



**REPUBLIC OF MALAWI  
MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI**

**LILONGWE DISTRICT REGISTRY**

**CHILD CRIMINAL REVIEW CASE NO. 8 OF 2017**

**[Being Criminal Case No.352, 2017, First Grade Magistrate Court sitting at Lilongwe]**

**THE REPUBLIC**

**v**

**JOHN MPONDA**

**CORAM  
Mwale, J.  
Kafereaanthu, Official Interpreter**

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**Mwale, J**

**ORDER UPON REVIEW**

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**Introduction**

1. These proceedings are commenced at the instance of the Acting Chief Resident Magistrate in Lilongwe by a memo dated 17<sup>th</sup> March 2017 using his powers under section 361(1) of the Criminal Procedure and Evidence Code. The subject of the referral involves a case of child trafficking under section 79(1) of the Child Care, Protection and Justice Act in the First Grade Magistrate's Court. There are number of concerns with the way the matter was handled, administratively, procedurally and substantively. Administratively, the Acting Chief Resident Magistrate expressed

concern that the case file in this case did not go through the normal channel where a case is registered in the Criminal Registry and then distributed to a Magistrate by a Chief Resident Magistrate. In fact, the Acting Chief Resident Magistrate was surprised that neither him nor any other supervising magistrate distributed the file to the First Grade Magistrate concerned. Equally as disturbing, upon inquiry by the Acting Chief Resident Magistrate, it transpired that the prosecutor in the matter brought the file directly to the First Grade Magistrate. The clerk and the First Grade Magistrate however insisted that the file went through all proper channels, against all the evidence.

2. Procedurally and substantively, the Acting Chief Resident Magistrate noted that the First Grade Magistrate did not follow procedure with regard to the child witnesses. The First Grade Magistrate neither considered hearing the children in camera nor did he conduct a *voir dire* examination to determine the competence of the children to testify on oath or not.
3. The file was referred to the High Court after three witnesses had testified and all that remained was for the First Grade Magistrate to deliver judgment.

### **Facts of the Case**

4. The case involves a trafficking of three girls from Mulanje who were sent to work for the accused in Lilongwe. They had been told that they would be working in a restaurant and shop only to find that they were to be working in a bar. The girls reported the accused to the police, being unhappy with the exploitative conditions of their service.

### **Determination**

5. To begin with, administratively, the First-Grade Magistrate who was seized of this matter was improperly seized. It is highly irregular and most reprehensible that he should have handled a matter directly given to him by a prosecutor who has admitted at much when he is well aware of the administrative chain of command and the manner in which the matter should have been assigned to him. It is highly unlikely that a magistrate of the First Grade would be ignorant of the manner in which cases are assigned. As the Acting Chief Resident Magistrate has already directed the First-Grade Magistrate and the Clerk to compile individual reports on what actually transpired and recommends disciplinary action. Further, I am not convinced that a First-Grade

Magistrate lacks the knowledge that *voir dire*s are a necessity in cases such as this and the only way to determine whether this is a case of lack of competence or indiscipline/corruption, I fully endorse the Acting Chief Resident Magistrate's recommendation and direct that disciplinary proceedings be instituted forthwith to maintain the integrity of the judiciary and the sanctity of the oath of office that judicial officers take.

6. In the premise, jurisdiction over the case having been improperly assumed, I find that the proceedings were a nullity and the matter must be reheard by a court that has properly been assigned the matter.
7. With regard to the flaws in the substantive law and procedure, I am satisfied from the record that the First Grade Magistrate failed to follow section 71A of the Criminal Procedure and Evidence Code in which by his own motion or by application, the magistrate should have considered holding the proceedings in camera or with special consideration of the need to protect the vulnerable child witnesses by measures that ensured that the child witnesses did not come into direct contact with the accused. The said section also makes provision for the witness to be accompanied by a relative or friend for support in court. Section 303(5)(h) of the Criminal Procedure and Evidence Code which foresees the possibility of a pre-recorded interview of a child witness being submitted as evidence in chief could also have been considered in the circumstances of the case. Therefore, when the matter is reheard, the presiding magistrate is to consider these provisions in protecting the rights of the vulnerable child witnesses.
8. With regard to the procedure, the First Grade Magistrate went ahead to receive the evidence of child witnesses without recording any process to record whether the children could give sworn or unsworn testimony (holding a *voir dire*). In the premises, any conviction based on such a hearing would have been unsafe (see **Makhanganya v Rep** 1961-63 ALR Mal. 491 and **Rep v Magombani** 1964-66 ALR Mal. 397). There is no indication whatsoever that the First Grade Magistrate had recourse to section 6 of the Oaths, Affirmation and Declarations Act in dealing with this matter as appropriate. The said section provides as follows:

*...in any proceedings against a person for any offence, any person of immature age, before the court as a witness, does not in the opinion of the court understand the nature of either an oath or an affirmation the court may receive his evidence, though not given on oath or affirmation, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence.*

*(2) Where evidence is received by a court in accordance with the proviso to subsection (1), the accused shall not be liable to be convicted on such evidence unless it is corroborated by some other material evidence implicating him.*

The court which rehears this matter is also directed to ensure that proper procedure is followed upon rehearing taking all the relevant and requisite legal provisions into account.

9. The court re-hearing the matter must be one that has the competence to handle child witnesses and proper care should be taken to ensure that the directions above are followed to avoid repeat victimization by having the witnesses go through a number of trials. The said re-trial should be held within 14 days to avoid contamination of the evidence through witness tampering.

I so order.

Made in open court in Lilongwe this 29<sup>th</sup> day of March 2017.

**Fiona Atupele Mwale**  
**Judge**