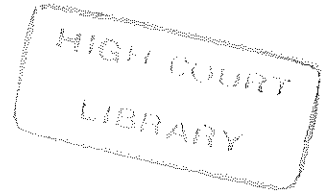




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**IN THE HIGH COURT OF MALAWI**

MZUZU REGISTRY

CRIMINAL APPEAL NO. 44 OF 2017

Being Criminal Case No. 514 of 2015 in the CRM's Court Sitting at Mzuzu

**RABSON GAMA**

**VERSUS**

**THE STATE**

CORAM: HON. JUSTICE T.R. LIGOWE  
D. Shaibu of Counsel for the State  
N. Mdazizira of Counsel for the Appellant  
G. Msukwa, Official Interpreter  
J. N. Chirwa, Court Reporter

**JUDGMENT**

Ligowe J

- 1 The appellant was on 7<sup>th</sup> October 2015 convicted by the Chief Resident Magistrate, of the offence of defilement, after his own plea of guilty. He was sentenced on 13<sup>th</sup> October 2015 to imprisonment for 16 years with hard labour from the date of his arrest. He now appeals to this court against the sentence on the ground that it is excessive considering that he is a first offender, he is young and he pleaded guilty.
- 2 The Chief Magistrate took note that the girl defiled was 13 years old and in Standard Seven at school. He considered the case of *Rep v. Alex Mwanza*, Conf. Case No. 115

of 2015 (High Court, Mzuzu Registry) (unreported) where imprisonment for 18 years was confirmed for a man who defiled his step daughter. He had taken her to a deserted place, forced her down, defiled her, gave her K500 and advised her not to report. The man had not pleaded guilty.

3 He also considered the case of *Wyson Ngulube v. Rep*, Criminal Appeal No. 63 of 2011 (High Court, Mzuzu Registry) (unreported) where a 25 year old man grabbed an 11 year old girl from his neighbourhood around 7 pm and with his hand on her mouth took her to some hedges where he took off her dress and underwear and defiled her. The man gave the girl K50 but she threw it down because she was hurt. She felt pain and was bleeding. After a full trial the Magistrate sentenced him to nine years, but the High Court reduced it to seven because he was a first offender and the case was in the mind of the Judge, not worse compared to other similar cases.

4 The Chief Magistrate in this case also considered the case of *Brian Shaba v. Rep*. Criminal Appeal 19 of 2014 (High Court, Mzuzu Registry) (unreported). The appellant had been sentenced to imprisonment for six years by the Magistrate's Court after a full trial. He was a teacher and 47 years old. He defiled a girl from his class 12 years old. He had asked three girls to take his books to his house. He instructed two girls to leave the books on the veranda and go back, but the victim to proceed into the house. As she walked out after dropping the books, he asked her to sit on the chair and asked for her age. When she answered he proposed if he could carry her in his arms but she refused. He persisted with his advances until the girl tried to escape, but he stoned her and she fell down. He then grabbed her, told her to sit on the chair and started touching her breasts. She started crying but he told her to stop as he would give her notebooks afterwards. He then dragged her to his bedroom, undressed her, undressed himself and defiled her. She was crying. Afterwards he told her not to tell anyone. He went outside to talk to some people and then came back to defile her again. Afterwards he repeated that she should not tell anyone, for the sake of his reputation, and gave her two notebooks. In view of these circumstances, and considering the case of *Rep v. Bright Jamali*, Conf. Case No. 421 of 2013 (High Court, Principal Registry) (unreported),

which set out imprisonment for 14 years as the starting point for defilement, the High Court enhanced the sentence to 18 years.

- 5 In the present case, the girl missed from home for three days because the appellant had taken her in for marriage without the knowledge of her parents, a week after he had proposed to her. In arriving at the sentence of imprisonment for 16 years, the lower court was of the view that at 13 the girl would then live with trauma and ridicule for a long time, the appellant having changed the direction of her social life because of the defilement.
- 6 The appellant would like this court to consider reducing his sentence considering his age at 19, his plea of guilty and that he is a first time offender. These are some of the very factors the Chief Magistrate considered, but counsel both for the appellant and the State submitted that he attached minimal weight to them. Counsel referred this court to *Kingstone Kambalame v. Rep*, Criminal Appeal No. 39 of 2009 (High Court, Principal Registry) (unreported) and *Vona Kamowa v. Rep*, Criminal Appeal No. 12 of 2016 (High Court, Principal Registry) (unreported).
- 7 In the case of *Kingstone Kambalame*, 12 years were reduced to nine years for a 33 year old man who pleaded guilty to defilement after impregnating a 12 year old girl. And, in the case of *Vona Kamowa*, 9 years were confirmed after full trial of a 23 year old man who defiled a 15 year old girl, 36 times and impregnated her. The court found that the girl had not always been willing but she succumbed due to his threats to beat her.
- 8 The principle to apply in an appeal of this nature is that the discretion of the trial court should not be interfered with unless the trial court erred in principle or omitted some material factor or the sentence is manifestly excessive or inadequate as to comport an error of principle. The cases outlined above are, in my view, sufficient to make the needed assessment.

- 9 The starting point is as already stated, imprisonment for 14 years. The actual sentence will be higher or lower depending on the aggravating and mitigating circumstances available.
- 10 There is an element of abduction in the manner the appellant took the girl away for three days, but comparatively, the circumstances in the present case are less grave than *Rep v. Alex Mwanza*, *Wyson Ngulube v. Rep*, *Brian Shaba v. Rep*, *Kingstone Kambalame* and *Vona Kamowa*. Except for *Kingstone Kambalame* the offenders had not pleaded guilty and were violent in all the cases. Although *Kingstone Kambalame* also pleaded guilty, he impregnated the girl. *Wyson Ngulube* has a much lower sentence, but I doubt if that matches well with the circumstances in that case. I am also mindful that the appellant in this case is much younger than the offenders in the other cases, and the age difference between him and his victim is much less. He deserves a sentence much less than imprisonment for 16 years. I reduce it to seven, and it will still be with hard labour.
- 11 The appeal succeeds.
- 12 Delivered in open court, this 10<sup>th</sup> day of October 2018.

  
T.R. Ligowe  
**JUDGE**