REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

FINANCIAL CRIMES DIVISION

CRIMINAL CASE NUMBER 19 OF 2023

THE REPUBLIC

VERSUS

1. **JOSEPH MATHYOLA MWANAMVEKHA**
2. **DR. DALITSO KABAMBE**
3. **HENRY MATHANGA**

CORAM: HONOURABLE JUSTICE R.E. KAPINDU

Messrs Sakanda and Partridge, Counsel for the State

Mr. Kaphale, SC, Counsel for the 1st Accused person

Mr. Nkhutabasa, Counsel for the 2nd Accused person (on Brief)

& for the 3rd Accused person

Court Reporter: V. Mombera

Clerk: Mr. V. Khombe

RULING

KAPINDU, J

1. Three accused persons are facing criminal charges in the present matter, namely Hon. Mr. Joseph Mathyola Mwanamvekha, the 1st accused person; Dr. Dalitso Kabambe, the 2nd accused person; and Mr. Henry Mathanga, the 3rd accused person.

2. The charges stem from the purported misreporting of information to the International Monetary Fund (IMF).

3. More specifically, the charges pertain to the alleged misreporting of Malawi's Net International Reserves (NIR) and the Gross Reserve Liabilities of the Reserve Bank of Malawi (RBM) during the period spanning 2018 to 2019. The prosecution's case is that these actions compromised the economic interests of Malawi with respect to its Extended Credit Facility (ECF) arrangement with the IMF.

4. The 1st Accused person, Hon. Mr. Joseph Mathyola Mwanamvekha, has brought an application before this Court that he be discharged from these proceedings. His application is predicated on the purported misrepresentation by the prosecution of his official capacities during the period when the alleged offences are said to have been committed. Additionally, he contends that the State's disclosures do not reveal any evidence implicating him with regard to the charges being preferred against him.

5. With a view to properly laying the context of his application, the 1st accused person has outlined the charges that have been preferred against all the accused persons in the present case.

6. He states that in the 1st count, all the accused persons herein are accused of fraud other than false pretence contrary to section 319A of the Penal Code. The particulars of the charge allege that between the period of June 2018 and September, 2019, in the Republic of Malawi, being persons employed in the public service at the time as Governor and Deputy Governor of the Reserve Bank of Malawi (RBM) respectively, with intent to deceive, did not disclose crucial information to RBM departments

responsible for computing and calculating Net International Reserves (NIR) to allow it to make an accurate computation of the said NIR as required by the IMF and consequently causing a detriment to the Malawi Government as the IMF cancelled the USD108 million Extended Credit Facility to the said Government;

7. In count 2, the 1st Accused person states that all the accused persons are jointly charged with abuse of office contrary to sections 95(1) and 95(2) of the Penal Code. The particulars of the offence are that between the period of June, 2018 and September, 2019, being persons employed in the public service at the time as Governor and Deputy Governor of the Reserve Bank of Malawi respectively, in abuse of their offices, the accused persons did an arbitrary act, namely flouting the terms of the Technical Memorandum of Understanding (TMU) between the IMF and the Government of Malawi by procuring or counselling Rodrick Wiyo and Leah Donga, Director and Manager in the Financial Market Operations Department of the Reserve Bank of Malawi at the time, respectively, not to disclose to the IMF the gross reserve liabilities of the RBM in the calculation of NIR as was required by the said TMU, hence prejudicing the rights of the said Government to access the USD108 million Extended Credit Facility as it was eventually cancelled by the said IMF.

8. He further exhibited a Press Release issued by the IMF on 17 November 2022, marked *"JMM1"* which, he argues, talks about misreporting that allegedly occurred during reporting dates in end December 2018 and end June 2019. He emphasises that on neither reporting occasion, that is to say end December 2018 or end June 2019, did he serve as Governor or Deputy Governor of the RBM.

9. He proceeds to state that on 7 November 2018, he was serving in the capacity of Minister of Agriculture, Irrigation and Water Development. He has, in this regard, exhibited a Cabinet List marked as *"JMM2"*. He then states that he was appointed Minister of Finance on 19th June, 2019 and only occupied the substantive office for that portfolio in the first week of July, 2019.

10. In the circumstances, the 1st Accused person contends that whilst counts 1 and 2 allege that he, alongside the other two accused persons, occupied the position of Governor

of the Reserve Bank of Malawi or Deputy Governor of the Reserve Bank of Malawi, the truth of the matter is that he never occupied any such position at the material time.

11. Secondly, he argues that there is no evidence in the Disclosure Bundles availed to him, of any interface between himself and any staff of the RBM, let alone any staff of the RBM responsible for computing, calculating, approving or submitting Net International Reserves data before the end December, 2018 and end June 2019 reporting dates to the IMF, and hence that it was not possible for him to have participated in deceiving the IMF through non-disclosure of information as alleged under Count 1.

12. Third, it is his contention that in any event, the disclosed evidence on record from the Witness Statement of the late Hon. Goodall Gondwe clearly points to the fact that the raw data for calculating Net International Reserves was, at the material time, generated by and domiciled in the Reserve Bank of Malawi and not at the Ministry of Finance.

13. Fourth, he argues that even if the data had been generated by or domiciled at the Ministry of Finance, which he denies, he only reported for duties at the Ministry of Finance in the first week of July, 2019 which was after the end June 2019 reporting date to the IMF. As such, he submits that he was not privy to the generation or reporting of the data that was submitted by the Reserve Bank to the IMF.

14. In the circumstances, the 1st Accused person argues that prosecuting him on the two counts proffered against him is contrary to his right to human dignity as it curtails his personal liberty and amounts to cruel and degrading treatment as he will be made to undergo a criminal trial when there is no iota of evidence disclosed, linking him to any of the charges.

15. Furthermore, the 1st Accused person submits that in view of the foregoing, the criminal trial process is being used against him arbitrarily and for pure reasons of vexation. He therefore submits that the prosecution process herein amounts to an abuse of the process of the court, and that it is for ulterior ends.

16. In this regard, the 1st Accused person calls upon this Court to, in its inherent jurisdiction, exercise its power to prevent the abuse of its process.

17. The State has filed an affidavit in response, sworn by Counsel Festas Sakanda, Senior State Advocate. In the said Affidavit, the State clearly concedes that it does not have the requisite evidence against the 1st Accused person, and goes further to state that based on the evidence it has, chances of a conviction against the 1st accused person are *"unrealistic"*.

18. The state has, as a matter of fact, used so many words to describe the weakness of its own case against the 1st Accused person.

19. The State states that its evidence *"only leaves a remote possibility of a conviction against the 1st Accused person"*, that it has *"no direct evidence on the file to link the 1st Accused person to the commission of the offence(s) he stands charged with"*, that there is no *"circumstantial evidence strong enough linking him to the crime(s)"*, and that on *"the totality of the evidence, the prospect of obtaining a conviction against the 1st Accused person is unrealistic."* These are the direct words of the State in response to the 1st Accused person's application to be discharged from the case.

20. In view of these staggering concessions, the Court inquired from the State why it could not simply enter a discontinuance of the proceedings against the 1st Accused person under section 77 of the CP & EC, considering that it is the State itself that arrested the 1st accused person and is accusing him until now of offences in respect of which the same State now says, under oath, that it has no evidence.

21. In response, Counsel for the State equivocated, but eventually stated that as much as the State had no evidence against the 1st Accused person, they would rather leave it to the Court to discharge the 1st Accused person under section 270 of the Criminal Procedure and Evidence Code (CP & EC), in view of the accused person's own application, than for the Director of Public Prosecutions (DPP) to exercise his power to discontinue the case. No reasons were given for this stance.

22. The Court however observed that that unfortunately, the section that State Counsel cited does not seem to fit neatly, or at all, into the circumstances of the present matter. The section provides that:

> *"(1) If, at the close of the case for the prosecution or after hearing any evidence in defence, the court considers that the evidence against the accused is not sufficient to put him on his trial, the court shall forthwith order him to be discharged as to the particular charge under inquiry; but such discharge shall not be a bar to any subsequent charge in respect of the same facts.*
>
> *(2) Nothing in this subsection shall prevent the court either forthwith, or after such adjournment of the enquiry as may seem expedient in the interests of justice, proceeding to investigate any other charge upon which the accused may have been summoned or otherwise brought before it, or which in the cause of the charge so dismissed as aforesaid, it may appear that the accused has committed."*

23. Firstly, the Court observed that this provision falls under Part VIII of the CP & EC which contains *"Provisions Relating to the Committal of Accused Persons for Trial Before the High Court."* This is the Part of the CP & EC that, among other things, empowers a subordinate Court to hold a preliminary inquiry with a view to making a decision on whether or not to commit an accused person to the High Court for trial. The provisions of section 270 of the CP & EC specifically refer to what a Subordinate Court can do during the preliminary inquiry process.

24. Secondly, even if the provisions of section 270 of the CP & EC were to apply to a substantive trial process before this Court, it is evident that the trial against the accused persons herein has not even started, in earnest, as they are yet to take plea in respect of the amended charges that the State is preferring against them. It therefore seems to this Court that we cannot, at this stage of the proceedings, talk about the *"close of the case for the prosecution"*, let alone the hearing of *"any evidence in defence"* as provided for in section 270 of the CP & EC. The Section is therefore unhelpful and indeed patently inapplicable to the circumstances of this case.

25. The State however maintained that entering a discontinuance was not an option that they were considering as a route to the discharge of the 1st Accused person under the circumstances, and that they would rather let the Court to decide the matter based on the the 1st Accused person's own application.

26. Pausing here, the Court is mindful of the fact that entering a discontinuance is indeed a constitutional discretionary power that is exclusively exercised by the Director of Public prosecutions under section 99 of the Constitution as read with section 77 of the Criminal Procedure and Evidence Code, by him or her personally or by another person in the public service expressly authorised by the DPP to do so.

27. Under section 77(1) of the CP & EC, which gives effect to the DDP's constitutional power of discontinuance, once the DPP exercises the power of discontinuance, the Court is obligated to immediately discharge the accused person under subsection 77(1)(a) of the CP & EC, in an instance such as the present one where the accused person is yet to be called upon to enter his defence. Where the accused has already entered a defence, then the Court is obligated to acquit the accused person under subsection 77(1)(b) of the CP & EC.

28. In the present circumstances, we are thus faced with a scenario where the State, to all intents and purposes, is both unable to proceed with the prosecution of the 1st Accused person on account of lack of evidence on the one hand; and unwilling to enter a discontinuance in respect of his case on the other.

29. I must state, at this point, that the Court has been left to wonder, under the present circumstances, why the 1st Accused person was arrested in the first place, let alone taken through a process of commencement of prosecution by having him take plea in the lower Court when the State was at all material times aware that it did not have evidence against him. Was it a case of arresting him with a view to investigating later, only to realise that there was actually no evidence?

30. It is worth pointing out here, that Chikopa JA emphasised in the case of ***Kamwangala vs Republic***, MSCA, Miscellaneous Criminal Appeal No. 6 of 2013, that "*evidence should only be the product of investigations. Where there is no investigation there cannot, we believe,*

be any evidence. Where there is no evidence, it would seem only natural that there should be no arrests. We therefore find it rather perverse that law enforcement should arrest with a view to investigate."

31. The profound philosophy behind this proposition by the learned Justice of Appeal in ***Kamwangala vs Republic*** should not be understated or lost. His proposition lays a strong emphasis on the principle of the rule of law and the due process of law. Justice of Appeal Chikopa's statement signifies the fundamental importance of protecting individuals from arbitrary or unjustified arrests and prosecutions. His speech reflects the need for a strong commitment to upholding people's liberty rights and preventing the abuse of state power in the criminal justice system.

32. It has long been stated in the legal circles that the liberty of every human being is sacrosanct and that it should not be lightly interfered with. It is therefore imperative that the prosecutorial legal process against any person, that leads to a curtailment of his or her personal liberty, should only be based on well founded evidence.

33. In the instant case, just like the learned Justice of Appeal found it "*rather perverse that law enforcement should arrest with a view to investigate*" in ***Kamwangala vs Republic***, this Court finds, *afortiori*, that it is rather perverse that there should be a prosecution where there is no credible evidence against an accused person. Such approach would amount to an abuse of the process of the Court.

34. Thus, when they realise that there is no evidence or credible evidence against an accused person who has incidentally already been arrested, and a prosecution process commenced, the prosecutorial authorities are under a constitutional obligation to make sure that they take active steps to terminate the prosecutorial process at the earliest opportunity. That, in this Court's view, is the essence of the constitutional and statutory powers of discontinuance that they have been invested with. There are of course other factors such as public interest considerations based upon which a discontinuance might be entered, but this is not a consideration in the present matter.

35. It follows that in a case such as the instant one, where the State realises, as stated under paragraph 7 of Counsel Sakanda's affidavit in response, that *"the prospect of obtaining a*

conviction against the 1st Accused person is unrealistic", the State is under an obligation to terminate the prosecutorial process which the State itself commenced. It only makes good legal logic to do so, this Court would think. Indeed, such duty, this Court opines, is juristically correlative to a panoply of constitutional individual human rights including the broad rights to personal liberty under section 18 of the Constitution, and freedom and security of the person under section 19(6) of the Constitution, among others.

36. Where however, the State is still unwilling to terminate the prosecutorial process, the Court is still duty bound to offer a remedy. That is indeed the whole essence of the right of access to justice and legal remedies under section 41 of the Constitution.

37. Fortunately, in the present matter, there seems to be a remedy under the CP & EC, which obviates the need to advert to the inherent jurisdiction of the Court as the 1st Accused person's founding papers sought to do. This remedial process is to be found under section 247 of the CP & EC. The section provides that:

> *(1) When proceedings have been instituted under section 83 and, at the time fixed for the hearing of the case or the time to which a hearing is adjourned, the complainant or the prosecutor, as the case may be, is either absent or unable or unwilling to proceed with the case against the accused, the court, if it is satisfied that the complainant or prosecutor has had reasonable notice of the time and place fixed for the hearing, shall, unless it considers there is good reason to adjourn the hearing, discharge the accused.*
>
> *(2) A discharge under subsection (1) shall not operate as a bar to any subsequent proceeding against the accused commenced within twelve months of the date of the discharge on account of the same facts after which period the discharge shall become absolute and operate as an acquittal for all purposes.*
>
> *(3) If the Court is not satisfied as provided in subsection (1) or considers that there is a good reason for adjournment, the court shall adjourn the hearing."*

38. In the present case, given the affidavit in response filed by the State, this Court concludes that the prosecutor (the State) is both unable and unwilling to proceed with the case against the 1st Accused person, in terms of section 247(1) of the CP & EC.

39. The Court therefore hereby discharges the 1st Accused person, Hon. Mr. Joseph Mathyola Mwanamvekha, from the present prosecution, and I so order.

40. In terms of section 247(2) of the CP & EC, this discharge shall not operate as a bar to any subsequent proceeding against the 1st accused person herein, if commenced within twelve months of the date of this discharge on account of the same facts. At the expiry of such period, if such subsequent proceeding against the 1st accused person is not commenced, this discharge shall become absolute and shall operate as an acquittal for all purposes without further reference to this Court.

41. It is so ordered.

Pronounced in open Court at Lilongwe this 9th day of January, 2024.

R.E. Kapindu, PhD

JUDGE