



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE CRIMINAL DIVISION REGISTRY
CRIMINAL REVIEW NO 01 OF 2024
(Being Criminal Case No. 334 of 2023 at Nkhotakota Magistrate's Court)

REPUBLIC

V.

COLLINS NKHUNDA

CORAM: HONOURABLE JUSTICE MZONDE MVULA.

Mrs. E. Khonje, Court Clerk and Official Interpreter.

ORDER ON REVIEW OF PROCEEDINGS

(Made under Section 362 of the CP & EC and Section 26 of Courts Act)

Mvula, J.

1.0 Introduction

- 1.1 Section 361 (1) of the Criminal Procedure and Evidence Code, the Code, empowers a Resident Magistrate to call record of an inferior subordinate court, for purpose of reporting to the High Court. The latter are the Graded Magistracy cadres from First to Third. Reporting makes the path of the rule of law straight, which law, was on the face of it, misapplied in the inferior Subordinate Court.
- 1.2 The Chief Resident Magistrate received the file to be forwarded for sentencing at the High Court. The 19 year old Collings Nkhunda of Mphanda Village T. A Mwadzama in Nkhotakota was arraigned on rape contrary to section 133 of the Penal Code. The victim is grandmother of the accused person. The Chief Resident Magistrate observed that incest and not rape should be the charge. Thus, there is need to seek consent to prosecute as a procedural requirement from the Director of Public Prosecutions, before such matter can proceed. The issue now becomes if the proceedings were held on the correct charge in the circumstances.

2.0 **Jurisdiction of the High Court in review proceedings**

2.1 The High Court exercises supervisory authority over Subordinate Courts, under section 26 of the Courts Act. The powers read as follows:

“(1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may in particular, but without prejudice to the generality of the foregoing provision, **if it appears desirable in the interests of justice, either of its own or at the instance of a party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give such subordinate court such directions as to further conduct of the same as justice may require.**

(2) Upon the High Court calling for any record under subsection (1) the matter or proceeding in question shall be stayed in the subordinate court pending the further order of the High Court”

[Emphasis supplied].

2.2 Against the foregoing, where there is a perceived error of law arising from either its application or from not following procedure, the High Court, (i) **either of its own motion**, or (ii) **at the instance of a party affected by a decision of the Magistrate’s Court**, may call for such record to examine the irregularity. The important aspect however, is, if it is desirable in the interests of justice. Once it calls the record, it may elect keep it at the High Court. Alternatively, it may send it back, to the Subordinate Court, with directions, after exercise of supervisory or revisionary powers as the case may be, on further conduct of the matter.

2.3 This being a criminal case, section 360 of the Code provides for powers of the High Court to call for records for review. It reads:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

[Emphasis supplied]

3.0 **Irregularities detected in the file under review**

3.1 **The evidence**

3.1.1 The Prosecution understandably based the charge sheet on the mere fact that the offender had unlawfully carnal knowledge without her consent. This for all intents and purposes grounds the offence of rape. The investigative team, which had first-hand experience with both the accused person and the victim, let a very important observation slip through their grasp. This is the revelation that the pair are closely related by blood. The victim is grandmother of the accused person, altering terrain completely, from rape offence under section 133 of the Penal Code, to incest by males, an offence under section 157 of the Penal Code.

3.1.2 The charge proffered by the Prosecution therefore was wrong one at law. The Magistrate who tried the case, should have had eyes wide open and pick up this fact, to send the charge sheet back at least the moment the complainant PW1 entered court on 18th October 2023 to give evidence. She was 89 years old and raped by her 19 year old grand child who alleges he was drunk at the material time. The age gap between the pair, and the circumstances the offence was committed should have drawn the attention of the trial Magistrate to further scrutiny. Magistrates should always be curious of the facts before them, being the managers of the evidence they gather. Cases should never be routinely tried.

3.1.3 The offence of rape under section 133 of the Penal Code reads:

“any person who commits the offence of rape shall be liable to be punished with death or life imprisonment.”

3.1.4 Rape is defined under section 132 of the Penal Code as unlawful carnal knowledge of a woman or girl without her consent, or if the consent is obtained by force or means of threats or intimidation of any kind. If the woman is married, personating her husband makes the *acts reus* and *mens rea* of the offence.

3.2 **Policy considerations**

3.2.1 Given the offence is between close families members, where the offender and the complainant are related by blood, it is a requirement that the DPP should give consent for the case to be prosecuted. This would have happened had the trial Magistrate not fallen in deep slumber the moment evidence of the complainant was being recorded. The offender and the complainant are under the prohibited degrees of consanguinity. Sexual relations of persons between prohibited degrees

of consanguinity are incestuous and fall under section 157(1) of the Penal Code as follows:

“Any male person who has carnal knowledge of a female person, who to his knowledge is his grand-daughter, daughter, sister, mother or grandmother shall be guilty of a felony and shall be liable to imprisonment for five years:

Provided that if it is alleged in the information or charge proved that the female person is under the age of sixteen the offender shall be liable for imprisonment for life.”

3.2.2 Both offences under section 133 and 157(1) of the Penal Code are sexual offences. Defilement offences under Section 138 of the Penal Code fall into category. All these involve unlawful carnal knowledge. The policy consideration however where the lewd act involves close family members within prohibited degrees of consanguinity, should be sent to the Director of Public Prosecutions, for necessary legal consent. With the correct charge in the matter under review needing consent, incest under section 157(1) of the Penal Code becomes the offence. Rape under Section 133 of the Penal Code falls off due to consanguinity. Had the victim been under age of sexual consent at age 18 to point towards defilement, the fact does not change either. See **Republic v Symon Macheso Confirmation Case 329 of 2021 (Principal Registry)**.

3.2.3 The Director of Public Prosecution retains discretion to allow certain matters from proceeding in open court. The consent is sought, in writing, just as it must be granted in writing. The fact that such permission must first be sought, it does not prevent the Republic from arresting Collins Nkhunda and indeed any other offender in similar predicament, to be remanded either on bail or in custody, subject to the interests of justice. For this policy consideration, any trial which proceeds without such written consent is null and void.

4.0 **Conclusion**

4.1 In the wake of observations made under paragraph 3 above, the application of the law by the Chief Resident Magistrate, under section 361(1) of the Code flags procedural irregularities in the case under review. The charge is indeed irregular. Consequently, the conviction, entered on an irregular indictment does not stand. I quash it under section 353 (2) (a) (ii) of the Code. The sentence is set aside as

logical conclusion. Application for review by the Chief Resident Magistrate is, thus, meritorious. The file which sent for sentence enhancement, has met justice, which will see it now proceed on the correct charge as observed above.

- 4.2 This court departs from the finding in **Republic v Macheso (*supra*)** discussed by elder brother Judge, which is on all fours with the matter under review. In my considered view, criminal law is a matter of public policy. As such, public policy considerations are paramount and must be applied full throttle, by among other considerations, with full regard to the facts. Section 3 of the Code does not cure the defect, the First Grade Magistrate was trapped under. Sentence alone should not be consideration of which charging section to apply. The moment close blood ties come in, legal policy considerations precede mere whimsies to prosecute. In that regard, the intention of Parliament must strictly become applicable.
- 4.3 Pursuant to section 362 of the Code, through the Chief Resident Magistrate, we order trial *de novo* at First Grade Magistrate Court in Nkhotakota as follows:
 - 4.3.1 The Magistrate who took the evidence, should now open their eyes and draft a charge sheet on the offence under section 157(1) of the Penal Code, as reminder that close blood ties sexual acts are incestuous, not generic sexual offences.
 - 4.3.2 The Charge sheet so drafted should be sent to the Station Prosecution officer for Nkhotakota, who may vet it and return with it to the court in point for trial.
 - 4.3.3 The Station Prosecution Officer for Nkhotakota should simultaneously seek leave to prosecute the incest offence, before the Director of Public Prosecutions, as a matter of legal policy.
 - 4.3.4 Should consent to prosecute the offence under section 157(1) of the Penal Code be granted, the matter should be tried by another Magistrate at the Court.
- 4.4 The Magistrate who hitherto was seized with the matter may in the meantime handle and determine any applications for bail, and be done according to law.
- 4.5 The Chief Resident Magistrate should make available this order to the Magistrate who was seized with this matter, and all magistrates in the Region of regiment, for continued legal education.

Made in Court this 30th January 2024



JUDGE.