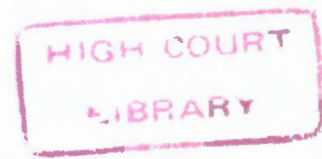


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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL REVIEW CASE NO. 17 OF 2017

(Being Limbe FGM Criminal Case Number 160 Of 2017)

THE REPUBLIC

V

SALIM MILANZI

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Mr Chitsime, Senior State Advocate, of Counsel for the State

Mr Maele, of Counsel for the Convict

Mrs Chanonga, Official Interpreter

ORDER ON REVIEW

Kalemba J

The Accused/Applicant, Salim Milanzi, is answering charges of robbery before the Limbe First Grade Magistrate Court together with four other co-accused. He pleaded not guilty to the charge. The trial is being conducted in Chambers. The Applicant being dissatisfied with the conduct of his trial in Chambers has moved the court to review the same.

There is only one ground for review:

(a) The propriety of conducting criminal trial in Chambers.

The State agrees that it is improper to conduct criminal trials in Chambers.

The legal position as to public trials is very clear. Section 42(2) of the Constitution provides as follows:

“Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –

(f) as an accused person, to a fair trial, which shall include the right –

(i) to public trial before an independent and impartial court of law within a reasonable time after being charged.”

And section 71 of the Criminal Procedure & Evidence Code provides as follows:

“s.71 –(1) All proceedings under this Code shall, except as otherwise expressly provided by any law for the time being in force, be carried on in an open court to which the public generally may have access:

Provided that –

(a) any court shall have power to hear any inquiry or trial or any part thereof, in closed court and to exclude any particular person from the court, if, in the opinion of the presiding judge or magistrate, it is expedient in the interests of justice or propriety or for other sufficient reason so to do;

(b) nothing in this section shall apply to –

(i) the proceedings of a juvenile court in accordance with the Children and Young Persons Act;

(ii) any proceedings in the High Court relating solely to a person under the apparent age of eighteen years;

(iii) any proceedings in the High Court, other than the trial of a person of the apparent age of eighteen years or upwards, which the High Court in its discretion, may think fit to conduct in closed court;

(iv) proceedings before a magistrate under section 83(2), (3) and (4) or under section 84;

(v) the deliberation of a jury in the course of any proceedings;

(vi) *any proceedings, other than an inquiry or trial, which the Chief Justice may, by writing, direct shall not be subject to this section.*

(2) Where the presiding judge or magistrate is of the opinion that, for purpose of avoiding delay, expense or inconvenience which in the circumstances of the case would be unreasonable, a court should be held on a Sunday, such court may be so held and no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered only by reason of the fact that the same was made or passed on a Sunday."

Furthermore, section 60 of the Courts Act provides as follows:

"In exercise of its jurisdiction, powers and authorities the proceedings of every court shall, except as otherwise provided for by any other law for the time being in force, be carried on in an open court to which the public generally may have access:

Provided that any court shall have power to hear any matter or proceeding or any part thereof in camera if, in the opinion of the presiding judge or magistrate, it is expedient in the interests of justice or propriety or for other sufficient reason so to do."

Thus it is clear from the constitution and the respective statutory provisions cited herein, that criminal trials are public trials unless otherwise provided under statute. Thus there are exceptions where the trials would be held in camera, and the presiding judge or magistrate has the authority to determine whether a particular trial or part thereof ought to be held in camera, but with sufficient reasons. The most important reason is if it's expedient in the interests of justice. If the accused person's constitutional right to a fair trial is being breached and his relations can't attend his trial because the presiding judicial officer just feels he has to conduct the trial in his chambers for lack of court space, that might not be a sufficient reason in all trials. Otherwise the exception is becoming the norm.

I have been referred to the cases of **Towera Chitsa and Another v The State Miscellaneous Criminal Application No. 160 of 2009 (HC)(PR)(Unreported)** where Chipeta J (as he then was) held that committal proceedings conducted in prison precincts were a sham ; and **Republic v Allan Feston George and 2**

Others, Confirmation Case No. 290 of 2013 (HC)(PR)(Unreported) where Mwaungulu J (as he then was) quashed a robbery conviction on the ground that the trial took place at Chichiri Prison which is not a public place and a designated place for the sittings of the courts. The learned judge further stated as follows:

“There is no indication that the Chief Justice authorized generally that trials can be conducted in prisons, that the trials can be conducted at Chichiri Prison or that the specific case should be held at Chichiri Prison. Such an order would be inconsistent with section 42(2)(f) of the Constitution. If made under section 60 of the Courts Act, the order would be inconsistent with section 60(1) and therefore ineffective under section 21(b) of the General Interpretation Act.”

I cannot agree more with the views expoused by my learned brothers. The Constitution and related statutes are very clear about hearing of criminal cases in open court, that is, a public trial. While I sympathize with the situation on the ground as to lack of sufficient court space, I do not think the solution is to deny the accused persons their constitutional right to a public trial. More so where the Chief Justice has not designated Chambers of magistrates as designated places for conducting trials. The office of the Registrar must engage Parliament and Treasury on the problem of court space and lobby for development funding for construction of more court rooms.

All in all, I agree with both parties that holding the Applicant’s trial in Chambers without sufficient reasons, and without the Honourable the Chief Justice designating magistrates’ Chambers, and in particular the Chambers of the Limbe First Grade Magistrate as places or a place for conducting public trials is improper. I consequently declare the proceedings in the Applicants trial a nullity. Consequently, I order and direct that the Applicant must be retried in a proper court room within 30 days from the date hereof.

PRONOUNCED this 14th day of November 2017, at the Principal Registry, Criminal Division, Blantyre.



S.A. Kalembera

JUDGE