IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL CASE NO. 8 OF 2023

THE REPUBLIC

VS

KINGSLEY KAPANGA

CORAM: HON. JUSTICE E. CHANZA

Mr. Maele, Counsel for the State

Mr Chipeta, Counsel for the Respondent

Ms. F. Ngoma, Court Clerk

Chanza J. **Ruling on Preliminary Objection**

Background

1. This is a ruling on a preliminary objection by the accused person who stands charged with the offence of Theft by servant contrary to Section 286 as read with Section 278 of the Penal Code; Money Laundering contrary to Section 331 A (1) of the Penal Code and three counts of interfering with data contrary to Section 84(4) of the Electronic Transactions and Cyber Security Act.

2. The accused person is challenging the three counts under the Electronic Transactions and Cyber Security Act ("the Act") on the ground that these three counts have been formulated and included in the charge sheet without adherence to the provisions of Section 96(1) of the said Act. He submits that the failure to comply with this provision renders the three counts unlawful, unconstitutional and invalid. He therefore prays that the three counts should be struck out from the charge sheet.

3. Section 96(1) of the Act provides that *"any person affected by a criminal offence defined under this Act may lodge a complaint to the Authority which shall direct a cyber inspector to assess the relevance of the complaint and, if the complaint is considered relevant and reasonable, proceed with investigations".*

4. The State objects to this prayer on the grounds that the provisions of Section 96(1) of the Act are not mandatory, and they do not restrict the commencement of criminal proceedings without compliance with the provision. Counsel for the State submits that the use of the word *"may"* in Section 96(1) of the Act is a clear indication that the provision is not a mandatory provision. He therefore prays that the objection by the accused person be dismissed.

5. In response to the State's argument on the non-mandatory nature of Section 96(1) of the Act, Counsel for the accused person argues that although the word *"may"* grants discretion to the complainant to initiate the process, the Act's structure suggests that a formal complaint and subsequent investigation by a cyber inspector is an essential procedural step before charges can properly be laid. He therefore submits that the absence of a complaint being lodged under the section and the prescribed procedure being followed undermines the validity of the charges under the Act.

6. He further argues that while the word *"may"* ordinarily implies discretion, a statute must be read as a whole, and the provisions should be interpreted in the context of the Act's purpose and procedural framework. He avers that the mandatory nature of the subsequent steps after a complaint is lodged with the Authority under Section 96(1) of the Act, the involvement of the cyber inspector is not optional. He therefore submits that this is an indication that the legislature intended a structured procedure to handle cyber offences under the Act so that the lodging of a complaint is the trigger for a formal, specialised investigation conducted by a qualified cyber inspector.

7. Counsel therefore urges this Court to take a purposive approach to statutory interpretation in interpreting Section 96(1) of the Act by looking at what Parliament intended when it enacted the Act in general, and Section 96(1) of the Act in particular. He submits that given the importance placed on the cyber inspector's certification, and explicitly mentioning that upon receiving a complaint the Authority shall direct an assessment by the cyber inspector and the potential investigation; it must necessarily follow that the legislature intended this pathway to be followed as a matter of course.

Legal Issue for Determination

8. The legal issue for determination by this Court is whether the three counts levelled against the accused person of interfering with data contrary to Section 84(4) of the Act

(being count numbers 3, 4 and 5) should be struck out from the charge sheet for being unlawful, unconstitutional and invalid.

Court's Determination of the issue

9. To answer this question, I will have to first answer the following questions:
    a. whether Section 96(1) of the Act prescribes any conditions that must be complied with before the charges under the Act can be formulated and included in the charge sheet; and
    b. what effect if any, would such non-compliance with such conditions on charges brought against an accused person under the Act.

10. In the wider scheme, the Act makes provision for electronic transactions; for the establishment of the functions of the Malawi Computer Emergency Response Team; for criminalising offences related to computer systems and information communication technologies; for investigation; collection and use of electronic evidence; and for matters connected therewith and incidental thereto.

11. The purpose of the Act among other things are: to set up a responsive information and communication technology legal framework that facilitate competition; for the development of information and communication technology; and the participation of Malawi in the information age and technology (Section 3 of the Act). To achieve this, the Act gives legal effect to electronic writing through the recognition of documents rendered or made available in the electronic form, its accessibility and capability of being retained for subsequent reference (Section 7 of the Act). Thus the Act touches and enables different aspects of social interactions between persons through electronic means, and out of which interactions there exist a potential for both civil or criminal liability to arise.

12. However proprietary rights in the information and communication technology, and any data hosted on these technologies belong to the individuals that own them, and can be used by them in any legal proceedings whenever it becomes necessary within the existing legal framework. While persons may access the data and electronic documents that are within their information and communication technology platforms, they may not have access to information which is on third party electronic platforms with whom they may have interactions with electronically. These third party platforms may contain information that may be useful in legal proceedings in which they are involved in.

13. Thus the Act among other things, provides for various role players and their attendant obligations, functions and powers that can enable persons affected by the social interactions conducted through electronic platforms have accessibility to the information stored in the information and communication technology platforms belonging to third parties whenever it becomes necessary in any litigation proceedings in which they are involved in. One such role player is the cyber inspector who is appointed by the Malawi Communications Regulatory Authority ("Authority") under Section 69 of the Act. The powers and functions of the cyber inspector are specifically stipulated in Section 70 of the Act. In terms of Section 70 (1) (a) and (b) the cyber inspector has specific investigative powers in respect of specified website databases, and activities of suppliers of encryption and encryption service providers without the need for a court order. However, the investigative activities under Section 70(1) (c) can only be done by the cyber inspector under the authority of a court order. In addition to these, the cyber inspector has under Section 96(1) of the Act the responsibility of assessing complaints lodged with the Authority, and carrying out investigations in respect of the complaints lodged if the complaint is considered to be relevant and reasonable.

14. It is clear that Section 96(1) of the Act provides for three processes which have to take place in a sequential order, with each process in a way triggering the subsequent process. The first in the sequence is the lodging of a complaint with the Authority by any person affected by a criminal offence. In this respect it is our view that a person affected by a criminal offence can either be a complainant or victim of a criminal offence, or a person suspected to have committed a criminal offence or indeed a person who has been affected in any way by a criminal offence under the Act.

15. The second process which is triggered by the lodging of the complaint to the Authority is the assessment of the complaint lodged. This assessment is carried out so as to determine its relevance and reasonableness. The assessment is carried out by a cyber inspector having been directed by the Authority. In terms of Section 96(1) of the Act, once the Authority receives a complaint, it is obligated to direct the cyber inspector to assess the same.

16. The third one is the investigation process. This process is only triggered by the outcome of the assessment carried out by the cyber inspector in respect of the complaint lodged. In terms of Section 96(1) of the Act, the investigations are proceeded with, if the outcome of the assessment is that the complaint is considered to be relevant and reasonable. In this instance the cyber inspector has to resort to Section 70 of the Act in order to ascertain how s/he will proceed with the investigations depending on the nature of the investigations that need to be carried out; and in terms of Section 96(3) of the Act the Authority is obligated to keep the complaining organisation informed of the investigations.

17. The Act is however silent on what will happen if after the assessment by the cyber inspector, the complaint filed in the first process is found to be irrelevant and unreasonable. One can only infer on what should happen in such a situation from what the Act says will happen if the complaint is found to be relevant and reasonable. It can

therefore be safely concluded that no investigations will be carried out in such situation. However, in view of the expectations that the obligation put on the Authority under Section 96(3) of the Act creates on the complaining organisation, the Authority in such a situation would be expected to inform the complaining organisation of the fact that no investigations will be carried out due to the fact that on assessment the complaint lodged was found to be irrelevant and unreasonable.

18. If one is to follow Counsel for the defence's suggested purposive approach to statutory interpretation in interpreting the Act in general, and Section 96(1) of the Act in particular, and then proceed to apply his reasoning in reaching the conclusion as regards the legislature's intentions, and the consequences that would likely follow in the event of noncompliance with Section 96(1), the resultant outcome would be that as the complaint lodged is being thrown out for irrelevance and unreasonableness; and no investigations in the matter being undertaken, so will the criminal offence which prompted the affected person to lodge the complaint in the first place not be pursued. This will also mean that through the assessment of a complaint lodged under Section 96(1) of the Act, the cyber inspector will indirectly be making a decision of whether a criminal charge can be brought against a suspect or not. This is a prosecutorial decision which under our laws is preserved for those that have specifically endowed with prosecutorial powers under the Constitution or Statute.

19. Did the legislature intend to give the cyber inspector this prosecutorial decision making power over the offences under the Act when it enacted Section 96 (1) of the Act, or indeed in the wider context of the Act? This Court does not think so. If the legislature intended this to be the case, it would have specifically endowed this decision making power just as it has done in respect of other offences such as those under the Financial Crimes Act. Such powers cannot be inferred from a purposive interpretation of a provision providing for a process such as the one under Section 96(1) of the Act.

20. Even if it were to be held that the purposive interpretation of Section 96(1) of the Act does not lead to giving the cyber inspector the prosecutorial decision making power as alluded to above, a close look at the wording of Section 96(1) of the Act shows that the word *"shall"* has been used in such a way as to restrict its effect to the action that is required of the Authority when it receives a complaint from a person affected by a criminal offence. It is the action to be taken by the Authority after receiving the complaint that is being made mandatory in the provisions and nothing else. It does not in any way take away the option given to the person affected by a criminal offence to lodge a complaint or not to do so.

21. This Court also notes that the assessment of the complaint is also followed by a non-mandatory process of investigations. The word "non-mandatory" in reference to the investigation that comes after the assessment in this context is being used in the sense that in terms of the provision, the investigations are proceeded with in the instance that the complaint filed is found to be relevant and reasonable. The investigation does not have to be proceeded with if the complaint is considered irrelevant and unreasonable. If the intention of the legislature was that the process in Section 96(1) of the Act is to be the only pathway to formulating charges and including them in the charge sheet, investigations in the complaint lodge would also have been made to be as a matter of course in respect of any complaint lodge under the Act without needing the complaint to be assessed first before proceeding with the investigations.

22. I therefore do not agree with Counsel for the Defence's argument that the subsequent use of the mandatory word *"shall"* was meant to take away the optional nature of the word *"may"* when it comes to the lodging of a complaint under this provision. Just as the legislature chose to use the word *"shall"* in respect of the action to be taken by the Authority once in receipt of the complaint; I do not see why the legislature could not do the same with regards to the action of lodging a complaint by an affected person.

23. If the Legislature intended that the investigations by the cyber inspector should be the only pathway to the formulation of charges and commencement of criminal proceedings in respect of the offences under the Act, it would have specifically provided for the same somewhere within the Act, or indeed it would have specifically made the lodging of the offence and the carrying out of the investigations under Section 96(1) of the Act mandatory.

24. Furthermore, the phrase *"any person affected by a criminal offence defined by this Act… "* which comes at the beginning of the provision, but before the permissive action phrase *"may lodge a complaint",* presupposes that someone would have already formed a suspicion that a criminal offence define under the Act has been committed. This suspicion can be formed based on other pieces of information other than information emanating from the investigations that may be carried out by the cyber inspector under the Act. Such information may be from electronic sources which may already be in the possession of the affected person or indeed otherwise; and which may have already been made available to the police at the point of reporting the incident to them. The processes in Section 96(1) of the Act cannot therefore be the only basis for formulating and including a charge in a charge sheet for offences under the Act; and indeed for commencement of criminal proceedings.

25. A cursory reading of the offences created under the Act shows that not all of them would require investigations to be carried out by the cyber inspector. In some cases, information may already be in the custody of the affected person, or indeed readily available in the public domain for use by either those prosecuting offences, or defending themselves against criminal charges under the Act. This would therefore negate the need for the involvement of the cyber inspector. The involvement of the cyber inspector may however be necessary where the needed information is in the electronic

platforms/technology of third parties who may not voluntarily surrender the same to the affected person.

26. This Court therefore finds that Section 96(1) of the Act does not in any prescribe any conditions that must be complied with if any person is to be charged with any of the offences under the Act. The lodging of a complaint under Section 96(1) is not mandatory and this provision is not the only pathway for the formulation and charging of offences under the Act.

27. I further find that non-compliance with Section 96(1) per se does not render any charge brought against an accused person in respect of an offence under the Act unlawful, unconstitutional or invalid and accordingly dismiss the objection raised by the defence in its entirety.

28. Accordingly, I find that the three counts of interfering with data contrary to Section 84(4) of the Act which are in counts 3, 4 and 5 on the charge sheet are not unlawful, unconstitutional or invalid. Trial of the accused person will therefore proceed with all the charges as contained in the charge sheet.

29. Any party aggrieved by this ruling has the right to appeal against the ruling.

Delivered in open court this 17th day of December 2024

E CHANZA

JUDGE