



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CONSTITUTIONAL CASE NUMBER 3 OF 2018

BETWEEN

FRANK MALAYA.....CLAIMANT

AND

THE ATTORNEY GENERAL.....DEFENDANT

Coram:

Hon Justice J M Chirwa

Hon Justice F Mwale

Hon Justice J N'riva

Counsel for the claimant Mr B Theu

Counsel for the Attorney General Mrs Kumichongwe and Mr Maulidi

Court Official: Ms D Mithi

Court Reporter: Ms H Chiusiwa

Honourable Justice N'riva:

RULING

The claimant commenced this case claiming that policemen violently arrested and tortured him, unjustifiably charged him with murder and kept him in custody until he was released without trial. The claimant claims that the acts of the policemen constituted serious violations of his constitutional rights. The applicant's claim against the defendant is for damages for suffering torture, and some other wrongs, at the hands of the Malawi Police Service. He also seeks some declarations against the acts and omissions on the part of the police.

On the claimant's application, the Honourable the Chief Justice certified this matter to be determined under section 9 of the Courts Act. This entails that a panel

of the not less than three Judges of the High Court have to determine the questions the claimant is raising.

During the scheduling conference, counsel for the claimant told us that he intended to call witnesses to prove his claim.

Counsel representing the defendant questioned whether it was proper for a Court sitting to determine a constitutional question to hear witnesses. The defendant, in addition, queried whether the matter before us is a constitutional case or a civil suit. Counsel argued that the claimant's claims, though raising constitutional issues, properly fell under civil claims.

Counsel for the claimant insisted that the issues before the Court were mainly constitutional. He mainly depended on the fact that the Honourable Chief Justice already certified the matter as a case raising a constitutional question.

As we indicated during the scheduling conference, we felt it was apt for us to deal with the issues raised by the defence. The defence hinted that they were willing to provide submissions. The claimant argued that it was not necessary to make submissions and that we could proceed to make a determination based on the oral arguments the parties provided. Counsel, once again, emphasised that already there is a certification of the matter to be decided by a panel of Judges.

We have to determine whether we should determine this case the way the claimant is suggesting. That is to say whether, by the way the claim before us is, we will be dealing with an "issue expressly and substantively relating to or concerning the interpretation of the Constitution" as section 9(2) of the Courts Acts provides.

Needless to say, under section 41 of the Constitution, every person has the right to effective legal remedy for constitutional violations. Every person has a right to access any court of law or any other tribunal with jurisdiction for final settlement of legal issues.

As is usual, the Constitution provides for rights in general; the specifics on the realisation of the rights are generally to be found in legislation and subsidiary legislation. The law in relation to access to civil justice is available in the Courts Act and its subsidiary pieces of legislation such as Courts (High Court) (Civil Procedure) Rules, 2017 "Civil Procedure Rules".

Section 9 of the Courts Act provides that, every proceeding in the High Court has to be before one Judge. However, three or more Judges would hear and determine

a case, if the proceeding expressly and substantively relates to or concerns the interpretation, or application, of the Constitution:

(1) Save as otherwise provided by this Act, or by any other Act for the time being in force, every proceeding in the High Court and all business arising there out shall be heard and disposed of by or before a single Judge.

(2) Every proceeding in the High Court and all business arising thereout, if it expressly and substantively 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.

(3) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact.

The Civil Procedure Rules provide for underlying overriding objectives of the Rules. These objectives include saving expenses, dealing with a proceeding proportionately to the importance of the proceeding and complexity of the issues, while ensuring expeditious and fair disposal of cases. Furthermore, the rules require allocating to a proceeding an appropriate share of the Court's resources, taking into account the need to allocate resources to other proceedings- Order 1 Rule 5, Civil Procedure Rules.

Under the rules, Courts have a duty to uphold the overriding objectives of the rules by engaging in active case management. Active case management, according to the rules, includes, identifying the issues for resolution at an early stage; and deciding promptly which issues need full investigation and trial, and accordingly disposing of other issues summarily. The Courts have a duty to consider whether the likely benefits of taking a particular step justifies the cost of taking it, and to deal with many aspects of the proceeding as the Court can manage on the same occasion; Order 1 rule 5(5), Civil Procedure Rules.

Under the spirit of this provision, I am convinced, a Court has to assess a case before it to consider a step to take and also for purposes of planning for the case. In this regard, it is within our judicial and managerial powers to consider whether the case before us is a constitutional case; whether the claimant has raised constitutional issues. We have to identify this issue at an earliest time possible. See Order 1 rule 5(b) of the Rules.

This should be understood in the light of the philosophy behind the civil procedure rules. This should be understood from the concept of active case management in relation to the overriding objectives of the rules. I believe that this is why, among other reasons, the Rules provide, for a scheduling conference

where a Constitutional panel has been empanelled at the instance of a claimant. From the very rules, in Order 19 rule 2(4), certification of a case as constitutional, by the Chief Justice, is an administrative function.

The paperwork of this case and the claimant's arguments at the scheduling conference, obviously show that the claimant is substantively seeking compensation for having suffered torture and other constitutional breaches. The rights the claimant is claiming include right to dignity, freedom from torture, cruel or inhuman treatment and the right to be tried within a reasonable time. These are rights under sections 19(1), 19(3), 42(2) (f) (v) (i) of the Constitution. He also claims that the police violated the rights to personal liberty, freedom and security of his person and to be provided by the State with services of a lawyer. (Sections 18, 19(6) (a), and 42(1)(c) as read with 42 (2)(f)(i) of the Constitution). The claimant has cited violation of several rights, but he is substantively seeking compensation for the breaches, and some declarations against the breaches. The claimant's claim falls under the ambit of Law of Tort over which one Judge has jurisdiction. The fact that there are several provisions of the Constitution does not necessitate a sitting of more than one Judge.

As I have pointed out, Section 9 of the Courts Act requires the determination as a constitutional case if the proceeding expressly and substantively relates to or concerns the interpretation or the application of the Constitution.

Order 19 Rule 2 of the Civil Procedure Rules expounds proceedings that the Chief Justice may certify as substantively Constitutional proceedings under section 9 (3) of the Courts Act. These include where the proceeding involves—

- a matter under section 89 (1) (h) of the Constitution—constitutional disputes that the State President refers to the High Court,
- the determination of the constitutionality of an Act of Parliament or its part;
- determination of the constitutionality of an act or omission of an organ of State or another person;
- a matter concerning the status, powers or functions of State or a public authority under the Constitution;
- determination of the relationship between the Constitution and a treaty or part of the treaty; or
- the enforcement and protection of the Constitution.

In the oral arguments counsel argued that the case is not only about compensation to the claimant but also on whether Malawi has an obligation to conduct diligent

and effective investigations and prosecution and punishment in cases bordering on torture. That indeed is an issue that falls under Order 19 rule 2 (2) of the Civil Procedure Rules. However, in my view, that is not the main claim that the claimant is pursuing.

The Courts Act uses, in section 9 (2) the words “expressly” and “substantively” relating to, or concerning “interpretation” or “application” of the Constitution.

The case before us is in the main a claim for damages and some declarations against the defendant. It does not seem to me that the fact that the claim is loaded with constitutional provisions necessitates it to be one that is substantively Constitutional. That approach would mean, for example, to have a case of maintenance of children before a Constitutional panel just because issues of rights of women and children under the Constitution arise. It might also mean bringing before a Panel a case concerning pre-trial release just because a suspect has been in custody more than the Constitutional requisite period. That is not what section 9 of the Courts Act intended. Issues of rights arise in a number of civil and criminal cases but that does not qualify them as Constitutional proceedings.

To qualify as constitutional a proceeding, the proceeding must expressly and substantively relate to or concern the interpretation or application of the provisions of the Constitution. The key words are expressly and substantively. Collectively, the words entail that the interpretation or the application must be the specific and particular fundamental issue before the Court. It must not be a side issue or an enhancement to the claim. R Burrows in *Words and phrases judicially defined*, (Butterworth, London, 1945) states that expressly ‘often means no more than plainly, clearly and the like.’ Likewise, J Saunders in *Words and phrases legally defined* (Lexis, London, 1969) quoting *Clarke v Wright* [1953] All E R 486, C A, suggests that ‘express’ suggests intention that a step must be directed, and directed specifically, to the question. In this context, a question must be specifically directed, and not peripheral, to the application or interpretation of the Constitution.

To proceed with issues before Constitutional panels, just because they involve Constitutional provisions may appear like having a Constitutional panel is the default position. Cf:- *Chilumpha and another v The Director of the Public Prosecutions* Criminal Case Number 13 of 2006, and *In the Matter of Bakili Muluzi and the Anti-corruption Bureau* Court Reference No 2 of 2015.

Understandably, many applicants in our Courts have been depending on the South African model under which where there is a constitutional issue the matter has to be before the Constitutional Court. See Kalaile Ag CJ's observation in *State and another; Ex Parte Dr Bakili Muluzi and John ZU Tembo II* [2007] MLR 310 (HC) quoting the applicants' reliance on *SABC v National Director of Public Prosecutions* [2006] ZACC 15. His Lordship distinguished *SABC v National Director of Public Prosecutions* because it was modelled on the South African model of constitutional court in relation to constitutional issues. In the South African archetypal case, once a constitutional issue arises, the Constitutional Court assumes jurisdiction.

In *Chilumpha and another v The Director of the Public Prosecutions*, the Honourable Chief Justice Munlo dismissed the argument by the applicant in that matter that because of section 9(2) of the Courts Act, a High Court Judge no longer had the power to substantively interpret the Constitution. He said, at page 7:

I found this proposition novel and I would caution against any enthusiasm to go that far. Section 108 of the Constitution gives the High Court unlimited original jurisdiction to hear and determine any civil or criminal proceedings, to review any law and any action or decision of the Government, for conformity with the Constitution. Section 9(1) of the Courts Act makes it clear that every proceeding in the High Court and all business arising thereout is to be heard and disposed of by a single Judge.

His Lordship continued:

The original jurisdiction of the High Court Judges is therefore intact and has only been tampered with by those cases which come within the narrow confines of section 9(2) and which need certification under section 9(3) of the Courts Act. In my view a single judge of the High Court has jurisdiction to interpret the Constitution.

In *In the Matter of Bakili Muluzi and the Anti-corruption Bureau* Court Reference No 2 of 2015, the Chief Justice provided the rationale for section 9(2) of the Courts Act. He said the provision is meant to allow for opportunity to give appropriate guidance on the interpretation or application of a constitutional provision in deserving and selected proceedings. He said that the provision is applicable where the circumstances of the case expressly and substantively raise a constitutional matter for interpretation or application.

The Chief Justice said at page 4:

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 responsibility of human beings in one way or another. In the course of every litigation before court, it is about the interpretation or application of individual or group rights. With a permissive constitution as ours, every time courts undertake such a responsibility they are, necessarily, interpreting or applying constitutional rights and obligations, from labour rights, through contractual rights, family obligations, tortious responsibility to rights and responsibilities under the criminal law.

His Lordship stated that Constitutional interpretation or applications ‘run across and is always before our courts in different ways, at different levels, but all the time.’

In *Chilumpha’s* as well as in *Muluzi and John ZU Tembo II cases* both Courts accepted the respective arguments by counsel for the State, Mr Mbendera, as he then was. His argument was that section 9(2) of the Act deliberately uses peculiar phraseology. He argued that Parliament intended something totally different from mere connectivity to the Constitution:

Examples abound. A case dealing with employment law does not qualify for certification under the section when it alleges unfair treatment. Yet section 31 of the Constitution guarantees fair labour practice to every person. That by itself does not make every case alleging unfair treatment to qualify for certification under section 9(2) of the Act.

In the recent case *Sauti Phiri v The Privatisation Commission and the Attorney General*, Civil Cause No. 2569 pg 2005 the Chief Justice duly certified that under section 9(2) of the Act. When the case came up for hearing, it was doubted whether the Chief Justice had properly certified the matter. The matter alleged unfair treatment and breach of contract by the Malawi Government and the Privatisation Commission.

Almost all divorce matters will require consideration of disposition of property and maintenance for the spouse and children. These are matters provided for under section 24(1)(b) of the Constitution. It has never been contended that the reference to section 24(1)(b) of the Constitution qualifies the proceedings under section 9(2) of the Act. The Courts have regularly dealt with such matters as falling within the general business of the High Court.

In summary, a case does not become a constitutional one, in our legal system, by merely having reference to, or application of, Constitutional provisions. Using basic canons of statutory interpretation, to qualify as constitutional proceedings, the proceedings must expressly and substantively be one of either the interpretation or the application of the provisions of the Constitution.

Let me finally touch on the issue of calling witnesses. In addressing the Court of this intention, counsel himself described the move as unusual in Constitutional

cases. He, however, said that there was need to have witnesses to face cross-examination on the allegations. He argued that, in the face of legal and factual disputes, there was need to put the issues in context to present a *prima facie* case of violations. Further, he argued that there is a degree of finality where a Constitutional panel determines a dispute.

Counsel for the defendant, in response, argued that Constitutional panels deal with applying and interpreting Constitutional provisions; whether a law or an act of Government is consistent with the provisions of the Constitution. Counsel, therefore, argued that calling witnesses is inconsistent with the scheme of proceedings under the Constitutional matters.

On this point, my view is that, much as it may be possible, calling of witness would surely be unusual in a court empanelled under section 9(2) of the Courts Act. Looking at matters that have previously been before a panel of Judges, and looking at the rules of this Court, the issue of facts should not be in dispute. Ordinarily, the facts of a dispute must have been settled or must not be in dispute when a matter is to be referred to a Constitutional panel. Alternatively, a question should arise merely on the Constitution as opposed to the main dispute or the prosecution, as the case may be. The question before the panel must customarily be that of the interpretation or the application of the Constitution. A close look at Order 19 rule 5 of the Civil Procedure Rules, which is about summons in Constitutional matters, in my view, is on this point. A claimant has to specify the provision of the Constitution to be applied or interpreted. That rule, in my view, envisages determination of a Constitutional question and not the factual disputes. One can see that that rule differs from the rule on other summons and proceedings.

On the issue of some degree of finality of the Court's decision, I do not find that position quite persuasive. A Constitutional panel is not a final adjudicator of disputes or Constitutional questions. Its decisions, just like that of a single Judge, are appealable to the Supreme Court of Appeal. Therefore, that argument cannot be a reason for one to approach a Constitutional panel when they can approach the Court presided over by one Judge.

In all this, the case before us is in general, a claim in tort much as it is couched in constitutional provisions. Secondly, it is improper to bring up a Constitutional case in a proceeding when the facts are not yet settled. Therefore, this is not a proper case to be determined as one expressly and substantively requiring the


application or the interpretation of the Constitution. The case is significantly a claim for torts.

The case should be dismissed with costs to the defendants.

MADE this 24th day of April, 2019 at Blantyre

Honourable Justice Chirwa:

I agree with the ruling and I have nothing to add.

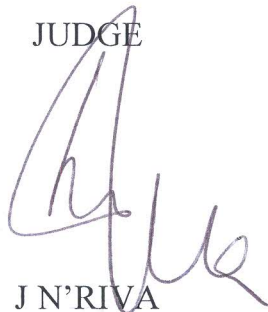


J. M. CHIRWA
JUDGE

I equally concur with the ruling by my brother Judge N'riva and I have nothing to add.



F.A. MWALE
JUDGE



J N'RIVA
JUDGE