

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CRIMINAL DIVISION  
APPEAL CASE NUMBER 3 OF 2022

(Being Criminal Case No. 85 of 2021 before FGM Sitting at Chiradzulu)

BETWEEN

BROWN LUWAYO.....APPELLANT

AND

THE STATE.....RESPONDENT

**Corum: Honour Justice Ruth Chinangwa Judge**

Minjale	Counsel for the Appellant
Njobvu	Counsel for the Appellant
Chisanga	Counsel for the Respondent
Amos	Court Clerk

**JUDGEMENT**

**Introduction**

1. The appellant was charged and convicted of the offence of rape contrary to section 133 of the Penal Code. He was sentenced to 10 years imprisonment.
2. The appellant appeals against the decision of the First Grade Magistrate on the following grounds:

- a) The magistrate erred in law and on evidence at the end of the prosecution case in holding that the appellant had a case to answer when the prosecution failed to establish all elements of the offence of rape as charged.
  - b) The lower court erred in law and evidence in convicting the appellant without a valid judgement.
  - c) The lower court erred in law and evidence in convicting the appellant without considering the evidence of the appellant herein.
  - d) The lower court erred in both evidence and law at the end of the trial in convicting the appellant when the prosecution had failed to establish the elements of the offence of rape beyond reasonable doubt.
  - e) The magistrate court made an error of fact and law by failing to consider that there was consent from the complainant to have carnal knowledge with the appellant.
  - f) In all circumstances of the case, the verdict against the appellant has occasioned failure of justice and the finding of the court was against the weight of the evidence.
  - g) The lower court erred by imposing a custodial sentence of 10 years imprisonment with hard labour to the appellant.
3. It is this court's view that the appeal mainly centers on 2 main grounds namely whether the conviction and sentence was proper in law. Regarding whether a valid judgement was delivered or not, this court notes that the lower court record has a thirteen paged hand written judgement on file. The appellants query should have arisen, rightly so, on account that the file shows that the lower court first wrote as the judgement on page 27 when the case was called on 16<sup>th</sup> June 2021 as follows: *'The accused is Brown Luwayo. He stands charged of the offence of rape. He committed the offence. I convict accordingly'*.
  4. However, on the following page, also page 27, the lower court writes a full judgement when the case was called on 16<sup>th</sup> June 2021. This court finds no legal error which would support the argument by the appellant that the conviction be quashed on account that there was no valid judgement because there is one on file. It is common practice that a decision of the court may be pronounced and reasons for the decision are given later as was in *Malawi Law Society v Registrar of Financial Institutions* MSCA Civil Appeal No 9 of 2021 (delivered on 10<sup>th</sup> November 2022). The Supreme Court said *'the hearing of the application to re enter the appeal took place on 10<sup>th</sup> November 2022, and after considering*

*the parties' respective submissions this Court unanimously determined that the application was untenable and proceeded to dismiss it, reserving, however, its reasoned Ruling to a later date. This is the Ruling".* The ground of appeal that there was no valid judgement and the conviction must be quashed fails.

5. For this court to determine the two grounds of appeal that is whether the conviction and sentence it is pertinent that this court reproduces the evidence of the lower court which was so brief.

#### **The Prosecution Evidence in the Lower Court**

6. The first prosecution witness was SC the victim herself. She stated that as follows: 'I am married and aged sixty-two years. I know the accused person. I know him because a week ago on Sunday as I slept in my house – I have a beer hall at my house. At 8:00 pm I saw someone opening on the window. I lit a torch and saw a person who then ran away – I was suspecting it was someone for Maludi. Later I met my child and told her of the incident. I went to the house of the person who I suspected but I found the person sleeping. I left for home thereafter. Later I noted a person carrying me and got hold of my mouth. I recognized it was the accused. He took me to a garden to have sexual relations with me and he got hold of my mouth so that I should not shout. My child followed me and accused was found and was arrested by a man who went to his house. He was caught as he was running away. He was then tied taken to my house and when asked he only apologised and we took him to village headman and then counter forum – I remained only with child of my sister but accused was tied. He suggested we take him to his home. We went and found his parents where he admitted he had carnally known me. I asked for money to go to hospital. At 3:00 am, my husband came and I told him what had happened. He decided to take it to police. We went to police at Chiradzulu. There was moonlight bright enough and I also know the accused. He was caught not very far from the place of incident. At police I was referred to hospital – (shows her a medical report). This is the medical report.
7. In cross examination she added that, 'I never said anything when we met, I never told you to have sexual relations. When you were arrested, we went to village Headman. On the way to the house of community policing person – who refused to assist me. We went to your home. I told her you had sexual relations with me and you admitted'.

8. In re examination, she stated that, 'I didn't give the consent to have sexual relations with me. Yes, he indeed did sexual relations to me. He has never asked me for sexual relations at any day'.
9. The second prosecution witness was Detective Sub Inspector Lucy Nyondo of Chiradzulu police. She stated that, 'I know the accused person it was on 3<sup>rd</sup> May 2021 - when I was assigned to investigate a case of rape. Complainant being SC who complained against the accused. I arrested the suspect and I recorded him a statement and charged him with the offence of rape. This is a medical report for complainant. I tender it as evidence. He said that they agreed to have sex with her but only differed because victim wanted money which the accused have.
10. The second prosecution witness was not cross examined.
11. The lower court then entered a finding of a case to answer and invited the accused to enter his defence.

#### **The Appellants Evidence in the Lower Court**

12. The only defence witness was the appellant himself. He stated that, 'I was drinking beer at the house of Mrs S. I go there every Sunday. She has been asking me to have sexual relations with her. On this day she also asked me to have sex with her. I went to Masanjala. As I came back, I met her again. Since I was drunk, I had sexual relations. She demanded payment but I didn't have it. She shouted for people and people came and we went to village headman who referred us to community policing people. Later we went home and told them when she was asked what she wanted she said all she needed was money. Later, she told her husband who told her to report the matter at police. I was then summoned by police. Hence the matter here is in Court'.
13. In cross examination he added that, 'It is far from my house to the house of complainant. On this date indeed I went to drink beer at her place. At the beer place we were many. The victim was also present. She told me at first at her house and I left for Masanjala but again met her on the road. She asked me to pay her K3,000.00 we went to her house but after people heard the issue some went away. She shouted for help as she wanted money which I didn't have. This was the only day I had sexual relations with her. I never told anybody that she wanted me to have sexual relations with me. She drinks beer. I knew she was married but said her husband frequently move out of her house'.

14. The appellant had nothing to add in reexamination.

#### **Analysis of Law and Evidence**

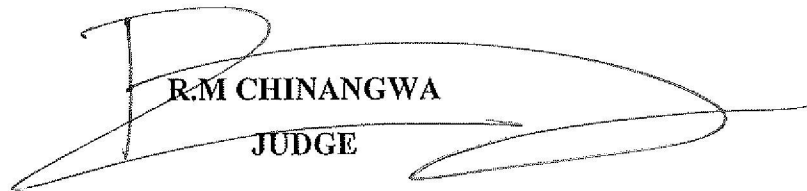
15. **Section 132 of the Penal Code** provides that 'Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, shall be guilty of the felony termed rape'.
16. Rape is proved where a person has sexual intercourse with a woman or girl without her consent. In this case that the appellant had sexual intercourse with SC, the victim, is not in contention. The appellant confessed in his caution statement and in court during his defence that he did have sexual intercourse with SC. The dispute is on whether consent was given for the appellant to have sexual intercourse with SC.
17. How then is lack of consent proved? In *Rep v Sambani* [1994] MLR 311 (HC) the court held that 'where an accused pleads consent, the complainant is to produce corroborative evidence of lack of consent'. In this case the court found that the evidence of the complainant was corroborated by that of her friend who was in her company at the time of the event, her distressed condition, the condition of her clothes and the marks of violence which police found at the scene led to no other conclusion than that the sexual intercourse was without consent'. It is noted from this case that there ought to be corroborative evidence to prove lack of consent. In *Republic v Fredi* 8 MLR 48 it was held that distressed condition of the complainant may provide corroboration.
18. The question in this case is was there any corroborative evidence that SC did not give consent? There are indicators of corroborative evidence from SC evidence such as the victim's child who is said to have followed her when she was taken by the appellant to the bush; the appellants parents before whom the appellant apologized. These potential witnesses were not brought to testify to corroborate SC evidence. If the medical report was to be considered as corroborative evidence, the findings as recorded in the courts view confirm that sexual intercourse did take place. The element of lack of consent does not come out clearly. The clinician's impression or opinion after history and examination simply states, '*she may have been sexually abused and also physically abused*'. The physical abuse is not explained as to show lack of consent.

19. From the foregoing it is this court's view that the prosecution did not prove lack of consent and finds the conviction unsustainable. This being the case the court will not proceed to analyse whether the sentence was correct in law considering that the conviction is quashed.

**Finding**

20. The appeal succeeds. The conviction and sentence are quashed. This results in the immediate release of the appellant.

**Pronounced this 21<sup>st</sup> day of June 2021 at BLANTYRE**

  
**R.M CHINANGWA**  
**JUDGE**