



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CRIMINAL DIVISION  
CRIMINAL APPEAL NO. 28 OF 2017**

**BETWEEN:**

**CHARLES KATANDIKA.....APPELLANT**

**AND**

**THE REPUBLIC.....RESPONDENT**

**CORAM: HON. Justice M L Kamwambe**

Chisanga of counsel for the State

Kazembe of counsel for the Appellant

Ngoma Official Interpreter

**JUDGMENT**

**Kamwambe J**

The Applicant was convicted by the First Grade Magistrate Court of the offence of defilement contrary to section 138 (1) of the Penal Code. It was alleged that the Applicant had carnal knowledge of a girl, EU, on 21<sup>ST</sup> June, 2017 at Kaudzu village in the district of Machinga. He was sentenced to 14 years imprisonment.

Being dissatisfied with both conviction and sentence, the Appellant appealed against both conviction and sentence on the following grounds:

1. That the lower court disregarded expert evidence from a medical professional who emphatically said that the alleged victim had not been defiled.

2. The decision of the lower court was against the weight of evidence.
3. There was no corroborated evidence of indecent assault or rape.

## **THE LAW AND EVIDENCE**

The prosecution had to prove strictly that there was penetration however slight it was. According to the evidence of the medical professional there were no sores or lacerations. The medical report does not say that there was no penetration. Whether there was penetration or not is a matter to be determined by the court by looking at the totality of evidence and applying the law to the evidence, and not by the clinician. The victim child said that Applicant took his penis and entered it into her vagina, and that she pulled the penis out when she felt pains.

In her testimony, the mother of the victim child told the court that Appellant later told them that he really was having sex but he did not come to finish his desire; and that the victim girl explained thoroughly that he took his penis and entered it into her vagina. The testimony of the mother is corroborative enough.

The incident occurred on the 21<sup>st</sup> June, 2017 while the medical examination took place on the following day. The clinician testified that the parents revealed that the vulva was open after the defilement, which meant that the man forced himself but failed to penetrate due to the disturbance by the boys. The medical report concluded that history is more suggestive of defilement. The law is clear that it is not necessary that semen be deposited in the vagina. The matter was reported to the father of the victim girl on the same day and not too late.

The victim said that she felt pain as he entered her. Although he might have failed to penetrate her successfully, he succeeded

to press on her private parts for entry, hence she felt pain. This constitutes penetration however slight it may have been. Emission of seed into the victim is irrelevant (**Twaibu v R ALR (Mal) 532**) and **Marriette v R 4 ALR (Mal) 119**.

This court fails to find fault with the lower court and therefore conviction is maintained.

**Pronounced** in open court this 18<sup>th</sup> May, 2018 at Chichiri, Blantyre.

  
M L Kamwambe  
**JUDGE**