



REPUBLIC OF MALAWI

IN THE CHIEF RESIDENT MAGISTRATE COURT SITTING AT BLANTYRE

CRIMINAL CASE NUMBER 220 of 2022

REPUBLIC

VS.

MARTHA CHIZUMA

Coram: H/W (Mrs.) Jean Rosemary Kayira Chief Resident Magistrate (S)

Mr. Fryson Chodzi 1st Complainant (Represented)

Mr. Lameck Rashid Nembo 2nd Complainant (Represented)

Counsel Michael Goba Chipeta of Counsel for the Complainants

Mrs. Patricia Chiphwanya Court Clerk and Official Interpreter

RULING ON SECTION 83 (1) (a) OF THE CRIMINAL PROCEDURE AND EVIDENCE CODE

INTRODUCTION

The complainants are seeking the indulgence of this court to issue a summons under Section 84(1) of the Criminal Procedure and Evidence Code compelling Ms. Martha Chizuma to appear in court and answer three charges as stipulated in the chargesheet before this court. This prayer is on the understanding that the court first determines if the complaint is sufficient under Section 83 (1)(a) of the Criminal Procedure and Evidence Code. The complainants filed three charges against Ms. Martha Chizuma which are that Ms. Martha Chizuma directly revealed official information to an unauthorized person which is contrary to regulation 4 (a) of the Corrupt Practices (Oath of Secrecy) Regulations; making use of speech capable of prejudicing a person against a party to judicial proceedings contrary to Section 113 (1)(d) of the Penal Code; and making use of speech calculated to lower the authority of a person before whom a judicial proceeding had contrary to Section 113 (1)(d) of the Penal Code.

The present application is supported by two Affidavits sworn by Mr. Fryson Chodzi and Mr. Lameck Rashid Nembo. The Affidavit of Chodzi has Exhibit FC 1 which is a recorded audio conversation and a video of the State President's National Address. He went further to attach Exhibit FC 2 which is a communication between Forum for National Development and the Judiciary on allegation of corruption of two Judges; the two Facebook posts by Onjezani Kenani; the response by the Honorable the Registrar of the High Court and Supreme Court of Appeal to corruption allegations against members of the Judiciary; communication on commitment towards corruption fight in Malawi; and communication to His Excellency the President of the Republic of Malawi on compromised fight against corruption in Malawi.

observations relating to Counsel Michael Goba Chipeta in terms of prosecuting the present criminal matter.

PROSECUTORIAL DISCRETION

This court notes that the two complainants here were represented by Counsel Michael Goba Chipeta when they appeared. Actually the court documents which they filed and adopted during their examination under oath were filed by the said Counsel. First and foremost, I am aware that Counsel Goba Chipeta renewed his practicing licence as of 21st February, 2022 according to the list of legal practitioners who have renewed their licences for the 2022-2023 year. He therefore has audience before this court according to Section 23 of the Legal Education and Legal Practitioners Act. For the avoidance of doubt the said section provides as follows:

“(1) Every legal practitioner shall on admission pay the admission fee prescribed in the Second Schedule and shall, in the year of his admission, and annually thereafter, take out an annual licence for which he shall pay the fee specified in the Second Schedule. (2) Every licence to practice shall expire on the 31st January next following the date of its issue, and every legal practitioner desirous of practicing thereafter shall renew his licence. Page 5 of 9 (3) No legal practitioner shall be entitled to practice unless he has had issued to him a current licence to practice.”

Despite having the legal standing, it must be made abundantly clear that when the court examined these complainants, Counsel was not involved. This decision was because this court had a strong conviction that the said Counsel did not have the power to conduct private prosecution without complying with the legally stipulated procedures. My departure point is Section 5 of the Constitution which sets the Constitution as the supreme law of the land. As a deliberate way of ensuring that there is separation of powers, Sections 7, 8 and 9 of the Constitution created three branches of government namely: Executive, Legislature and Judiciary respectively. It is proper to note that each of these three branches is differently mandated and that is for a purpose.

In section 99 of the Constitution states as follows:

“(1) There shall be a Director of Public Prosecutions, whose office shall be a public office. (2) **The Director of Public Prosecutions shall have power in any criminal case in which he or she considers it desirable so to do— (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person; (b) to take over and continue any criminal proceedings which have been instituted or undertaken by any other person or authority; and (c) subject to subsection (5) to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or herself or any other person or authority. (3) Subject to section 101 (2), the powers conferred on the Director of Public Prosecutions by subsection (2) (b) and (c) shall be vested in him or her to the exclusion of any other person or authority and whenever exercised, reasons for the exercise shall be provided to the Legal Affairs Committee of the National Assembly within ten days: Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.**”

This court is mindful that the exclusive prosecutorial power of the Director of Public Prosecutions (*hereinafter referred to as DPP*) can be delegated under Section 100 (1) of the Constitution which states

to use the back door to prosecute a matter by way of filing a complaint under section 83(1)(a) of the CP & EC having failed to apply and obtain consent to prosecute from the DPP.

Counsel may argue as he did before Senior Resident Magistrate Msekandiana under Miscellaneous Criminal Application Number 160 of 2022 between the Republic and Martha Chizuma¹ that this court can grant him the power to prosecute under Section 82 (1) of the Criminal Procedure and Evidence Code. Under that provision any magistrate inquiring into or trying any case **may** permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in his behalf shall be entitled to do without permission.

In the case of *Republic vs. Dingani Ndhlovu* Criminal Appeal No. 80 of 2016 Honourable Justice Dr. Kachale discussed Section 82 (1) of the Criminal Procedure and Evidence Code extensively by considering the case of *Richard Kimani & S.M. Maina v Nathan Kahara* Criminal Review Case Number 10 of 1983 where Chief Justice A.A. Simpson gave the following directions:

“The right of private prosecution is a constitutional safeguard. In the words of Lord Diplock in the *Gouriet* case (*Supra*) at p. 498; it is useful constitutional safeguard against capricious, corrupt or biased failure or refusal of police forces and the Office of Director of Public Prosecutions to prosecute offenders against the criminal law... when an application is made under section 88 to conduct a prosecution, we think that the magistrate should question the applicant to ascertain whether a report has been made to the Attorney General or to the police and with what result. If no such report has been made, the magistrate may either adjourn the matter to enable a report to be made and to await a decision thereon or in a simple case of trespass or assault proceed to grant permission and notify the police of the fact. The magistrate should ask himself, how is the complainant involved? What is his *locus standi*? Has he personally suffered injury or damage or is he motivated by malice, or political consideration.”

The Judge dismissed the appeal in the *Ndhlovu* matter on the basis that it lacked merit and that there were public institutions empowered to conduct prosecutions with an elaborate accountability mechanism for discharging that onerous responsibility.

It is true that Section 82 (1) of the Criminal Procedure and Evidence Code is discretionally. The reason is simple. There has to be genuine reasons why prosecution commences with the court and not through the office of the DPP. Some of the reasons may be that the one who offended is either the DPP or anyone working under the delegated authority of the DPP such as those in the Malawi Police Service or any other institution that conducts prosecution. It is also possible that courts can grant such prayer where it is established that the complainant made efforts to have the DPP commence the matter but there is either reluctance or resistance or blatant disregard of a genuine complaint. It is at that point that the court would be justified to discharge the noble task of granting permission to prosecute to a private prosecutor. In this case, all those reasons are non-existent. The attachment to the Affidavits by the two complainants relate to the engagements that Forum for National Development made with His Excellency the President, the Malawi Judiciary and the Office of the Ombudsman. There is no correspondence or engagement with the office of the DPP. In this court's considered view therefore, it would be unreasonable to assume that the Directorate of Public Prosecutions has not assisted the two complainants herein. I am therefore very reluctant to grant prosecutorial powers to Counsel Chipeta under Section 82 (1) of the Criminal Procedure and Evidence Code.

¹I will revert to this case shortly.

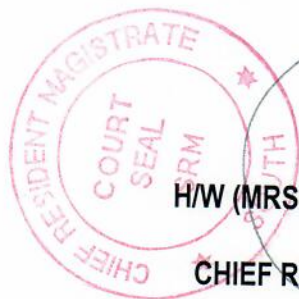
Procedure and Evidence Code. In that case, the learned Magistrate faulted Counsel for failing to present complainants in court for examination as required under Section 83 (3) of the Criminal Procedure and Evidence Code. She then went further to dismiss the application. Subsequent to that, Counsel Chipeta then brought the present application in this court.

Section 110 (1) of the Constitution establishes Magistrate courts as subordinate to the High Court and these are manned by professional and lay Magistrates. The Courts Act in Section 33 establish courts of Resident Magistrates and they have similar jurisdiction. In terms of criminal matters, Section 58 of the Courts Act is clear that the jurisdiction emanates from Section 13 of the Criminal Procedure and Evidence Code. The said provision does not distinguish between the Senior Resident Magistrate and Chief Resident Magistrate. Actually, it remains a fact that both are subordinate courts and therefore their decisions are amenable for appeal to the High Court of Malawi. In short this court is of similar jurisdiction to that of the Senior Resident Magistrate. In other words, the application here is not by way of appeal but re-commencement. This is where the principle of *res judicata* applies. This principle of *res judicata* has now been codified in Section 44 of the Courts Act. In that provision a subordinate court may dismiss or stay proceedings where the matter in question is *res judicata* between the parties or where by reason of multiplicity of proceedings in any courts the proceedings ought not to be continued. This court finds that the matter here is precluded from recommencing because it is *res judicata*. By virtue of the preceding finding, this court holds that the complaint herein is an abuse of the court process. In order to prevent the improper use of this court, the application is dismissed for being *res judicata* and an abuse of the court process.

This being the case, I will not determine the complaint because it is not necessary in my considered view.

This order can be appealed to the High Court within 21 days from today.

PRONOUNCED IN OPEN COURT ON 1st MARCH, 2022@08:30



H/W (MRS.) JEAN ROSEMARY KAYIRA

CHIEF RESIDENT MAGISTRATE (S)