IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
FINANCIAL CRIMES DIVISION
MISCELLANEOUS CRIMINAL REVIEW NO. 05 OF 2023

BETWEEN

JOSEPH NSABIMANA ..... **APPLICANT**

-AND-

THE STATE ..... **RESPONDENT**

CORAM: **HON. JUSTICE VIOLET PALIKENA-CHIPAO**
Mr. Soko, Counsel for the Applicant
Ms. Jafali, Counsel for the Respondent
Ms. Mkochi, Court Clerk

Chipao, J

RULING

1. The Applicant, Joseph Nsabimana filed a notice of motion for review of the proceedings before the Chief Resident Magistrate Court and for an order of unconditional release. The motion was filed on the authority of section 26(1) of the Courts Act, section 360 of the Criminal Procedure and Evidence Code (CP & EC) and section 42(1) and (f) of the Constitution of Malawi. The Court directed that the matter should come on the 4th of July 2023 at 9:30 with notice to the Respondent.
2. The Claimant served the Respondent with the notice of the motion on 29th June 2023. When the Court convened to hear the application, Counsel for the Respondent sought an adjournment arguing that they have not been able to prepare for a response as they are seeking information from other institutions and that as such, they needed more time to gather enough information and prepare for a response.
3. Counsel for the Applicant strongly objected to the application for adjournment arguing that no good reasons had been advanced in support of the prayer for adjournment for such a simple application which alleged that the Applicant was arrested and had not been brought before a court of law. It was argued that the State had 10 days within which to have formed

an opinion as to why they were keeping the Applicant in detention. Counsel argued that in exercising its discretion on whether to grant the adjournment or not, the Court must consider whether the adjournment would cause injustice to parties. For this, Counsel cited the case of ***Stella Chapinga t/a Matechanga Motel & Enterprises v. National Bank Ltd*** MSCA Civil Appeal No. 29 of 2018.

4. Counsel further argued that with the detention of the Applicant for 10 days, the scales of justice do not even balance and that it would be a perpetuation of unconstitutional state of affairs to grant the adjournment. It was submitted that if the Court is to grant an adjournment, then the court should make an order the release of the Applicant whilst allowing the State time to respond to the application for review. It was the view of Counsel for the Applicant that direction on the issue of jurisdiction would offer guidance as it is becoming common for the lower court to refuse to assume jurisdiction in applications where a suspect has not been charged before the lower court.
5. Counsel argued that the main issue in the matter is the issue of refusal by the CRM to assume jurisdiction in the matter and that the release of the Applicant is an interim relief.
6. In response, Counsel for the Respondent argued that they cannot just respond without sufficient information as this is a matter of national interest. As such Counsel for the Respondent insisted that the matter be adjourned to a later date. According to Counsel for the Respondent, the main issue is the issue of unconditional release and not the issue of review. Counsel for the Respondent argued that the CRM was entitled to refuse to exercise jurisdiction on the matter and when asked whether that meant doing so without giving reasons, she said that she would leave the issue to the court. Considering the issue raised by Counsel for the Applicant that such refusals are becoming a common practice for the lower court, the Court directed the Respondent be allowed to respond to the application for review so as to address the court on the issue of jurisdiction of the lower court to enable this court make directions for future conduct in such matters. It was for this reason that an adjournment was allowed to give more time to the State on the issue of refusal by the lower court to assume jurisdiction.
7. Before delivery of the ruling on application for unconditional release, the Court had notice of proceedings in the Civil Division of the High Court under ***Judicial Review Cause No. 33 of 2023***; ***The State v. Minister of Homeland Security and Chief Immigration Officer ex parte Joseph Nsabimana*** where the Applicant was seeking judicial review. The Applicant was invited through Counsel to address the Court on why he filed two matters in two different courts and whether the ruling in the present matter would not have affected the proceedings in the other court.
8. In responding to the query raised by the Court, Counsel for the Applicant indicated that the matter in **Judicial Review Case No. 33** was narrow dealing only with the question deportation as the Applicant had a valid business permit and that the Applicant never asked for release in that matter as he was aware that he had already raised the issue of release in this court. Counsel argued that there would have been no conflict of decisions as this court was dealing with review of the decision of the magistrate refusing to assume jurisdiction whereas the judicial review proceedings were dealing with the issue of deportation. Counsel argued that the two cases are different and could not be litigated in the same court. Having said that however, Counsel abandoned the application for unconditional release arguing

that it would be academic as the Applicant had already been deported on the same day the application was heard; that was on the 4th of July 2023.

9. Counsel for the Applicant however asked the court to proceed to deal with the application for review of the magistrate's decision despite the fact that the Applicant had already been deported from Malawi. Counsel for the Applicant argued on the authority of the case of ***The State on the application of the Malawi Law Society and Prosecutor Levison Mangani, the Chief Resident Magistrate and the Secretary to the President*** Judicial Review Cause No. 6 of 2023 that where the behaviour complained of is capable of repetition yet may evade review, the court can proceed to assume jurisdiction. This was particularly with reference to the application for review of the decision of the Chief Resident Magistrate refusing to assume jurisdiction and hear an application for unconditional release without giving any reasons for the refusal. The State agreed that the court should proceed to determine the application for review so that the court offers guidance for the future.
10. I have considered the case ***The State on the application of the Malawi Law Society and Prosecutor Levison Mangani, the Chief Resident Magistrate and the Secretary to the President*** Judicial Review Cause No. 6 of 2023 and the case of ***Kathumba and Others v President of Malawi and Others*** Constitutional case number 1 of 2020 (High Court) (unreported). The position is clear. As a general rule, where the subject matter no longer exists, the case is moot or academic such that the case cannot be determined by the Court. To this general is an exception that where the impugned conduct is capable of repetition yet evading review, the court will have the jurisdiction to determine the case.
11. It is important to recall that there were two applications subject of the present proceedings. The first application is that of review of the decision of the CRM refusing to assume jurisdiction without giving reasons for the refusal and the second is the application for the release of the Applicant from custody. At the time of the application, the Applicant had been in custody beyond the prescribed 48 hours without having been brought to court to be told of reasons for his further detention or to be charged. The Applicant was however deported from Malawi on the same day that application for his release was made but before the ruling was delivered. He is in fact outside Malawi following his deportation from Malawi. The issue of unlawful detention which was the basis for the application for unconditional release no longer exists. Determining the application for unconditional release from detention therefore is moot as submitted by the Applicant's Counsel.
12. The second application however is different. Much as the person behind the application is no longer in custody, the subject of the application is the decision of the CRM refusing to assume jurisdiction in the matter without providing any reasons for the same. Counsel for the State agreed that the Court should proceed to determine the application for review although on a different basis namely that it would offer guidance in future. In view of the Applicant's argument that such conduct is capable of repetition the case should be considered to fall within the exception entitling the court power to proceed to determine the application for review.
13. The application by the Applicant is for review of the decision of the CRM refusing to assume jurisdiction to hear the application for unconditional release. It is stated by the Applicant that on 28th June 2023 he filed an application for unconditional release but the

CRM refused to assume jurisdiction and directed that the matter should be filed in the High Court without giving any reasons for such a decision. The application which was filed in the CRM court was exhibited to the present application as JN2. According to the notes on the application, the CRM directed Counsel to file the application in the High Court but did not provide any reasons as to why she could not assume jurisdiction. It is this direction and the absence of reasons for the same which has led to the present application.

14. The Applicant argued that since he filed an application, the CRM was not entitled to simply reject it without giving reasons especially when the court has jurisdiction. He also argued that the pronouncement of this court would implicate on hundreds of other people who have been detained by State law enforcement agencies in areas where the High Court is not accessible by reason of physical distance.

15. The Applicant cited the case of ***Standard Bank Ltd v Tourism Investments Ltd and another MSCA Civil Appeal No. 17 of 2018*** where the Supreme Court of Appeal emphasised on the need for judicial officers to give reasons for their judgments or decisions. The Applicant also argued that if the reason for rejecting to assume jurisdiction was that the accused person had not yet been charged then this was erroneous citing the case of ***Joseph Mwanamveka v Republic, Misc Bail Application No 37 of 2021*** where the court stated as follows;

> *If indeed the learned Chief Resident Magistrate had made such a decision on the alleged basis, this Court would be quick to point out that the decision was wrong in law because under section 42(2)(e) of the Constitution, any and every detained person, is at liberty at any point after his or her arrest to apply to a competent Court for release on bail even within the 48 hours period prescribed under section 42(2)(b) of the Constitution.*

16. Counsel for the Applicant argued there is a practice by subordinate courts to decline jurisdiction where an accused person has not been charged. He said that the basis of this practice is not entirely clear but that it offends the rights of a detained person under section 42 and implicates the right of a detained person to access the courts under sections 41 (2) and (3) and Section 46 (2) and (3) of the Constitution, considering also that access to the High Court is extremely limited as opposed to Magistrates Courts that are more accessible to the majority of Malawians

17. The State in their response argued that the matter before court is a financial crimes matter and that according to section 6A (2) of the Courts Act, the subordinate court does not have jurisdiction. The State argued that although the Magistrate Court did not furnish the applicant with reasons as per requirement of the Constitution, the State would assume that court refused to assume jurisdiction because it believed that it did not have jurisdiction. The State argued that Magistrate Court acted on its own volition by deciding that the application that was brought before it should have been brought before an appropriate court which is the financial crimes division and hence transferred the matter. It was the State's view that Magistrate Court did not error when it directed that the matter be commenced in the Financial Crimes Court.

18. On the issue of giving reasons, the State cited section 43 of the Constitution. The Applicant in reply argued that section 43 of the Constitution cannot be the correct provision but that section 40(1) of the CP & EC might have some relevance. Counsel argued that although the provision appears to apply to decisions after a trial, it should, for the reasons the Supreme Court gave in ***Bazuka Mhango v New Building Society Bank Ltd*** MSCA Civil

Appeal No. 50 of 2015 apply to every other judicial decision that is made by a judicial officer.

19. Counsel for the Applicant argued that because of the absence of reasons for rejecting to assume jurisdiction, parties are left to speculate as to why the magistrate refused to assume jurisdiction.
20. Section 40 of the CP & EC which Counsel for the Applicant referred to, does not have subsections and it relates to search of and entry into premises for purposes of effecting arrest. It has nothing to do with giving of reasons for decisions made. The provision which the Applicant may have intended to refer to must be section 140 (1) of the CP & EC which corresponds with the cited quotation and which provides as follows;

> *Every judgment shall, except as otherwise expressly provided by this Code, be in writing and shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer.*

21. Section 140(1) of the CP & EC mandates a judicial officer in his or her judgment in making a determination on a matter that comes before him or her and provide reasons in writing for such a determination. Reference is made to every judgment without reference to the court which makes the decision which means that this applies to both judges and magistrates.
22. A judgement is defined as follows under the General Interpretation Act;

> *"judgment" in relation to a court includes decree, order, sentence or decision.*

23. The Magistrate upon receipt of the application filed by the Applicant for unconditional release made a decision. Her decision was not to entertain the application but instead to direct the Applicant to seek his relief in the High Court. Having made that decision, the Magistrate ought to have given reasons for so deciding as required under section 140(1) of the CP & EC.
24. Even if the decision that the Magistrate made was not to be considered as a judgment under section 140(1) of the CP & EC, but as an administrative action, the lower court would still be caught by section 43 of the Constitution which requires that reasons be provided for administrative action where one's rights, freedoms and legitimate expectations are affected.
25. The importance of giving reasons for a judicial officer's decision has been discussed in a number of judicial decisions both locally and internationally. The starting point is the case of ***Bazuka Mhango v New Building Society Bank Ltd*** MSCA Civil Appeal No. 50 of 2015 where the Supreme Court on pages 7 and 8 of the ruling [paragraphs 5.1.2 to 5.1.3] held as follows;

> *The importance of the requirement for a court to give reasons for a decision or a judgment cannot, in my considered view, be overemphasized;* ***that is one of the ways of holding a judicial officer accountable****. Indeed, as was observed in Battista v Bassano [2007] EWCA Civ 370 [at paragraph 28]*
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> > *"... The duty to give reasons is a function of due process and therefore justice, both at common law and under Article 6 of the Human Rights Convention. Justice will not be done if it is not apparent to the parties why one has lost and the other has won. Fairness requires that the parties, especially the losing party, should be left in no doubt why they*

have won or lost. Want of reasons may be a good self-standing ground of appeal."[emphasis added].

26. In the case of ***Standard Bank Ltd v Tourism Investments Ltd and another MSCA Civil Appeal No. 17 of 2018*** the Supreme Court of Appeal also explained the importance of giving reasons in the following manner;

> *As a basic rule, judgments and orders must contain reasons/grounds for the decisions they carry. That is the only way judges can ensure that they remain transparent in their decisions and/or work. A decision which has no grounds or reasons supporting it hangs in the air shrouded with mystery. It deprives the parties, the public and even the appellate court the opportunity to appreciate why and how the judge made that decision. It is a serious afront to judicial transparency and accountability. It denotes arbitrariness. And it is a recipe for the unwanted perception that bribery, corruption, underhand dealings and other extraneous considerations are the drivers of the wheels of justice which, inevitably, erodes public confidence in the justice system. We do not want that in our jurisdiction and we urge all judges to always bear this on their minds when discharging their duties*

27. McHugh JA put the matter succinctly in ***Soulemezis v Dudley (Holdings) Pty Ltd*** (1987) 10 NSWLR 247, 279 where he held as follows;

> *The giving of reasons for a judicial decision serves at least three purposes. **First**, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision. As Lord MacMillan has pointed out, the main object of a reasoned judgment 'is not only to do but to seem to do justice': (**The Writing of Judgments** (1948) 26 Can Bar Rev at 491). Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. **Secondly**, the giving of reasons furthers judicial accountability. As Professor Shapiro has recently said (In Defence of Judicial Candor (1987) 100 Harv L Rev 731 at 737):*
>
> > *... A requirement that judges give reasons for the decisions – grounds of decision that can be debated, attacked, and defended – serves a vital function in constraining the judiciary's exercise of power.*
>
> ***Thirdly**, under the common law system of adjudication, courts not only resolve disputes – they formulate rules for application in future cases: (Taggart 'Should Canadian Judges Be Legally Required to Give Reasoned Decisions In Civil Cases' (1983) 33 University of Toronto Law Journal, 1 at 3-4). Hence the giving of reasons enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future. (Emphasis added).*

28. The CRM committed an error of law when she declined to assume jurisdiction without giving reasons for her decision. If the Applicant was still in custody, one way to remedy the error would have been to return the file to the Lower Court with a direction that reasons be recorded for the decision to enable this Court appreciate whether the decision arrived at was wrong at law or not.
29. By failing to provide reasons for the decision, the Lower Court left the parties to their own speculation of what may have been the basis for refusing to assume jurisdiction. The

Applicant is of the view that the Lower Court refused to assume jurisdiction because the Applicant was that not yet charged at the time of the application. Counsel for the Applicant referred to the case of ***Joseph Mwanamveka v Republic***, Misc Bail Application No 37 of 2021 arguing that such a reasoning was erroneous. The Applicant further argued that the practice by subordinate courts to decline to grant jurisdiction where an accused person had not been charged offends the rights of a detained person under sections 42 and the right of a detained person to access to courts under sections 41(2) and (3) and 46(2) and (3) of the Constitution.

30. On the other hand, in speculating the reasons for the refusal to assume jurisdiction, the Defendant took the view that the CRM did not give reasons for her decision refusing to assume jurisdiction because she had no jurisdiction to entertain the application before her. The Defendant in their submission did not properly address the court on the issue of whether or not it was proper for the CRM to refuse to assume jurisdiction without giving any reasons. They simply acknowledged that no reasons were provided against the requirement of the Constitution but went on to speculate that the refusal to assume jurisdiction was because the CRM did not have the jurisdiction to handle the matter being a financial crimes case. The State referred to section 6 of the Courts Act in paragraph 5.2 but cited section 6A (2) in paragraph 4.6 and 4.7.
31. Reference to section 6 of the Courts Act by the Defendant is erroneous as the provision has no bearing on issues of jurisdiction. The section talks about the Senior Judge of the High Court. Section 6A (2) is also erroneous. Section 6A (2) makes provision for transfer of matters from one Division of the High Court to another (an appropriate Division) by the Registrar either on his own motion or on application. It does not apply to a transfer of a matter from the magistrate court to the High Court. The State's argument that the Lower Court acted on its own volition to transfer proceedings to the High Court cannot be supported by section 6A (2) of the Courts Act.
32. In addition, it is to be noted that the Courts Act does not empower the magistrate court to transfer proceedings from itself to the High Court. The magistrate court under section 46 of the Courts Act can only transfer proceedings from one subordinate court to another. See also cases of ***Gladys Ndunya v. Gift Ndunya*** Miscellaneous Matrimonial Cause No. 24 of 2015 and ***Regina Mulira v. Malawi Sun Hotels and Conference Centre Ltd*** Miscellaneous Civil No.42 of 2016.
33. Section 6A (1) of the Courts Act establishes various Divisions of the High Court including the Financial Crimes Division, Commercial Divis, Civil Division and Revenue Division. The creation of the Divisions of the High Court does not mean that jurisdiction is taken away from the Magistrate Courts but that when the matters are brought before the High Court, they should be filled in the appropriate specialised Division of the High Court. To illustrate the point, it is noted that magistrate courts continue to enjoy jurisdiction over matters of divorce despite the fact that the High Court has a Family and Probate Division which is mandated to her family and probate matter. Again, Magistrate Courts also continue to enjoy jurisdiction over criminal matters despite the establishment of the Criminal Division of the High Court which has jurisdiction to hear any criminal matter. The establishment of the Financial Crimes Court therefore did not mean that the Magistrate Courts no longer have jurisdiction to hear financial crime matters. Again, even if that was

the correct interpretation of the law (which is not), it has to be noted that there is no direct root for criminal cases as the law stands, to go the High Court. Accused persons still have to pass through the Magistrate Courts which then refer their matters to the High Court by way of committal under Parts VIII and IX of the CP & EC.

34. The Applicant's speculation as already indicated was that the CRM may have refused jurisdiction because the Applicant had not yet been charged by the time, he filed his application in the lower court. Counsel argued that such a reasoning is erroneous and cited the case of ***Joseph Mwanamveka v Republic***, Misc Bail Application No 37 of 2021 as an authority for so arguing. In the arguments in reply further argued that such a refusal is a violation of rights under sections 41, 42 and 46 of the Constitution and perpetuates the unlawful detention of people and makes the court complicit in the rights violations instead of stopping them.
35. Proceeding on the above speculation as to why the CRM may have refused to assume jurisdiction, Counsel for the Applicant further argued that even the law on bail does not support the Learned CRM in this case. He argued that under section 118(1) of the CP & EC, jurisdiction of the Subordinate Court is not triggered by charging the accused person but the fact of arrest and detention of an accused person. Section 118(1) of the CP & EC provides as follows;

> *When any person, other than a person accused of an offence punishable with death, is arrested or detained without warrant by a police officer, or appears or is brought before a subordinate court, and is prepared at any time while in the custody of such police officer or at any stage of the proceedings before such subordinate court to give bail, such person may be released on bail by such police officer or such subordinate court, as the case may be, on a bond, with or without sureties.*

36. Similar arguments were made in respect of Guideline 1 under Part II of the Schedule to the Bail (Guidelines) Act where it is provided as follows:

> *A person arrested for, or accused of, the alleged commission of an offence is entitled to be released, with or without bail, at any stage preceding his or her conviction in respect of the offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.*

37. Counsel argued on the authority of these provisions that one can apply for bail because they have been arrested and not after charging only. He further argued that where the State does not take an arrested person to court within 48 hours both the Constitution and the CP & EC are violated and that an Accused Person ought to have a remedy to challenge in court the lawfulness of his detention by way of asking for bail or unconditional order of release in line with sections 42(1) (f) and (2) (e) of the Constitution. According to Counsel for the Applicant, the scheme under the CP & EC is that Parliament intended that Subordinate Courts should have jurisdiction over arrested persons and not to limit such jurisdiction to the High Court which is only located in the 4 cities. Such a limitation it was argued would violate section 41(2) and 3 and 46(2) and (3) of the Constitution.
38. Section 41(2) and (3) of the Constitution provides as follows;

(2.) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.
(3.) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.

39. Section 46 (2) and (3) of the Constitution provides as follows

(2) Any person who claims that a right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled—
a. to make application to a competent court to enforce or protect such a right or freedom; and
b. to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require.

3. Where a court referred to in subsection (2) (a) finds that rights or freedoms conferred by this Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such rights or freedoms, it shall have the power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated.

40. An aggrieved person can under section 41(2) and (3) and 46(2) and (3) of the Constitution access any court of law for an effective remedy where his or her rights have been violated or infringed. The qualification to the provision is that the approached court of law must have jurisdiction to deal with the matters brought before it. The fact that one's right to employment and fair labour practices have been violated does not mean he can go to the Magistrate Court to seek redress. Jurisdiction over employment rights have been specifically conferred on the Industrial Relations Court by the law. As was held in the case of ***Humphreys Malola -vs- Alice Malola*** Civil Appeal Case No. 48 of 2016 (High Court of Malawi) (Principal Registry) (Unreported), jurisdiction is statutory. See also the case of ***Kettie Kamwangala v. Republic [2013] MLR 146*** SCA where the court had this to say regarding the question of jurisdiction;

...Jurisdiction, as I further understand the law, is not assumed for mere purposes of convenience. Jurisdiction is Statute-conferred, and unless and until the circumstances the Statute has specified as creating jurisdiction in this Court occur, no one should try and confer jurisdiction on this Court otherwise.

41. Whilst any court of law may include the magistrate's court, it is important to observe that unlike the High Court the magistrate court does not enjoy unlimited original jurisdiction. The High Court has under section 108 of the Constitution unlimited original jurisdiction to determine any civil or criminal matter under any statute. Similar power is not conferred on the Magistrate Courts.
42. In the case of ***In Re Namkhwenya*** citing the case of ***Jasi v Republic***, Cr. App. Cas. No. 64 of 1994 (unreported), the court held that the procedure for enforcing rights under the

Constitution is supplied by the general law of the land, the Constitution itself not having provided a specific procedure. In the ***In Re Namkhwenya Case,*** the court used the habeas corpus procedure under the Statute Law (Miscellaneous Provisions) Act. Under section 16 (6)(a) of the Statute Law (Miscellaneous Provisions) Act, the **High Court** (and not the Magistrate Court) has power to release a detained person or order that the detained person be brought to court to be dealt with in accordance with the law. The Applicant did not invoke the Statute Law (Miscellaneous Provisions) Act in his application before the CRM and rightly so in my view as the Statute Law (Miscellaneous Provisions) Act in section 16(6)(a) confers jurisdiction specifically on the High Court. This Court does not agree with Counsel for the Applicant that section 16(6)(a) of the Statute Law (Miscellaneous Provisions) Act creates a concurrent jurisdiction between the High Court and the Magistrate courts to handle applications for challenging unlawfulness of detention for detained persons. For avoidance of doubt this is what the said section provides;

> *(a) The High Court may whenever it thinks fit direct—*
> *(i) that any person within the limits of Malawi be brought up before the Court to be dealt with according to law;*
> *(ii) that any person illegally or improperly detained in public or private custody within such limits be set at liberty;*
> *(iii) that any prisoner detained in any prison situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;*
> *(iv) that any prisoner detained as aforesaid be brought before a court-martial or any commissioners acting under the authority of any written law for trial or to be examined touching any matter pending before such court-martial or commissioners respectively;*
> *(v) that any prisoner within such limits be removed from one custody to another for the purpose of the trial; and*
> *(vi) that the body of a defendant within such limits be brought in on a return of cepi corpus to a writ of attachment.*

43. Habeas corpus is also provided for under Order 19 Part IV of the CPR under which a detained person can challenge his unlawful detention and seek release from detention. Interestingly, under the said Order 19 of the CPR, an applicant is not mandated to serve his or her application on the authority responsible for his detention. It would appear the Applicant took that approach as the application was made without notice to the State. In the court in the ***John Mwanamveka Case*** where the Applicant filed an application for release from detention without notice to the State called such an approach unorthodox. One would, as did the court in that case, indeed wonder why the Applicant would have wanted to be released from custody without notifying the State or hearing from the State. Speculating as the parties did before this court, I would speculate that perhaps there was something that the Applicant was hiding and did not want it to come out before his application was dealt with.
44. The procedure of habeas corpus whether under the Statute Law (Miscellaneous Provisions) Act or under the CPR is a civil procedure process. In the matter at hand however, the application was filed as a criminal matter before the CRM Court. For criminal jurisdiction

of magistrate courts, the starting point is section 58 of the Courts Act which provides as follows;

> *In exercise of their criminal jurisdiction the powers of courts of magistrates shall be as provided for in this Act, in the Criminal Procedure and Evidence Code and in any other written law.*

45. What comes clear from section 58 of the Courts Act is that jurisdiction of magistrate courts over criminal matters is conferred by the Courts Act, the CP & EC and any other written law. The Applicant in the arguments in reply cited a number of provisions from the CP & EC under which he argues the Magistrate Courts has jurisdiction to entertain an application for release from detention where an accused person has not been brought before a court of law within 48 hours of arrest as sanctioned by the Constitution. Reference has been made to sections 32, 104(1), 118(1) of the CP & EC and also Guideline 1 under Part II of the Bail Guidelines Act. The arguments of Counsel were to the effect that one can under the cited provisions apply for bail simply because they have been arrested and there is no need that they be charged. Counsel also argued that under sections 32 and 104 the Subordinate Court has jurisdiction to deal with disposal of arrested persons.
46. Interestingly, the Applicant never cited any of the provisions that he has referred this court to in his application before the CRM both in his application and in the arguments in support of the Application. In addition, the Applicant in his application before the CRM did not apply for bail but for unconditional release.
47. It has been submitted in the arguments in reply that the Learned CRM erred when she refused jurisdiction over the application for unconditional release of the Applicant when in fact, she had such jurisdiction under the CP & EC and the Constitution. The argument presupposes that the Applicant invoked the CP & EC in his application which he did not. As already noted above, the Constitution does not confer jurisdiction on the Magistrate Courts but the Courts Act, the CP and EC and other written laws which may specifically confer jurisdiction on it. Having only cited the Constitution as a basis for his application, the Applicant cannot fault the CRM for not attending to him under the CP & EC. It was not for the CRM to be searching under the CP & EC as to what provision would be applicable to the circumstances of the Applicant. As it was, the Applicants application was incompetent and it ought to have been dismissed for being incompetent, if it had been attended to.
48. The argument also suggests that what was before the CRM was an application to be released on bail and that is why Counsel relied on section 118(1) of the CP & EC and also section 10 of the Bail Guidelines Act. Section 118(1) of the CP & EC provides as follows;

> *When any person, other than a person accused of an offence punishable with death, is arrested or detained without warrant by a police officer, or appears or is brought before a subordinate court, and is prepared at any time while in the custody of such police officer or at any stage of the proceedings before such subordinate court to give bail, such person may be released on bail by such police officer or such subordinate court, as the case may be, on a bond, with or without sureties.*

49. Relying on section 118(1) of the CP & EC and the case of ***John Mwanamveka v. Republic,*** Counsel argued that the section is triggered by arrest and detention of an accused person and not by the charging of the said person. Similar arguments were made in respect of Guideline 1 under Part II of the Schedule to the Bail (Guidelines) Act where it is provided as follows:

> *A person arrested for, or accused of, the alleged commission of an offence is entitled to be released, with or without bail, at any stage preceding his or her conviction in respect of the offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.*

50. Counsel argued on the authority of these provisions that one can apply for bail because they have been arrested and not only after they have been charged and brought to court. He argued that where the State does not take an arrested person to court within 48 hours both the Constitution and the CP & EC are violated and that an Accused Person ought to have a remedy to challenge in court the lawfulness of his detention by way of asking for bail or unconditional order of release in line with sections 42(1) (e) and (2) (e) of the Constitution. According to Counsel for the Applicant, the scheme under the CP & EC is that Parliament intended that Subordinate Courts should have jurisdiction over arrested persons and not to limit such jurisdiction to the High Court which is only located in the 4 cities. Such a limitation it was argued would violate section 41(2) and 3 and 46(2) and (3) of the Constitution.
51. Sections 32 of the CP & EC makes provision in relation to disposal of persons arrested with or without a warrant by a police officer. The provision states as follows;

> *A police officer making an arrest without a warrant shall, without unnecessary delay and in any event not later than forty- eight hours, or if the period of forty-eight hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, take or send the person arrested before a magistrate or traditional or local court having jurisdiction in the case.*

52. The section obliges a police officer who arrests a person without a warrant to bring that person before a magistrate or traditional or local court having jurisdiction in the matter within 48 hours of such arrest. When such person is brought before the court, such person may be released on bail with or without sureties under section 118(1) of the CP & EC. When such a person is brought before the court, there is no question that he can be considered for release on bail under section 118(1) of the CP & EC. The issue raised by Counsel for the Applicant is whether where an accused person has not been brought to court by the arresting officer as was the case with the Applicant, can then move the lower court under section 118(1) to consider him for bail.
53. In considering the question, I did consider the case of ***Vilimulo Mlenga v. Republic*** Miscellaneous Application No. 8 of 2001 where the court took the view that where an accused person has not been charged but has been detained beyond 48 hours, the proper way to challenge the legality of his detention or to proceed by way of habeas corpus application. Chikopa J (as he was then) had this to say when faced with an application for bail made under section 42(2)(e) of the Constitution and section 118 of the CP & EC;

It was his assertion that he has, since his arrest not been charged with any offence as decreed by section 42(2(e) of the constitution nor has he been informed of the reasons for his continued detention.
Clearly the applicant is not, but for this application and as I understand this application, before any court. My understanding of the law is that one cannot ask for bail, which is in my view itself an anomaly in the present circumstances, other than before the court in which one is appearing. *Because the applicant is not appearing in this court he cannot come here and ask for bail. Reading his affidavit, in which he says he has neither been charged nor brought before court within the constitutional 48 hours, the only way he could have come here was by application for a writ of habeas corpus. It would then have been up to this court to order that he be brought before us to be dealt with according to law one of whose results would include (though not exclusively) the granting of bail.*
Alternatively, he could have come here to challenge the legality of his detention/arrest. If successful, it would again have been up to this court to release him from detention with or without bail. That in my view is the purport of section 42(2)(e) aforesaid. Not the one that the applicant sought to attribute to it.

54. Section 118(1) of the CP & EC provides as follows;

> *(1) When any person, other than a person accused of an offence punishable with death, is arrested or detained without warrant by a police officer, or appears or is brought before a subordinate court, and is prepared at any time while in the custody of such police officer or at any stage of the proceedings before such subordinate court to give bail, such person may be released on bail by such police officer or such subordinate court, as the case may be, on a bond, with or without sureties.*

55. My understanding of the court in the ***Vilimulo Mlenga v. Republic Case*** is that an accused person can only ask for bail before the court in which he is appearing and that appearing does not mean by way of the bail application itself. In that case just like in the present case, the applicant had not been brought before the lower court. His appearance before the court was through Counsel and by virtue of his bail application.
56. Contrary to the reasoning in the ***Vilimulo Mlenga v. Republic Case,*** it has been argued by Counsel for the Applicant that jurisdiction under section 118 (1) of the CP & EC is triggered by the fact that the Applicant is an arrested or detained and that the word 'appears' as used in the section can certainly not mean 'is brought'. Counsel relied on the case of ***Nippo Corporation v Shire Construction Civil Case No 372 of 2011*** on interpretation where two different words are used. He argued that the word 'appears' therefore would support the view that an uncharged detained person can move the Court to consider him for bail under section 118 (1) of the CP & EC over and above the other option that he has of challenging the lawfulness of the detention. Counsel made similar observations regarding Guideline 1 under Part II of the Schedule to the Bail (Guidelines) Act where it is provided as follows:

> *A person arrested for, or accused of, the alleged commission of an offence is entitled to be released, with or without bail, at any stage preceding his or her conviction in respect of the offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.*

57. I agree with Counsel for the Applicant that the words mean different things as argued by Counsel. However, I would arrive at the same conclusion arrived at in the case of ***Vilimulo Mlenga*** but on a different basis namely that bail cannot be considered where the accused person has not been charged. In coming to this conclusion, I am confirmed by the decision of the Supreme Court in the case of ***Republic v. Bakali Bauti and Another*** [2014] MLR 290 where the court dealt with the question of whether an accused person who has not been charged can apply for bail. This is what Msosa CJ on behalf of the bench said;

> *The respondents were not charged with any criminal offence. The Judge was certainly wrong to order an acquittal in the circumstances.* ***Courts should not entertain a bail application where a person has not been charged with the commission of any offence****. The respondents were not committed to the High Court. In Charles Sindeya v Republic, Misc. Cri. App. Number 1/2007, Chikopa J (as he then was) rightly stated the following:*
>
> > *"The applicant herein was arrested and thrown into custody on suspicion of murder. Since then he has appeared before no court. He has not been charged with any offence. He has not been committed in this Court for trial. We would not be competent to grant him audience in respect of bail. There would be no offence in respect of which the scales of justice would be engaged in weighing the odds whether to grant him bail."* [emphasis added]

58. In view of the foregoing, it cannot be said that the CRM had jurisdiction to entertain the bail application under section 118 of the CP & EC for in his application the Applicant indicated that he was arrested by Police but was not informed of the reasons for his arrest and was detained for more than 5 days without being told of the reasons for further detention. He also stated that the Police went to his residence and conducted a search claiming to be looking for firearms and foreign currency but found none. He never suggested that he was charged with any offence.

59. He could also not have been considered for bail under section 118 of the CP & EC because he never invoked that section. His application was clearly one for unconditional release and not for bail. Counsel must have appreciated this and that is why he may not have cited section 118(1) of the CP & EC which clearly deals with release on bail.

60. I wish however to comment on the application for unconditional release before this court which the applicant later abandoned after it had become moot. From the facts of the case and which the State did not dispute, the Applicant had been in beyond the 48 hours being without the sanction of the court which made his detention unlawful. At the time of his application before this court, the Applicant got information that he would be deported from Malawi a fact which he knew and that is why on the same day he filed the application in

this court, he filed an application to challenge his intended deportation under **Judicial Review Cause No. 33 of 2023 before the High Court Civil Division, Lilongwe Registry.**

61. Issues of deportation are governed by the Immigration Act. Under section 39 of the Immigration Act, the Minister has power to issue a deportation order of any person not being a citizen of Malawi, if he thinks fit. Such a deportation order can be made in any of the following circumstances;

    (a) if any court certifies to the Minister that that person has been convicted either by that court, or by an inferior court from which the case of that person has been referred for sentence or brought by way of appeal, of any offence for which the court has power to impose a sentence of imprisonment and that the court recommends that a deportation order be made in the case of that person; or

    (b) if the Minister is satisfied that it is in the interests of defence, public safety, public order, public morality or public health to make a deportation order against that person.

62. Under section 4(1) of the Immigration Act, a person who has been deported from or ordered to leave Malawi, is considered a prohibited immigrant. Under section 15 of the Immigration Act, a prohibited immigrant may be detained in prison or place of custody pending his deportation from Malawi.

63. Considering that a person against whom a deportation order has been made, is considered a prohibited immigrant, and that a prohibited immigrant to whom a deportation order has been issued may be detained in custody pending his removal from Malawi, the Immigration Act would have been an additional relevant law in considering the question of release from the said unlawful detention and it would have been better to raise the challenge to the alleged illegal detention in the same matter that the deportation was being challenged.

Made in Chambers this 24th Day of August, 2023 at Lilongwe.

V. Palikena-Chipao
JUDGE