



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY

CRIMINAL CASE NO. 5 OF 2010

THE REPUBLIC

AND

HARRY MKANDAWIRE

FIRST ACCUSED

YEREMIAH CHIHANA

SECOND ACCUSED

CORAM: **THE HONORABLE MR. JUSTICE L. P. CHIKOPA**
Wapona Kita/Davie Lameck of Counsels for the Accused
Persons
Nicely Msowoya Senior State Counsel for the Respondent
I. Zimba Bondo/PF Msiska Court Clerks
Mrs. F. Silavwe/CB Mutinti [Mr.] Court Reporter

RULING

INTRODUCTION

The accused persons are charged with Managing an Unlawful Society contrary to section 65 of the Penal Code Cap 7:01 of the Laws of Malawi. The particulars are that:

'HARRY MKANDAWIRE AND YEREMIAH CHIHANA, between the 17th October 2009 and 14th November 2009 in the CITY OF LILONGWE managed an unlawful society namely the NORTHERN REGION FORA, the object of which society was to disturb and incite disturbances of peace and order in the Republic of Malawi'.
[Sic]

Initially the accused persons were charged in one count with having committed the offence in the cities of Lilongwe and Mzuzu. Such an allegation in one count might result in the count being bad for duplicity. To avoid needless 'preliminary' objections we pointed out this fact to the State and suggested that the accused either be charge on two counts or in the alternative. The State instead chose to charge the accused with respect to acts done in Lilongwe. The charge and its particulars were accordingly amended and the accused maintained their not guilty pleas. The prosecution after parading three witnesses has since closed their case. It is now for this court to decide whether on the available evidence the accused has a case to answer.

THE LAW

We will at sometime say something about the charging in this case. At this point however allow us to say that in deciding whether or not the accused have a case to answer we shall only be considering whether a case has been made out against the accused sufficiently to require them to enter a defence herein. The burden placed upon the State at this stage is not to prove its allegations beyond reasonable doubt, which is the standard placed on the State at the close of trial, but simply to establish grounds for presuming that our accused persons committed the offences they are answering. In **R v Dzaipa** Revision Case Number 6 of 1977 [unreported] Skinner CJ adopted the definition of 'case to answer' contained in the **Practice Note** issued by the Lord

Chief Justice of England Lord Parker at [1962] 1 ALL ER 448 which runs as follows:

'A submission that there is no case to answer may properly be made and upheld:

- a. when there has been no evidence to prove an essential element in the alleged offence; or*
- b. when the evidence adduced by the prosecutor has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it;*

The decision should depend not on so much whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer'.

The above is the approach we will adopt in analyzing the evidence before us at this stage.

ISSUES

The ultimate question is whether or not the State has proved to the standard set out in Dzaipa's case its allegations against the accused persons. Before we get to debate that question however we think we should, as we promised hereinabove, say a word about the propriety of the charging herein. Accordingly we observe that section 65 under which the accused are charged only criminalizes *inter alia* the management of an unlawful society. It does not define an unlawful society. The definition is provided for in section 64(2). With specific

reference to this case the definition is provided for in paragraph (g) thereof. In our view charging the accused with reference only to section 65 was not best. Section 64(2)(g) should have been referred to as well. We made, we think, sufficient noises about this in **Witney Douglas Selengu v R** Criminal Appeal Case Number 26 of 2004 High Court of Malawi, Mzuzu Registry [unreported]. It is our sincere hope that the prosecutorial powers have taken note of our above sentiments.

Coming back to whether or not the accused have a case to answer it was incumbent upon the State to establish grounds for presuming that the accused between October 17th 2009 and November 14th 2009 **in Lilongwe managed an unlawful society namely the Northern Region FORA** [our emphasis]. Some of the key questions we need to answer therefore are firstly whether the Northern Region FORA is an organization as envisaged in section 64 of the Penal Code, secondly whether, if the answer be in the positive, the accused persons managed the said organization and thirdly whether the Northern Region FORA, if it be an organization managed by the accused persons, is an unlawful organization as defined in section 64 of the Penal Code. We should clarify at this stage that it is not an element of an offence under section 64 as read with section 65 of the Penal Code that the society not be registered with the Registrar General. A society will be unlawful if it meets the criteria set out in section 64(2)(g) abovementioned [to which we make greater reference later hereinafter] which, we must emphasize, does not make any reference to registration with the Registrar General or incorporation of any kind.

Is the Northern Region FORA a Society?

We heard evidence on behalf of the State from Superintendent Maxwell Ngongonda. He made reference to *inter alia* two documents. One, exhibit P2, was pages 13, 14, 31 and 32 of the Daily Times of Friday

October 30, 2009. There is on page 14 an advertisement clearly placed for or on behalf of Northern Region FORA. It was calling people to a conference to be held before the expiry of 2009 to discuss various [going purely by the advertisement] unstated issues. The contact persons were listed as our accused persons herein. Their names complete with mobile telephones numbers and email addresses were plastered on the advertisement. The signature of a Mkandawire was appended at the bottom of the said advertisement. Another document, exhibit P3, is a duly certified copy of, we were informed, the Daily Times of November 11, 2009. Again it is an advertisement placed for or on behalf of the Northern Region FORA. It made reference to exhibit P2 and listed items which were to be discussed at a meeting of the Northern Region FORA. Again the accused's names, mobile telephone numbers and email addresses were plastered thereon. Section 64(1) defines a society as including any combination of persons. Is the Northern Region FORA a society? The answer is in the positive. It is clear from exhibit P3 that the Northern Region FORA comprised more than just the accused persons. We find that the State has established facts for presuming that the Northern Region FORA is a society as defined in section 64 of the Penal Code.

Did the Accused Persons Manage the Northern Region FORA?

To manage can be defined as *inter alia* 'to run, direct, deal with or supervise'. In relation to the Northern Region FORA can it be said that the accused persons ran, supervised, dealt with, or directed the said society? The answer again must be in the positive. The accused were pointmen for a society that was inviting persons to a conference, soliciting ideas and finances. More than that PW1 Gover Ziba a Forensic Manager for Standard Bank told us that on October 28, 2009 a company known as YMW Property Investments issued cheque number 000802 to Blantyre Newspapers Limited who are publishers of the

Daily Times Newspaper. The only signatory to the account on which the cheque was drawn is the second accused Jeremiah Chihana. Considering the time frame within which the cheque was issued, the cheque's signatory, the time frames within which the press releases appeared in the Daily Times and the accused persons' association with not just the press releases but each other we think the conclusion is inescapable. There is at this stage also reason for presuming that the accused persons had a hand in the management of the Northern Region FORA between the dates October 17th and November 14th 2009. This brings us to the last question:

Is the Northern Region FORA an Unlawful Society?

Section 64(2) of the Penal Code defines an unlawful society as one formed for *inter alia* the purpose of:

'(g) disturbing or inciting to the disturbance of peace and order in any part of the Republic'. [Sic]

The Republic is obviously the Republic of Malawi. The question is 'was the Northern Region FORA formed for purposes of disturbing or inciting to the disturbance of peace and order in any part of the Republic of Malawi?' It would have been easier if the State had brought before us documentation relating to the society's formation. That would have allowed us determine not just the society's objectives but also whether such objectives qualify the Northern Region FORA to be labeled an unlawful society. The foregoing notwithstanding we think we should be able to tell whether the society was formed for purposes of disturbing or inciting to the disturbance of peace and order in any part of the

Republic by looking at the society's actions. We commence that process by going through exhibit P2 which reads:

'in view of the developments that have happened in the recent past, it has come to the understanding of many to establish the Northern Fora and that before the end of the year, we should hold a Regional Conference to map the way forward on the people that will be affected in various circles of Malawi;' **[Sic]**

Unless we have got the Queen's language hopelessly wrong there appears nothing in the words of the press release exhibit P2 to suggest that the Northern Region FORA had as its purposes the disturbance and inciting to disturbance of peace and order in any part of the Republic of Malawi.

Coming to exhibit P3 we think we should for better effect reproduce verbatim the relevant parts thereof.

'FOLLOWING THE DEVELOPMENTS AFTER THE PRESS RELEASE OF THE ABOVE AND COMMENTS AND CONTRIBUTIONS FROM VARIOUS PEOPLE, THE FOLLOWING CONTRIBUTIONS HAVE BEEN RECEIVED FOR CONSIDERATION AT THE NORTHERN REGION FORA CONFERENCE.

1. CALL FOR REFERENDUM ON 1ST JANUARY 2010 ON
 - DEVOLUTION OF POWER FOR THE NORTH;
 - QUOTA SYSTEM
2. CONSIDERATION/CONFIRMATION OF THE NAME OF NORTHERN REGION AND ITS CONSTITUTION
3. WHETHER BINGU IS EMPHATIC ON THE QUOTA SYSTEM IN EVERY SECTOR OF GOVERNMENT IS MEANT FOR DEVOLUTION OF POWER

4. ESTABLISHMENT OF A NON-DISCRIMINATORY UNIVERSITY FOR ALL DESERVING STUDENTS WHETHER IN SOUTH, CENTRE OR NORTH
 5. THE ROLE OF KAYEREKERA AND CHIKANGAWA FOREST AND ITS CONTRIBUTIONS TOWARDS NORTHERNERS
 6. CONSIDERATION ON WHETHER BINGU'S COMMENTS ABOUT QUOTA SYSTEM OF GOVERNMENT AND MZUZU CORNER ON KUCHEZA NDI A MALAWI PROGRAMME IS TANTAMOUNT TO INTERNAL XENOPHOBIA IN MALAWI AGAINST NORTHERNERS'.
- [Sic]

Firstly let us reiterate what we have said above that the offence which the accused stand accused of has nothing to do with the society's lack of registration or incorporation. This we feel obliged to restate in view of the testimony of PW2 Superintendent Ngongonda who was perhaps the State's principal witness. It is clear that PW2 was laboring under the misconception that the accused persons are guilty merely because the Northern Region FORA is not registered/incorporated at the Registrar General's. Whether or not the Northern Region FORA was/is registered/incorporated is irrelevant to the accused persons' guilt in this matter.

On whether going by exhibit P3 or its actions it can be said that there are grounds for presuming that the Northern Region FORA is an unlawful society the State answered the question in the positive. Pivotal to such thinking is once more the evidence of PW2. In his testimony he told us that the words of exhibit P3 were in his view:

'not good to Malawians. It can make the public do something harmful to the government'.

When he was pressed as to how the press release could be said to be in contravention of section 64(2)(g) his main concern was that the society seemed to be centered only on Malawians of northern heritage. That according to him would encourage sectarianism and tribalism which according to him is perhaps exactly what section 64(2)(g) sought to criminalize. Further he thought that the press releases did not pay sufficient respect to this great Republic's leadership.

In the context of this case the press release exhibit P3 must be looked at from several viewpoints. Firstly the State was not specific as to what it was about the press release that it had issues with. Was it the totality or parts thereof? And how was the press release, taken either as a whole or in parts, not good to Malawians? How would it induce the public into doing something harmful to the government? Had there been instances, potential or actual, where the press release had been shown as not being good to Malawians or where it prodded the public into doing something harmful to the government? This is important not because the State is at law obliged to inform the accused of the charge against them with sufficient particularity but because it offers the Court as the final arbiter an opportunity to decide whether the society's actions and therefore its purpose is as exemplified in the press release to disturb or incite the disturbance of peace and order in Malawi. That deficiency means that we have to indulge in conjecture. We must by ourselves try and find out which parts of the press release are capable of goading Malawians into doing 'something not good or harmful to government'. Or proceed on the assumption that the totality of the press release is capable of such. It is a deficiency that should, even at this stage, be fatal to the State's case. It, in the final analysis denies this Court the chance to determination one way or the other one element of the offence charged namely the illegality of the Northern Region FORA.

Secondly it is clear that exhibit P3 is not an amalgam of facts. Rather it is a compilation of items which some unmentioned persons raised for discussion at a forthcoming meeting of the Northern Region FORA. Exhibit P3 does not for instance accuse anyone of xenophobia or spew out what might be termed gratuitous insults. It instead raises the question [for discussion] whether someone's utterances might be. Similarly it raises, again for discussion, questions of devolution of power, the quota system and natural resource utilization i.e. Kayerekera and Chikangawa Forest. Should we, if it may be asked, criminalize open discussion of such issues merely because doing so might have the effect of not showing sufficient respect to certain quarters? Is it true that open discussion of such issues can incite Malawians into disturbing peace and order? So that any organization[s] that promotes discussion of these matters should be deemed unlawful for having as its purpose 'the disturbing or inciting to the disturbance of peace and order? We do not think so. These are after all issues that are already in the public domain being discussed by diver's persons, offices and institutions. We find it difficult, impossible we should say, to appreciate how the mere discussion of these very issues now by the Northern Region FORA should lead to the conclusion that the said FORA is a society whose purpose is to disturb or incite the disturbance of peace and order in Malawi. In other words that it is an unlawful society. There was the suggestion that the press releases and the Northern Region FORA placed undue emphasis on northerners and the northern region. That the foregoing was bound to incite sectarianism and tribalism. Such thinking smacks of too much simplicity, convenience and is clearly untenable. To begin with it assumes that northerner means only that person who is native to the northern region of Malawi. It cannot be true. There are persons who while residing in the Northern region of Malawi are not native to the said region. They have all the same an interest in what happens in the region. Anyone dealing with

the northern region must also have them and their views in contemplation. Such thinking also assumes that issues to do with the northern region are the exclusive preserve of the natives of the said region. As we have shown above such can not be the case. But the foregoing notwithstanding Exhibit P2 did not invite contributions from native northerners only. In the alternative it did not exclude input from persons other than native northerners. Similarly issues were not restricted to only those affecting the northern region or [for lack of a better word] northerners. If therefore only northerners responded or only issues affecting the northern region were raised what were the promoters of the Northern FORA supposed to do? Extract, in the manner of dentists input from non-northerners? Or manufacture for purposes of convenience non-northern issues? They would, correctly in our view, be accused of flouting the people's freedom of expression which includes the right to keep silent on any choice issue[s]. But in any event what is to stop so called northerners from coming together and debating amongst themselves an issue or issues which they feel tickles only their fancy? It is not after all the law of this Republic that an organization should have membership across the country, the regions or tribes. Localized membership is permissible. Different considerations would obviously have applied if membership to the FORA was limited on grounds of tribe, race or region of origin which is not the case in the instant instance. The truth of it all is that merely raising for discussions the issues in exhibit P3 the Northern Region FORA should not be labeled a society whose purpose is to disturb or to incite disturbance of peace and order in Malawi in other words an unlawful society even if the issues raised seem to be closely attached to the northern region of Malawi only.

Thirdly, it must not be forgotten that our Constitution guarantees freedoms of speech/expression, opinion, conscious and association. Freedom of speech/expression should not in our view be restricted to

speaking about only those things that delight the powers that be. It must extend to the freedom to speak about even those things that have the capacity/potential to displease indeed annoy. Persons or institutions should not therefore be barred from expressing themselves on any issue merely because doing so will discomfit certain quarters for the remedy in such instance is not to bar expression but to allow those offended to pursue civil suits. Much the same can be said about the freedom to hold or impart opinions and the freedom of association. People must be free to hold and impart even unpopular and/or minority opinions. The freedom to associate should not only be extended to associations whose aims and objectives agree with those of the establishment or those in majority. People should be free to associate even if the associations thereby formed have aims and objectives that do not accord with the establishment or the majority. Looking at the instant case we can not resist the temptation to conclude that the reason the Northern Region FORA and its views/objectives find themselves the subject of these proceedings might be because they are antiestablishment. Fortunately or unfortunately, depending on one's viewpoint, views/opinions and associations are not in Malawi proscribed merely because they are unpopular or in minority. They are because they are a legitimate limitation of peoples' rights under section 44(2) of the Constitution. Applying the above to the instant case it is clear that section 65 as read with section 64 are limitations on the freedoms of conscious, expression and association. Such limitation however does not accord with section 44(2) abovementioned in that it is not prescribed by law, reasonable, recognized by human rights standards and necessary in an open and democratic society. Criminalizing a discussion of the issues set out in exhibit P3 and allowing any society promoting such discussion to be declared unlawful would be tantamount to making illegal that which the Constitution has decreed legal. That is an inconsistency. Section 5 of the Constitution

makes the Constitution superior to any other law. To the extent therefore that sections 64 and 65 are inconsistent with the people's rights to hold and impart opinions, to associate and to express themselves the said sections are ineffectual. The Northern Region FORA cannot be an unlawful society. Whatever it did was only in furtherance of its and its members' constitutional rights to opinion, expression and association.

CONCLUSION

According to Dzaipa's case a case to answer will not have been established if *inter alia* one element of the offence charged has not been established to the requisite standard. In the instant case it is clear that there are no grounds for presuming that the Northern Region FORA is an unlawful society as defined in section 64(2)(g) of the Penal Code. That is an element of the offence charged. The State having failed to prove that one element must also be taken to have failed to prove that the accused persons have a case to answer. The accused are therefore acquitted. Whatever bonds they entered into in relation to bail are hereby set aside.

In our ruling of July 5, 2010 we ordered that the State would meet the costs of the first defendant's defence if the State proceeded against him on a charge other than under sections 50 and 51 of the Penal Code. The State has proceeded under sections 64 and 65. The State will therefore meet the said costs the same to be agreed or taxed whichever shall be applicable. We so order not just because the State was dithering as to what charge to bring against the first accused but also because it was clear from the word go that the case against the accused persons especially the first accused was hopeless. And yes perhaps it is time we decided whether in their present form our sedition laws remain valid in the current Constitutional dispensation or whether we still need them. We think not in either instance.

Delivered in open Court this October 8, 2010 at Mzuzu.

L. P. Chikopa

JUDGE

final judgment