

REPUBLIC OF MALAWI



**IN THE SENIOR RESIDENT MAGISTRATE COURT SITTING AT MANGOCHI
CRIMINAL CASE NUMBER 547 OF 2021**

THE STATE

V

JANA GONANI

Coram: Michongwe R. S., Senior Resident Magistrate

Inspector Mwase for the State

Accused unrepresented

Makhanga, Court Clerk/Official interpreter

Thokozani, Court Marshal

JUDGMENT

1. Introduction

1.1.In this matter, the accused person is one Jana Gonani, 27 years old. During the first part of the trial (the State's case), the accused person preferred to be recognised as a woman and mentioned with the pronoun "she" but later in his defence, he preferred the pronoun (he) because he said he was a man. I will do the same in this judgment so that I preserve the accused person's identity. She is appearing before this court charged with three counts. She was at first charged on a holding charge of theft in two charge sheets but later, the State applied for the amendment of the charges under section 151 of the Criminal Procedure and Evidence Code which the court granted. The State also applied for the consolidation of criminal cases number 546 and 547 to proceed as criminal case number 547 which the court also granted. The State adopted the facts already adduced for PW1 in each case and the court directed that PW1 in case number 547 be PW2 for easy numbering of the State witnesses. After the amendments, the counts were duly

read to the accused person and he took plea on the amended charge sheet. She adopted the cross examinations and the trial proceeded.

1.2. The first count is obtaining by false pretense contrary to section 318 as read with section 319 of the Penal Code.

1.3. The State is alleging that

Jana Gonani, on or about the 14th day of October, 2021, within Mangochi township in the district of Mangochi, with intent to defraud, obtained money amounting to K16, 000. 00 and cell phone, Huawei p8 from Emmanuel Jusab by falsely representing himself as a woman who was trading as a commercial sex worker.

1.4. The second count is also obtaining by false pretense contrary to section 318 as read with section 319 of the Penal Code.

1.5. The State is alleging that

Jana Gonani, on or about the 19th day of October, 2021, within Mangochi township in the district of Mangochi, with intent to defraud, obtained a cell phone, Samsung j5, valued at K120, 000 from Wilson Salad by falsely representing himself as a woman who was trading as a commercial sex worker and that the said cell phone to act as a payment for the sexual intercourse offered.

1.6. The third count is unnatural offence contrary to section 153(c) of the Penal Code. The State is alleging that

Jana Gonani, on or about the same time and place as stated in the second count in the District of Mangochi, willfully and unlawfully permitted a male person to have sexual intercourse of him against the order of nature.

1.7. When the accused person appeared before the court and then the charges read and carefully explained to him, she denied all the three counts and the court consequently recorded a plea of not guilty to each count. In view of the plea of not guilty entered to each count, the State paraded witnesses to testify against the accused person. The court advised the accused person of her right to have a legal representation as it is his right under section 42 of the Constitution, but she told the court that she will represent himself and she desired no private or public legal representation. The court also honored

his choice. The facts of the case on all the three counts unfolded from the evidence that was adduced before the court from both the State and the accused person in her defence.

2. The Prosecution's case

2.1.The first State witness, who was a man, told the court that he knows the accused person as they meet at Club 700 in Mangochi township. He knows her by the name Triza. She is a commercial sex seller who stands along the road of devil street. On this day, he went into the bar at Club 700 around 11pm. He met the accused person who he has been perceiving her as a woman all along.

He proposed her that he wanted sexual intercourse from her to buy. The witness told the court that the accused person priced the consideration of the services at K10, 000. 00. The witness negotiated the price and agreed K8, 000. 00 for the desired services. Upon this agreement, the two proceeded to the accused person's room Number 109 at Grace Rest House. It was the accused person who led the witness to this room. While there, the accused person demanded the money before the services were offered. The witness gave her the K8, 000. 00 as agreed. The witness told the court that thereafter, the accused person went out temporarily and she locked him up in the room. It took almost an hour before she came back while very drunk. Upon her arrival, she went into bed and slept looking tired.

The witness said that he started caressing her on her cheeks. He wondered that he was feeling the buds of beards on her cheeks. When the witness went ahead to romantically touch the private parts of the accused person, she was resisting and denied him the access of her private parts. The witness waited until the accused person slept completely. When he proceeded to touch her private parts, he found that the alleged commercial sex seller, the accused person, was a man. She had a penis and testicles just like him. The witness, did not wake up the accused person up until it was dawn.

The accused person woke up and again went out locking the witness up in the room. After about two hours, the accused person came back and told the witness that she had gone to see someone who she alleged stole her phone. She did not find the alleged thief and asked the witness to escort her to police so that she reports the incident of the stolen

phone. This time around, the witness had known that he had been tricked and admitted to escort her so that she is arrested. The accused person started demanding the extra K2, 000. 00 they had initially negotiated so that the price goes back to the initial K10, 000. 00. He wondered why he should pay for the same when no services were offered. The accused person started threatening the witness and the witness admitted to give her the said amount, and in fact he gave her.

Surprisingly, the accused person demanded more and the witness said he told her to go to the FDH Auto Teller Machine before proceeding to police. They proceeded as such. This time around, she was no longer a woman. It was now a physical issue. Demanding more than agreed. The witness said he was lying on the issue of going to the FDH ATM to her. What he wanted is that he should be safe in the public and if possible the accused person be apprehended by the community. At the bank, the accused person took the phone from him and K6, 000. 00 from his pocket. This time, it was still dark. The witness told the court that the accused person then took stones and started threatening him as the witness was struggling to get his phone back. She told him that “*nyamuka uzipita apo ayi ndikupha. Ndapha ambiri ine*”. The witness tried to calm her down but eventually she went.

It was the evidence of the witness that the accused person was putting on a dress on this night and looked a woman as he always knew her. She was in a weave dressing her head. He said it was the same weave she was putting up in the court that particular day of the hearing of the matter in court but had changed the clothes. He told the court that they agreed a fulltime engagement and not short time. He told the court that he did not succeed in having sexual intercourse with her since she was a “he”. The witness said he went to police and reported the matter.

2.2.The second witness of the State was also a man. He told the court that he knows the accused person as a woman called Triza. He chats with her in the drinking joints (shabins) in Mangochi town.

On 19th October 2021 he met the accused person at Greenland at the drinking joint. Being friends, she asked him to escort her to her house for her to take a bath. They both

went to Aliko Rest House. The witness told the court that they proceeded to room number 5 where she was putting up. This was around 7pm. While in her room, she slept on her bed. It did not take time when she started caressing the witness romantically. The witness did not take time too, but responding to her instantly sexually.

The witness told the court that the accused person asked him “kodi ukandichinda undipasa zingati”? He replied to her that he had no money. The accused person told him that since they were friends she will offer the sexual services for free. The accused person went on and took a condom, opened it and put on the penis of the witness romantically. They started the sexual intercourse. The witness told the court that she held his penis and penetrated herself where she knew she inserted. The witness said he believed he was doing sexual intercourse with a woman through her vagina. He felt he was well accommodated by a woman and he told the court that he did not know that *sindikunyenga malo oyenerera*. He told the court that he finished the sexual intercourse business and he ejaculated.

The accused person did not take the bath as planned. Together, they went outside the room. The accused person told him that if he had money, he could have spent a night with her. They proceeded to the drinking joint again. While there, she told him that *wandikonda kwambiri ndiye ndikagone kwawo*. They indeed went to the same room. He slept there with her and enjoyed a second round of sexual intercourse. In the morning, she asked him where his phone was. The witness told the court that he trusted her and gave her his phone. After she took the phone, the witness said that she told him that *ngati sundipasa K6, 000. 00, phone sutenga*. He said to her he had no money as earlier indicated.

The witness told the court that the accused person told him he was going to police to report that someone had stolen her phone. She locked him up in the room. The witness realized that the accused person had another case similar to his when he saw the accused person coming back after sometime with the police officers in the room he was locked up. The witness was picked up by the police to police station at Mangochi. The police are the ones who told him that the accused person was not a woman but a man. This

was a news to him. He told the court that he did not recover his phone back, J5 Galaxy Samsung.

2.3.Detective Banda, the Criminal Investigation Officer for Mangochi police station told the court that, in the month of October 2021, the Mangochi police received an information that there was a certain man dressing himself as a woman and he was within the Mangochi township. It was alleged that he was stealing from men.

On 15 October 2021, there was a report made by the first State witness (PW1) of this case that he was attracted to a certain lady at a bar drinking joint. He was taken to the Grace Lodge where the witness and the lady slept. He realized that she was not a woman but a man after touching her private parts. He observed that she had male organs after he had already paid K8, 000. 00 as consideration of the sexual business they engaged. As the PW1 was about to leave the room in the morning, the accused person intimidated him and demanded extra money. He paid K2, 000. 00 extra. He promised to give her the other demanded money at the bank. The matter was reported to police.

On 20 October, 2021, the police also got the information that the accused person was seen at M'baluku and police officers rushed to arrest the accused person. The accused person was arrested in her womanly attire with a weave dressing up her head. Upon interviewing the accused person herein, she insisted she was a woman and not a man.

As part of investigations, she was told that she should choose between a male officer or a female officer to inspect her for genital verification. She chose a female officer. When they went into a private room, the accused person completely denied the exercise and they came out unsuccessful. The witness, asked him to undress herself in his presence, the accused person did voluntarily and showed the witness her genitals. She was putting on a half *pitcoat* and female *pants*. The witness saw a penis and testicles. He further wanted to verify his chest. The accused person put on a *bra* but there were no breasts at all only a plastic breast like thing.

Outside, the accused person put on a sweater, a chitenje wrapper, and he was carrying a female hand bag. The accused person, told the witness that she was Trizza Banda.

The witness, tendered a photo on how the accused person dressed up on that particular day for the court to appreciate. The witness proceeded to place the accused person in a male cell and he told the court that the accused person never regretted for the same.

2.4.The medical practitioner, a clinical officer at Mangochi District Hospital told the court that the accused person was brought to the hospital by three police officers so that he conducts examination on the accused person in order to establish whether the accused person was a male person or a female person.

At first, he told the court that he examined her whether she was ill or not mentally. His findings were that her mental faculties were fine. Then he further, examined her on whether he was a male or female using a machine. She scored 15 out of 15 on that machine representing that he was a male person. The machine measures the neology of a person. Further, the witness said, he examined the chest cavity and abdominal cavity of the accused person. Both were functioning properly.

The witness said he then examined the private parts of the accused person, and found that he has a penis, two testicles and anus. He said he did not find any ambiguity in terms of the genitalia since others may be found with both genitalia. The accused person had male genitals only.

2.5.The investigator of the case told the court similar to what the other witnesses said. He recovered the two phones, that of PW1 and PW2 in the hand bag of the accused person. He said the accused person was dressed up in a womanly attire and had a plastic thing on her chest disguising as breasts. The witness told the court that they were surprised to hear that PW2 had a normal sexual intercourse with the accused person.

When cautioned on the first count, the following is what the accused person told him in the presence of other two officers.

Padali pa 15 October 2021 nthawi ya 12 koloko usiku pamene ndidali pa bala ya 700 kumwa mowa. Ndipo ndidakomana ndi mnyamata wina nayenso amamwa mowa. Ndipo adandifunsira kuti tikanyengane ndipo ndidavomela. Tidatengana kupita ku room yanga ku Grace Rest House room 109.

Tidatengana kukagona mpaka m'mawa. Tidatengana kupita ku bank ya FDH nthawi ili 14:30 hours ndipo tidafikako mpaka 15:30 hours ndipo ndidamusiya komweko. Koma ku police ndidabwera ndekha.

The witness told the court that the accused person denied the charges.

3. Prima facie case

3.1. Upon the closure of the State's case, the court found the accused person with a case to answer in all the three counts after it used the test as required by Section 254 of the Criminal Procedure and Evidence Code and as well expounded in the case of *Gwazantini v R [2004] MLR 75* on *prima facie* case. Accordingly, the accused person was put to defence. He told the court that he will opt for giving his evidence and not call any other witness. The court reminded him of his right to remain silent. He denied. The court also reminded him of his right to legal representation but said he was not interested. The proceedings proceeded to defence.

4. The defence case

4.1. In defence, the accused person told the court that she will prefer being called a man and the court will proceed to do that in this judgment and I will use the pronoun "he" when referring to the accused person. He said he was comfortable testifying in open court and not in chambers only that people must not be taking photos of him or recording him. The court made such orders.

4.2. In his defence, he told the court that on 15 October 2021, he went for the Black Missionary's show at Madeco. He lodged at Grace Lodge. He was then informed that he was being wanted by the police. On 17 October 2021, he went to Alipo Rest House. Then he said that he went to police to report about his stolen phone.

While at police, he saw the CIDs who told him they were looking for him. He was asked whether he was a male or female. He said he told them he was a boy. When asked if they can take a photo of him, he admitted and they took the picture. The police told him about the issue of the phones of the alleged victims (PW1 and PW2). He told the court that he was cautioned and then released with a warning that the community can kill him

because people are hunting for him after they realized that he was a man and not a woman.

The accused person said he then went to his room and reflected on this at night. He said he knew who had reported the issue to police. Although he was told to leave Mangochi for fear of being killed, he did not. He said in the morning he went back to police to check about his issue of the phone. He told the court that he left a boy in his room who was the owner of the Samsung phone. He said there was no sexual intercourse with him. He locked him up because he did not trust him although he knew the person. He said the phones were given to him for security reasons.

At police, he was alerted that the PW1 wanted his phone and the matter will proceed to court. He said he was told that he was being arrested because he was cheating to men that he was a woman for sexual gains. He left the phone of PW2 with the police officer. He was taken to the said room at Alipo Rest House. When the police opened the door, they found the boy, PW2. He said the boy was threatened as to what he was doing in the room. Both were taken to police and were locked up.

He told the court that whatever this boy was saying was doing so for fear of the police. The boy was released and the accused person was placed in a police custody. He told the court that what the boy, PW2 was telling the court was not true.

On the issues that happened at club 700, the accused person said that when he left the club, he went to his room at Grace Lodge. He met a man who he could not identify since it was at night. The accused person said that this man asked him whether the accused person was a man or a woman to which answer he said he was a boy. He said it ended there. He further told the court that it was a surprise to this man to see a man dressed up in a womanly attire. He said then he went to sleep. In the morning, he was called at police. He went there since he had already wanted to go there.

On his dressing, he told the court that everyone has a right to dressing as he wishes so. He said he is sponsored by CEDEP and HRDC in what he does. He started some time back. He said he was born like a person with disability and he does not do sexual

intercourse with ladies. He feels like he is a woman. He has no sexual feelings towards women. He told the court he was a transgender. He says he stays in Lilongwe where CEDEP and HRDC supports him but he would not call any from CEDEP and HRDC to testify in his defence.

5. The law

5.1.The duty of the court

5.1.1. This court is mindful that its duty derives from section 9 of the Constitution that provides as follows:

The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.

5.1.2. The court will look into the facts of this case and the prescription of the laws deemed to have been violated in coming up with its decision.

5.2.Burden of proof

5.2.1. To begin with, the starting premise in criminal matters is that a person who makes an allegation must prove it (*Section 187(1) of the Criminal Procedure and Evidence Code Chapter 8:01 of the Laws of Malawi*). The presumption at law is that every person who is accused of a crime is innocent and that the person remains so until proven guilty (*Section 42 (2)(f) (iii) of the 1995 Republican Constitution of Malawi*).

5.2.2. Mostly, criminal allegations come from the State hence the burden of proof lies on the State. This basis was established in the case of *DPP v Woolmington (1935) A.C. 462 at 481 – 2* where *Viscount Sankey, L.C.* said:

“but the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence ... it is the duty of the prosecution to prove the prisoners case...”

5.2.3. The prosecution therefore bears the burden of proving all the elements in the offence (*R V Laximidias (1923 – 60) ALR 409 at 413, also Mpasu vs R Criminal Appeal*

Cause No. 26 of 2008 at 13, Republic vs Msosa [1993] 16 (2) MLR 734, Gondwe vs Rep [1971 – 72] ALR Mal 33).

5.3.The standard of proof

5.3.1. The standard of proof in criminal matters is that of ‘beyond reasonable doubt’. Any proof falling short of that standard is supposed to end up in an acquittal. In *Miller v Ministry of Pensions [1947] 2AllER 373 at 373, Denning J*, stated that

Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.

5.3.2. This principle is part of our laws as they were adopted in various judgments. *R v Saidi, (1923 – 60) ALR Mal. 560 at 561, R v Laycock Criminal Case No. 6 of 1980 (unreported) and R v Banda 5 ALR (Mal) 9.*

5.4.Circumstantial evidence

5.4.1. The prosecution can be said to have proved beyond reasonable doubt the elements of the offences either by adducing direct evidence or by corroborative circumstantial evidence. Direct evidence is when the said accused person was caught in the action of committing the said offence. However, it is rare to prove a case by direct evidence. Cases are usually decided upon circumstantial evidence (*Chidothi and another v R [1992] 15 MLR 51*).

5.4.2. Circumstantial evidence is when the circumstances surrounding the commission of the offence point to the fact that the alleged commission of the offence was done by the accused person. This must be capable of only one possible inference to establish offence charged (*Masulani v R [1995] 2MLR 762*). The guilt of an accused may be established by circumstantial evidence (*Nyamizinga v R (1971–72) 6 ALR 258*). Circumstantial evidence works cumulatively in Geometrical Progression eliminating other possibilities. It is like a rope comprising several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. **DPP vs Kilbourne [1973] AC 729.**

5.4.3. Circumstantial evidence is evidence of relevant facts. These facts are from which the existence or nonexistence of facts in issue may be inferred. It does not necessarily follow that the weight to be attached to this kind of evidence will be less

than that to be attached to evidence of a direct nature. A tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, than to direct evidence to the contrary, coming from the witnesses lacking credibility - **Blackstone's Criminal Practice, 1777**

- 5.4.4.** The prosecution is not bound to present an eyewitness to a crime in order to obtain a conviction. Cogent circumstantial evidence linking an accused person to the commission of a crime is sufficient (*Chidothi and another v R [1992] 15 MLR 51*).
- 5.4.5.** The circumstantial evidence need to be corroborated to avoid convicting an innocent person. Corroboration is merely some independent evidence which tends to confirm or support other evidence in proving that the offence was committed and that it was the accused person who committed the offence (*Chikoza v Rep [1993] 16(1) MLR 46*).
- 5.4.6.** In circumstantial evidence there may be a combination of circumstances none of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt that human affairs can require or admit of - **Exall (1866) 4F & F, 922 at 929**.

5.5. Corroboration evidence in sexual offences

- 5.5.1.** Corroboration has been said to be independent testimony which affects the accused person by connecting or tending to connect him with the crime confirming in some material particular not only the evidence that the crime has been committed but also that the accused person committed it (*Dixon Chammwamba v R Criminal Appeal No 3 of 2012*)
- 5.5.2.** Justices of Appeal - Kwach, Bosire and O’Kubasu sitting on the East Africa Court of Appeal held that:

The requirement for corroboration in sexual offences affecting adults ... is unconstitutional to the extent that the requirement is against them. We think that the time has now come to correct what we believe is a position which the courts have hitherto taken without a proper basis, if any basis existed or treating female witnesses differently in sexual cases such basis cannot properly be justified presently. The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offence. In the result, we have hesitation in holding that decisions which hold

that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with ... the Constitution (Makungu v Republic 2003 EA)

5.5.3. A whole case cannot therefore fail where there is no corroboration. Further, corroboration does not necessarily have to be in human form, there could be other surrounding evidence that could provide corroboration of the evidence of the complainant. Before a case is therefore thrown out for lack of corroboration it is important to examine all evidence on record to see if the evidence of the complainant does point to the accused person as having committed the offence complained of. **Wesle v Rep [1995] 1 MLR 367 (HC); See also Kaliyati v R, Criminal Appeal No. 109 of 2018**

5.5.4. In *R v Kapalepale*{1972-72} *ALR Mal. 150* quoting with approval the case of *R v Baskerville [1916] 2 K.B. at 667* held that;

“Corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.”

5.6.The substantive law on obtaining by false pretences

5.6.1. The offence of obtaining by false pretense is defined under **Section 318 of the Penal Code**. It stipulates that:

Any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretense.

5.6.2. The offences are created under section 319 of the Penal Code. Subsection 1 provides as follows:

Any person who by any false pretense, and with intent to defraud, obtains from any other person anything capable of being stolen or any services or induces any other person to deliver to any person anything capable of being stolen shall be guilty of a misdemeanor, and shall be liable to imprisonment for five years.

5.6.3. My humble duty on the first and second count is to determine whether, the accused person made any *representation made by words, writing or conduct, of a matter of fact, which representation is false in fact, and which the person making it knows to be false or does not believe to be true.* Also, my duty is to determine if the accused person had an *intent to defraud* and he *obtained from any other person (PW1 and PW2) anything capable of being stolen or any services or induces any other person to deliver to any person anything capable of being stolen.*

6. Findings on the 1st and 2nd counts

6.1. Obtaining property by false pretenses is proved if the accused person makes a false pretense, intends to defraud and obtains from another something capable of being stolen. The offence bases on a false pretense. The offence is committed when the false pretense operates on another to release property (**R. V. Laverty, 54 Cr. App. R. 495; Metropolitan Police Commissioner v. Charles [1977] A.C. 177; Mputahelo v R Criminal Appeal no 28 of 1999**

6.2. The accused person must make a false pretense as defined. The accused person must say words, write or present a writing or do some action whose effect is a representation of some fact. The representation must be to a present fact and be false. The expression “words, writing or conduct” should not be read disjunctively. The key word is a representation. A representation can be made by words used, writing made or proffered and conduct done in conjunction. One can, however, make a representation excluding possibility of another mode. Whatever mode, it is a question of fact whether the accused person made the representation the prosecution alleges (**R. v. Adams, The Times, January 28, 1993; Appeal no 28 of 1999. Mputahelo v R Criminal Appeal no 28 of 1999.** The accused person must know that the representation made is false.

6.3. The Representation

6.3.1. The representation the prosecution alleges is that the accused person conducted himself as a woman selling sex commercially when in fact he was a man. The evidence on record shows that the accused person was dressing up like a woman. He was speaking like a woman. He was conducting himself as a woman. He had his head dressed up as a woman. The two victims herein believed that the accused person was a woman. The court appreciated in court that he came as a woman. He

spoke as a woman. He had a plastic bra representing breasts but had no breasts. The accused person told the court that he was not a woman. He was a man. He said dressing is a matter of choice and right. It could be the overall conduct making such a representation. I find that the accused person represented by conduct that he was a woman. This leaves the other aspect: the representation must be false.

6.4. Was the representation false?

6.4.1. It is necessary to prove the representation that the accused person was a woman is false. The onus is on the prosecution to show that the representation is false (**R v. Mandry and Wooster, 58 Cr. App. R. 27**). The evidence indicate that the accused person was asked to undress so that he is examined at first by a female officer which he denied and then the male officer which he did. The findings were that he had a penis and testicles. The medical practitioner's examination found that he was a male person. He had no genitalia ambiguities at all. PW1, when he romantically caressed him, he found that he was a male person and that was the genesis of this matter. It is quite false to anticipate the said organs in a female person. The accused person told the court in defence that he prefers to be called as a man. He said he is a man. The representation that he was a woman is false.

6.4.2. The 2nd victim said he knew the accused person very well as a woman called Triza. They went together to her room escorting her to take a bath. The accused person started caressing the 2nd victim romantically and as any normal man sexually, he responded to the accused person thinking she was a woman. He proceeded having sexual intercourse and he was satisfied that he has indeed done the act. He, for the second time, was told to go to the room of the accused person and spent a night there. They had another sexual intercourse. The victim said in fact, the accused person was the one dressing his penis with a condom. He believed he was enjoying sexual intercourse in the vagina since he believed the accused person was a woman. At police, he was told that he was a man. In fact, in court, the accused person said he is a man. I find that the representation of being a woman was false and that the accused person knew the same to be false.

6.5. Did the 1st victim pay the accused person the money because of the false representation? Was the phone of the 2nd accused person taken because of the false

representation?

- 6.5.1.** PW1 told the court that he was looking for sexual intercourse services. He approached the accused person thinking he was a woman, Triza. They agreed to have the services provided. He paid K8,000.00. It was when the victim wanted to touch her where he recognised that he was his fellow man. The victim paid the money, which is a thing capable of being stolen, because he believed he will have his sexual desires well quenched by the accused person who was in his eyes a woman. In turn, the sexual intercourse did not happen. The accused person further demanded extra money. The accused person took the phone of the 1st victim.
- 6.5.2.** The 2nd victim went ahead and had sexual intercourse with the accused person on the belief that she was a woman. He was open enough to the accused person that he had no money. The 2nd victim was loved most and was allowed to be offered the services freely. Surprisingly, the accused person demanded money for the services already rendered. He had no money. His phone was taken away by the accused person. He was locked into the room. That's how his phone went to pay for the sexual services that were deemed to be free. He was made to believe and in fact he believed that the accused person was a woman and had sexual intercourse with her, Triza. He was told to pay for the same.
- 6.5.3.** I find that the false representation of the accused person made the two victims to pay the money and that the phones were taken away from them because of the same false representation.

6.6. Was the conduct past or present

- 6.6.1.** The evidence on record indicates that these events were happening at the time when each victim encountered his fate. The conduct was present. It was happening to them at that particular time. It was not past.

6.7. Did the accused person know that his conduct was false?

- 6.7.1.** It is the positive view of this court that the accused person knew that his conduct of representing himself as a woman was false. He at first told the court that he would prefer being called a woman. Then he changed. He preferred masculinity. He told the police that he would prefer to be checked his sex by a female officer. He changed and did the same with a male officer. He told the court that he was a male but

clothing is a right. He told the court that he had no sexual feelings towards female although he is a man. The accused knew he was a man but chose to conduct himself as a woman. I find that the accused person knew that he was falsely representing himself as a woman.

6.8. Did the accused person had intention to defraud the victims or was he doing business as usual?

6.8.1. Intention to defraud is integral in this offence. The evidence of the State indicates that the accused person engaged himself as a commercial sex worker with the intention to defraud men. The accused person is a man, that argument is a closed chapter. He was receiving money whenever he offers the sexual intercourse to men.

The first victim said he agreed K8, 000. 00 after negotiating successfully from the K10, 000. 00 the accused person charged him. The second victim told the court that he had no money and the same was communicated to the accused person when he started caressing him. He also was told that if he had money, he would have spent a night with him. He proceeded having a joyous night with him after the accused person said he loved him and he could be with him even without money.

In all this the accused person's intention was money. He knew he had no vagina. He proceeded to entice the 2nd victim. At the end, he demanded the money. After he failed to produce the money, he asked for the phone which he indeed took. The State's evidence shows that the phone was to act as payment of the services offered. He knew he had no vagina. He proceeded to accept a proposal from the 1st victim and got the consideration in cash. The court finds that the accused person's conduct was for monetary gains. He used his conduct to cheat men that they would enjoy and quench their libido on him when in fact he was a man who had no vagina at all for the pleasure.

6.8.2. Deviating a bit, the accused person could be said that he was doing a business for himself. The accused person was being approached for the sexual services by men. They could agree for the same and consideration was being paid. Could this be a valid contract?

A contract can be defined as ‘a promise or set of promises which the law will enforce’ (**Pollock Principles of Contract (13th Edn) 1**). The agreement will create rights and obligations that may be enforced in the courts. However, there are situations where the parties have reached agreement but the question arises whether the existence or non-existence of some fact, or the occurrence or non-occurrence of some event, destroys the basis upon which that agreement was reached so that the agreement is discharged or in some other way vitiated. There are vitiating factors, of which some of them are misrepresentation, and illegality.

A misrepresentation is a false statement of fact or law which induces the other party to enter into the agreement. Generally speaking, such statements have to be made before the contract is entered into. Thus the requirements of an action for misrepresentation are that it must purport to be statement of fact or law, it must have induced the other party to enter the contract and it must have been a false statement. A fraudulent misrepresentation is one that is made with the knowledge of the falsity or with reckless disregard as to its truth.

Public policy dictates that illegal contracts are unenforceable and the courts should be vigilant not to enforce any contract with an illegal purpose. Thus, contracts such as those tending to corruption in public life, promoting sexual immorality, prejudicial to the administration of justice, trading with an enemy in war time, for future separation, in restraint of marriage, marriage brokerages and contracts attempting to oust the jurisdiction of the courts will all be illegal and unenforceable.

- 6.8.3.** The accused person misrepresented as a matter of fact a woman to men. This was a false misrepresenting. He was not disclosing the real terms of the contract to the other party. The contract of commercial sex working he was engaged in was illegal as it borders on sexual immorality. This contract cannot be enforced in courts. It cannot be therefore said that the accused person was doing business as usual. The contracts, if any, were invalid that are not enforceable. He had intentions to defraud others, in this case, men.

6.9. Accused person’s defence

6.9.1. It is not the accused person's duty to prove his innocents. The duty of the accused person is to raise a doubt in the State's case that can warrant his acquittal. The defence of the accused person herein, shows that he admits that he conducts himself as a woman. He started long time ago with the support of CEDEP and HRDC.

However, he says that he only met the 1st victim at the junction to Grace Lodge. He says the victim asked him whether he was a man or a woman and everything ended there. The court thinks this is not true. Why is it that the victim had to ask on his sex? What interest could he have had on a stranger? The accused person never refutes the events that occurred at the Grace Lodge. He has not refuted anything on the demanding of the extra money that led them to the FDH bank. The accused person admits he has sexual response to fellow men and not women because he feels to be a woman. That is his orientation. He is a transgender. He also admits that the phone of the 1st victim was found with him in his bag. Where did he get it if it just "ended there"?

6.9.2. The accused person's defence further says he indeed locked up the 2nd victim in his room. He says he took his phone as security. He did not trust him. Security for what? He did not trust him on what? How did they meet? Questions unanswered.

6.9.3. He alleges that the 2nd victim was threatened to say what he said at police. The 2nd victim said the same in court. The accused admitted that in court the 2nd victim was not forced or threatened to say anything.

He claims to have reported the matter on the stolen phone to police. This allegation is not substantiated at all. The accused person is failing to raise any doubt. The court did all it could to at least inform him his right to get a legal practitioner, he responded to the negative. He said he is being supported by CEDEP and HRDC but refused to call any other witness.

6.9.4. The court is of the view that the accused person knew the two victims. He had agreed to have sexual intercourse with them. He falsely represented himself as a woman knowingly that he was a man. He had an intention to defraud the victims which he indeed did. The State has managed to prove the elements of this offence.

7. The substantive law on unnatural offences

7.1. The offence of unnatural offence is provided under section 153 of the Penal Code. Section 153(c) provides that

Any person who permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years.

8. Findings on the 3rd count

8.1. Section 153(c) requires that any person must permit or allow a male person to have carnal knowledge of him or her against the order of nature. Like in typical sexual offences, the offence of buggery is complete upon proof of carnal knowledge – penetration, even if emission is expressly negative. **R v Reekspear (1832) 1 Mood 342; R v Cozins (1834) 6 C & P 351.**

8.2. This provision presumes that there is an order of nature for which sexual intercourse is done. Borrowing a leaf in defilement cases, it has been said now and again that ‘penetration of the male sexual organs into the female sexual organs of the victim’ is another material evidence to the offence of defilement. This was emphasized in the case of *Rep. vs. Mphande [1995] 2 MLR 586.*

8.3. The male organ, penis, has to be inserted into the female organ, vagina, for sexual intercourse to be regarded as done in the order of nature. The penis alongside the testicles and the vagina are regarded as sexual organs and they were made for that pleasure sexually. The slightest and shortest amount of penetration suffices and the male is not required to release semen for the charge to stand. Nevertheless, Sexual intercourse, be it in the required order of nature or against the order or nature, can be done in the form of genital, oral-genital, anal-genital contact or otherwise, whether between persons of the same or opposite sex, masturbation, touching of the genitals, buttocks, breasts, sadistic or masochistic abuse and other deviant sexual relations.

8.4. It should be said that when sexual activities are done, they are rarely done in the open. Normally, sexual intercourse is done in private where only the two engaged know. In this case, there was no any eye witness apart from the accused person and the victims.

8.5. The second victim was a man. He told the court that he knew the accused person as a woman. They both went to Aliko Rest House. They proceeded to room number 5 where the accused person was putting up around 7pm. While in the room, the accused person slept on her bed. It did not take time when she started caressing the victim romantically.

The witness did not take time, but responding to her instantly.

The witness told the court that the accused person asked him “kodi ukandichinda undipasa zingati”? He replied to her that he had no money. The accused person told him that since they were friends she will offer the sexual intercourse for free. The accused person went on and took a condom and put on the penis of the witness romantically. They started the sexual intercourse. The victim told the court that she held his penis where she knew she inserted. The victim said he believed he was doing sexual intercourse with a woman. He felt he was well accommodated by a woman and he told the court that he did not know that sindikunyenga malo oyenerera. He told the court that he finished the pleasure and he ejaculated while inside the accused person. The accused person told him that if he had money, he could have spent a night with her. They proceeded to the drinking joint again. While there, she told him that wandikonda kwambiri ndiye ndikagone kwawo. They indeed went to the same room. He slept there with her and had another round of sexual intercourse.

- 8.6.** Detective Banda told the court that he did not see the accused person with a vagina. He saw a penis and testicles. The medical practitioner told the court that he found that the accused person was a man. He has no female organs. There was no ambiguity on his genitalia. The 1st victim told the court that when he wanted to touch the accused person with all his romantic muscles, the accused person denied. When the accused person fell asleep, he observed that the accused person had a penis just like himself.
- 8.7.** One wonders therefore, which organ was used by the accused person in having the sexual intercourse or in allowing the 2nd victim to have this pleasure on him. The penis of the 2nd victim was inserted into that unknown organ of the accused person by the accused person himself. It is normal doing this even in heterosexual relationships. Females penetrates themselves by holding the penis into their vagina. Where was this penis penetrated into? No one knows.
- 8.8.** Coming to the 1st victim, the accused person admitted to the proposal of sexual intercourse with the victim. He charged K10,000.00. He was doing this knowing that he had no vagina. Where did he think he would insert the penis of the victim? No one has an answer except the penetrated one.
- 8.9.** Nevertheless, each link in a chain of evidence must be unassailable and its cumulative effect must be inconsistent with any rational conclusion rather than guilt. See the case

of **Jailosi v R ALR (Mai), 494**. The accused told the court that on his dressing, everyone has a right of dressing as he wishes so. He said he was born like a person with disability and he does not do sexual intercourse with ladies. He feels like he is a woman. He has no sexual feelings towards women. The accused person told the court that he indeed locked up the 2nd victim in the said room 29 at Alipo Rest House. He says, he did that because of security. He said he did not do sexual intercourse because himself is a man too.

8.10. The court thinks his evidence corroborates the evidence of the 2nd victim that the two went into the room and had sexual intercourse. But where did the sexual intercourse took place? The court thinks sex through the anus (against the order of nature) is the only reasonable and rational conclusion that can be derived from the conduct and everything that took place between the 2nd victim and the accused person. **See the case of Nyamizinga v R (1971-72) 6 Mal 258, and Jailosi v R.** The court thinks, based on the facts and circumstances, that the accused person admitted to the sexual intercourse with the 1st victim so that he does the same using the anus as there is no any other opening of the accused person in his private part except the anus as observed by Detective Banda, the medical practitioner and the 1st victim. The 2nd victim was hoodwinked to believe he enjoyed the sexual pleasure with him in the vagina when in fact, it was the other opening not worth for the pleasure.

8.11. Was this a consented act?

8.11.1. Section 153 of the Penal Code, does not embrace the concept of consensual sexual intercourse against the order of nature. It prohibits it outright, whether consensual or forced. In legal interpretation sex against the order of nature, is classified not only in homosexual activity, but in heterosexual activity as well. Anal sex and oral sex even in heterosexual, fall in this category because they are considered sexual acts against the order of nature. The mouth and the anus are not sexual organs. Only the penis and testicles in men and vagina in women are. Acts against the order of nature remain offences under this provision even when they are consensual, between adults and conducted in private.

8.11.2. The circumstances in which the accused person and the two victims traded, one can think that there was agreement to the acts. For example, the 1st victim said that it was him who proposed the accused person to have sexual intercourse with her

(him). The accused person accepted to this. They agreed K8, 000. 00. This was consensual on the face of it. The 1st victim was operating from the belief that the accused person was a woman. This was so because the accused person was in a womanly attire. She spoke as a woman. She was known as a woman, Triza. She admitted sexual intercourse when the 1st victim was a man. The 1st victim had all reasons to believe that the accused person was a woman. The consent herein was marred with nondisclosure of other relevant factors, like the fact that the accused person was not a woman.

8.11.3. For the 2nd victim, he knew the accused person as a woman, Triza. The accused person dressed up as a woman all along. He was taken into her (his) room. It was the accused person who started the romance. They had the sexual intercourse successfully.

Did the 2nd victim consent to the act? Yes, but just like the 1st victim, he was misled by the victim into believing that he was doing everything he did with a woman. The consent was not a full one. The victim did not know other relevant factors. The accused person did not reveal that he was a man. Be it as it may, the consent is immaterial under section 153 of the Penal Code.

8.12. What is the position of homosexuality in Malawi? (In passing)

8.12.1. Briefly, this is a contentious issue in Malawi. Pro-homosexuality argue that homosexuality must be regarded as a human rights issue. They base their arguments on section 20 of the Constitution. The provision stipulates that

Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.

8.12.2. They argue that in “other status”, persons who are oriented differently, sexually, are accommodated. There has been little or no jurisprudence on the area in Malawi as regards to the decided cases from the higher bench, thus, the High Court and Supreme Court of Malawi. Finding precedents was had.

8.12.3. However, my learned brother magistrate as he was then, His Honor Nyakwawa

Usiwausiwa, CRM, handled a similar case in the case of **R v Steve Munjeza Soko and Tiwonge Chimbalanga Kachepa Criminal Case Number 359 of 2009** where the 2nd accused person was charged with the offence the accused person herein is charged in the 3rd count. When convicting the two accused persons, my learned brother had the following to say:

Therefore the Prosecution's proof beyond reasonable doubt of a man who behaves like a woman and likes to be treated as such; the wearing of female clothes by one; ... ; the soundness of their mind; them both being male; and the lie which Tionge had been telling people that he was a woman; all these leave us with one rational conclusion or inference leading to only the guilt of Steven having anal carnal knowledge of Tionge and Tionge permitting it by the anus c/s 153(a) and (c) respectively and therefore convict both of them of the offence of buggery. Otherwise "the law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice".

8.12.4. Though not binding on me, I find that it is highly persuasive. The case sets the position that in Malawi, as it is now, homosexuality, be it consensual or not, is a prohibited act until and or unless, the high benches and or the parliament does otherwise.

8.13. Can these offences be prosecuted?

8.13.1. Until and unless, the high benches and or the parliament does otherwise, unnatural offences are prosecutable. The case of **R v Steve Munjeza Soko and Tiwonge Chimbalanga Kachepa**, to the knowledge of this court was not appealed and was not subjected to a review. However, there was a moratorium that was issued in 2012 by the Ministry of Justice and Constitutional Affairs that suspended the arrest or prosecution of homosexuals until parliament votes on the issue and the laws are reviewed by the high court. The moratorium was challenged and it was annulled. **The State v The Minister of Justice and Constitutional Affairs, The Director of Public Prosecutions, and The Malawi Police Service, Experte Christopher Kammasamba and Others, Miscellaneous Civil Cause No. 17 of 2016.** The moratorium had and has no legal mandate or effect if the act of parliament has not repealed the law in question and if the court of unlimited jurisdiction has not declared it unconstitutional.

8.13.2. There was an attempt to have a judicial review on the constitutionality of laws against “unnatural offenses” and “indecent practices between males”, when three men were arrested on allegation that they were practicing unnatural offences in 2013. In 2014, the proceedings were suspended after an order by the Supreme Court of Malawi that the Chief Justice must certify constitutional questions first before the proceedings continue. It is still not decided up to now to the knowledge of this court.

8.13.3. This entails that, section 153 of the Penal Code is still law and it has to be enforced and interpreted by the law enforcers and the courts respectively. The offences are prosecutable before the courts until and unless, the high benches and or the parliament does otherwise.

8.13.4. In relation to the case at hand, the relevance is that the accused person said he is sponsored by CEDEP and HRDC in what he does. He started some time back. He said he was born like a person with disability and he does not do sexual intercourse with ladies. He feels like he is a woman. He has no sexual feelings towards women. Be it a supported act or not, the law creates the offence which is prosecutable as it is now in Malawi until and or unless, the high benches and or the parliament does otherwise. This court has no mandate at all to the same. The duty of this court is only determining allegations based on the facts and the prescriptions of the law. If anything, recommending for the review of its judgments by the High Court which it intends to do for clarity sake on the constitutionality of the said offences.

8.14. Is the accused person a transgender?

8.14.1. The accused person told the court that he is a transgender. He said he was born like a person with disability and he does not do sexual intercourse with ladies. He feels like he is a woman. He has no sexual feelings towards women. He told the court that it was his choice to put on womanly clothes.

8.14.2. Some people feel that the sex they were assigned at birth doesn't match their gender identity, or the gender that they feel they are inside. These people are often called transgender. Transgender people express their gender identities in many different ways. Some people use their dress, behavior, and mannerisms to live as the gender that feels right for them. Some people take hormones and may have surgery to change their body so it matches their gender identity. Some transgender people

reject the traditional understanding of gender as divided between just “male” and “female.”.

8.14.3. It is not the duty of this court to determine who a transgender is. However, as discussed above, this issue is still a debatable one and not yet settled. It is the recommendation of this court that such debatable issues be settled by the higher benches to give guidance to the lower bench amidst the calls to look into the constitutionality of the said provisions that criminalizes sexual intercourse or sexual activities between people of the same sex.

9. Determination

9.1. From the foregoing, the totality of evidence when analyzed with the prescriptions of the law, the court is of the view that the offences leveled against the accused person were committed by the accused person.

9.2. All in all, this court finds that the prosecution has proved the case beyond reasonable doubt on the offence obtaining by false pretense in the 1st and 2nd counts and unnatural offence in the 3rd count contrary to **sections 319 and 153(c) of the Penal Code**. In view of this the court proceeds to convict the accused person on all the three counts as leveled against him.

9.3. As indicated, the file will be forwarded to the High Court instantly for the review process.

9.4. Any aggrieved party has a right to appeal before the High Court on conviction within 30 days from date of pronouncement.

Made in Open Court, this 23rd December 2021

RHODRICK STEPHEN MICHONGWE
SENIOR RESIDENT MAGISTRATE

REPUBLIC OF MALAWI



IN THE SENIOR RESIDENT MAGISTRATE COURT SITTING AT MANGOCHI
CRIMINAL CASE NUMBER 547 OF 2021

THE STATE

V

JANA GONANI

Coram: Michongwe R. S., Senior Resident Magistrate

Inspector Mwase for the State

Convict unrepresented

Makhanga/Ngolora, Court Clerk/Official interpreters

Thokozani/Mandala, Court Marshal

SENTENCE

-
1. On 23rd December 2021, the convict was found guilty by the court on three counts of obtaining by false pretense and unnatural offence contrary to *section 319 and 153 of the Penal Code* respectively.
 2. The offence of obtaining by false pretense contrary to *section 319 of the Penal Code* is a misdemeanor and attracts a maximum sentence of imprisonment for 5 years. It states that
Any person who by any false pretense, and with intent to defraud, obtains from any other person anything capable of being stolen or any services or induces any other person to deliver to any person anything capable of being stolen shall be guilty of a misdemeanor, and shall be liable to imprisonment for five years.
 3. The offence of unnatural offence contrary to *section 153(c) of the Penal Code* is a felony and attracts a maximum sentence of imprisonment for 14 years. It states that

Any person who permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years.

4. At this stage, it is relevant to appreciate the yardstick upon which this court will employ to measure the appropriate sentences to be imposed on the convict. The court will use the relevant provision of the law, the aggravating factors to the offences herein and the mitigating factors adduced before this court in coming up with the determination on sentence.
5. The convict denied to have committed the offences. The State was called upon to prove the allegation and the convict was found guilty and consequently convicted on all the three counts. Therefore, the convict will not benefit from the reduction of sentences on the account of plea of guilty.
6. In antecedent, the State told the court that the convict is a first offender. However, he does not deserve suspended sentence as regards to section 339 and 340 of the Criminal Procedure and Evidence Code. The State told the court that the convict planned well to commit these offences. He had to modify himself to look like a woman only to defraud men like the victims. He indeed achieved that and obtained money and phones from the victims. The State also told the court that the convict is not a member of Sexual Workers' Association in Malawi and that he was doing the commercial work against the association. Also, the State told the court that people have been robbed off in this way and this conduct is bringing fear and insecurity to the residence of Mangochi.

On obtaining by false pretense, 1st and 2nd counts, the State said that the offence is on the increase in the district hence requiring hefty punishments. People are losing their property through these offences.

On the 3rd count, the State told the court that it brought a sense of shock to the district's morals and if continued it will perpetrate the decaying of the morals in the district. He prayed that the society be protected from such behaviors.

Further, the State said that the conduct of the convict violated the dignity of the victims as provided under section 19 of the Constitution of the Republic of Malawi. The 2nd victim took it as if he was enjoying the pleasure of sexual intercourse with a woman. When he

realized that he was his fellow male person he felt dehumanized. He would not have done if he had known that he was a fellow woman just like the 1st victim.

7. In his mitigation, the convict said that he is a first offender. He has overstayed in custody and deserved lenience. He told the court that he comes from Lilongwe and that Mangochi was not his home. He said he was employed by CEDEP and HRDC as a client and he was receiving salary. If sent to prison, he will lose his employment. He prayed for leniency.
8. On Suspended sentences the court is aware of *section 339 and 340 of the Criminal Procedure and Evidence Code*. The provisions advocate for non-custodial sentences to first time offenders. However, the court may depart from this if it has given reasons why the convict requires an immediate custodial sentence. The nature of the offences that the convict committed is serious and befitting custodial sentence. According to the High Court decision of *R v Chibwinja 7 MLR 411*, this court is aware that a suspended sentence is not appropriate for serious offences. The court in Chibwinja said the following

First, it can only be said briefly that it is not desirable to suspend sentences for serious offences...

9. The 1st and 2nd count, which is one in principle, is the offence of obtaining by false pretense. It is a misdemeanor punishable with 5 years. The convict managed to modify himself to look like a woman. The victims in this court were misled by his conduct. The convict started using force to obtain what he wanted.

In the first instance, he went ahead threatening the 1st victim. The two agreed K8, 000. 00 after a successful negotiation from K10, 000. 00. To the surprise, the convict demanded the negotiated K2, 000. 00. He further, took K6, 000. 00 after using threats. He took stones. He verbally told him that “*nyamuka uzipita apo ayi ndikupha. Ndapha ambiri ine*”. The situation that started as an agreement turned to be physical. The convict had plans to defraud him. He knew what he was doing. He went outside the room twice and twice he locked him up in the room. Detaining him inside. The victim had all legitimate expectations to quench his sexual thirst by buying the services. All in vain. I find it to be a good reason to divert from sections 139 and 140 of the Criminal Procedure and evidence Code.

In the second instance, the 2nd victim was offered the services freely. He was not the one who started the sexual wildly fire. He was responding to the romantic caress the convict started on him. The victim explicitly told the convict that he had no money when

responding to a question “kodi ukandichinda undipasa zingati”? The convict told him that since they were friends s/he will offer the sexual services for free. In fact, it was the convict who went on and took a condom, opened it and put on the penis of the witness romantically. The convict held his penis and penetrated her/himself where s/he knew s/he inserted. The victim felt he was well accommodated by a woman, the vagina. Further, the convict told him that if he had money, he could have spent a night with her/him. The convict told him that wandikonda kwambiri ndiye ndikagone kwawo. They indeed went to the same room. He slept there with her/him and enjoyed a second round of sexual intercourse. The convict took the phone of the victim. Surprisingly the victim was told *ngati sundipasa K6, 000. 00, phone sutenga*. The convict locked up the victim in the room. I find the conduct of the convict well premeditated. The convict was fully on monetary gains by defrauding the victims. Suspended sentence is not appropriate here although the offences are misdemeanors.

10. The State also told the court that the convict is not a member of Sexual Workers’ Association in Malawi and that he was doing the commercial work against the association. The victim never responded to this. He could not register with the association when he knew he was not eligible. The court wishes to agree with the State that, the victims were robbed off their phones. If not attended to, the conduct of the convict can render many people be robbed off in this way. The conduct has a potential of bringing fear and insecurity to the residence of Mangochi and those who tour this tourist district.

11. On the charge of unnatural offence, it is a felony punishable with 14 years’ imprisonment. The convict knew he had no vagina because she is not a woman. S/he went ahead and cheated to the two victims. For the second victim, he, in fact, believed he was doing sexual intercourse in the order of nature. Little did he know that *sindikunyenga malo oyenerera*. Only to be told at police.

The State has argued that this is a violation of a human dignity. The victim had all reasons to believe that he was satisfying himself with a woman. The court is certain that, if the 2nd victim had knowledge that the convict was a man, he would not have proceeded having sexual intercourse through the anus. His inner worth was violated. This was dehumanizing the victim. I find this conduct of the convict to be not normal. The conduct that could shock the victim and the citizenry of Mangochi in particular, and Malawi at large. This could rightly be said a foreign behaviour in our traditional culture as it stands now. The conduct can corrupt the district’s morals and if continued it has a potential to perpetrate the decaying

of the morals in the district and Malawi at large. This was evidenced in that the convict had no remorse at all. He took everything as normal. His demeanor could tell a story. He could tell the court in mitigation that he comes from Lilongwe where he is employed by CEDEP and HRDC as a client and he was receiving salary. If sent to prison, he will lose his employment. This shows that, to him, his conduct was normal and nothing wrong with that.

12. My learned brother, His Honor Nyakwawa Usiwausiwa, in the case of **R v Steve Munjeza Soko and Tiwonge Chimalanga Kachepe Criminal Case Number 359 of 2009**, (not binding but persuasive), rightly put the context of section 153 of the Penal Code to the Malawi's position. He said the courts

are sitting in place of the Malawi society. Which I do not believe is ready at this point in time to see its sons getting married to other sons, or cohabiting or conducting engagement ceremonies. I do not believe Malawi is ready to smile at her daughters marrying each other. Let posterity judge this judgment.

13. This position has not yet changed since section 153, despite several amendments taking place in the penal code recently, is still intact. It has not been talked about or debated in the National Assembly to the contrary and no High Court decision has declared it a bad law to the knowledge of this court. This dictates my reasoning that section 153 of the Penal Code is still good law. It protects the Malawi society. This is why, when the 1st victim observed that the commercial sex worker he was about to have sexual intercourse with was a man, he reported to police. If it were not that he found the penis and the testicles, this matter would not have been a case in this court. He would have not been shocked. In fact, he was paying for the vaginal sexual intercourse which, he was unfortunate, he did not find. Rightly argued by the SPO Inspector Mwase, the conduct of the convict brought a shock to the 1st victim and the people of Mangochi. I will concur with my learned brother that Malawians are not yet ready for this conduct. If it were ready, the legislature would have done otherwise since it represents the people of Malawi.

14. My learned brother further said that

So this case being "the first of its kind", to me, that becomes "the worst of its kind". I cannot imagine more aggravated sodomy than where the perpetrators go on to seek heroism, without any remorse, in public, and think of corrupting the mind of a whole nation with a chinkhoswe ceremony. For that, I shall pass a scaring sentence so that "the public must also be protected from others who may be tempted to emulate their [horrendous] example".

15. My brother could not imagine *more aggravated sodomy than where the perpetrators go on to seek heroism, without any remorse, in public, and think of corrupting the mind of a whole nation with a chinkhoswe ceremony*. He sentenced the convicts to the maximum sentence of 14 years. If indeed, they were worst offenders, it was because it was the first of its kind. I am now faced with a similar case with slightly different facts. This is not the first of its kind. If the convicts, **Steve Munjeza Soko and Tiwonge Chimbalanga Kachepa**, were the worst offenders, then we would not have the convict in this case who could corrupt men and fall in sexual love with him thinking he was a woman. The convict who could charge K10, 000. 00 for sexual intercourse against the order of nature. The convict who could proudly come in the open that he is sponsored by organizations to do what he does. The convict who could use force to obtain what he desires in the name of a sex worker. A convict who could stand in the devil street waiting for fellow men for sexual offers.
16. This court is aware that maximum sentences are reserved for worst offenders. It is also aware of the sentiments of **Kapindu J, in R. v Funsani Payenda Homicide Cause Number 18 of 2015**, where the judge said that

Parliament did not prescribe the maximum penalties in legislation for decorative purposes or as conceptual fiction or as were illusory punishments sign. Parliament means what it says and it meant what it said. It meant those sentences to be applied and not to be theorized into non-existence.

17. Also, the court is alive to the case of **R. v Shauti 8 MLR at 69**, where it was held that

Although mercy should have a place in deciding what sentence to impose on a convicted person..., mercy should not be confused with mere weakness or sympathy with criminal behaviour. A sentence should also be fitting to the crime and the criminal, and fair to the society...

18. It is the opinion of this court that the worst offenders are yet to be born who will have the conduct more than that of **Steve Munjeza Soko and Tiwonge Chimbalanga Kachepa** and the convict here, **Jana Gonani**. I have to exercise mercy and not sympathy when sentencing the convict herein. He deserves a hefty punishment. As rightly said

" ..people who do desperate things like this are likely to do it again, and the public must also be protected from others who may be tempted to emulate their example."
Rep v Kamil and Yaghi (1971-2) ALR Mai 358.

19. It is the view of this court that all the three counts carry with them a sense of shock against the morals of a Malawian society. The conduct of the convict corrupts the morals of the Malawian society. At the age of 27, the convict deserves the full rigour of the sentence that fits the crime on the assumption that the convict is supposed to have developed a mature temperament towards and mature understanding about crime and consequences about crime and its impact on the offender, the offender's family and the society of which the offender is integral. **R v Keke (2010) Confirmation case No. 404 (HC) (PR) (Unreported).**
20. The court opines that meaningful protection to men like the victims in this case, sex workers, properly so called, who does their work properly, if any, and the society at large need to be done. In *R. v Yasini Jackson 1 MRL 1995* the court stated that the society requires protection of the law through a meaningful penal process in our courts. Therefore, there is a real need to mete out appropriate sentence herein.
21. In **R v Raphael Malira Conf. No. 13 of 2008 (T.A High Court Registry)** the appellant was convicted of having anal sex with his niece. He was sentenced to 14 years Imprisonment with Hard Labour; but which was reduced to 7 years by the High Court. After reconsidering the factors of being young and a first offender.
22. In the case of **R. v Betland Crim Case 159 of 2007** the initial sentence was reduced to 6 years by the High Court. But 6 years was confirmed in **R v Christopher Masaknira (Crim. Cas. 629 of 2007).**
23. The convict herein said had overstayed in custody and deserved lenience. This will be taken into account by making the sentences run from the date of arrest.
24. On the account of the foregoing and considering the relevant facts, the nature of the offences, seriousness of the offences, the age of the convict, and the protection of the society at large, the court is of the view that the aggravating factors have outweighed the mitigating factors.
25. The court therefore proceeds to sentence the convict, on the 1st count on the offence of obtaining by false pretense contrary to *section 319 of the Penal Code* to 3 years' imprisonment. On 2nd count, on the offence of obtaining by false pretense contrary to *section 319 of the Penal Code* to 3 years' imprisonment. On the 3rd count of unnatural offence contrary to *section 153(c) of the Penal Code* to 8 years' imprisonment. Effect of the sentences to start on the day the convict was arrested. The sentences shall run concurrently.

26. The file will be taken to the High court for review.

27. Any party aggrieved by the decision of this court has the right to appeal against the sentence before the High Court within 30 days from date of pronouncement.

Made in Open Court, this 23rd December 2021

RHODRICK STEPHEN MICHONGWE

SENIOR RESIDENT MAGISTRATE
