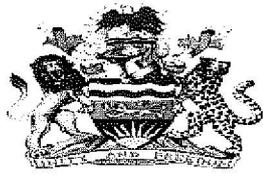


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**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL REVIEW CASE NO. 8 OF 2021**

BETWEEN:

HENRY KAJANI BANDA.....APPLICANT

-and-

THE STATE.....RESPONDENTS

CORAM: THE HONOURABLE JUSTICE J. M. CHIRWA

Mr. H. Kajani Banda, of Counsel for the Applicant

Mr. Msume , Senior State Advocate for the Respondents

Ms. Mthunzi, Court Reporter.

R. Chanonga, Official Court Interpreter.

M. Chirwa, Court Marshall

JUDGMENT

1. Introduction:-

This is an application by **Henry Kajani Banda** (“the Applicant”) for the review of the decision of the first Grade Magistrate’s Court sitting at Chisenjere being Criminal Case Number 60 of 2021 made on the 15th day of June, 2021 dismissing the Applicant’s application for the release of the findings of the investigations by the Professional Standards Unit of the Malawi Police Service (“the PSU”) and/or for an order granting the said application. The application is supported by an Affidavit *alias* sworn statement of the Applicant himself and Skeleton Arguments.

The application is opposed by the State (“the Respondents”) and submissions in response to the application have been filed for the purpose.

The Applicant has replied to the Respondents’ submissions with submissions by way of reply.

2. Background:-

The Applicant stands charged in the lower court with the following offences:

First count;

“Failing to wear a mask in Public contrary to Section 20(3) of the Public Health Act.

The particulars of the offence being that the Applicant on 15th February, 2021 at Pamango Area (Kameza) Roundabout) in the district of Blantyre was found without wearing a mask contravening the Public Health Act.”

And second count;

“Conduct likely to cause breach of peace, contrary to Section 181 of the Penal Code.

The particulars of the offence are that the Applicant [at] the same time and place as stated in the first count, conducted himself in a manner to annoy Inspector Kondwani Mkandawire.”

During the hearing of the case in the lower court on the 5th day of May, 2021, the Applicant made an application for the following orders:

- (a) That the PSU through the Inspector General of Police be compelled to release and make available the findings of the investigations conducted by the said PSU in respect of the matter;
- (b) That the investigators who conducted the said investigations be summoned and compelled to appear as witnesses before the lower court on the hearing of the matter; and
- (c) That on the date of actual hearing, subject to the directions which the lower court may deem fit in the circumstances, all the State witnesses be cross-examined at the *locus in quo*.

By its Ruling delivered on the 15th day of June, 2021, the lower court declined to grant the Applicant the first and the second prayers. It was the holding of the said court that if it proceeded to grant the said orders it might be akin to be resolving civil and criminal matters. It was the further holding of the said court that if the findings are adverse to the State then the criminal matter would fall out. It was still further the holding of the said court that the Applicant should thus wait for the prosecution to parade its witnesses and close its case and that the PSU findings may be released depending on whether the court acquits him after complying with the dictates of Section 254 of the Criminal Procedure and Evidence Code ('the CP&EC') or after finding him guilty of the offences charged in line with Sections 139 and 140 of the CP & EC. It was still further the holding of the said court that the issue was not all about the public consumption of the PSU report but the State being compromised. The said court however, proceeded to allow the third ground of the application. The said court surmised that the conclusion of the proceedings was the only way to clear or implicate the Applicant of the two counts herein.

3. Issues for the determination:-

The issues for determination by this Court are as follows;

- (a) Whether or not the High Court has jurisdiction to review the decisions made by the lower court in this matter;
- (b) Whether or not the lower court erred in law by declining to grant the order for the release of the findings of the investigations made by the PSU; and
- (c) Whether or not the lower court erred in law by declining to grant the order to compel the investigators to appear before the said court as compellable witnesses.

4. Determination:-

(a) Whether or not this Court has jurisdiction to review the decisions made by the lower court in this matter.

It is the case of the Applicant that the Constitution and the relevant statutes of Malawi, such as the Courts Act and the CP & EC, accord him the right to make an application to the High Court to review the proceedings before a subordinate court at any stage of such proceedings. The Applicant has in his Skeleton Arguments cited the provisions of Section 42 (2) (f) (viii) of the Constitution and Sections 25 and 26 of the Courts Act.

The Respondents while concurring with the Applicant that the High Court has jurisdiction to review decisions of the subordinate courts under Section 26 of the Courts Act and Section 362 (1) of the CP & EC, contend that the reviewing proceedings in the present matter entails that this Court will be exercising the same powers as the powers of an appellate court, that is to say, deciding whether the order made by the court below was justified and that if this Court decides that the order was not appropriate, the court may have powers to reverse the order which is the same as appealing against the order of the lower court. It is the further contention of the Respondents that the law provides that an aggrieved person only appeals on final orders of the court below: vide Section 346 of the CP & EC. The Respondents have relied on the cases of **Chihana v Republic**, MSCA Criminal Appeal Case No. 7 of 1992 and **Republic v Abdul Rehman Abdullah**, Criminal Case No. 4 of 2017 where, so they contend, the courts held that no appeal lies from the interlocutory orders of a subordinate court.

There is no doubt in this Court's mind that the decisions made by the subordinate courts in interlocutory proceedings can be reviewed by the High Court in order to rectify any irregularity which has occurred in the process. There is both statutory and case law authority in support of this position. As for the statutory authority, the starting point could be Section 42 (2) (f) (viii) of the Constitution which gives an accused person a right to have recourse by way of appeal or review to a higher court than the court of first instance. The other statutory provisions are Sections 25 and 26 of the Courts Act and 362 of the CP&EC. This Court proceeds to reproduce the provisions of the CP&EC as follows:

First, Section 25 of the Courts Act:

"The High Court shall exercise 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."

Secondly, Section 26(1) of the Courts Act:

“(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 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.”

Thirdly, Section 362 (1) of the CP & EC:

“In the case of a proceeding in a subordinate Court the record of which has been called for or which has been forwarded under Section 361, or which otherwise comes to its knowledge, the High Court, by way of review, may exercise the same powers as are conferred upon it on appeal by Section 353 (2) (a), (b) and (c), and 356.”

The powers conferred upon the High Court by Section 26 (1) of the Penal Code to call for any record of the criminal proceedings before any subordinate court are similar to those conferred upon the said Court by Section 360 of the CP & EC. The wording of Section 360 of the CP&EC is as follows:

“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 subordinate court.”

And as regards case law authorities, there are such cases as: **Francis Kapu and 7 others v The State**, Miscellaneous Criminal Review Case No. 5 of 2021 (unreported), **The Republic v Jan Wim Akster** Miscellaneous Criminal Case No. 6 of 2021 (unreported), **Republic v Ndalakwanji Victor (Female)**, Criminal Review Case No. 2 of 2020 (Zomba District Registry) and **The Republic v Ndau** 7 MLR77. The last two cases have been cited by the Applicant in his submissions by way of reply to the Respondent’s response as cases where the High Court has exercised the powers of review. This Court proceeds to reproduce below the views expressed by the learned judges when exercising the powers of review in the said cases.

First, in the **Ndalakwanji Victor** case (*supra*), Ntaba J had this to say:

“Firstly in dealing with this matter, I would like to highlight a fundamental principle of Malawian Criminal law which is provided for in section 3 of the Code which states that the principle that substantial justice should be done without undue regard for technicality shall at all times be adhered to in applying this Code. It is that which this Court is very much concerned with when examining this review. Further it also recognised that where a finding by a lower court results in a failure of justice, such a failure must be rectified. The rectification should be done at the earliest possible time.

Secondly, this Court is mindful of the Constitutional tenets of a right to a fair trial as espoused in section 42. This Court is ever so mindful that throughout the process of trial, an accused person’s rights should be considered and upheld where legally required. Consequently, it is acknowledged in meting out justice, it should do so by taking into account fairness and equity in all aspects. Therefore, this Court is cognizant that a reviewing Court should examine all issues on the Court-record, that is, a re-examination of the entire trial process”.

And secondly, in the case of **Republic v Ndau** (*supra*) **Kamwambe** J also had this to say:

“If I were to adopt the above cited case I would immediately say I have no jurisdiction as the lower Court never pronounced any final order. But if I am to consider the regularity of the proceedings so far, I chose to assume jurisdiction, I think rightly so, so that I ably direct the lower Court how to proceed. I am aware that the application was not made under Section 26 of the Court’s Act but I think it is worth referring to it. In my view I think I would not be wrong to extend jurisdiction to this case on the auspices of Section 26 of the Court’s Act. Note that these powers are exercisable at any stage of criminal proceedings. Review entails judicial re-examination of a lower Court’s record. Since this case is not concluded I have to consider any order made by the lower Court and the regularity of proceedings in the subordinate Court.”

From the several authorities above cited, it would thus be quite safe to make a finding that this Court has jurisdiction to review decisions of the lower court albeit the same were made in interlocutory proceedings in the said court.

This Court however, finds it pertinent to comment on the provisions of Section 346 of the CP & EC relied upon by the Respondents in their contention that an aggrieved party appeals only on the final orders of the lower court. It is evident from the wording of the section that it is only against a final judgment or order or sentence made by a subordinate court that a party can appeal to the High Court. It would thus be erroneous to construe the provision as restricting a party's right to apply for a review of an interlocutory order if aggrieved by the same. And the purview of Section 362 (1) of the CP & EC is to allow the High Court when exercising the powers of review to exercise the same powers as are conferred upon it on appeal by Sections 353(2) (a), (b) and (c), and 356.

It may be worthy of note that the purpose of the review as per Section 360 of the CP & EC is for the court to satisfy 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. These powers of the High Court, in this Court's view, ought be exercised at any stage of the proceedings in the subordinate court. The Courts in the cases of **Chihana** and **Abdul Rehman Abdullah**, as properly submitted by the Applicant, thus rightly dismissed the proceedings because the High Court has no power to hear appeals on interlocutory decisions made by the subordinate courts.

(b) Whether the subordinate court erred in law by declining to grant the order for the release of the findings of the investigations made by the PSU.

It is here the case of the Applicant that the findings of the PSU are relevant for the just determination of the matter before the subordinate Court because they address the nature of the arrest for the alleged crime and therefore, in the principle of fair trial those findings ought to be made available to him as an accused person well before the commencement of the trial. The Applicant here relies on Section 42(2) (f) of the Constitution.

It is on the other hand the case of the Respondents that the Applicant has failed to demonstrate the relevance of the findings of the PSU to the charge he is facing. It is the further case of the Respondents that as much as the Applicant has a right to be given disclosures, the disclosures must be relevant to the matter at hand. In the case at hand, the Respondents contend that they fail to see how the alleged assault is relevant to the charge the Applicant is answering considering that the alleged assault occurred after his arrest.

It is the further case of the Respondents that if this Court were to allow the present application, it would tantamount to resolving both a civil action and a criminal action. It is still the further case of the Respondents that if the Applicant is seeking a remedy for the assault then it would be better for him to commence a separate action.

It is thus the prayer of the Respondents that the Applicant's application be dismissed and that this Court do make an order that the proceedings in the subordinate court do proceed.

In reply, the Applicant submits that his arrest took place at a residence and that the same is a statutory defence provided under the Rules. It is the further submission of the Applicant that the sequence of events of his arrest and assault were such that the arrest followed the assault.

The right to a fair trial is provided for in Section 42 (2) (f) of the Constitution. The provision as is material for the determination of this issue is worded as follows:

“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-

(f) as an accused person, to a fair, which shall include the right –

(ii) to be informed with sufficient particularity the charges;

(iv) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;

In the absence any evidence being proffered by the Respondents to counteract the Applicant's assertion that his arrest by the police officers was made after being assaulted by them, this Court would thus be inclined to hold that the findings of the PSU would be relevant for the purposes of the trial before the subordinate court. It is, however, worth mentioning here that the relevance of the said findings is only in so far as the second count of “conduct likely to cause breach of peace contrary to Section 181 of the Penal Code” is concerned and not the first count.

The Respondents' contention that allowing the disclosure of the said findings would be resolving both a civil action and a criminal action cannot however, go without comment. With due respect to the Respondents, this Court finds the said contention misplaced on the grounds that there are currently no civil proceedings pending determination by the lower court, the only proceedings pending determination by the said court being the criminal proceedings under Criminal Case No. 60 of 2021.

In the premises, it is the finding of this Court that the lower court erred in law in declining to grant the order for the release of the findings of the PSU.

(c) Whether or not the lower Court erred in law by declining to grant the Applicant the order to compel the investigators to appear before the said court as compellable witnesses.

It is here the case of the Applicant that the right to a fair trial and the right to a lawful and procedural administrative action cannot be derogated from. It is the further case of the Applicant that the right to a fair trial entails that every person charged with a criminal offence has the following rights:-

- (a) be tried by an independent and impartial court;
- (b) be presumed innocent until proven guilty by such an independent and impartial court;
- (c) be told as early as possible what he or she is accused of and the evidence against him or her;
- (d) be given and access all relevant information;
- (e) have adequate time and facilities to prepare for his or her case;
- (f) adduce and challenge evidence by, inter alia, examining or having examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf with possession of relevant admissible evidence under the same conditions as witnesses against him or her; and
- (g) not to be a compellable witness against himself or herself.

The Applicant has cited the cases of Larry Scott Parker and Steven Joseph Stark and 6 Others v Joseph Miller QC for Anti-Corruption Commission of Western Australia, Robert Faulker, Commissioner of Police and Anti-Corruption Commission, Case No. Civil 2345 of 1997; Huvig v France 11105/84 (1990) ECH R9 at p. 20 and The State v The Director of Public Prosecutions and Others, ex-parte Hon. Dr. Cassim Chilumpha, SC, Constitutional Case No. 5 of 2006 (unreported) in support of his case.

The Respondents have, however, made no submissions, whether written or oral, on this issue. As a result this Court has only the Applicant's submissions upon which to base its determination.

It cannot be in dispute that the Applicant as an accused person in the lower court has a right to a fair trial. As already stated in this judgment, this right is a right conferred by Section 42 (2) (f) of the Constitution. And this Court having earlier in this judgment made a finding that the Applicant is entitled to the release of the findings of the investigations made by the PSU it would thus follow that the

officers who carried out the said investigations as authors of the report containing the said findings ought to be compellable witnesses in the court proceedings where the said findings are relevant or material.

The High Court has powers under Section 195 of the CP & EC to summon a person who is in possession of any evidence material to a criminal proceeding. The section is worded as follows:

“If it is made to appear that evidence material to say criminal cause or matter before, or pending before, any court can be given by, or is in possession of, any person, it shall be lawful for a police officer of the rank of Assistant Superintendent or above, or the Registrar of the High Court, or the magistrate having cognizance of such cause or matter, to issue a summons to such person requiring him to bring and produce to such court for the purpose of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons.”

The High Court has further powers under Section 201 of the CP & EC to summon any material witness. The section is worded as follows:

“(1) Subject to subsection (2), any Court may, of its own motion at any stage of any inquiry, trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined as a witness or recall and re-examine any such person if his evidence appears essential to the just decision of the case.

(2) The prosecution or the accused or his legal practitioner shall have the right to cross-examine such person, and the court shall adjourn the case for such time, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of such a person as witness;

(3) In exercising the power conferred on it under Sub-Section (1), the Court, shall be governed by the interests of justice and, in particular, shall avoid taking over the prosecution of the case.”

Now, given that the presence of the investigators as witnesses before the lower court would both be in the interests of justice and of conducting a fair trial, it would thus follow that by declining to grant the Applicant the order to compel the

investigators to appear before the lower court as compellable witnesses the lower court had thus erred in law.

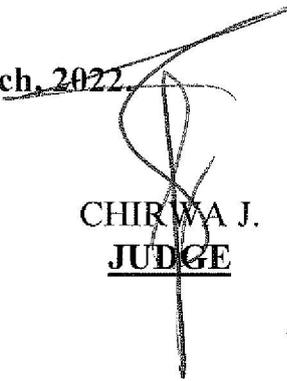
7. Conclusion:-

This Court having thus exercised the powers of review vested upon it and found that the lower had erred in law in declining to grant the orders sought by the Applicant now proceeds to reverse the lower court's findings, as aforesaid, and makes the following orders:

- (a) that the Report of the findings of the Malawi Police Professional Standards Unit be released to the Applicant forthwith;
- (b) that the investigators who made the said findings be compelled to appear before the lower court as witnesses in the case before the said court.

It is further so ordered.

Dated this Eight day of March, 2022.



CHIRWA J.
JUDGE