

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL CASE NO. 111 OF 2008**

BETWEEN

ZEFATI HWANGWA APPELLANT

AND

THE REPUBLIC RESPONDENT

CORAM : CHOMBO, J.

: Appellant, Unrepresented.
: Ms. Kahaki Jere for the State
: Mrs. Kabaghe, Court Reporter
: Mrs. Munyenembe, Court Interpreter

JUDGMENT

The Appellant was charged with defilement of a girl who was 12 years of age at the time. When he appeared before the lower court and charged accordingly, the lower court indicates that he stated that he understood the reading of the charge and that he pleaded guilty thereafter. When prosecution narrated the facts of the case in court the appellant responded by stating that the facts were correct. In the said facts it was stated that the Appellant had on several occasions proposed love to the girl but she refused to have an affair with him. One day when the girl had gone to the garden the Appellant having

failed to initiate the affair with the complainant he forced himself on her and defiled her. And on several other occasions afterwards he had sex with her at her father's garden. He used to threaten her not to report the same to anybody.

The matter came to light when the girl's parent suspected that she was pregnant. It was then that the complainant revealed what had been taking place with the Appellant. A pregnancy test revealed that the complainant was 30 weeks pregnant. The matter was reported to Police and Appellant was arrested. He was asked about the matter and he admitted to have had sexual intercourse with the girl on several occasions.

At Police he also admitted the same and caution statement and formal charge obtained from the Appellant were read over in court. When the Appellant was asked if the facts were correct he admitted the facts. He stated that he had agreed to marry the complainant.

The lower court had been informed by the complainant's parents that the girl was 12 years of age at the commission of the offence. However, the lower court decided to have medical confirmation on the issue of the age and the medical report confirms the same. The appellant did

indeed admit all these facts before the lower court and did not bring any issues about age or the purported ages of the complainant's siblings.

The State opposed the appeal and filed skeletal arguments in that respect. The State is questioning why the Appellant should bring the issues only now when in the lower court he admitted the charge and when the facts were read out to him he also admitted that the facts were correct.

I have looked at the matters that the Appellant has introduced in court and also wonder why the Appellant should only bring them now. In the lower court he admitted he had sex with the complainant on several occasions. He now alleges that this was consensual sex. However, the facts in the lower court state that he way led the complainant and defiled her. All this notwithstanding it should be made clear that because it was proved that the complainant is actually below the age of 13 years consent to sex is not immaterial. The Appellant stated that the complainant is the first born of 7 children and therefore the complainant could not have been 12 years. The fact that there are 6 other children after the complainant does not necessarily prove that the complainant is not 12 years old. Indeed the Appellant now, submits

that the complainant's young sister is 14 years of age and therefore the complainant, who is older than her younger sister could not be 12 years of age. This piece of evidence is neither here nor there because it is only an allegation that the appellant has brought in court now. The court finds it difficult to accept that the appellant could have had these facts and chose to keep the evidence to himself, and instead admit the charge in the lower court. And even when the facts of the case were read out to him all he said was that he had agreed with the complainant that they would marry. I am of the view that this is only an attempt by the Appellant to delay or derail the justice system.

The Appellant stated that the sentence was excessive. I looked at the facts of the case and notice that there are aggravating circumstances. The Appellant had sex with the complainant on several occasions and he threatened her not to reveal the matter to her parents. Who knows, may be the matter would have been addressed at a much earlier point if it were not for the fear of the complainant to report the same to her parents and may be the pregnancy could have been avoided. The medical report does show that there are risks accompanied with early pregnancies. The Appellant submitted in court that the girl gave birth without any complications contrary to the medical report. In my view this issue has not been properly proved. At the time that the Appellant

was arrested the complainant had not given birth yet – she was only 30 months pregnant and it is not known how the appellant, who was not on bail after the said arrest got to know about the facts of the normal delivery of the baby.

Our main point in this case is that a girl under the age of 13 years of age was defiled and she fell pregnant. The Appellant has admitted he defiled the girl and made her pregnant. The girl was said to be under the age of 13 years and the same was confirmed medically. This, in my view satisfies the qualification of defilement.

I must therefore find that the sentence imposed was appropriate in the circumstances. I therefore confirm both the conviction and sentence and dismiss the appeal accordingly.

MADE in Court this 17th day of September, 2008.

E.J. Chombo
J U D G E