



**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CRIMINAL CASE No. 43 OF 2013**

**THE REPUBLIC**

**AND**

**KETTIE KAMWANGALA**

**CORAM** : **MWALE, J.**  
: Mpandaguta, Court Clerk

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**RULING ON APPLICATION FOR TRIAL WITHOUT JURY**

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**1.0 BACKGROUND**

- 1.1 The applicant stands charged with the offences of theft contrary to section 278 of the Penal Code and Money Laundering contrary to section 35 of the Money Laundering, Proceeds of Serious Crime and Terrorist Act.
- 1.2 The applicant pleaded not guilty to the charges and the State paraded witnesses and closed its case. The matter is pending for ruling of a case to answer before this Court sitting as a single judge without a jury.
- 1.3 The applicant applies for jury trial pursuant to section 294 of Criminal Procedure and Evidence Code (CP& EC). Subsection (1) of the said section 294 provides that “*all criminal trials before the High Court shall be by jury*”. There is an exception provided in

subsection (2) which empowers the Minister, by order published in the *Gazette*, to “*direct that any case or class of case shall be triable by the High Court without a jury.*” At the time the current application was filed, there was no order published in the *Gazette* exempting the type of offences that the applicant is charged with from being tried without a jury.

1.4 The State opposes the applicant’s application for jury trial.

## 2.0 ARGUMENTS

2.1 The applicant argues that this Court has no jurisdiction to try the applicant without jury under section 294 of the Criminal Procedure & Evidence Code (CP&EC). The basis of the argument is that the offences the applicant is answering are not covered under the exception of trial without a jury under the Criminal Procedure (Trials Without Jury) Order made pursuant to section 294(2) of the CP& EC.

2.2 The State, in response contends that under the amended Criminal Procedure (Trials Without Jury) Order made by the Minister on 31<sup>st</sup> January 2020, the offences the applicant is answering are covered under the exception as such the court has jurisdiction to try the applicant. The State also relies on the ruling by the Honourable Justice Chombo in the case of *The Republic v Mphwiyo and 18 others, Criminal case No. 35(g) of 2014* in declining a similar application. The State also contends that there is no prejudice to be suffered by the applicant resulting from the amended Order.

2.3 The applicant, in reply argues that the amended the Criminal Procedure (Trials Without Jury) Order by the State made on 31<sup>st</sup> January 2020 by the Minister has effect of retrospective application of the law when the enabling provision of the Act does not provide for retrospective application. The applicant wishes to distinguish the ruling by Hon. Justice Chombo in **Mphwiyo case** (cited above) on a similar application to the current

one dismissing the application, as it was made without hearing the parties. It is argued by the applicant that the amended Order infringes her right to fair trial.

### **3.0 THE LAW**

3.1 Section 294 of the CP& EC provides for trial before the High Court. It provides:

*“(1) Subject to subsection (2) all criminal trials before the High Court shall be by jury. A jury shall, except where otherwise specially provided, consist of twelve persons.*

*“(2) The Minister may, by Order published in the Gazette direct that any case or class of cases shall be triable by the High Court without a jury, and in any such case or class of case instead of the procedure set out in this Part the High Court shall, with any necessary modifications, follow the procedure set out in Part VII for trials before subordinate courts.”*

3.2 The Criminal Procedure (Trials Without Jury) Order provides for cases triable by the High Court without jury. Paragraph 2 provides that the cases or class of cases specified in the Schedule thereto shall be triable in the High without jury as follows:

- “1. All offences under the Customs and Excise Act.*
- 2. All offences under the Exchange Control Act.*
- 3. All offences under the Taxation Act.*
- 4. All offences under Chapter XIX of the Penal Code.*
- 5. All offences under Chapter XXXIII of the Penal Code.”*

3.3 The Criminal Procedure (Trials Without Jury) (Amendment) Order 2020, paragraph 2 provides:

*“The schedule to the Criminal Procedure (Trial Without Jury) Order is amended by adding thereto, the following new items-*

*6. All offences under Chapter XXVI of the Penal Code.*

*10. All offences under the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act.”*

#### **4.0 ISSUES FOR DETERMINATION**

4.1 Whether the order of the Minister in amending the Criminal Procedure (Trials Without Jury) Order retrospectively prejudices the applicants right to a fair trial.

#### **5.0 THE ANALYSIS**

5.1 Both parties agree that the offences the applicant is answering were not covered under the exception of offences triable by the High Court without jury before the amendment was made by the Minister to the Criminal Procedure (Trials Without Jury) Order including the offences the applicant is answering. The State’s argument is that this Court has jurisdiction to try the applicant without jury following the amendment. However, it is the applicant’s view that the law as amended is not applicable considering that it has retrospective application having been made after the present proceedings were filed.

5.2 It is clear that the amendment to the Criminal Procedure (Trials Without Jury) Order came into force after the present proceedings were filed and expressly states that it has retrospective application. I however cannot agree with the applicant that the amendment was a direct response to the current application because no evidence to that effect has been presented. I also find it difficult to agree with the applicant’s argument that the said retrospective application is unlawful. Section 18 of the General Interpretations Act provides for retrospective operation of subsidiary legislation. It provides as follows:

*“Any subsidiary legislation, except where a contrary intention appears, may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which such subsidiary legislation is made,*

*but so, however, that no person shall be made or become liable to any penalty whatsoever in respect of any act committed or failure to do anything before the day on which such subsidiary legislation is published in the Gazette.*

5.3 In ***Lenson Mwalwanda v Stanbic Bank Ltd*** [2007] MLR 198, the court held that it is the fundamental rule of law that no statute shall be interpreted to have retrospective application unless it is expressly stated or by necessary implication in terms of the legislation. The court stated that:

*“As a fundamental rule of law, no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication (see Maxwell on the Interpretation of Statutes, Bennion Statutory Interpretation 2nd edn page 215 and Carson v Carson [1964] 1 WLR 511 at p 16).”*

5.4 In ***P. Mahendran v The State of Karnataka*** [(1990) 1 SCC 411] Supreme Court of India held that where there is no express or necessary implication the rule can not be given retrospective effect. In ***Maxwell v Murphy*** [1957] 96 CLR 261, the High Court of Australia stated that the general rule of Common law is that the statute changing the law ought not to have retrospective operation, unless the intention appears with reasonable certainty to be applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined in reference to past events.

5.5 It is clear that the law affecting rights and obligations, as a general rule has to have prospective application unless a contrary intention is expressed in the statute or by necessary implication from the wording of the Act.

5.6 In *Stanbic Bank Limited v Mwalwanda [2008] MLR 361*, the Supreme Court of Appeal held that the rule against retrospective operation of the statute is not a rigid rule. The court said:

*“The rule against retrospectivity of statutes or laws is fundamental rule of law, but one that is not rigid or inflexible. This means therefore that there will be situations where a law or statute may be construed to have retrospective operation.”*

5.7 In *Rodway v R [1990] 169 CLR 515*, the court held that statutes dealing with matters of procedure are an exception to the rule against retrospectivity. The court said as follows:

*“It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure.”*

5.8 The similar reasoning that the rule against retrospectivity does not apply to matters of procedure was reached in **re Athlumney; Exparte Wilson** (1898) 2 Q.B. 547 and **P. Mahendran v The State of Karnataka (supra)**,

5.9 It is clear therefore a statute may have retrospective operation by covering situations that prevailed before the law came into force expressly provided in the statute itself or by necessary implication and including where it is affecting matters of procedure as opposed to substantive rights and obligations.

5.10 The other argument by the applicant is that the amended Order by the Minister is inconsistent with section 294(2) because it does not provide for retrospective application. In terms of section 58(1) of the Constitution, Parliament has authority to delegate to the Executive, Judiciary power to make subsidiary legislation only within the specification and for the purposes laid out in the parent Act. It provides:

*“(1) Parliament may, with respect to any particular Act of Parliament, delegate to the executive or to the judiciary the power to make subsidiary legislation within the specification and for the purposes laid out in that Act and any subsidiary legislation so made shall be laid before Parliament in accordance with its Standing Orders.”*

5.11 Section 21(b) of the General Interpretation Act provides that no subsidiary legislation shall be inconsistent with the provision of any Act and any such legislation shall be of no effect to the extent of such inconsistency. In the case of ***Press (Produce) Limited v A.H. B. Enterprises*** 12 MLR 1, the court held that the subsidiary legislation must conform strictly to the enabling provisions of the main Act and that any subsidiary legislation made in excess of what is permissible under the enabling provisions of the main Act is ultra vires and invalid to the extent of the inconsistency with the main Act.

5.12 In ***Kunj Behari Lal Butail and Others v State of H.P. and Others*** [2000] 3 SCC 40, the court held that delegated power to legislate by making rules can not be exercised as to bring into existence substantive rights or obligations not contemplated by the Act itself.

5.13 The question is whether the Order as amended by the Minister is inconsistent with section 294(2) of CP& EC. From reading of the said section, it does not state as to when the class of offences may be included to the schedule as triable without jury. It only states that;

*“The Minister may, by Order published in the Gazette direct that any case or class of cases shall be triable by the High Court without a jury”*

I therefore find that the amended Order is not inconsistent with the provisions of the parent Act.

5.14 The State also opposes that present application because there is an earlier decision in ***Mphwiyo case*** (cited above) declining a similar application. The applicant however wants

that decision to be distinguished because that the ruling was made without hearing the parties. Hon Justice Chombo in declining that application said that:

“ ... *in view of recent developments, the court finds that this application is misplaced and it will not be entertained except to give reasons why the same is misplaced. An Order signed by the Minister of Justice and Constitutional Affairs was published in the Malawi Gazette Supplement of 31<sup>st</sup> January 2020 containing Regulations, Rules, etc, Government Notice No.1, (FILE NP. SUB.D. 8:01) as follows:*” (quoted in full)

- 5.15 It is very clear that the court in *Mphwiyo case* considered the merits of the application in its decision to decline, notwithstanding that the parties were not heard. There is no statutory requirement for this type of application to be heard orally and the honourable judge used her discretion to dispose of it on the papers.
- 5.16 The application in the present case was heard on 9<sup>th</sup> March 2020 following which I adjourned to deliver the current ruling. On the 18<sup>th</sup> of March, the applicant filed an *ex parte* summons for leave to adduce further evidence after the hearing of the current application. The application was brought under the court’s inherent jurisdiction most likely for the reason that there is no statutory power that would countenance such an application. Having already heard both parties, in the interests of finality to litigation, I am unable to grant leave for the applicant to produce additional evidence. Of counsel for the applicant has had ample opportunity to present his case. I would have been more inclined to entertain the application if a statutory provision or common law practice guiding the exercise of court’s jurisdiction had been provided. In the present circumstances, in the interests of finality and to avoid allowing the applicant “a second bite at the cherry” as it were, I must dismiss the *ex parte* application for leave to adduce additional evidence.

## 6.0 ORDER

6.1 From all I have argued above, I hereby dismiss the application on the ground that:

- (1) a statute may have retrospective operation where it is clearly stated in the Act



itself or from necessary implication as well as where it concerns matters of procedure as opposed to substantive rights and obligations; and

(2) The applicant has not shown any substantial prejudice that proceeding in a trial without a jury has occasioned or is likely to occasion an irremediable violation of her right to fair trial.

**7.0 FURTHER DIRECTIONS**

7.1 As the State has now closed its case, I further direct that both parties make submissions for and against a case to answer in compliance with section 313 of the Criminal Procedure and Evidence Code.

7.2 The State shall file its submissions electronically within 14 days from 22<sup>nd</sup> April 2020 and the defence shall file its submissions in response 14 days thereafter, also electronically.

7.3 The matter is adjourned to a date to be fixed for a ruling on the submissions which shall also be delivered electronically.

I so order.

**Made in chambers, in the Republic, this 16<sup>th</sup> day of April 2020.**



**Fiona Atupele Mwale  
Judge**