

# **IN THE HIGH COURT OF MALAWI**

## **PRINCIPAL REGISTRY**

**Confirmation Case No. 480 of 2010**

**THE REPUBLIC**

**Versus**

**AUSITN LIMULA ELIYA**

**Coram: HON. JUSTICE MANDA**

**Mbendera** for the State

**Defendant Present** (Unrepresented)

**Mrs Matekenya** Court Clerk

## **ORDER ON CONFIRMATION**

This matter was set down to consider the sentence. The reviewing judge did not indicate whether he thought that the sentence was excessive or indeed lenient. During the hearing of the matter I did enhance the sentence of the defendant from 4 years to 6 years imprisonment with hard labour.

The defendant pleaded guilty to a charge of indecently assaulting a girl of 10 years old. From the facts that were presented in the lower court, it would seem that the defendant did actually defile this young girl. However it would seem that the medical evidence was not conclusive in this regard apparently because the girl had taken a bath prior to being examined. I have of course always stated that the taking of a bath does not remove the fact that a woman or girl has been raped. This is in view of the fact that there is always bound to be other signs that there was penetration such like bruising, which cannot be washed away.

Indeed what is normally washed away would be the semen. In this regard I would urge the prosecutors to still insist on the medical examination to be conducted even in cases where the victim has taken a bath.

Specifically, in this case it was noted that the defendant did state in his mitigation that he was HIV positive. During the confirmation hearing the defendant did inform this court that he was aware of his status before he indecently assaulted this young girl. Indeed being aware of his status and the risks that it posed to this girl, the defendant still went ahead with his intentions. I believe that this was very sadistic, to say the least. In this regard therefore I felt that the defendant did not deserve any leniency. Yes it is accepted that being infected with HIV does no longer spell a death sentence for the person so infected since one can have access to ARV's. However it must be noted that for some people having access to the ARV's is also problematic and that for these they would still die from complications that come from those suffering from AIDS.

It must also be borne in mind that it is a serious felony for one to deliberately infect another with HIV, thus a person who commits the offence of defilement or rape while being aware of his serostatus is actually committing two offences. Such persons in my view do not deserve any leniency and it is my view that the courts need to take a strong stand against such offenders. This is what I did in enhancing the defendant's sentence.

By this order the defendant's conviction is also confirmed.

Made in Open Court this.....day of.....2010

K.T. MANDA

**JUDGE**