



## **THE TREATMENT OF CONSENT IN SEXUAL ASSAULT LAW IN MALAWI**

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## 1.0. INTRODUCTION

Sexual assault can be described as a form of abuse of power that violates the human right to be free from violence. Sexual assault is far more likely to happen to women than men and this reflects the broader social problem of unequal power relationships between men and women. Because sexual assault is predominantly a gendered crime, failure to provide adequate protection from sexual assault violates the equal right of men and women to the enjoyment of all civil and political rights<sup>1</sup>.

In Malawi, the law on sexual assault and consent has historically reflected stereotypes about what constitutes consent. This is so due to the fact that there are many gendered assumptions that have disadvantaged complainants in sexual assault cases. The prosecution of sexual offences in Malawi is unlike the prosecution of any other criminal offence. In sexual offences, the prosecution has to prove absence of consent on the part of the complainant to the commission of the offence<sup>2</sup>. Thus there is an intense focus on the character and motivation of the complainant in most sexual offences. Traditionally, this focus has translated into a preoccupation with aspects of the complainant's behavior which are not related to the circumstances of the offence. Examples of this include whether the complainant provided a 'recent complaint' after the assault, a demonstration of proof of resistance by the complainant and the use of force by the perpetrator<sup>3</sup>.

A number of Malawian women face various forms of sexual assault such as rape, indecent assault, incest, defilement, abduction among others. The Penal Code<sup>4</sup> in Chapter XV provides against these forms of sexual assault. The chapter is titled 'offences against morality.' This paper is going to discuss five of the offences under the Act namely; the offence of rape, defilement, indecent assault, incest and abduction<sup>5</sup>. The paper shall specifically focus on the element of consent pertaining to these offences as defined by the Penal Code and case law. The paper shall further discuss and analyze consent in these sexual offences in relation to customary law in Malawi.

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<sup>1</sup> Australian Human rights Commission, 2007. ' Discussion paper on the law of consent and sexual Assault'. Available at;[http://www.hreoc.gov.au/legal/submissions/2007/20070720\\_sexual\\_assault.htm](http://www.hreoc.gov.au/legal/submissions/2007/20070720_sexual_assault.htm). Accessed on 21-03-11 at 11:23 am

<sup>2</sup> There are other sexual offences that do not require consent such as defilement, discussed below.

<sup>3</sup> Malunga, B. 2010. 'The Rule on corroboration in Rape and defilement offences; A Systematic Violation of the rights of women and Girls in Malawi.' Research Paper towards a master's degree in Women's Law, University of Zimbabwe

<sup>4</sup> Chapter 7:01 of the Laws of Malawi

<sup>5</sup> As provided for under Section 133, 138(1), 137, 157, 135 of the Penal Code.

## 1.1 Definition of consent

The Malawi Penal Code does not provide a general definition of consent in sexual offences. This has left the courts to rely on provisions providing for specific offences to deduce the meaning of consent. Courts therefore determine consent mainly by looking at the circumstances of the offence. In most cases, the court looks for evidence of physical struggle between the complainant and her assailant, without which it would be doubtful that the woman or girl did not consent. Lack of consent therefore is mostly shown by evidence of scratches, torn clothes, bruises on the body of the victim, immediate report of the offence to the first person the woman meets after the incident, signs of trauma and distress among other indicators. In 1994 the High Court of Malawi found as follows;

The evidence of the complainant corroborated by that of her friend who was in her company at the time of the event, her distressed condition, and the condition of her clothes leads to no other conclusion than that the sexual intercourse was without consent. Further more there were marks of violence which police found at the scene providing more corroborative evidence<sup>6</sup>.

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<sup>6</sup> Republic vs. Patrick Sambani CC No 392 of 1994.

## 2.0 THE PENAL CODE PROVISIONS ON CONSENT IN SEXUAL OFFENCES

### 2.1 CONSENT IN RAPE CASES

The offence of rape is defined in Section 133 of the Penal Code. The section also addresses the issue of consent in rape cases. The section reads as follows;

“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”.

According to the above section there are three elements to be proved by the prosecution to obtain a conviction for the offence of rape. These elements are: sexual intercourse (penetration), lack of consent and the identity of the accused person;

”To justify a conviction of rape, penetration, the use of force and absence of consent on the part of the woman must be established beyond reasonable doubt”<sup>7</sup>.

There are two circumstances in which sexual intercourse will be said to be without consent. The first instance is where the woman did not agree to the sexual intercourse but the man forced himself upon her. The second instance is where the woman agrees to the sexual intercourse but that agreement is obtained by force, intimidation, threats, fear of bodily harm or was misrepresented as to the nature of the act, or in the case of a married woman, by personating her husband.

#### a) Where the woman did not agree or consent to sexual intercourse

Having sexual intercourse with a woman or girl without her consent is an offence. Thus if a woman or girl refuses to have sex with a man but the man proceeds to have the same he would be guilty of the offence of rape. In the case of **Republic vs. Antony Kamanga and Hambe Nthara**<sup>8</sup>, the two accused persons were convicted and sentenced to 7 years imprisonment of the offence of rape for having sexual intercourse with a woman without her agreement. The two accused persons went to the complainant’s house in the evening and called her outside. When she went out they dragged her into a bush and forcibly had sexual intercourse with her in turns.

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<sup>7</sup> Republic vs. Kaluwa 1964-66 ALR (Mal)

<sup>8</sup> Case reported in the Weekend Nation Newspaper of the 26<sup>th</sup> of February 2011 at Page 8.

The two were convicted for forcing the woman to have sexual intercourse with them. They had not sought prior consent from the woman but rather just dragged her into a bush and proceeded to have sexual intercourse with her without assessing whether she was in agreement to the same. This shows that the use of force on a woman who is not in agreement to have sexual intercourse would be constituted as rape for lack of consent.

### **Capacity to consent**

There are some instances in which a woman would be said to be incapable of consenting to sexual intercourse, for instance where the sexual act happens when the woman is unaware of what is happening. For example in the case of **Republic vs. Nzina**<sup>9</sup>, the accused was charged and convicted of rape where he had sexual intercourse with a woman who was asleep. She only awoke to discover that some person was having sexual intercourse with her. The court held as follows;

“Connection while asleep knowing the woman to be sleeping and incapable of consent amounts to rape”.

Similarly, in the case of **The State vs. Austin Makina**<sup>10</sup>, the accused person was charged and convicted of the offence of rape where he had sexual intercourse with a girl whilst she was asleep. The complainant woke up due to pain in her private parts and realized that the accused was having sex with her.

### **b) Where consent is obtained by force, means of threats, intimidation of any kind, fear of bodily harm.**

Sometimes a woman will not refuse sexual intercourse due to the circumstance in which she is in. In this case consent will be said to have been negated by the circumstance. For instance the assailant may have threatened the complainant with harm or injury. This might be physical injury upon herself, her relations or property. Thus to protect herself from harm the woman may not refuse the sexual assault<sup>11</sup>.

### **c) Means of false representations as to the nature of the act.**

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<sup>9</sup> 1966-68 ALR (Mal) 263.

<sup>10</sup> Cc no.14 of 2010 at Lilongwe Magistrate Court.

<sup>11</sup> A police prosecutor reported of a case where a police officer raped a married woman in his office. The woman did not struggle as she was under threat and under fear of this officer. (Reported in Malunga, B. 2010. Research Paper)

Where a woman or girl is led to have sexual intercourse with a man under false representation she would not be said to have consented and the man would be guilty of rape. For example in the case of **Republic vs Shauti**<sup>12</sup>, the accused person was a witch doctor and one of the complainants went to consult him on an issue of infertility. She was advised by the accused to sleep at his place. He asked the complainant to undress herself because he wanted to examine her to see what prevented her from having children. The complainant obeyed and lay on her back. The accused instructed her to open her legs; he took his penis and inserted it into her vagina. The complainant was surprised and asked what was wrong and he told her that that was his method of conducting his medicine. The accused was convicted of the offence of rape.

#### **d) Personating a husband in case of a married woman.**

Where a man sleeps with a married woman whilst pretending to be her husband, he could be guilty of rape. In that case the woman though willingly was involved in the sexual act would be taken not to have consented because the consent is assumed to be to her husband and not to any other man. In the case of **The State vs. Sumani Saidi**<sup>13</sup>, the court convicted the accused of the offence of attempted rape and sentenced him to 7 years Imprisonment. The accused and the husband of the complainant went drinking together and they spent a night at the complainant's house. Whilst the complainant's husband was in deep sleep the accused attempted to rape his friend's wife. The complainant thought it was her husband when she was being caressed but later got suspicious.

### **2.1.1 Standard of proof for absence of consent**

Absence of consent on the part of the complainant has to be proved beyond all reasonable doubt and where the defendant claims consent, absence of the same has to be corroborated by some other independent testimony apart from the evidence of the complainant herself;

“Where the defense to a charge of rape is consent, the evidence of the complainant should be treated with the same caution as that of an accomplice. Corroboration should be sought for that portion of her story which the accused challenges”.<sup>14</sup>

Similarly in the case of **Wesle vs. Republic**<sup>15</sup> it was stated as follows;

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<sup>12</sup> 8 MLR 69

<sup>13</sup> Reported in the Weekend nation Newspaper of February 2011 at page 3.

<sup>14</sup> R vs. Kaluwa 1964-66 ALR(Mal)

<sup>15</sup> 1995 1 MLR

“...for rape the corroborative evidence must establish in some material respect that sexual intercourse has taken place, without the woman consenting and that the defendant is the one who committed it”.

Thus although the burden of proof rests on the prosecution, in practice the victim is required to prove that she did not consent to rape. Failure to provide corroboration often times jeopardizes the prosecution’s case. Thus the manner in which rape trials are conducted and the nature of evidence required exposes the woman victim to indignity, making it a man’s trial, but a woman’s tribulation<sup>16</sup>.

### **2.1.2 Marital rape.**

The position in Malawi is that marital or spousal rape does not exist under the Penal Code. Section 132 of the Penal Code on rape, does not make any reference to the position of husband and wife. There has never been an explicit exemption for marital rape, it is the interpretation of consent and the word ‘unlawful’ that results in the legal impunity for marital rape<sup>17</sup>. It should be noted that Malawian law originated from the English legal system and thus British common law has had much influence on the law in Malawi. In early English decisions the understanding was that one of the terms of the marriage contract was that the wife consented to sexual intercourse at the time the marriage was being contracted. Thus there was no need for the husband to seek consent any time the husband required sex with his wife.

“The wife submits to her husband’s embraces because at the time of the marriage she gave him an irrevocable right to her person. The intercourse, which takes place between a husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed on her by law. Consent is immaterial”<sup>18</sup>.

Malawi law adopted this interpretation of the law so that there have been cases which have interpreted section 132 of the Penal Code to mean that non-consensual sexual intercourse in marriage is not unlawful and therefore can not be said to be criminal.

The question has been raised whether a wife can lawfully refuse intercourse at any time, that is to say, irrespective of custom and place, e.t.c. in this connection, it would seem reasonable for a respectable wife to refuse her husband, e.g., in a public place in front of other people. But in a normal way, I doubt whether she can do so... It has been observed that a man can never be guilty of raping his wife and conversely that she can never refuse

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<sup>16</sup> Olateteru-Bisi et al, 2004. ‘Actual women situation in Nigeria’. WARDC: Nigeria.

<sup>17</sup> Sampson, F. 2010. The Legal Treatment of Marital Rape in Canada, Ghana, Kenya and Malawi- A Barometer of Women’s Human Rights.

<sup>18</sup> R. vs. Clarence 1888 22 QB 23.



her consent. Whether this is a sound argument or not, I am inclined to the view....that a wife can not lawfully refuse her husband intercourse<sup>19</sup>.

In marriage therefore there is a presumption that consent to sexual intercourse is by mutual matrimonial consent and thus has been argued by many that penal laws in Malawi do not have provisions creating or defining marital rape. In 1996 there was a proposal to include marital rape as an offence under the Malawi law, but this was rejected in the National Assembly on the basis of presumed and perpetual consent to sex in marriage<sup>20</sup>.

However, though it is widely accepted that marital rape is not an offence there is evidence that women complain of actions amounting to marital rape in civil cases. This mostly comes as a prayer for divorce on grounds of sexual abuse. For example in the case of **Roger Moffat vs. Grace Moffat**<sup>21</sup>, the defendant, the wife to the complainant told the court that she had deserted the complainant husband partly due to sexual abuse. The sexual abuse consisted of the defendant having sexual intercourse with her whilst menstruating and when she was unconscious / asleep. The court concurred with the defendant that the actions of the complainant amounted to sexual abuse. The court however did not go further to pronounce this as marital rape though the husband was having sex with the defendant when she was unwilling and without her consent.

### **2.1.3 Customary law and consent in rape cases.**

At customary law in Malawi it is unlawful for someone to have sexual intercourse with a girl or woman without her consent. However customary law allows some instances for sexual intercourse to happen with a girl or woman without their consent. Consent in those circumstances will be given by the people entrusted with the care of the girl or woman. This understanding of the law implies that women/girls are the property of men. Some of these instances are as follows;

#### **Initiation ceremonies**

In most Malawian communities when a girl reaches puberty she undergoes an initiation ceremony welcoming her into adulthood. Girls are taught about pleasing one's husband as well as being gentle and obedient wives. The initiation at times involves bringing in a man to the place where the initiation is being conducted<sup>22</sup> commonly known as 'Fisi' (hyena in English)

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<sup>19</sup> R.vs. Mwasomola 4 ALR(Mal) 572.

<sup>20</sup> Kanyongolo, N. etal, 2010. 'Customary Law and Women's Rights: A case of Malawi'. University of Malawi.

<sup>21</sup> Civil Case No. 10 of 2007

<sup>22</sup> This is usually a secluded place most of the times near rivers away from the villages.

who is expected to have sexual intercourse with the girl to test the knowledge she has gained<sup>23</sup>. The Fisi is usually a man chosen by the community to perform these kinds of functions. This sexual intercourse is condoned without the girl's consent because it is sanctioned by the community. *(it should be noted however that this practice is slowly being abandoned due to the state's and non state actors condemnation of the same as against human rights of girls. The condemnation is by public campaigns against the practice and not through prosecution of the Fisi.)*

### **Ritual cleansing ceremonies**

At customary law there are certain rituals which demand sexual intercourse with women as a form of cleansing when calamity has befallen a community to appease spirits. If these rituals are not done, it is believed that a certain calamity will befall the community. It is imperative therefore for the women to conduct these rituals whether they approve of the person they are chosen to have sex with or not. One of those rituals is known as widow cleansing. Widow cleansing is where a man known as Fisi (meaning the same as provided for in initiation ceremony above) sleeps with a woman whose husband has died to appease the spirit of the dead husband<sup>24</sup>. Another ritual of the same type happens when there has been purchase of an important item in a house hold such as a canoe for business or where a family wants to burn bricks for building a house. A fisi is called upon to sleep with a woman in the family to appease spirits so that the business will thrive or that the bricks should burn well<sup>25</sup>. *(It should be noted however that these practices are also slowly being abandoned due to the state's and non state actors condemnation of the same as against human rights of girls. This is done through public campaigns against the practice.)*

### **'Kulandira Alendo'/Installation of New Chiefs**

Installation of New Chiefs is another commonly practiced rite among the Chewa tribes of the Central Region of Malawi that is also a violation of the rights of young girls. During the installation of chiefs, other chiefs from near and far come and spend nights in the Chief-Designate's village. During such nights, it is part of traditional etiquette that young girls should be organized that will be required to keep the visiting chiefs company and have sex with them

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<sup>23</sup> Kanyongolo, N. et al, 2010. Customary Law and Women's Rights: A case of Malawi. University of Malawi.

<sup>24</sup> Munthali, A. et al, 2008. ' The timing and role of initiation rites in preparing young people for Adolescence and Responsible Sexual and Reproductive Behavior in Malawi. Available at <http://www.google.co.zw>. Accessed on 4/2/2009.

<sup>25</sup> Malunga, A. 2005. Geographical analysis of HIV/AIDS from a cultural perspective in Tambo and Nthukuso villages in Nsanje District. Dissertation at Chancellor College: University of Malawi. Unpublished.

during the night. Like in most cultural rites, the girls involved are never consulted for their express opinions about the arrangement. It is supposed to be considered a high honour to be invited to serve visiting chiefs in this manner, apart from it being considered good manners for one to comply with such traditional demands<sup>26</sup>.

By looking at these customary practices it can very well be argued that customary law infringes on women's and girl's right to make a free choice on issues that affect their sexuality. These practices can be challenged under certain provisions of the Constitution such as section 13(a) of the Constitution which provides for principles of national policy one of which is to obtain gender equality for women with men, section 20 of the Constitution which prohibits discrimination in any form on grounds of sex, section 23 of the Constitution which provides for the protection of children from any treatment that is or is likely to be hazardous, interfere with education, be harmful to their health or to their physical, mental or spiritual or social development. The constitution also states that legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as; sexual abuse, harassment and violence.<sup>27</sup> However, to date there has been no legislation to such effect.

#### **2.1.4. Myths and stereotypes relating to consent.**

There are some myths among Malawian society that entrench the view that consent of women in sexual matters is not necessary. One of these myths is that women and girls are very pretentious in sexual matters. That in most cases when they say 'no' to sexual advances what they actually mean is 'yes.' These myths are not part of Malawian customary law but they do carry much weight, so much so that they have actually found way in the Malawian courts. As such there have been court decisions supporting the stereotypes. One High Court Judge held as follow:

“I do not wish to be duped by the talk that she was forced down. Who does not know that women are generally difficult and pretentious when sex demands are in force. She may have wanted it at the house and in meeting that resistance he applied the pressure”<sup>28</sup>.

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<sup>26</sup> Malawi Government, ministry of gender, 2005

<sup>27</sup> Section 24 (2) (a) of the Constitution.

<sup>28</sup> Rashid Hussein James vs. R in (Kasambara R. *'The law of rape: A critical Appraisal'*; Staff/Students Law Seminar Paper No.3 of 1989-90 Academic Year; Chancellor College, Zomba.)

### 2.1.5. Customary law and marital rape

In Malawi there are two major systems of contracting marriages at custom: the dominant matrilineal system which prevails in most parts of the central region and in most parts of the southern region, and the patri-lineal system which prevails in the whole of the northern region and in certain parts of the central region and also in certain parts of the southern region<sup>29</sup>. Under the matrilineal system of marriages there is no payment of dowry but various gifts may be exchanged between the contracting parties. Under the patri-lineal system of marriage, dowry is paid by the man's family side to the woman's family side in the form of livestock or money.<sup>30</sup> Most marriages in Malawi are characterized by unequal power relations, which sometimes manifest injustices such as marital violence, including marital rape. This is caused and rooted in gender inequalities that underlie the superior status of the husband.

Customary law in both systems of marriage does not recognize the concept of marital rape. In both systems a husband is entitled to exclusive sexual intercourse with his wife. Denial of sexual intercourse of the wife to the husband is a fertile ground for divorce. However, customary law in both systems recognizes certain circumstances in which a spouse can justifiably withhold consent to sexual intercourse<sup>31</sup> and if a husband forcibly has sex with the wife this can be a ground for divorce.<sup>32</sup> Some of these circumstances include:

- a) During advance pregnancy
- b) Immediately after child birth
- c) During menstruation and
- d) During mourning for a deceased close relative of either spouse.

Thus it can be argued that it is not the payment of dowry as such which leads to ongoing consent to sex in marriage since even those marriages that do not recognize the practice of dowry believe that consent to sex through out the marriage is given at the onset of marriage.

Section 24(1) of the Malawi Constitution recognizes the principle that women have equal rights as men without sex based discrimination. Although this is so, the law does not regulate what happens in a family whilst it is still subsisting. The law in Malawi focuses on the inception and the end of marriage. Power relations in the family are therefore unregulated. The law in Malawi

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<sup>29</sup> Chigawa, M. (1987) *Customary Law marriages and Social development: De Jure Marriages at Customary law in Malawi*.

<sup>30</sup> (Ibik, J.O., (1970). *The law of Marriage and divorce*, Sweet and Maxwell: London)

<sup>31</sup> *ibid*

<sup>32</sup> It was held in the case of Robert Moffat vs. Grace Moffat that having sex with a wife who is menstruating is a good ground for divorce under customary law.

does not prescribe minimum standards for the quality of relations in families<sup>33</sup>. However, international standards are clear that relations in the ongoing families should be both equitable and equal. CEDAW demands that men and women must have the same rights and responsibilities during marriage<sup>34</sup>. The Protocol to the African Charter requires equality of relations between parties<sup>35</sup>.

## 2.2. CONSENT IN DEFILEMENT CASES.

Section 138(1) of the penal code establishes the offence of defilement. The section reads as follows;

“Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of a felony and shall be liable to imprisonment for life, with or without corporal punishment”.

The section does not discuss the issue of consent but case law has elaborated more on consent in defilement cases. Case law has established that it is not necessary to ask whether the girl consented or not in defilement cases to determine the guilt of an accused person. Therefore whether the girl consented to the sexual assault or not is irrelevant, the accused person would still be guilty. In the case of **Republic vs. Goliati**<sup>36</sup>, two accused persons slept with a girl of 10 years of age on agreement with the girl that they would give her money which they did. The accused persons argued that the girl had consented to the sexual intercourse and thus they could not be guilty. The court held as follows;

“Consent of the complainant provides no defence to a charge of defilement. A girl who is under the age of 13 is not capable of giving that consent”.

Similarly, in the case of **Republic v William John**,<sup>37</sup> the accused person pleaded guilty to the charge of defilement contrary to section 138 of the Penal Code. However, he said that he did this because the girl, aged 11 years, deliberately came to where he slept. The court held that for offences of defilement, it does not matter whether the girl consented or was willing to have sex. That even if a girl below 13 years was actually asking, the act is still criminal because the law deems these too young to give proper consent to the act of sex.

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<sup>33</sup> Malawi Law commission, Special Law Commission on Gender- Based Law Reform in Malawi. 2003. ‘Overview and issues of gender – Based Law Reform in Malawi.’

<sup>34</sup> Article 16(1)(c)

<sup>35</sup> Article 7(g)

<sup>36</sup> 1971-72 ALR 251

<sup>37</sup> Cc No.13 of 2009

In another case of **Luwishi vs. R**<sup>38</sup>, consent to sexual intercourse with a girl under 13 years was given by her sister; the court held that consent on behalf of a girl under 13 to the commission of an offence against her is irrelevant to the issue of the guilt of the offender.

Though the issue of consent is irrelevant to the question of guilt of the accused person, the courts have decided that consent would be relevant to the issue sentencing. Further the courts have held that where the girl consented the court can not make an order for compensation:

“Be that as it may consent may be taken into account when considering sentence. It is not proper to make a compensation order following a conviction for defilement where it is established that the complainant consented to the sexual intercourse, since it may act as an inducement to her to encourage others to commit similar offences with the hope of obtaining other compensation orders”<sup>39</sup>.

### **2.2.1. Customary law and consent in defilement cases.**

There is evidence to suggest that a lot of violence against children is perpetuated in the administration of various cultural practices and rituals related to rites of passage, funerals, marriages, installation of new chiefs and absurdly, debt repayments among others. Most of these violations could be happening due to sheer ignorance about the rights of the child, or under the pretext of cultural values. There is evidence to suggest too that the issue of cultural practices and rituals that could be contravening the rights of the child is geographically widespread in Malawi with each ethnic grouping having their own unique practices<sup>40</sup>.

Under customary law it is unlawful to have sexual intercourse with a child without their consent. However in some cases customary law allows sexual intercourse with a girl under 13. Such instances include in times of initiation ceremonies as discussed (at page 9 and 10) and in child marriages.

## **Child Marriages**

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<sup>38</sup> 1923-60 ALR (Mal) 982.

<sup>39</sup> Rep. vs. Goliati and Jonasi 1971-72 ALR (Mal) 251.

<sup>40</sup> Malawi government, Ministry of Gender, Child Welfare and Community Services, Study on Violence Against Children In Malawi., UNICEF. 2005

In Malawi some children marry or are forced to find families early. Economic pressures and the association of puberty with adulthood are the major causes of this problem<sup>41</sup>. Child marriages are sometimes justified by parents on the ground that it prevents promiscuity, which a girl child it is believed, is prone to at puberty. At times the reasons are religious, economic and often times the low appreciation of the need for the girl child to go to school<sup>42</sup>. In child marriages, some Malawian cultures allow parents to give away their girl child in marriage even at a tender age. In this instance, the consent of the child is hardly sought. This most commonly happens when the parents want to enrich themselves with dowry which they receive from the man's family. This practice is common in the northern part of Malawi where cultural practices force girls from poor families, some as young as nine years old into marriages, particularly when parents need to settle loans.<sup>43</sup> Apart from early marriage there is also another practice known as 'nhlazi', which entails giving into marriage a young relative of the wife, as a reward to her husband for being good to her family. The girl need not consent; the decision is made by the senior members of her family<sup>44</sup>.

Practices such as child marriages, or the Fisi practice in initiation ceremonies, have contributed to the problems relating to capacity and consent. Under custom there is no specific minimum age for capacity to marry. Consequently capacity to marry is determined by the physical and intellectual capability of a particular individual to sustain a relationship.

These practices can be challenged under the Constitution. Section 23 (4) of the constitution provides that children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to be hazardous, interfere with their education or be harmful to their health or to their physical, mental or spiritual or social development.

However, there is a drawback under section 22(8) of the same Constitution. Under that section the Constitution does not prohibit marriages of children under the age of 15 years. The provision only says that the state shall discourage such marriages.

“The state shall actually *discourage* marriage between persons where either of them is under the age of 15 years”.

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<sup>41</sup> Law Commission, 2003.

<sup>42</sup> Olateru, B. etal. 2004. 'Actual women situation in Nigeria.' WALDC: Nigeria

<sup>43</sup> IPS-Inter Press Service, 2009.' Malawi: Controversy over child marriages bill continues.'  
<http://ipsnews.net/news.asp?idnews=48177>. Accessed on 15-03-11 at 10:31 am.

<sup>44</sup> IPS- Inter Press service,2009. 'Women fight forced marriage in Malawi.'  
<http://ipsnews.net/news.asp?idnews=48177>. Accessed on 15-03-11 at 11:00 am.

The above provision entails a possibility of marriage with a girl under 15 years of age without prosecution for defilement because the law has not forbidden such marriages, and the state has only been given authority to discourage and not to forbid such marriages. It can therefore be argued that the Constitution strengthens violence against girl children contrary to Article 16 of the Convention on the Elimination of All Discrimination Against Women (CEDAW), which prohibits the betrothal, and marriage of a girl child. According to international standards, the law must prohibit early marriages and customs that are detrimental to the health and best interests of children<sup>45</sup>.

## **2.3 CONSENT IN INCEST CASES**

Sections 157 and 158 of the Penal Code provide for the offences of incest;

Section 157 (1) provides as follows;

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

(2) It is immaterial that the carnal knowledge was had with the consent of the female person.

Section 158 provides as follows;

Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, or son to have carnal knowledge of her (knowing him to be her grand father, father, brother, or son, as the case may be), shall be guilty of a felony and shall be liable to imprisonment for five years.

From the reading of the above section it is clear that a man would be guilty under section 157 whether the woman consented or not. Under section 158 a woman would be guilty if it is shown that she consented to sex within the forbidden boundaries. The sections have not defined what will and will not constitute consent. In this case therefore it would be up to the court to determine whether the woman consented or not. The court will therefore look at the physical evidence such as scratches, bruises, torn clothes among others to shows lack of consent depending on the circumstances of each particular case.

### **2.3.1 Customary law and consent in incest cases**

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<sup>45</sup> Article 23(2) of the International Covenant on civil and Political rights and Article 3 of the Convention on Consent to Marriage, Minimum age for Marriage and registration of marriages, 1964.



Under Customary law there are forbidden degrees to marriage. A person is not allowed in all cultures in Malawi to have sexual intercourse with a blood relation unless they are distantly related such as cousins. Sexual intercourse with a daughter, son, granddaughter/son, brother and sister is not allowed under customary law<sup>46</sup>. Thus it will still be an offence under custom to have sexual intercourse within the prohibited degrees whether or not there was consent on either party.

However, there are some communities that condone incest and it is part of their custom. For example, there is a custom in some communities in Nsanje district that allow a father to have sexual intercourse with his daughter in order to determine lobola (dowry)<sup>47</sup>

It is also important to point out that there are certain beliefs associated with having sex with children and young girls that are common among Malawian societies that aggravate sexual violence against children and young girls. The most common among these is the belief that having sex with children or young girls, or indeed indulging in incest relationship with one's own daughter for example, facilitates the activation of certain magical wands that can make one acquire wealth in terms of money and other material possessions. This belief has been behind most incest practices in Malawi that have involved fathers and their daughters. Because there is the fear of magic behind such practices, it has been difficult for concerned family members to come out in the open to discuss or disclose of such malpractices for fear that their family members will die under the influence of such magic<sup>48</sup>.

Lately, there is some general belief that seems to indicate that having sex with children or young girls or indeed people with disabilities, that are purportedly HIV/AIDS infection free, will cure an adult man from the infection. This belief has accounted for the escalation of child sexual abuse cases with the advent of the HIV/AIDS pandemic<sup>49</sup>.

## **2.4 CONSENT IN ABDUCTION CASES**

Section 135 and 136 of the Penal Code provides for the offences of abduction as follows;

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<sup>46</sup> Ibid, 1970.

<sup>47</sup> Malawi Law commission, Special Law Commission on Gender- Based Law Reform in Malawi. 2003. 'Overview and issues of gender – Based Law Reform in Malawi.'

<sup>48</sup> Ibid

<sup>49</sup> Ibid

Any person who, with intent to marry or carnally know a woman of any age, or to cause her to be married known by any other person, takes her away, or detains her, against her will, shall be guilty of a felony and shall be liable to imprisonment for seven years<sup>50</sup>.

Any person who unlawfully takes an unmarried girl under the age of sixteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person, shall be guilty of a misdemeanor<sup>51</sup>.

The provision above has not discussed the issue of consent but the same has been discussed in case law. In these cases absence of consent on the part of the woman has to be established. Absence of consent is determined by signs of physical struggle such as, running away if there is opportunity, cries and injuries on the body of the complainant among others.

Further consent in abduction cases can be obviated by false and fraudulent misrepresentation. Thus even where the woman has consented to be abducted, if that consent was obtained by false or fraudulent misrepresentation the court will determine that there was no consent.

“Although the girl in this appeal was of age to consent, nevertheless she had a representation of hospitality made to her parents to induce them to go, which seemed true, and then she was induced by false and fraudulent representation which also seemed true to go away with the accused. By analogy these misrepresentations could result in ‘taking.’ ...although the girl in this case consented to go with the accused once she found out that his purpose was not to deliver the luggage but to have sexual intercourse with her she refused to continue with him. If he forcibly detained her, for however short a time, whether or not she eventually gave in to his advances, in such circumstances abduction would be established”<sup>52</sup>.

#### **2.4.1 Customary law and the issue of consent in abduction cases.**

Customary law of some parts of the country especially in the central region of Malawi used to allow abduction of a woman or girl with the intention of having sexual intercourse with her. If a man was interested in a certain woman or girl with the intention of marrying her but for other reasons he would not have her, the man would just abduct the woman or girl and have sexual

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<sup>50</sup> Section 135 of the Penal Code.

<sup>51</sup> Section 136 of the Penal Code.

<sup>52</sup> Rep. vs. Jeremiah 1966-68 ALR (Mal) 431.

intercourse with her. The incident would then be reported to the authorities of that particular community and the man would be asked to marry the woman<sup>53</sup>.

## **2.5. CONSENT IN INDECENT ASSAULT CASES.**

The offence of indecent assault is provided for under section 137(1) and (2) of the Penal code;

Any person who unlawfully and indecently assaults any woman or girl shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment<sup>54</sup>.

It shall not be a defence to a charge of an indecent assault on a girl under the age of thirteen years to prove that she consented to the act of indecency<sup>55</sup>.

From the reading of the provisions above, indecent assault committed on an adult woman invokes the discussion of whether the woman consented or not. If the woman consented there will be no offence. Whether a woman consented or not is a matter of fact and the court will look at the circumstances of each case to determine the existence of consent.

Where there is consent on the part of the woman or girl concerned, a charge of indecent assault can not be sustained unless she is under the age of 13 years. If she is under the age of 13 years, it will be no defence to a charge of indecent assault to prove that she consented to the act of indecency. That on a charge of indecent assault it is whatever one may think about it morally or privately a complete defence to prove that the girl consented, that is provided she is over 13 or over<sup>56</sup>.

### **2.5.1. Customary law and consent in indecent assault cases.**

At customary law it is an offence to indecently assault a woman with or without her consent. An unmarried woman is either in the hands of parents if it is a patri-lineal society, and in the hands of maternal uncles if it is matrilineal society. Anything important concerning the girl is decided by the ones who take care of her and thus she can not on her own consent to be indecently

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<sup>53</sup> Ibik, 1970

<sup>54</sup> Section 137(1)

<sup>55</sup> Section 137(2)

<sup>56</sup> Rep vs. Mwale 1966-68 ALR (Mal) 355

assaulted by a man. A married woman is in the hands of her husband and it will be an offence for her to be indecently assaulted by any man or to consent to do so<sup>57</sup>.

### **3.0 CONCLUSION**

The above discussion shows how some of the sexual assault cases that Malawian women and girls face. The discussion looked at consent in sexual offences under the Malawi Penal Code and also under customary law. It has been shown that under the Penal Code it is essential for the prosecution to prove absence of consent to sexual assault unless the girl is under the age of 13, when she is said to be incapable of consenting. It has also been shown that it is not easy for a woman to show that she did not consent to sexual assault. This is worsened by the fact that there is no specific statutory definition of consent in sexual assault cases which has left the courts to resort to looking for physical evidence to show absence of consent. The paper has also discussed some instances in which consent to sexual intercourse is not required. Some of these instances are; when a woman is married she is said to have given perpetual consent at the onset of marriage, under customary law such as in initiation and ritual cleansing ceremonies. These practices violate women and girl's rights under the Malawi constitution as well as under international law and thus they can be challenged. This legal treatment of consent is influenced by women's disadvantaged status in Malawi as they are most often treated as men's property, incapable of making their own decisions including decisions of when and who to have sexual relations with. Such treatment hinders women's and girl's physical, social, economic and health wellbeing and therefore perpetuates inequalities between men and women in Malawi.

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<sup>57</sup> Ibik, 1970

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**Republic vs. Patrick Sambani** CC No. 392 of 1994)

**Republic vs. Kaluwa** 1964-66 ALR (Mal)

**Republic vs. Nzina** (1966-68) ALR 263

**Republic vs Shauti** 8 MLR 69,

**R vs. Kaluwa** 1964-66 ALR (Mal)

**R vs. Clarence** [1888] 22 QB 23.

**R. vs. Mwasomula** 4 ALR (Mal) 572

**Republic vs. Goliati** 1971-72 ALR 251

**Luwishi vs. R** 1923-60 ALR (Mal) 982,

**Rep. vs. Jeremiah** 1966-68 ALR (Mal) 431.)

**Rashid Hussein James vs. R**

**The State vs. Austin Makina Cc No.14 of 2010**

**Rep vs. Mwale** 1966-68 (ALR) Mal 355)

**The State vs. Suman saidi** (case reported in the weekend News paper of February 2011)

**Wesle vs. Rep** 1995 1 MLR

**Rep vs. Antony Kamanga and Hambe Nthara.** (Case reported in the Weekend Nation Newspaper of the 26<sup>th</sup> of February 2011)

**Rogger Moffat vs. Grace C. Moffat Civil Case No.10 of 2007.**

## **STATUTES AND OTHER INTERNATIONAL INSTRUMENTS.**

The Republic of Malawi Constitution of 1994

The Penal Code Cap 07:01

Convention on the Elimination of All Discrimination Against Women (CEDAW)

The International Covenant on civil and Political rights (ICCPR)

The Protocol to the African Charter.

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