There are basically two issues for determination.

1. Whether there was enough evidence to support the conviction.
2. Whether the sentence was excessive regard being had to circumstances of the offence, the offender and the victim.

5.0 The Evidence

5.1 PW1 was Grace Nkhoma from Mchengautuwa Township in Mzuzu. She told the court that girl X (hereinafter referred to as the victim) was her daughter, and she was 11 years old. In November 2010 she went to a maize mill leaving the victim and another child sleeping. When she came back her neighbor told her that her daughter had been defiled and was failing to walk properly. She said that the Appellant was the one who had defiled her. She went to the Village Headman and later to the Police where they were referred to the hospital for examination. They were also told to go back to the hospital after 3 months for an HIV test.

5.2.1 PW2 was Mrs. Ida Nkhoma. She told the court that the victim was her neighbour's daughter. In the morning of 13 November 2010 she went to the victim's house and found her and her sibling crying. When she asked as to why they were crying the victim did not answer. When she asked her again she said somebody she knew had defiled her the previous day, and she said it was Mr. Ngulube the Appellant.

5.2.2 PW2 then sent her kid to call the victim's mother from the maize mill. She also called an elderly woman (Traditional Birth Attendant) to examine her. They thought she was really defiled because she had blood stains and her vaginal opening was slightly bigger for her age. The victim said it happened at night but she did not tell her mother because she was sleeping and was sick. There after they went to the Police with the victim's mother and at the hospital it was confirmed that she had been defiled.

5.3.1 PW3 was the victim herself. Before she gave evidence a *voir dire* examination was conducted. She told the court below that she was

staying with her parents and that she was born in 1999. She stated that she knew the Appellant who was working at the Zimba's and the Appellant also knew her mother.

5.3.2 On the material day at around 7.00 pm together with other girls, they were singing and praying at their house. There after they started playing hide and seek. As she tried to search for her friend who had run behind their neighbour's house Mr. Ngulube grabbed her and put his hand on her mouth. He took her to some hedges and took off her skirt and underwear. He then took out his penis and entered it on her vagina. She felt pain but could not shout because he had put his hand on her mouth. He gave her a K50.00 which she threw on the ground.

5.3.3 Before this incident the Appellant had once called her to go to his house but she refused. The victim stated that she saw blood on her vagina, legs and her skirt. That those things were not there before she was defiled. She concluded that she was not happy with what the Appellant did to her because she was hurt.

5.4 PW4 was Anna Chima from Mtwalo, Mzimba District. She stays in Mchengautuwa. She told the court that the victim was her grandchild. She told the court that on 12th December 2010 the victim was defiled by Mr. Ngulube. She first saw the victim walking uncomfortably and she was crying. When she asked her she said Mr. Ngulube had defiled her. She checked her vagina and found that her vaginal way was swollen and there were some stuff that looked like mucus. The victim went to the hospital with her mother in the accompany of another woman.

5.5 PW5 was Constable Kabula of Chibavi Police Unit. He told court that it was on 13th November 2010 when Chibavi Police Unit received a complaint of defilement from the victim an 11 year old girl. She said

that Mr. Ngulube the Appellant was the one who had defiled her at around 19.00 hours. She was referred to the hospital where defilement was confirmed. The Appellant was arrested on 16th December 2010, cautioned and charged. He denied the offence. The medical report was also explained to the Appellant.

5.6.1 PW6 was Blackmore Magawa, an Orthopedic Clinical Officer based at Mzuzu Central Hospital. He told the court that it was on 13th December 2010 when he examined an 11 year old girl. On vaginal inspection she had bruises, no hymen and there were discharges from her vagina. Laboratory tests showed:

- No white blood cells
- No epithelial cells
- No red blood cells
- No spermatozoa
- HIV non-reactive.

5.6.2 She was given *dovior* to be taken for 30 days. He told the court that an 11 year old girl is supposed to have a hymen and that a normal child is not supposed to have bruises or discharges. Spermatozoa were not found and according to PW6 it was because she took time before going to the hospital. PW6 suspected that the vagina discharges might have been caused due to the defilement.

6.0 Prima Facie Case

6.1 At the close of the prosecution's case the Learned Magistrate found that the Appellant had a case to answer and he was called upon to enter a defence and call witnesses if he so desired.

7.0 Defence

7.1 DW1 was Wyson Ngulube the Appellant himself. He told the court that he stays in Sonda in the City of Mzuzu. He stated that he was truck driver. On 12th November 2010 he went to work as usual. He transported bricks from Dunduzu to Hill Top. At around 5.00 pm he knocked off and went home. He found that there was not enough food at home. He then left home with his child and younger brother and went to Target market. He further went to four ways with his child while he had sent his younger brother home with the rice. He bought kanyenya and went home.

7.1.1 On 13th November 2010 he went to work as usual. But as he knocked off at around 8.00 pm, as he was locking his car, he found Police officers who said they wanted to see him. They said he should escort them as they were looking for some other person. Eventually they got to Chibavi Police Unit. That is when he was told of the offence.

7.1.2 When he tried to explain his side of the story they did not listen to him until he was put in custody. The following day he was told they would call the girl's parents and the girl herself. At around 4.00 am the girl visited him and told him she did not know anything about the issue.

7.2 DW2 was Dolia Munthali. She told court she was staying at Sonda and that the Appellant was her son. She stated that she he stays at Choma and on the material day she went to the Appellant's house. When the Appellant had returned back from work he went to buy food from the market with his son. He bought sugar, rice and meat. His friend was the one who carried these things. He returned home carrying his child and later proceeded to play with him. This was on

12th November 2010. The following day she was surprised to see that it was getting dark without him coming home. Then a friend told her that he had been arrested.

7.2.1 On 14th November 2010 they were called to the victim's house where the father of the victim asked them to pay K45, 000. The amount was reduced to K25, 000 but they did not have the money. On 24th February 2010 she gave K9, 000 to the mother of the child. The mother said it was her husband who had sent her to collect the money.

8.0 Law and Evidence.

8.1 Burden and Standard of Proof

8.1.1 It is trite that in this matter the State was duty bound to prove each and every element of this offence and the standard required by the criminal law is beyond a reasonable doubt. The relevant provision is section 187(1) of the Criminal Procedure and Evidence Code.

> *The burden of proving any particular fact lies on the person who wishes the court or jury as the case may be to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person.*
>
> *Provided that subject to any express provision to the contrary in any written law the burden of proving that a person is guilty of an offence lies upon the prosecution*

8.1.2 Our own local case is *Namonde vs. Rep*. [1993] 16(2) MLR 657 in which renowned Malawian jurist my late elder brother Chatsika, J. as he was then called, in affirming Lord Sankey views in *Woolmington vs.*

Director of Public Prosecution [1935] AC 462, summed up the law as follows.

> *"It should be remembered that subject to any exception at common law, cases of insanity and to various statutory provisions, the prosecution bears the burden of proof on every issue in a criminal case.*

8.2 Offence, Section and Law

8.2.1 Section 138(1) of the Penal Code (Cap 7:01) Laws of Malawi provides:

> *Any person who unlawfully and carnally knows any girl under the age of 13 years shall be guilty of a felony and shall be liable for imprisonment for life.*

8.2.2 For the state to secure a conviction they must prove the following.

1) Penetration of the male sexual organs into the female sexual organs of the victim. See *Rep. vs. Mphande* [1995] 2 MLR P. 586.
2) The fact that the girl was under the age of 13. See *Chipala vs. Rep* [1993] 16(2) MLR P. 498.
3) Knowledge. The accused must have known that the girl was under the age of 13 years. See *Rep vs.Mandala* [1987-1989] 12 MLR p. 213.
4) Consent is non consequential as girls under the age of 13 are incapable at law of giving consent.

8.2.3 When dealing with a case of defilement a court of first instance should warn itself of the dangers of convicting the accused in the absence of corroboration. In proving the offence of defilement the State must show that the accused for all intents and purposes had unlawful carnal knowledge of a female under the age of 13 years and that the accused knew at the material time that the girl was under age in terms of Section 138 (1) of the Penal Code. In this case did the State prove the elements of this offence against the Appellant? In *Rep vs. Msosa* [1993] 16(2) MLR. P. 734, learned judge Chatsika J. as he was then called stated as follows:

> *At the end of the trial the court must subject the entire evidence to such scrutiny as to be satisfied beyond reasonable doubt that important elements of the offence are proved. Even where the prosecution proves beyond reasonable doubt all elements of an offence, the court must consider the defence evidence. If the defence evidence creates a reasonable doubt as to guilt. The court must resolve that doubt in the favour of the accused.*

8.3 Penetration

8.3.1 For the charge of defilement to stand the State must prove that there was penetration of the male sexual organs into the female sexual Organs (penis into vagina). The slightest and shortest amount of penetration suffices and the male is not required to release semen for the charge to stand. In this case before me, there was evidence laid before court that there an inspection which was carried out by Ida Nkhoma and another elderly woman. Their findings were that the girl's vagina was bigger than normal and there were blood stains.

8.3.2 However absence of medical evidence notwithstanding, it should be made clear that sexual intercourse like any other fact can be proved without medical evidence. We surely do not need a doctor to prove that sexual intercourse took place. Do we seriously need a doctor to tell us that the red stuff on a person clothing is blood or that the person lying somewhere is dead? I do not think so.

8.3.3 It is trite law that older women are well qualified to determine that what they saw was some stuff which looked like semen. Of course, the court in the absence of medical or scientific examination cannot accept any such evidence as conclusive where a witness says what she saw was semen. In *Mpingawanthu vs. Rep* [1978-80] 9 MLR 436, Villiera, J concluded as follows:

> *It is not proper for lay witnesses to say categorically that what they say was semen. Only experts can say so after examining the substance. Lay witnesses even if they are elderly and experienced can only say that they saw something that was like or resembled semen, unless they are the victim of the offence.*

8.3.4 Additionally, to deny justice to victims of defilement on the mere premises that an adult Malawian female is the only one who did the inspection would undermine the very foundation of the institution of courts of justice in this our Republic. The evidence of PW4 Anna Chima grandmother to the victim who inspected the victim and concluded that her vagina was too big for her age and that there was some stuff like semen was good evidence in my view. This has also been substantiated by the evidence from the hospital that there were injuries the girl sustained in and on her vagina, that she had no hymen and her vagina had some discharge.

8.4 Under the age of 13 years

8.4.1 Further to the above, for the State to succeed they must also show beyond a reasonable doubt that the girl was under the age of 13 years and that the Appellant knew that fact at the time the offence was being committed. Where there is doubt as to age, the State must prove the age through scientific or medical means. But where this is not possible, evidence from the mother or someone who witnessed the birth should suffice.

8.4.2 In *Rep vs. Malanda* 12 MLR 213, it was clearly stated that evidence of a parent or somebody who was there when they were born is admissible to prove age. However a court may also form its own opinion of the complainant's age who is present in court. In this matter the mother of the victim mentioned her age and there was no dispute.

8.5 Consent

8.5.1 Once age is determined to be less than 13 years on a charge of defilement the State need not show that there was no consent. Consent is non consequential under a charge of defilement. The reason is that girls under the age of 13 years due to immaturity are incapable of giving consent. Therefore a person cannot plead this defence under this charge.

8.6 Circumstantial evidence

8.6.1 The evidence before this court is circumstantial. Where circumstantial evidence is entirely relied upon, the State must clearly show the various links in the chain of events and its cumulative effect must leave only one rational and logical conclusion that it is the Appellant who committed the crime and no one else. Therefore after eliminating all possibilities of innocence what must remain is the guilty of the Appellant. In this case before me, can it be said that after

eliminating all reasonable hypothesis of innocence, the Court will arrive at one conclusion that it was the Appellant who committed the crime? In answering the same, we must have recourse to the evidence.

8. 7 Alibi

8.7.1 The Appellant stated that on 12 November 2010 he had arrived home at around 5 pm but decided to go and buy food items at the market. He then proceeded to four ways to buy eggs. From there he returned home. On 13 November 2010 after knocking off from work he was arrested and taken to Chibavi Police for defiling a girl. His mother Dolia also told the court that his son was at home on 12 November 2010. She however confirmed that he had left the house to go and buy some food items. The following day her son was arrested.

9.0 The Finding.

9.1 There is no dispute in my mind that there was unlawful carnal knowledge of the victim. There is evidence of presence of some white stuff which looked like semen. Medical examination revealed that the victim was bruised and the entry to the passage of her vagina was just too big for her age. The question is whether it was the Appellant who committed this offence and finally whether the conviction on a charge of defilement can be sustained. I'm mindful that corroboration must be independent testimony which must implicate the Appellant by connecting or tending to connect him with the crime. It must be evidence which implicates him or that which confirms in some material sense not only the fact that a crime has been committed but also that it was the Appellant who committed it.

9.2.0 Corroboration

9.2.1 Section 6(2) Oaths, Affirmations and Declarations provides that where unsworn evidence is received from a person of immature age,

the accused must not be convicted in the absence of corroboration. Corroboration in sexual offences though not a matter of law is by legal tradition a matter of practice.

9.2.2 In sexual offences, courts are always called upon to warn themselves of the dangers of convicting an accused in the absence of corroboration. The law demands that the victim's story must be corroborated by some other independent testimony. However, if the victim is of immature age her testimony cannot be corroborated by the evidence of another minor. Unfortunately in this case before us the lower court did not warn itself of the dangers of convicting the Appellant in the absence of corroboration. How fatal was this error?

9.2.3 In *Tinazari vs., Rep* 1964-66 ALR Mal 184 at p. 192 it was held that

> *After a warning has been given, an examination of the evidence must be carried out to determine whether or not there is material amounting in law to corroboration of the complainant's account. If none is found, two courses are open to a trial court. It can acquit the accused person on the ground that it is dangerous to convict on the uncorroborated evidence of the complainant, or in a suitable case it can accept the testimony given notwithstanding the lack of corroboration….*

9.2.4 The law is that where the trial court fails in an appropriate case to direct itself as to corroboration and there is in fact no corroboration any conviction recorded will normally be quashed on appeal. In this

matter the lower court failed to give itself the necessary warning. However looking at how the learned Magistrate wrote her judgment it is clear that she had found corroboration of the various pieces of evidence and when she brought them together she entered a conviction.

9.2.5 Although she did not specifically mention the word 'corroboration' nor did she give the warning it is clear from the judgment that she was able to follow the sequence of events and finally convicted the Appellant using the various pieces of evidence. I do not think that was fatal to the totality of the evidence and the finding and to rule otherwise will cause an injustice and that will be a sorry day for the victim of this crime.

9.2.6 The charge under Section 138 (1) Penal Code restricts the age to under 13 years and not over. From the evidence it is clear the lower court conducted a *voir dire* examination of the girl to inquiry as to her suitability to give either sworn or unsworn testimony. During the testimony of the mother the court further inquired into the age of the girl. The mother said she was 11 years. According to the record it is clear the girl was able to comprehend what was going on in court. She also gave intelligent answers as to the consequences of lying. One of the elements of the offence of defilement is that the girl must be under the age of 13 years, or she must clock 13 years on the day the offence was committed since the exact time of birth is matter of evidence.

9.2.7 The question is how the victim aged 11 years was able to recognize the Appellant in the evening. The mother of the victim stated that the Appellant was known in the area because he was working for her relatives the Zimba family. The victim stated that she had been defiled by the Appellant. She mentioned the defiler's name. She stated

that while playing hide and seek at around 7 pm she went to look for a friend who had run towards the neighbor's house. While there the Appellant whisked her away and took her to some hedges while he closed her month. He then removed her skirt and under wear, removed his own clothing and produced his penis. Thereupon he defiled her and when he finished he offered her K50.00 which she threw on the ground.

9.2.8 The defence of *alibi* entered by the Appellant cannot hold water. He was home by 5 pm. He went to buy food items and returned home. He was home by 7 pm since he said he did not take long. What happened after his return can only be better known by himself.

9.2.9 The victim further alleged this was not her first encounter with the Appellant. That at some point before this incident the Appellant had called her to go to his house but she refused. She told the court below that she knew the Appellant because he used to talk to her mother. The mother confirmed this that he had known the Appellant for a year because he was working for the Zimba family

9.2.10 I'm convinced the victim gave good and convincing evidence. At 11 years she knew what had happened and told her mother's friend. She repeated this story to her family, the police and even the court.

10.0 Conclusion

10.1 I'm convinced the lower court did not error when it found that there was unlawful carnal knowledge. The court below rightly found penetration of the male sexual organ into the female sexual organ of the girl. I see nothing wrong with the finding by the lower court that all the evidence pointed at the Appellant as the one who committed this horrific offence upon this victim of such a tender age. The victim gave

intelligent answers during the *voir dire* examination and when giving her testimony and there is no doubt in my mind that she recognized the person who assaulted her that evening.

10.1.1 I further find that there was corroboration in this case although the trial court did not mention about it nor did it warn itself of the dangers of proceeding to convict in the absence of corroboration. I therefore uphold the conviction. The appeal against conviction was ill-conceived and it must fail.

11.0 Appeal against Sentence

11.1.1 I'm mindful of the need to ensure that courts pass sentences which are meaningful in the circumstances. The Appellant had no previous criminal record and he was a young offender aged 25 years. A sentencing court must therefore weigh the aggravating factors against the mitigating factors. A sentence must fit the offence and the offender but also reflect the general feeling of the public. A sentence must not outrage members of the general public.

11.1.2 Defilement is a felony punishable with life imprisonment. However a sentencing court must pronounce a penalty which must be blended with some measure of mercy. Looking at the antecedents of the offender I'm of the view that the sentence was slightly excessive in the circumstances and yet this was not a case of the worst kind as compared to other similar cases. I therefore reduce it to 7 years. The appeal against sentence partly succeeds.

Pronounced in Open Court at Mzuzu in the Republic on 5th December 2012.

Hon Justice D. Madise

JUDGE