

**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CONSTITUTIONAL CASE NO. 1 OF 2018**  
**(Being Confirmation Case No. 748 of 2015)**

**BETWEEN**

**WILLIAS DAUDI ..... APPLICANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

**AND**

**The LEGAL AID BUREAU ..... INTERESTED  
PARTY**

**Coram: Hon. Justice John Chirwa**  
**Hon. Justice Annabel Mtalimanja**  
**Hon. Justice Jack N'riva**

Mr. Fostino Maele, Counsel for the Applicant

Mrs. Loness Micongwe, Counsel for the Respondent

Dr. Steve Kayuni, Counsel for the Respondent

Mr. Masautso Chamkakala, Counsel for the Interested Party

Mr. Trouble Kalua, Counsel for the Interested Party

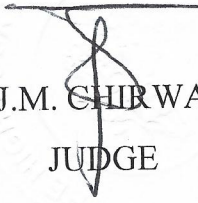
ORDER


By the way of summary, it is agreed that

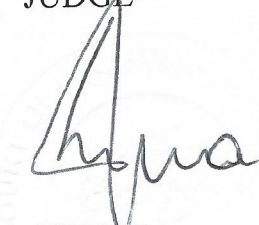
1. There was no discrimination in grant of the legal representation by the Legal Aid Bureau
2. There was a violation of the right to be informed of the right to legal representation

On whether there was miscarriage of justice and whether to quash the conviction and sentence, the majority decision of the Court is that there was no miscarriage of justice; therefore, the conviction and the sentence must stand. The dissenting opinion is that is that the trial was unfair as failure to inform the applicant of the right to legal representation amounted to miscarriage of justice. The dissenting decision went on to order the quashing of the conviction and sentence, and that there should be a retrial.

MADE in Open Court this 13<sup>th</sup> day of May, 2019

  
J.M. CHIRWA  
JUDGE

  
A. MTALIMANJA  
JUDGE

  
J. N'RIVA  
JUDGE

## JUDGMENT

*Chirwa J*

### **1. Introduction: -**

The Applicant herein, **WILLIAS DAUDI**, was on the 14<sup>th</sup> day of April 2015 convicted of the offence of robbery contrary to Section 301 of the Penal Code after a full trial. He was consequently, sentenced to a term of 9 years' imprisonment with hard labour with effect from the date of his arrest.

Following the said conviction, the Applicant applied to the High Court for the review of both his conviction and sentence on the following grounds:

1. That the lower court erred in law in failing to inform him of his right to legal representation as required under the Constitution of the Republic of Malawi ("the Constitution");
2. That the lower court erred in failing to advise the Applicant to seek legal representation as he was facing a capital offence;
3. That his trial without legal representation even at the expense of the State was a violation of the right to equality as persons charged with manslaughter, which is a lesser serious charge than robbery, are provided legal representation by the State;
4. That his trial was generally unfair and violated the right to a fair trial enshrined in the Constitution;



5. That the sentence of 9 years' imprisonment with hard labour was not proper.

The Applicant also applied to be released on bail pending the review on grounds that the review was very likely to be successful.

When the applications came before Tembo J, the learned Judge came to the conclusion that this matter ought to be determined by a panel of three judges in terms of Section 9(2) of the Courts Act since, according to the learned judge, it relates to the application of provisions of the Constitution, namely Sections 20 and 42(2) (f) and (v) of the Constitution. Consequently, the learned judge referred the matter to the Chief Justice for certification for consideration by a panel of three judges. The Chief Justice in his referral on the 7<sup>th</sup> day of March, 2018 had this to say:

*“Rather in appropriate referral, likely to result or cause backlog in criminal justice; but I would reluctantly certify it in compliance with Rule”.*

## **2. Issues for Determination: -**

The following are the main issues for determination by this Court:

- (1) Whether or not the Applicant's case raises constitutional issues for the determination by a constitutional court;
- (2) Whether or not there is any discriminatory policy by the government of affording legal representation at the State's expenses only to persons accused of the offences of murder and manslaughter (homicides), and
- (3) Whether or not the Applicant's right to a fair trial under the Constitution was infringed by the lower court's failure to inform him of his right to be represented by a legal practitioner.

## **3. Submissions by the parties: -**

All the three parties hereto filed Skeleton Arguments in support of their respective positions in the matter. This Court has no intention of reproducing the same but



will refer to the same in the determination of the above - stated issues. Suffice to say that this Court greatly appreciates the considerable ingenuity showed by the parties in the handling of this matter.

**4. Determination: -**

**(1) Whether or not the Applicant's case raises constitutional issues for the determination by a constitutional court.**

Section 9(2) of the Courts Act as provides as follows: -

*“Every proceeding in the High Court and all business arising there out, if it expressly and substantially relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges”.*

It is the considered view of this Court that it is apparent from the wording of the above provision that for a proceeding to be fit for determination by not less than three judges it must relate to or concern the interpretation or application of the provisions of the Constitution. The pertinent question here and now is: do the present proceedings relate to or concern the interpretation or application of the Constitution?

The word ‘interpretation’ is defined as follows:

- “1. The act or the result of interpreting;*
- 2. A particular adaptation or version of work method or style explanation”.*

And the word “application” is defined as follows:

- “1. An act of applying:*
  - a. (1) an act of putting something to use*  
*(2) a use to which something is put:*
  - b. an act of administering or laying one thing on another*

2 a: request, petition..... b: a from used in making a request” ...

see - the Merriam – Webster Dictionary.

With the foregoing definitions in the fore, this Court prefers to answer the above-stated issue in the negative. And as rightly, in this Court’s considered view, contended by the State, the fact that the Applicant’s matter touches on human rights does not automatically make it a Constitutional matter. The matter must relate to or concern either the interpretation of or application of the Constitution and not the rights conferred by the Constitution. In this regard this Court subscribes to the observations of the **Honourable the Chief Justice** in the following cases, first, *In the matter of Dr Bakili Muluzi and the Anticorruption Bureau and in the matter of Section 42(2) (f) of the Constitution and In the matter of the Courts (High Court) (Procedure on the Interpretation or application of the Constitution) Rules*, Court Reference No. 2 of 2015 when he said:

*“it is unthinkable to have a matter before our courts that has no bearing, none whatsoever, on rights, responsibilities and obligations of the human being. Virtually every cause of action relates to the rights, obligations and responsibilities of human beings in one way or another.....”*

And secondly, *Evelesi Simoni, Triphonia Raphael and Esnart Frank v Attorney General*, Constitutional Referral No. 9 of 2015 as follows:

*“...[R]eferrals must be regulated as we have done by Section 9 of the Courts Act and the rules, without a regulatory frame work, our judicial system could easily become inundated and overwhelmed with such proceedings”.*

It is, in the premises, the finding of this Court, sitting as a constitutional court that the Applicant’s case raises no constitutional issues meriting its determination. Indeed, the fact that a case involves the human rights provided for by the Constitution does not and cannot *per se* make the case constitutional. As a matter of fact, the High Court has dealt with so many similar cases involving the human



rights, such as, *Attorney General v Malawi Congress Party and Others*, [1997] 2 MLR 181 (SCA) (discrimination and *Marino v SGS Blantyre (Pvt) Ltd* [1998] MLR 208 (H)(discrimination).

This Court having answered the above stated issue in the negative will now proceed to determine the remaining issues as an ordinary High Court.

**(2) Whether or not the policy by the government of affording legal representation at the State's expense only to persons accused of the offences of murder and manslaughter (homicides) is discriminatory.**

Section 20(1) of the Constitution which deals with the equality of persons before the law provides as follows:

*“Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition”.*

*In the matter of the admission of David Nyamilandu and In the matter of the Legal Education Act (Cap 3:03 of the Laws of Malawi)*, Constitutional Case No 1 of 2008 at 10, cited by both the Applicant and the State in their Skeleton Arguments, there is a passage in the judgment, which the Applicant appears to have omitted, deliberately, on the definition of the word “discrimination”.

*“It has been defined elsewhere as an unequal treatment of persons where one similarly situated to the other suffers detriment or is placed at a disadvantage because of an attribute that distinguishes him from the other person. Thus, this discussion demonstrates that not all distinctions and differentiations created by law are discriminatory. For a complaint to succeed under Section 20 of the Constitution it must be shown not only that the applicant is not receiving equal treatment before the law and under the law or that the law has differential impact on him or her in the protection or benefit of the law but must also demonstrate in addition that the law is discriminatory”.*



Turning to the present case, it is apparent, that the Applicant feels discriminated against merely because suspects of manslaughter are provided with legal aid when he was not provided with the same. The case of the Applicant here seems to be wanting in many respects. First, and as rightly, in this Court's view, contended by the State, the comparison made by the Applicant is of offences different in nature and with different elements required to prove the same. The Applicant's case would have merited had the Applicant demonstrated to this Court that some other robbery suspects had been provided with legal aid at the expense of the State. This, the Applicant has not done. Secondly, and as also, in this Court's view, rightly contended, by the State the offences of robbery and manslaughter are tried in totally two different types of Courts, with the former being tried in the subordinate court while the latter in the High Court.

It is also pertinent to note that the guarantee to equal and effective protection against discrimination made by Section 20 (1), aforesaid, is as regards the status or condition of a person. The Applicant herein ought thus to have demonstrated to this Court that he had been placed at a disadvantage because of some attribute that distinguishes him from the suspects of murder or manslaughter. This, the Applicant has again not done.

It is, in the premises, the finding of this Court that the policy by the government of affording legal representation at the State's expense only to persons accused of the homicide offences (i.e. murder and manslaughter) is not discriminatory in terms of Section 20 (1) of the Constitution. It passes the Constitutional validity test and thus justifiable.

**(3) Whether or not the failure by the lower court and the State to inform the Applicant of his constitutional right to be represented by a legal practitioner resulted in any way in a miscarriage of justice.**

Section 42 (1)(c) and (2) (f)(v) of the Constitution provide the rights to a fair trial to accused and convicted persons. For the sake of clarity, the said provisions are hereby reproduced as follows:

*“(1) Every person who is detained, including every sentenced prisoner, shall have the right-*

*(c) to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State;*

*(2) 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-*

*(v) to be represented by a legal practitioner of his or her choice, or where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights”;*

This Court is generally, in agreement with the Applicant’s contention that the failure by both the subordinate court and the State to inform the Applicant of his right to be represented by a legal practitioner constituted a breach of the Applicant’s right to a fair trial. This Court however, does not subscribe to the Applicant’s contention that his trial in the subordinate court was thus unfair because it proceeded from a violation of his fundamental rights guaranteed under the Constitution. It is the considered view of this Court that a trial can be fair even though there has been a breach of the constitutional rights. In other words, the breach of the constitutional duty alone cannot result in a miscarriage of justice. The Applicant should thus have demonstrated by evidence how such a breach of constitutional duty had caused a miscarriage of justice to him.

In the case of *Nthala & Others v The Republic* [2000 - 2001] MLR 356, cited in the State’s Skeleton Arguments, it was held by the Court, at page 359, that



although failure by the State to provide the appellants with a legal practitioner to defend them constituted a breach of their right to a fair trial, that fact alone, did not result, on the facts of that case, in a miscarriage of justice. A similar conclusion was reached by the Supreme Court of Appeal in the case of *Dike Omeka & Henry Chima Amadi v The Republic*, Criminal Appeal No. 3 of 2003 (unreported) where it was held, inter-alia, that the failure by the lower court to inform the appellants of their rights is not considered fatal to warrant the quashing of the conviction. It was the view of the court that this is a technicality curable under Section 3 of the Criminal Procedure and Evidence Code. It is worthy of note that the Applicant herein has not demonstrated by evidence how the breach of his constitutional right by the lower court and the State in his case had caused miscarriage of justice to him.

This Court has had the occasion to peruse the record of the proceedings in the subordinate court and has observed that the evidence adduced by the State against the Applicant was so overwhelming that even if the Applicant had been provided with one of the best Counsel on the land there is no way that any reasonable tribunal could have reached a different finding than that of his guilt.

In the premises, it is the finding of this Court that the failure by the lower court and the State to inform the Applicant of his constitutional right to be represented by a legal practitioner did not in any way result in any miscarriage of justice to the Applicant.

##### **5. Conclusion: -**

For the reasons given above, this Court thus finds the Applicant's within application without merit. It is consequently, dismissed. It would follow thus that there would no justification for tampering with both the conviction and the sentence imposed on the Applicant by the subordinate court. The same are consequently, hereby confirmed.



Dated this 13<sup>th</sup> day of May, 2019



J.M. Chirwa

**JUDGE**

*Mtalimanja, J*

**Background**

The Applicant was charged in the Blantyre First Grade Magistrate's Court with the Offence of Robbery, contrary to 301 of the Penal Code (Cap. 7:01 of the Laws of Malawi). After full trial, he was convicted as charged and sentenced to serve a custodial sentence of 9 years with effect from 25<sup>th</sup> February, 2015. He was unrepresented throughout the proceedings.

The matter was subsequently sent to the High Court for confirmation. The Applicant engaged Counsel to assist him during the confirmation proceedings. Counsel for the Applicant filed four grounds for review, namely:

- i. that the Lower Court did not inform the convict of his right to legal representation as is required under the Constitution of the Republic of Malawi (hereinafter the "Constitution");
- ii. that the Lower Court erred in failing to advise the convict to seek legal representation when was facing a capital charge;

- iii. that the trial of the convict without legal representation, even at the expense of the State, was a violation of the right to equality as persons charged with manslaughter, which is a lesser serious charge than robbery, are provided legal representation by the State; and
- iv. that the trial was generally unfair and violated the right to a fair trial enshrined in the Constitution.

Whilst awaiting the hearing of the review, the Applicant applied for release on bail pending the said review. At the hearing of this Application, the Applicant argued that the matter substantially related to the application of the Constitution and was therefore fit for determination by a panel constituting not less than 3 Judges. Upon referral to the Chief Justice for certification, the matter was duly certified, hence the present proceedings.

### **The pleadings**

In this Referral the Applicant contends that he suffered the following violation of his right to:

- a. be informed of the right to legal representation under section 42(1)(c) of the Constitution;
- b. be represented by a legal practitioner of his choice or with a legal practitioner at the expense of the State in the case where he faces a serious charge;
- c. freedom from discrimination and equality before the law under section 20 of the Constitution, in that robbery suspects are not

- provided legal representation by the State, just as it does for all manslaughter suspects, when robbery is a more serious offence; and
- d. a fair trial under section 42 of the Constitution.

He thus claims the following reliefs:

- e. a declaration that his right to be informed of the right to legal representation under section 42(1)(c) of the Constitution was violated;
- f. a declaration that the Lower Court violated his right to a fair trial by failing to advise him of the right to legal representation under section 42(2)(f)(v) of the Constitution when he was charged with a capital offence;
- g. a declaration that his right to be represented by a legal practitioner of his choice or with a legal practitioner as the expense of the State in the case where he faced a serious charge was violated;
- h. a declaration that his right to freedom from discrimination and equality before the law under section 20 of the Constitution was violated as the State provides legal representation to all manslaughter suspects yet robbery suspects are not offered legal representation when robbery is a more serious offence [sic];
- i. a declaration that his right to a fair trial under section 42 of the Constitution was violated and he did not have a fair trial;
- j. a declaration that the violation of the several rights in this case is an irregularity that goes to the core of the right to a fair trial and the conviction herein cannot stand on account of the violations;
- k. an order that the conviction must be set aside and the sentence must be set aside; or
- l. an order that the sentence be reduced in the event that the conviction is upheld.



In response, the State avers as follows: the Director of Public Prosecutions (hereinafter “the DPP”) prosecutes homicide cases and forwards case dockets of homicide cases to the Legal Aid Bureau (hereinafter the “LAB”). The DPP has always sent all cases tried by the High Court to the LAB. These include homicide cases, criminal appeals and confirmation cases. It is therefore not true that the DPP refers homicide cases to the LAB because the office considers the offences as serious offences, rather it is because these cases are tried at the High Court where the processes are complicated. The DPP thus deems that it is in the interest of justice that homicide suspects should be legally represented. There are a lot of other offences which carry life imprisonment sentences like rape and defilement that the DPP does not forward to the LAB since they are tried in the Magistrates Courts. Owing to the complexity of the processes in the High Court, the State has found it necessary, in the interest of justice, to forward the same to the LAB to represent the suspects, unless the suspects have their own legal practitioners.

On its part the LAB contends as follows: it was created by the Legal Aid Act (Cap. 4:01 of the Laws of Malawi (hereinafter “the Act”) to provide legal aid to persons of insufficient means, if it is in the interest of justice so to do. The grant or refusal of legal aid to any applicant is in accordance with the provisions of the Act. Eligible applicants for legal aid may be referred to the LAB by other institutions, e.g. Courts, Office of the Ombudsman, the Police, the Malawi Human Rights Commission, Government ministries and departments). Applicants may also walk in person to its offices or may be discovered by the LAB in various places of detention across the country through the routine visits it carries out.

All applicants for legal aid in homicide cases and robbery cases have been granted legal aid. The Applicant herein did not apply for legal aid, either in person, by

way of referral or discovery by the LAB. There was therefore no way the LAB could have granted him legal aid. Had the Applicant applied for legal aid, he would have been represented by the LAB in the proceedings.

The LAB does not have any discriminatory policy in the grant of legal aid. It is not aware of any discriminatory policy of the Government in the grant of legal aid against robbery suspects. In any event, if such policy exists at all, the LAB is an independent institution created by statute and would therefore not be bound by any such policy. All applications for legal aid are assessed based on parameters laid down in the Act.

#### **Issue for determination**

The Applicant has put for this panel's determination, the question whether there is a constitutional justification, in light of sections 20 and 42(2)(f)(v) of the Constitution, for the discriminatory policy of the Government of affording the right to legal representation at the State's expense, to all persons accused of murder or manslaughter and not to those accused of robbery, when all these three offences attract a maximum penalty of death or life imprisonment.

#### **Analysis**

Section 42(2)(f) the Constitution guarantees an accused person the right to fair trial. This right to a fair trial is multi-faceted, but of relevance for present purposes is one of those facets - the right to be represented by a legal practitioner of one's choice, or where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights in section 42 (2)(f)(v).



As I understand section 42 (2)(f)(v), the right to legal representation encompasses 3 components:

- (i) the right to be legally represented by a legal practitioner of one's choice,
- (ii) the right to be provided with the services of a legal practitioner at the expense of the State, if deemed to be required in the interests of justice so to do, and
- (iii) the right to be informed of these rights.

In order to fully and effectively enjoy the right to legal representation, an accused person should be informed that he or she has the right to be represented, either by a legal practitioner of his or her own choice or at the State's expense, if the interests of justice so require.

It will be noted that the provision does not spell out who bears the duty to inform an accused person of this right. It is imperative to isolate who the said duty rests on, much more so in the Malawian context where some accused persons may be unrepresented and some may be illiterate. In my considered view, since the trial process is under the control and direction of the presiding judicial officer, it is fair and logical to conclude that the duty rests with the court. That said, the State can also invite the court to inform the accused person where the said court has omitted to do so.

Ideally, and to give meaningful effect to realization of this right, an accused person must be informed of the right at the outset of the trial process, i.e. before taking plea. In the event the court does not so inform the accused person at the commencement of the trial, he or she can still be informed in the course of the trial process and due accommodation made, should the accused person wish to engage a legal practitioner whilst the trial process is already underway.



It is instructive to note that section 42(2)(f)(v) does not subject the enjoyment of the right to legal representation to the type of offence an accused person stands charged with. It also does not subject such enjoyment to the class of court conducting the trial process. Subject only to the qualification imbedded in the provision, it must be that the legislature intended for every accused person to enjoy this right, regardless of the offence that accused person stands charged with or the court conducting the trial.

Upon perusal of the record of the proceedings in the Lower Court, I note the following: the Applicant was unrepresented. The proceedings commenced on 2<sup>nd</sup> March, 2015, when plea was taken by reading and explaining the Charge to the Applicant, who pleaded not guilty. A plea of not guilty was duly entered. After plea was taken the Public Prosecutor informed the Court that he will call 4 witnesses and proceeded to call the said witnesses accordingly.

At the close of the prosecution case, the Court recorded that the “Accused has a case to answer and all rights explained to the accused under section 254 of the Criminal Procedure and Evidence Code”. At this point the Applicant informed the Court that he will testify in his defence and will call one witness. After his defence the Applicant informed the Court that his witness was not available so the Court could proceed to judgment. Judgment was pronounced on 14<sup>th</sup> April, 2015, convicting him as charged.

Thus, the record clearly shows that the Applicant was not, at any time from commencement to conclusion of the trial proceedings, informed that he had the right to be legally represented during the said proceedings. I therefore find as a fact that the Applicant was not informed that he had the right to be legally represented in the proceedings, either by a legal practitioner of his choice or at

the expense of the State, if required in the interest of justice, as stipulated in section 42(2)(f)(v) of the Constitution.

The central question before us is then, what are the legal ramifications of the failure to so inform the Applicant? Section 44(4) of the Constitution provides that wherever it is stated in this Constitution that a person has the right to the services of a legal practitioner or medical practitioner of his or her own choice, that right shall be without limitation, save where the State is obliged to provide such services, in which case an Act of Parliament may prescribe that the choice of the legal practitioner or medical practitioner should be limited to those in Government service or employment.

As I understand this section 44(4), the right to legal representation is what I will term a hybrid right. This is because the section makes provision for both limitable and un-limitable components. The right of an accused person to engage the services of a legal practitioner of his or her choice is without limitation. The right to the services of a legal practitioner provided by the State is limited to those legal practitioners in Government service or employment.

Section 42(2)(f)(v) does not provide whether the right to be informed of the right to legal representation is with or without limitation. However, reading section 42(2)(f)(v) together with section 44(4), I am persuaded to conclude that the right of an accused person to be informed that he or she has the right to legal representation is without limitation. This, in my view, is the only way in which the un-limitable right to be represented by a legal practitioner of one's choice can be given effect. In order to realize the right to be represented by a legal practitioner of one's choice, an accused person must of necessity, first of all be informed that he or she has the right to legal representation. Otherwise, without knowledge of the existence of the right to legal representation, an accused who is



otherwise capable to retaining the services of a legal practitioner of his or her choice may not do so.

In the case of *Fred Nseula v Attorney-General and Malawi Congress Party* [1999] MLR 313 the Supreme Court of Appeal said

*“constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be construed not in narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intention of Parliament.”*

It would be absurd and a contradiction in terms to hold that the right to be informed of the right to legal representation is limitable whilst also holding that the right to be represented by a legal practitioner of one's choice is without limitation. On the authority of the *Fred Nseula* case, section 44(4) and 42(2)(f)(v) must be construed broadly and purposively, to mean that the right of an accused person to be informed that he or she has the right to legal representation is without limitation. I so hold.

Therefore, on this understanding, the Lower Court had an absolute obligation to inform the Applicant that he had the right to legal representation, so that he could then elect whether he would represent himself, or engage a legal practitioner of his or her own choice or if unable to, for one to be provided at the expense of the State, if deemed necessary in the interests of justice.

The Applicant argues that he ought to have been informed of the right to legal representation, much more so where he was charged with a serious offence, that carries a maximum sentence of life imprisonment. He further argues that the policy of the State to provide legal aid, at its expense, to all persons accused of



homicide and manslaughter cases, is discriminatory in so far as persons accused of armed robbery are not afforded the same service.

The State contends that, as a matter of practice, the DPP refers case dockets of all cases tried by the High Court to the LAB. These include homicide cases, criminal appeals and confirmation cases. Owing to the complexity of the procedures in the High Court, the State has found it necessary, in the interest of justice, to refer these cases to the LAB to represent the suspects, unless the suspects have their own legal practitioners. There are a lot of other offences which carry life imprisonment sentences like rape and defilement that the DPP does not refer to the LAB, since they are tried in the Magistrates Courts. It is therefore not true, so the argument goes, that the DPP refers homicide cases to the LAB because those cases are considered serious offences

For their part, the LAB contends that all applicants for legal aid in homicide and robbery cases have been granted legal aid. The Applicant did not apply for legal aid, either in person, by way of referral or discovery by the LAB. There was therefore no way the LAB could have granted him legal aid. Had the Applicant applied for legal aid, he would have been represented by the LAB in the proceedings in the Lower Court.

I have carefully addressed my mind to the arguments advanced by the State and the LAB. Firstly, it will be noted that both the State and the LAB do not dispute the fact that the Applicant was not informed that he had the right to legal representation at any time during the proceedings in the Lower Court. I find that the said arguments actually highlight the constitutional deficiencies in, not only the way the Applicant's case was specifically handled in the Lower Court, but also generally in how cases and accused persons are handled and dealt with by

the courts, the DPP's office and the LAB, in so far as giving effect to the right to legal representation is concerned.

In my view, the fact that the State, as a matter of practice, refers cases triable by the High Court to the LAB, as well the fact that the LAB would have represented the Applicant had his case been referred to it, does not take away the fact that he was not duly informed of his right to legal representation. The inescapable conclusion on the facts before us is that the Applicant's right to be informed that he had the right to legal representation was violated. I so find.

As was observed by the late Manyungwa J in *G.L. Chirwa v Attorney General* [2006] MLR 175 (HC) it cannot be doubted that under section 46 of the Constitution, the court has power to make such orders as are necessary where it is shown that a right or freedom has been unlawfully denied or violated. By virtue of section 41 of the Constitution, the Applicant has the right to an effective remedy from this court for the violation of his right. The question that has greatly vexed my mind is what remedy would effectively address the violation of the Applicant's right to be informed of the right to legal representation.

As indicated, the Applicant was charged with the offence of armed robbery. The violation of his right to be informed that he had the right to legal representation in the trial proceedings does not extinguish the charge. However, in my considered view, the violation of his right rendered the proceedings unfair. His conviction and sentence were therefore tainted with the unfairness and should therefore not be allowed to stand. Considering the peculiar circumstances of this present case, I am of the considered view that an effective remedy is a re-trial. I therefore set aside the conviction and sentence and order a retrial before the Lower Court.



The Applicant was convicted on 14<sup>th</sup> April, 2015 and sentenced to a custodial term of 9 years with effect from 25<sup>th</sup> April, 2015. Thus, he has served 4 years of the prison term. In the event the Applicant is convicted after the re-trial, I order that the period already served in custody should be taken into account when reckoning the sentence.

The Applicant argues that the failure to be granted legal aid by the State constitutes discrimination, since persons accused of homicide and manslaughter offences are routinely granted legal aid. I find this argument misconceived. Notwithstanding the finding that the right to be informed of the right to legal representation was violated, I find that the Applicant was not discriminated against. The LAB has argued, and it has not been disputed, that the Applicant's case was not brought before the LAB for grant of legal aid. There is no evidence before this Panel to show that the LAB refused to grant the Applicant legal aid notwithstanding the fact that he was charged with armed robbery.

I am of the considered view that the Applicant has conflated issues in this application. The facts before us only go as far showing that there was a violation by the court of the right to be informed of the right to legal representation. However, the allegation of discrimination lacks merit. I thus decline to grant the declaration sought by the Applicant in paragraph (d) of his pleadings.

Whilst this disposes of the Applicant's case before the Panel, it will be remiss to not address the arguments raised by the State and the LAB.

As indicated, it is on record that, as a matter of practice, the DPP refers cases triable by the High Court to the LAB for legal representation, on account of the complexity of procedures in this Court. This practice is problematic in light of the constitutional provisions under discussion in this referral. As indicated, the



right provided for in section 42(2)(f)(v) of the Constitution is guaranteed to every accused person, regardless of the type of offence that person is charged with and the court conducting the trial.

However, a consequence, perhaps unintended, of the implementation of the practice is that indigent accused persons answering charges that are triable by the Magistrate's court may end up being systematically denied the right to legal representation. By referring only cases triable by the High Court to LAB, the practice creates a lacuna for cases tried by the lower courts.

A procedural office practice cannot trump a right prescribed by the Constitution, being the supreme law of the land. So, whilst the practice has been touted to be in the interests of justice, I find that it is flawed and actually has the potential of perpetuating injustice. In order to actualize the enjoyment of the right guaranteed in section 42(2)(f)(v), the criminal justice system should devise systems to ensure that regardless of the type of offence or court exercising jurisdiction, all accused persons are informed of the right to legal representation. Considerations of interests of justice should only arise where the accused person is unable to engage a legal practitioner of his or her choice.

As indicated, the LAB contends that had the Applicant's case been brought to its attention, the Bureau would have represented him. Indeed, a perusal of the Act suggests so. Section 17 of the Act provides that the LAB shall develop and maintain a service to ensure that individuals against whom criminal proceedings have been instituted, who fulfil the requirements in section 18, have access to such legal aid, as the interests of justice require.

Section 18 of the Act provides as follows for eligibility to legal aid in criminal matters:

- “(1) A person shall be eligible for legal aid in criminal matters if-*
- (a) it is in the interests of justice that such person should have legal aid provided in accordance with this Act with respect to those criminal investigations or criminal proceedings in respect of which he seeks legal aid; and*
  - (b) he has insufficient means to enable him to obtain the services of a private legal practitioner.*
- (2) The factors to be taken into account by a competent authority in determining whether it is in the interests of justice that legal aid be granted in criminal matters shall include the following-*
- (a) the offence is such that if the applicant were convicted it is likely that the court would impose a sentence which would deprive the accused of his liberty or lead to loss of his livelihood or to serious damage to his reputation;*
  - (b) the determination of the case may involve consideration of a substantial question of law and adequate legal representation would make a material difference to the accused in receiving a fair trial;*
  - (c) the accused may be unable to understand the proceedings or to state his own case because of his inadequate knowledge of the English language or due to mental illness or physical disability or on account of any other valid cause;*
  - (d) the nature of the defence is such as to involve the tracing and interviewing of witnesses or to involve expert cross examination of a witness for the prosecution;*
  - (e) it is in the interests of someone other than the accused that the accused be represented; and*
  - (f) the accused would, if convicted be given the option of a fine and such fine would remain unpaid for more than one month after the imposition of sentence.*

The offence which the Applicant was charged with carries a maximum sentence of life imprisonment. He was therefore, *prima facie*, eligible for grant of legal aid in the trial proceedings. In fact, the LAB contends that had his case been brought to their attention, they would have represented him.

As elaborate as the Act is, it is apparent that there is a crack in the implementation system through which accused persons who qualify for grant of legal aid, such as the Applicant, are falling through, because of not being informed of the right to legal representation. Apart from waiting for the DPP' office to routinely refer cases triable by the High Court to it, the LAB, in collaboration with the courts and the State (DPP's office and the Police), must devise a system to ensure effective realization of the right in section 42(2)(f)(v).

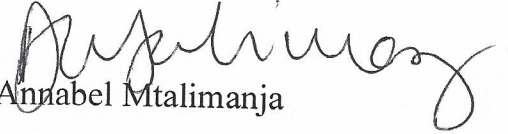
### **Conclusion**

From the foregoing, I grant the Applicant the following reliefs:

- m. a declaration that the Applicant's right to be informed of the right to legal representation under section 42(2)(f)(v) of the Constitution was violated;
- n. a declaration that the Applicant's right to a fair trial under section 42(2)(f)(v) of the Constitution was violated;
- o. an order that the conviction and sentence herein must be set aside;
- p. an order for a re-trial before the Lower Court on the same charge;
- q. an order that, in the event the Applicant is convicted in the re-trial, the period spent in custody serving sentence must be computed with the sentence.

Pronounced in Open Court this 13<sup>th</sup> Day of May, 2019.



  
Annabel Mtalimanja  
**JUDGE.**

*N'riva J*

**Introduction**

The applicant was tried for the offence of robbery in the Court of First Grade Magistrate at Blantyre. He was sentenced to a prison sentence of nine years.

The convict sought review of the conviction and the sentence on grounds bordering on the convict's right to legal representation. These included the failure by the trial court to inform him of the right and the convict being tried without legal representation at the expense of the State. He, therefore, claims that the State discriminated against him in failing to provide him with legal representation as is the case with defendants in murder and manslaughter trials.

On those grounds, the applicant argued that he was subjected to an unfair trial. The claimant, therefore, sought declarations that:

1. The policy or practice of Government of affording legal representation to homicide suspects and not to robbery suspects is unconstitutional as it violates the right to equality before the law and freedom from discrimination.
2. The trial court violated the applicant's right to be informed of his right to legal representation by failing to advise and inform him of the right to legal representation.

3. The trial was unfair as it proceeded from a violation of the applicant's fundamental human rights guaranteed under the Constitution and that the conviction must be quashed and the sentence set aside.

The applicant further sought that this Court should direct that:

1. Legal representation should be afforded to all persons charged with capital offences at the expense of the State if the accused person cannot afford their own legal representation.
2. Every trial court must, before taking plea in all criminal cases, inform and explain to every accused person of the right to legal representation and that that must be recorded.

The High Court sitting on review of the conviction and sentence, observed that the review involved constitutional interpretation. The Honourable Judge, therefore, referred the matter to the Chief Justice for purposes of certifying the matter as a constitutional matter under section 9 A of the Courts Act.

The Chief Justice certified the matter as a Constitutional matter.

### **Issues for determination**

The applicant raised issues, bordering on unfair trial, which I think we can classify into three categories. First, that the trial court did not inform him of the right to legal representation and, secondly, that the State did not provide him with legal representation. Thirdly, he argued that he suffered discrimination because the State provides legal representation to homicide suspects but not to robbery suspects.

### **Law, discussion and Findings**

#### **Right to legal representation and the right to be informed of the right**

My Lord, My Lady,

Under section 42 (2) of the Constitution, an arrested or accused person has a right first, to have legal representation of his own and, where it is required in the interest of justice, to be provided with legal representation at the expense of the State. Secondly, the accused person has a right to be informed of the rights. These rights are available in addition to those other rights that any other suspect or a detained person has under section 42(1).

Section 42(2)(f) (v) of the Constitution reads:

*'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...to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights.'*

The provision is self-explanatory. It simply provides that a person undergoing criminal processes has a right to have recourse to legal representation. He has to choose a lawyer of his own, and where it is required in the interest of justice, to be provided with legal representation by the Government. Apart from that, the accused person has a right to be told about this right namely, the right to legal representation.

In my view, when undergoing a criminal process, several actors have this duty to inform the accused person of the right to legal representation. This starts from an arresting or interrogating officer all the way. For the purpose of the case before us, a trial court has a duty to inform an accused person about this right.

For an accused person to invoke his or her rights, he or she has to be aware of the rights. To be aware of the rights, the need for services of a lawyer is self-evident. For one to know of the right to access services of a legal representative, he or she must be informed. The right is well-entrenched in the Constitution. We can assume that it is a right everyone should know. However, the Constitution



emphasises the right of the suspect to be informed of the right. This is because, in my view, the right to legal representation has been said the “one of the most important and fundamental rights of a citizen”-*R v Samuel* [1968] Q.B. 615. This right is eminent in numerous jurisdictions. This is because criminal procedure and evidence is, in most jurisdictions, including Malawi, a methodical and wide-ranging subject. In a Canadian case of *The Queen v O'Connor* (1964) 48 D.L.R. 110, the court said that one only has to consider the provisions of [Criminal Procedure and Evidence Act (of Canada)] to appreciate how necessary a professional is for a proper understanding of their operation.

In the American criminal procedural jurisprudence, there is emphasis on guarding the rights of an accused person by, among other things, custodial warnings and legal representation- *Miranda v Arizona* 384 US 346 (1966) and *Escobedo v Illinois* 378 US 478 (1964).

The South African Constitution also contains the right for accused persons to choose and be represented by a legal practitioner. Further, the accused has a right to have a legal practitioner assigned to them, by the State, if substantial injustice would otherwise result. Further, just like our Constitution, the accused has the right to be informed of these rights promptly.

To emphasise on the right to inform accused persons of the right to legal representation, it should be the duty of trial courts to explain the right to the accused person. In *S v Radebe* 1988 (1) SA 191 (TPD), Goldstone J, said at 196 F-I stated:

*‘If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction.*

*Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice'*

In another case, in *Ramaite v S* [2014] ZASCA 144, the Court held that the fact that the rights were explained to the accused must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation.

The Court said:

*'It would not be sufficient to record that the rights have been explained without sufficient particulars to determine whether that was in fact adequate. It is clear that if a judicial officer believes that an accused is aware of his rights, the right to legal representation must nevertheless be properly explained to him, in open court. If the accused chooses not to have legal representation in serious cases, it is incumbent on the presiding officer to inform an accused of the seriousness of the charges and advise him to make use of a legal representative. It can safely be assumed in any case where the possibility of imprisonment is real, an injustice would result if an accused does not have legal representation. For such explanation to be effective, it must be done prior to the commencement of the trial, which means prior to an accused pleading to the charges.'*

In short, accused persons have a right to be informed of the right to legal representation. Courts have a duty to inform accused persons of the right to legal representation. I know that courts inform homicide suspects, on referral to the High Court, of the right to legal representation, even at the expense of the State. I believe that, in similar fashion, the courts should inform other suspects appearing before them, of the right to legal representation and the court must particularly record that advice.



### **Discrimination in provision of legal servicesp**

On the issue of the actual legal representation, the main contention by the applicant is that the State did not provide him with legal representation as it does with suspects of homicide offences. Therefore, the State discriminated against him by treating him differently from the offenders of murder and manslaughter. By extension, the argument is that the State provides legal aid service to homicide offenders but it does not do so to robbery suspects. Therefore, the argument goes, the State discriminates against robbery offenders.

Section 20 (1) of the Constitution prohibits discrimination of persons in any form on the grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.

The claimant argues that all the offences, murder, manslaughter and robbery, attract the maximum punishment of death or life imprisonment. Further, convicts of robbery are receiving longer prison sentences as opposed to those convicted of manslaughter.

In their submission, the Legal Aid Bureau submitted that they are not aware of the existence of a Government policy that discriminates against robbery suspects in the grant of legal aid. They argued that the grant of legal aid is rather regulated by the Legal Aid Act and not any policy. The grant of legal aid, they said, is based on Legal Aid Bureau Act, especially section 18.

The primary question is whether the applicant has proved differentiation in the provision of legal aid.

Having listened to the parties, I fail to appreciate that there is a policy by the Legal Aid Bureau not to provide legal representation to suspects of robbery. As the Bureau Aid told the Court, the grant of legal aid in criminal matters is

governed by section 18 of the Legal Aid Act. There is, in my view, nothing to stop the bureau from providing legal representation to suspects of robbery. Therefore, I find nothing, as a policy to stop the bureau from representing robbery suspects. If there was such a policy, I would have hastened to find the policy discriminatory to suspects of robbery. It would then remain to consider whether the discrimination would have been justified. However, for the reason that I have found that there is no such policy, it is not necessary to go that far. I am saying this because during the hearing of this application, there arose issues justifying why suspects of homicide have to be provided with legal aid. However, as I said that I find nothing stopping the Legal Aid Bureau from representing robbery suspects, the issue of discrimination does not arise.

I have to emphasise that the right to legal representation by the State is not absolute. It depends on the interests of justice so dictating. The main issue in this matter, therefore, remains the failure to inform the applicant of the right to legal representation.

### **General comments**

In the final analysis, My Lord and My Lady, I find that the trial court had to inform the accused of his right to legal representation. I, therefore, suggest that Magistrates should develop a habit of informing accused persons of this right at the start of criminal processes. I also suggest that arresting and investigating officers of criminal enforcement and prosecuting agencies should inform suspects and detained persons of these rights. In *S v Melani & others* 1996 (1) SACR 335 (E) at 347 *e-h*) the Court observed:

*'The right to consult with a legal practitioner during the pre-trial procedure and especially the right to be informed of this right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions (and admissions for that matter) which "have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been*



*eroded by statute and in some cases by judicial decision” (in the words of Kentridge AJ in Zuma's case).<sup>1</sup> In a very real sense these are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination. The failure to recognise the importance of informing an accused of his right to consult with a legal adviser during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor, of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness which now informs the right to a fair trial in this country but also the right to equality before the law.’*

The comparable decisions from other jurisdictions, and from within this jurisdiction, suggest that failure to inform an accused of the right may negatively impact the fairness of the trial. However, the courts have held that failure, to inform an accused of the right, is not fatal to a finding of guilt.

In *Republic v Jackson* [2003] MWHC 111 (02 April 2003), counsel submitted that the trial in the lower court was not fair and just because the accused persons had no legal representation as provided under section 42(2)(f)(v) of the Constitution. He stressed that because the accused persons had no legal representation, the conviction was to be quashed. Counsel for the State replied that the appellants pleaded guilty because they understood the charge. Further that it was up to them to indicate that they wanted legal representation before plea was taken.

The Court held that

*“the Constitution provides for legal representation, but it does not make it mandatory on the State to provide such facility in every criminal case. The issue is whether failure to inform an accused that he has the liberty to engage a lawyer is fatal to result to quashing of a conviction. To quash a conviction because of such oversight would be stretching matter to extreme. In the present case this court is not prepared to quash the*

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<sup>1</sup> *Zuma and Others v The State* [1995] ZACC 1

*conviction just because the appellants had no legal representation in the lower court. Furthermore, failure by the lower court to inform the appellants of their right is not considered fatal to warrant the quashing of the conviction. This is a technicality which is curable under section 3 of the Criminal Procedure & Evidence Code.”*

Counsel for the applicant cited the case of **Republic v Lemani** 2000 MWHC 38 in which the court quashed the conviction for the reason of want of legal representation. The court found the right to legal representation to be so compromised and that it led to mistrial. Coupled with some procedural irregularities, the convict requested legal representation from the time of interrogations and that was denied. In that matter, there were glaring breaches on the rights of the accused coupled with denial to legal representation. The case was not merely a case of failure to inform an accused of the right to legal representation. It was actually a case of denial of legal representation. We can, therefore, distinguish the decision in **Republic v Lemani**.

Therefore, the courts have to look at the right breached in the totality of all the circumstances of the case.

Let me come back to the issue of the failure to inform an accused person of the right to legal representation. In South Africa, in **S v Gasa & others** 1998 (1) SACR 446 (D) at 448 B-C, the Court said:

*I am of the view that the magistrate failed in his duty to properly inform the appellant of his rights in respect of legal representation and the consequences of not exercising those rights. The magistrate did not encourage the appellant to make use of a legal representative, as was required, and the appellant did not validly waive this right, as he was not fully informed of the right. This constitutes a material irregularity.*

*If that be the position 'the crucial question to be answered is what legal effect such irregularity had on the proceedings at the appellant's trial. What needs to be stressed immediately is that failure by a presiding judicial officer to inform an unrepresented accused of his right to legal*



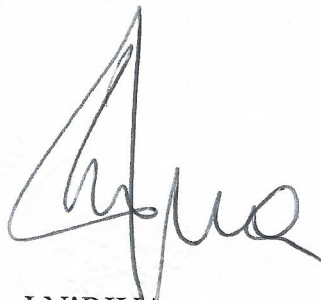
*representation, if found to be an irregularity, does not per se result in an unfair trial necessitating the setting aside of the conviction on appeal. It must be shown that the irregularity tainted the conviction and that the appellant had been prejudiced thereby. To determine that, it is necessary to evaluate how the trial was conducted in the absence of legal representation for the defence.*

The duty of a Court, on review, can be to consider the aspects of the trial that are detrimental to the prisoner which he or she might not have suffered had he been legally represented. Depending on the finding of the Court, the Court may order those other alternatives it has under the review powers under the Criminal Procedure and Procedure Code. Where, the failure to representation results in no prejudice to an accused, the Court on review will have no justification to tamper with the finding of the trial court. Quashing a decision on that point alone would be approaching the procedure with much emphasis on technicalities than aiming at attaining substantive justice.

In *Mphukwa v S* (CA&R 360/2004) [2012] ZAECGHC 6 (16 February 2012) the court said:

*I must emphasise though that the failure to inform an accused of his right to legal representation and/or the availability of legal aid, in my view, does not necessarily have the effect of vitiating the proceedings in a criminal trial. To constitute a fatal irregularity warranting the setting aside of the proceedings there must be proof of substantial prejudice to the accused or a miscarriage of justice. Such can only be established by having regard to what happened during the entire trial.*

As I said during the ruling for bail application, the claimant was merely raising constitutional questions. He did not raise issue with the aspects of trial. He did not raise issues with the decision of the court as being in error. I have examined the record of the trial court. Apart from the failure to inform the applicant of the right to legal representation, I do not find irregularity with the trial. Nor do I find that the failure by the court was fatal to the finding of the court or that it prejudiced

A handwritten signature in black ink, appearing to read 'J N' RIVA', written over a faint circular official seal.

J N'RIVA

JUDGE