IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 8 OF 2018

BETWEEN:

DAVIE NYALAPA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: Hon Justice M L Kamwambe

Dr Piriminta of counsel for the State

Maele of counsel for the Appellant

Ngoma....Official Interpreter

Chiusiwa...Court Reporter

JUDGMENT

Kamwambe J

This is an appeal against the judgment of the First Grade Magistrate Court sitting at Blantyre for the offence of defilement contrary to section 138(1) of the Penal Code. The offence was committed between the 25th and 26th July, 2016 at Baptist Primary School in the City of Blantyre. The Appellant pleaded not guilty and he was convicted after a full trial and was sentenced to 8 years imprisonment.

Grounds of appeal are as follows:

1) The learned magistrate erred in law in finding that the Appellant had a case to answer when there was no evidence

corroborating the story of the complainant who gave unsworn evidence.

2) The lower court erred in law in failing to consider the evidence that casted doubt on the veracity of the allegations against the Appellant.

3) The sentence is manifestly excessive.

The Appellant was a 57 years old teacher who was alleged to have defiled a 7 years old pupil. The story of the complainant is that he told her to lay down and undressed her while putting his manhood in her vagina. She felt pain. He did the same on the next day. In all he is alleged to have defiled her thrice.

According to section 6(2) of the Oaths, Affirmations and Declarations Act, the unsworn evidence of a minor is required to be corroborated as a matter of law.

The case of **Kagwa v R 14 MLR 3** says that '*corroboration is nothing more than some additional evidence from a source which is independent of the evidence of the witness whose evidence requires corroboration*'.

The Appellant confessed in his caution statement which was not retracted that he told her to remove her clothes and she did so and was left with pants only which were pulled down to her knees. Appellant said that as the girl slept on the floor and as he wanted to sleep on her he heard a knock. The girl dressed up and sat on the chair while he went out to attend to the knock.

This confession is corroborative enough of what the victim girl said. The medical report which was done much later because the matter was reported to police about 2 years later was of no help to

arrive at a conclusive finding that there was penetration however slight. By this time all was normal with the victim girl. The court has a duty to look at all the circumstances of the case to arrive at a conclusion that there was penetration. It should not rely only on the medical report.

The second ground of appeal appears to me to be of little or no basis because the evidence of PW 2 which is in issue cannot be said to be fit to be doubted. After all, since Appellant was represented, his counsel had the opportunity to request the court that he cross-examines PW2 why it took her over 2 years to report the matter to police. It would not be fair to ignore her evidence when counsel for the Appellant failed himself to seek clarification. It makes sense to me that she may have found opportunity to report the crime after the Appellant as perpetrator was dismissed from being a teacher on the reason that she committed similar offences with other girls. Victims and parents may not reveal the crime for many other different reasons.

The victim's parent's recorded admission of the Appellant of his sexual assault on the child victim is also independent corroborating evidence. The recording was listened to in court. The victim reported to her mother that she felt pain in her private parts and that she had difficulties to urinate. This is evidence of penetration corroborated by the confession in the caution statement and the recording. In accordance with section 176 (3) of the Criminal Procedure and Evidence Code, I find the prosecution evidence to be materially true.

The sentence cannot be said to be excessive, rather, I would go for enhancement of the same but I have refrained myself from enhancing it due to the advanced age of the Appellant.

In the circumstances, the appeal fails in its entirety.

Pronounced in open court this 28th day of August, 2018 at Chichiri, Blantyre.

M L Kamwambe

JUDGE