



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

REVIEW CASE NO. 5 OF 2021

(Being Criminal Case No 2 of 2021 in the First Grade Magistrate Court sitting at Thyolo)

ALEX JIMU

-v-

THE REPUBLIC

CORAM: HON. JUSTICE AGNES PATEMBA

Ms. Chijozi, Counsel for the Applicant

Mr. Nsume Counsel for the State

Mrs. Msimuko, Court Reporter

Mr Amos, Official Interpreter

ORDER ON REVIEW

1. The Applicant, Alex Jimu, 15 years old from Ndalama village, Traditional Authority Nchilamwera, Thyolo district brought the present application before this court. The Applicant was charged with an offence of defilement of a girl aged 13 years contrary to section 138(1) of the Penal Code. Both the boy and the girl are pupils at Mphinji primary school in Thyolo. The two were in a love relationship and engaged in sexual intercourse. When the parents of the girl were made aware of this fact, they reported the matter to a police station and the boy was arrested. The matter was brought before a First Grade Magistrate Court and the boy was charged with the offence of defilement.
2. Following the law under section 99 of the Child Care Protection and Justice Act, the matter was referred for preliminary inquiry before plea taking. Before the preliminary inquiry took

place, the Applicant filed the current application to challenge the provision of section 138 (1) of the Penal Code in relation to its applicability to a child who is 15 years old.

3. The application seeks the determination of the court on the following issues;
 - (a) Whether or not the offence of defilement under section 138 (1) of the Penal Code as it applies to consensual non exploitative sexual relations between the adolescent children violates the Applicant's right to privacy and dignity as provided under section 19 and 21 of the Constitution.
 - (b) Whether or not the application of the offence of defilement under section 138 (1) of the penal Code to the Applicant and other adolescent children in consensual non exploitative sexual relationships constitutes treatment that is harmful to their health and development, contrary to the best interest as provided under section 23 (1) of the Constitution.
 - (c) Whether or not section 138 (1) of the penal Code discriminates against the Applicant on the basis of sex and violates his right to equality provided under section 20 of the Constitution.
4. Before the hearing of the substantive application, the State raised a preliminary objection on the basis that the application is misplaced and premature as there is no decision before a lower court for this Court to review.
5. The State argued that it is their observation that the application is raising constitutional matters and the right party to respond to the issues of constitutionality is the office of the Attorney General and not the Director of Public Prosecutions.
6. The State submitted that section 25 of the Courts Act provides that the High Court shall exercise its powers of review in respect of criminal proceedings and matters in subordinate courts in accordance with the law for the time being in force relating to criminal procedure.

The State argued that a proper criminal review entails reviewing the proceedings in the lower court to see whether such proceedings are legal and proper. The present application does not state whether the lower court has committed any error in the matter before it. Counsel further submitted that let the applicant wait till the end of the trial and if the accused will feel aggrieved then he will have a range of remedies at his disposal.

7. The State further submitted that in view of the specific circumstances of the present case, it does not seem that there would be a prospect of failure of justice when regard is had to the issues of that have been raised in this application. The courts have ways of dealing with children who are in conflict with the law as provided under the Child Care, Protection and Justice Act.
8. On the above stated grounds, the State prayed that the Court should consider dismissing the present application.
9. The Applicant however, responded and submitted that he has not raised any issue relating to proceedings in the lower court *per se* but rather the Applicant's application is a fresh proceeding purportedly questioning the constitutionality of the penal code provision and that there are no proceedings subject to review before the lower court.
10. In her submission Counsel for the Applicant cited section 42 (2) (f) (viii) of the Constitution which provides that;

'Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right as an accused person, to a fair trial, which shall include the right to have recourse by way of appeal or review to a higher court than the court of first instance.'

Section 46 (2) (a) of the Constitution which provides that;

'Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to make application to a competent court to enforce or protect such a right or freedom.'

11. Counsel for the Applicant further relied on section 26 of the Courts Act which provides that;

(1) 'In addition to the power 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 interest of justice, either of its own motion or at the instance of any 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 to such subordinate court such directions as to the further conduct of the same as justice may require.'

12. Counsel for the Applicant submitted that the powers of the High Court under section 26 of the Courts Act as read with section 75 of the Criminal Procedure and Evidence Code allow this court to inquire into the fairness of a trial before a subordinate court, consider whether a difficult question of law is likely to arise and make such orders in the best interest of justice.

13. Counsel for the Applicant further submitted that when one reads section 26 of the Courts Act together with section 70 of the Criminal Procedure and Evidence Code it is very clear that the High Court has powers to decide on cases of doubt. This is one such case, where it is in doubt whether the framers of the offence of defilement under section 138 (1) of the Penal Code intended to criminalise even innocent sexual relationships among adolescents.

14. That this Court has powers under section 26 of the Courts Act to intervene at any stage of the proceedings including at the point in which this matter is, in the lower court, in the interest of justice to protect the rights of the Applicant. To allow the Applicant who is a

child in this matter to undergo a trial that would in effect result in grave injustice and will infringe on his rights would amount to miscarriage of justice.

15. The Court has considered the issues raised by the Applicant and the responses from the other party. I will now consider the legal issues raised in this application. The issues raised are summarized as follows;

- (1) Whether the applicant's application is premature?
- (2) Whether the matter should be referred to the Honourable the Chief Justice for certification as a constitutional matter?

16. It is appropriate at this stage to have a look at some of the relevant provisions of the law and case authority applicable to the present issues raised in this application.

17. Section 108 (1) of the 1994 Constitution of the Republic of Malawi creates the High Court (or 'the Court') with unlimited original jurisdiction to hear and determine any civil or criminal matter. The Court also has, by virtue of section 108 (2) of the Constitution, the power to review any law for conformity with the Constitution.

18. Although ordinarily a matter before the High Court is handled by a single judge, where proceedings before it expressly and substantively relate to, or concern the interpretation or application of the provisions of the Constitution, the matter requires a panel of at least 3 High Court judges to adjudicate over it: see section 9 of the Courts Act. Before a panel can hear the matter, however, the Chief justice must first certify that the matter is a constitutional one; See section 9(3) of the Courts Act, *The State v Director of Public Prosecutions (Ruling)* Miscellaneous Civil Cause No.16 of 2016.

19. Besides the powers specified under the Constitution, the Court also has jurisdiction conferred on it by specific statutes. Section 25 of the Courts Act empowers the Court to review criminal proceedings and matters before a subordinate court. However, in *Rep v Salirana* 12 MLR 63, it was held that the High Court can only exercise the powers of review pursuant to this provision if a subordinate court has made a final finding of some form.

20. Further, section 26 of the Courts Act gives the Court broad supervisory and revisionary powers over subordinate courts. The powers under this provision are exercised on proceedings that are still pending before a subordinate court: see *Rep v Genti* [2000-2001] MLR 383.

Whether the application is premature?

21. Key to resolving this question is understanding what the Applicant's application is about. If the application is for this Court to review the magistrate court's proceedings pursuant to its powers under **section 25** of the Courts Act, then the application is indeed as submitted by the State, on the authority of *Rep v Salirana* (supra), premature as there is so far no final finding by the magistrate court.
22. However, on a closer look at the Applicant's grounds of review, what he is asking the Court to do is to review the subordinate court proceedings regarding the law on which they are founded. Simply put, the Applicant wishes the Court to review the constitutionality of **section 138(1)** of the Penal Code under which he is charged in the subordinate court. The review of the law does not require that there be a decision by the magistrate court first. For example, in *Mayeso Gwanda v State*, Constitutional Case No. 5 of 2015 Mr. Gwanda was arrested and charged before Blantyre Magistrate Court of the offence of rogue and vagabond contrary to section 184 (1) (c) of the Penal Code. Before he could undergo trial, he sought to challenge the constitutionality of the provision under which he was charged contending that it infringed upon a number of his constitutional rights including dignity, equality, privacy, and freedom of movement. Consequently, proceedings in the magistrate court were stayed and the matter was referred to the Chief Justice for certification as a constitutional matter. The Chief justice proceeded to certify it as a constitutional one and 3 judges were empaneled to adjudicate over the constitutional petition. The Court, sitting as a constitutional court, reviewed section 184 (1) (c) of the Penal Code and declared it to be unconstitutional thereby leading to the discharge of Mr. Gwanda from the criminal proceedings that were pending. There is, therefore, no need for an accused to be convicted

or acquitted first before the High Court can review or determine the constitutionality of a law under which he is charged. Considering that this Court is being asked to 'review', not a magistrate's decision but, the law under which the Applicant was charged in the subordinate court, therefore, the application is not premature.

23. It could be argued that this matter is different from the **Gwanda case** in the sense that in that matter it was the magistrate who proceeded to directly refer the matter to the Chief Justice for certification. The distinction notwithstanding, what the **Gwanda case** reveals is that the determination of the constitutionality of the provision under which an accused is charged need not wait for the accused to be tried or for the magistrate to convict or acquit him first.

24. In the present matter, the review which the Court is being asked to do could be understood as an exercise of its broad powers under section 26 of the Courts Act as read with the powers under section 108 (2) of the Constitution to determine the constitutionality of section 138 (1) of the Constitution first before the Applicant can be required to undergo trial in the subordinate court. Unlike section 25 of the Courts Act which requires some final finding by a subordinate court, section 26 of the Courts Act gives the High Court broad supervisory powers over proceedings that are pending in the lower court as the Applicant's proceedings are as stated in the case of **Rep v Genti**. There is nothing barring the Court from, in the exercise of its powers under section 26 of the Courts Act and section 108 (2) of the Constitution, reviewing subordinate court proceedings in terms of the legality or constitutionality of the law on which such proceedings are founded. In fact, in **Republic v Banda and Others**, Review Case No. 58 of 2016, Ntaba J at paragraph 4.1 stated that the Court can review any proceedings before any subordinate court regarding their regularity. Reviewing the regularity of the proceedings includes reviewing if the law on which such proceedings are founded is constitutionally valid. Further, as the **Gwanda case** has demonstrated, the Courts' exercise of its powers of review of the law on which criminal proceedings in the subordinate court are grounded does not require a conviction or acquittal

first. The Applicant's application, therefore, in so far as it seeks the review of the law, is not premature.

Whether the matter should be referred to the Chief Justice for certification?

25. At the outset, it must be acknowledged that the Honourable the Chief Justice in **Simon and Others v Attorney General** Constitutional Referral Case No. 9 of 2015 cautioned that it is not every case in which a party complains about his constitutional rights that warrants a referral to the Chief Justice. Constitutional referrals, therefore, should not be the norm but the exception.

26. For a court to refer a matter to the Chief Justice for certification, the matter must be one that raises issues that **expressly** and **substantively** relate to, or concern the interpretation or application of the provisions of the Constitution; See section 9(2) of the Courts Act, and **The State v DPP** (supra). In the **Gwanda** case (supra), the Applicant challenged the provision under which he was charged as being a violation of his constitutional rights. The matter was regarded as raising constitutional questions.

27. The Court agrees with the decision of the court in the **Mayeso Gwanda** case where the court stated that;

'The issue of the State not being a correct party cannot arise. In terms of constitutional issues, it is indicated that under rule 8 (6) of the Rules, the Attorney General shall be served whether he is or not a party. The rationale is that the Attorney General shall have the chance to respond to the raised issues.'

28. The application before this court is not a constitutional matter to require the Attorney General to be a party to the proceedings. Therefore the State is the correct party to the current proceedings.

29. In the present matter, the Applicant similarly contends that section 138 (1) of the Penal Code, under which he is charged in the subordinate court, infringes upon his constitutional rights including the rights under sections 19 (1) (dignity), 20 (equality), and 23 (best

interest of the child) of the Constitution. The issues that the Applicant is raising before this Court bear some semblance to what the Applicant in the **Gwanda case** raised. While fully appreciating the caution raised by the Chief Justice in the **Simon and Others case** (supra), one cannot escape from concluding that the present matter likewise raises issues that expressly, and substantively relate to and concern the interpretation of the constitutional provisions. Thus, it deserves a referral to the Honourable the Chief Justice for certification.

Conclusion

30. The Applicant's application is not premature as it seeks the review not of the decision of the magistrate but of the law.
31. The matter raises issues that expressly and substantively relate to or concern the interpretation of the Constitution thereby deserving a referral to the Chief Justice.
32. I hereby refer the matter to the office of the Honourable the Chief Justice for consideration of certification of this matter as a constitutional cause in terms of section 9 (3) of the Courts Act.

Made at Blantyre in Chambers this **13th** day of **August** 2021.

A handwritten signature in black ink, consisting of a large, stylized letter 'A' with a vertical line extending downwards from its center, all enclosed within a circular scribble.

AGNES PATEMBA
JUDGE