IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONSTITUTIONAL CASE NO. 1 OF 2018

VON GOMANI — CLAIMANT

-AND-

THE REPUBLIC — RESPONDENT

CORAM: THE HONOURABLE JUSTICE POTANI

THE HONOURABLE JUSTICE KAMWAMBE

THE HONOURABLE JUSTICE CHIGONA

Mr. Kayuni of counsel for the State

Mr. Soko of counsel for the Claimant

Mr. Amos Court Clerk

COURT: We wish to point out, as a matter of setting the record straight, that much as this unanimous judgment is coming out after the retirement of the Honourable Justice Kamwambe, the decision was arrived at before he retired and he fully took part in coming up with the decision.

JUDGMENT

[1] This is a constitutional matter which was certified by the Honourable the Chief Justice pursuant to Section 9 (3) of the Courts Act and Order 19 Rules 3 and 7 of the Courts (High Court) (Civil Procedure) Rules, 2017, as fit for determination by a panel of three High Court judges to hear and dispose of the matter. This is unanimous decision of the Court.

FACTS

[2] The issue did not arise by the Claimant directly questioning the provision of the Act in issue but arose as a result of the Claimant's arrest by the police on or about the 19th July, 2017 and his subsequent charge with the offence of being idle and disorderly contrary to section 180 (e) of the Penal Code. Particulars of the offence allege that the Claimant had been soliciting for immoral purposes at Halo Rest house in the City of Lilongwe.

[3] The Claimant believes that section 180 (e) of the Penal Code violates the following rights:

a) The right to dignity;
b) The right to freedom from cruel, inhuman and degrading treatment;
c) The right to freedom and security of person;
d) The right to privacy;
e) The right to freedom of expression;
f) The right to not be convicted of an offence in respect of any act which was not an offence at the time.

[4] The question to grapple with is whether section 180 (e) violates such rights or it is the application by law enforcers that violate the rights stated above. It is very important that we understand what we are talking about otherwise we will be giving a wrong prescription. It is possible that the law enforcers may be applying section 180 (e) in a manner that is inimical to the spirit of the Section and we may turn around and blame the Section and not the manner of doing things to fulfil an arrest under section 180 (e) of the Penal Code. In other words, we should discover where the mischief lies, whether in the spirit of the law on the offence Section or the exercise of powers of arrest by the police. We do not want to fall in the trap of failing to distinguish the two factors which are of course related to each other.

Section 180 (e) of the Penal Code provides:

> "Every person who in any public place solicits for immoral purposes is deemed an idle and disorderly person."

PRELIMINARY ISSUES

[5] One of the preliminary issues raised by the Claimant is to do with the filing of a statement of facts by the State. The State filed a statement narrating facts surrounding the offence to which the Claimant objected saying that the facts of the case are irrelevant to the question at hand, which is simply to deal with whether or not section 180 (e) of the Act is unconstitutional for various reasons. The line of thought of the Claimant is that the court should directly deal with the certified matter in the manner it has been certified by the Chief Justice and not wander around considering facts. The State does not agree with the Claimant. The Claimant argues that the process under Section 9 of the Courts Act does not give room for filing statements more so if the Claimant did not file a statement there is no need for the State to reply by way of such statement. The Claimant stressed that a constitutional panel determines issues set out in Form 20 and it is so limited. The allegations contained in the sworn statement may be disputed by the Claimant and this would drag the court to consider veracity of the facts which are matters of criminal consideration in the referring court. The Claimant fears turning the court into fact finding.

[6] For the sake of better comprehension allow us to bring out the statement so that we are in no doubt of what we are talking about. The statement of Daniel Kuyokwa of State Advocate Chambers goes as follows:

> **That** on 16th July 2017, Von Gonani visited a hawker belonging to one Mr Oscar Butao and Von Gomani introduced himself as Triphonia.
>
> **That** Von Gonani met Mr Oscar Butao again on the same day and they agreed to have sexual intercourse at a fee of K500.00.
>
> **That** the two met in a room at night at Hallo rest House.
>
> That while in the room, Von Gonani switched off the lights and closed the door.
>
> **That** I repeat paragraphs 5 and 6 and state that Von Gonani demanded more money from Oscar Butao. Von Gonani had a razor blade in his hand and threatened to pierce Butao if he Mr Butao was not going to pay him the extra demanded money.
>
> That Von Gonani grabbed the phone of Oscar Butao and threatened to sell the following day if Oscar Butao failed to pay the demanded sum.
>
> **That** Von Gonani left the premises and later Mr Butao learnt that the person who had introduced himself to him as Triphonia, was not a woman but a male by the name of Von Gonani.
>
> **That** Oscar Butao reported the issue to police to assist him recover his phone.
>
> **That** Von Gonani was arrested by members of the public on 17th July, 2017 and handed over to Kanengo Police Station.
>
> That another complainant, Gift Mwahala reported to police that Von Gonani was pretending as a woman with the intention to seduce men to have sexual intercourse with him.
>
> That the police investigated the matter and charged Von Gonani with the offence of Idle and disorderly contrary to section 180 (e) of the Penal Code.
>
> **That** Von Gonani was never arrested or prosecuted because of his gender but because there was cause of belief that he had committed a crime.

[7] Such were the facts that the Claimant objects to be used in the determination of the constitutional issue as to whether Section 180 (e) of the Penal Code is unconstitutional. The court is not called to consider the constitutionality of the police actions or the arrest so that we see it necessary to revert to the facts. When considering the constitutionality of a provision we consider it as against provisions of the Constitution which are alleged to be violated. Ordinarily facts will not serve a useful purpose although they expose the background circumstances that gave rise to the application to declare the Section 180 (e) of the Penal Code unconstitutional. We are of the considered view that the mandate of the Constitutional Court is to decide constitutionality of the certified issues by the Chief Justice. As it was stated in **THE STATE AND DIRECTOR OF PUBLIC PROSECUTIONS, EX-PARTE GIFT TRAPENCE AND TIMOTHY PAGONACHI MTAMBO, Constitutional Case No. 1 of 2017,** that the scheme under Section 9(2) of the Courts Act is about constitutional interpretation and application. We reiterate, in this regard, that factual issues in constitutional matters are not paramount. In most cases, they are outlined just for purposes of giving background to the whole issue. Their reference, for instance, in the present matter, will be limited to few instances as shall be observed below.

[8] On the other hand, we can see the State asking how the Claimant's right was violated in the circumstances to help us see how true and alive the allegation of rights' violation is. If we say that the Claimant's rights were violated, we are referring to the incident that happened during the arrest and after may be. Violation cannot be in a vacuum but must be surrounded by hard facts. It is possible that the alleged unconstitutionality does not refer to what was experienced by the Claimant, then, we would consider the role the facts will play and how they would be applied in determining this constitutional matter. If we hardly refer to them, then their presence would serve no useful purpose apart from being informative. If the facts would not harm or jeopardise the case of the Claimant, why then raise alarm about them? They may not benefit either party and their neutrality should not bother this court since it would only become an academic exercise to determine on it.

[9] To be frank, in Constitutional cases as this one when the Claimant turns out to have lost the case, the criminal case continues in the original court which referred the matter to the High Court Constitutional panel to determine on the criminality of the Claimant as accused person. See **THE STATE AND DIRECTOR OF PUBLIC PROSECUTIONS, EX-PARTE GIFT TRAPENCE AND TIMOTHY PAGONACHI MTAMBO** (supra). It follows therefore that facts may not be of any importance in determining the constitutional issue. Counsel for the Claimant has not shown how the statement of facts would put the Claimant to his detriment. This supports what we said above that it becomes a useless fear to cry over the statement which does not do you any harm. Simply put, it is not worth spending valuable time on it. However, claimant may dispute the facts. Principally facts are not in issue but reference to them for clarification purposes is not harmful.

[10] Further, it would appear that the application to strike out the statement was made orally without indicating the rule of procedure supporting it. However, we note that in his skeletal arguments counsel for the Claimant has referred to the procedure under Order 19 of the Civil Procedure Rules, 2017 (CPR) as read with section 9 (2) of the Courts Act. What is directly applicable herein is sub-sub-rule (1) (b) which provides for the court to determine the constitutionality of an Act of Parliament, which, in this case, is Section 180 (e) of the Penal Code. Under Order 19 r 3 (3) an application shall commence by a notice of referral in Form

[11] A thorough examination of Form 20 shows that there is no provision of where to place a statement of facts. Only under rule 4 as read with rule 3 (1) would one commence by summons which shall contain a concise statement of case indicating the provision of the Constitution which the court shall interpret or apply. Form 20 will guide us principally how we proceed with the application. It may seem in our view therefore that the statement is superfluous apart from the fact that it may not even be put into use because we are not determining on the unconstitutionality of the actions of the Claimant which constitute the offence charged with, but the unconstitutionality of the offence Section.

APPLICATION OF SECTION 12(2) OF THE CONSTITUTION

[12] Another issue that arose during the hearing of the matter is the validity of Section 12 (2) of the Constitution. This preliminary issue was raised by Counsel for the Claimant. Let us now come to consider the application of Section 12 (2) of the Constitution which came to be part of law in 2010. During the hearing of the matter, Counsel for the Claimant challenged the validity of Section 12 (2) of the Constitution alleging that the same was merely an amendment and cannot be taken as a basis for testing the validity of the offence against morality. Counsel for the Claimant is insisting that the amendment introduced nothing new of substance to the scheme that the Constitution created when it was first adopted in 1994, and that if it did, which he contends it did not, then the amendment is invalid and remains void for failure to comply with the procedure laid down in Section 196 of the Constitution, which would have required a referendum to be held. He argues that before 2009 amendment, the Constitution already had inbuilt provisions which spoke to duties that people had *vis-a–vis* the rights under Chapter IV of the Constitution. He cites section 12 (v) [as it was before the 2009 amendment] as follows:

> "As all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society."

This provision emphasises duties of right holders just like section 15 (1) of the Constitution which still exists as follows:

> "The human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter."

Section 12(2) of the Constitution provides as follows:

> "Every individual shall have duties towards other individuals, his or her family and society, the State and other legally recognised communities and the international community and these duties shall include the duty to respect his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; and in recognition of these duties, individual rights and freedoms shall be exercised with due regard for the rights

> of others, collective security, morality and the common interest."

[13] Without belabouring the issue, we see that indeed Section 12 (2) does not bring in anything new and fundamental to the Constitution as it is merely restating what was and is there already, but this does not mean it does not carry force as a provision of the Constitution. It ought to be applied without hindrance in any way just like any other Constitutional provision despite the language in the bill/gazette. It was thus properly introduced and passed as a Bill not by way of referendum. We do not see any reason to fault the State for relying on it. In any case, some persuasive decisions such as **Otto-Preminger-Institute v Austria [1994] Series A, No.295-A** stated that:

> "Whoever exercises the rights and freedoms enshrined in the first paragraph of that article (art. 10-1) undertakes 'duties and responsibilities. Amongst them- in the context of religious opinions and beliefs- may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction and even prevent improper attacks on objects of religious veneration, provided always that any 'formality', 'condition', 'restriction' or 'penalty' imposed be proportionate to the legitimate aim pursued."

[14] The above implies that even if these duties were not provided for, they would nevertheless exist as they would be implied for the sake of good sense and human order. Therefore, that the State has placed reliance on Section 12 (2) of the Constitution need not grieve anyone.

[15] The last preliminary issue raised by the Claimant is one about costs which will be dealt with at the end of the judgment where we shall consider whether to award costs or not.

OFFENCE VAGUE AND OVERLY BROAD

[16] It is submitted by the Claimant that this provision is vague and overly broad and therefore unconstitutional. In the case of **Canada (Attorney General) v Bedford 2013 SCC 72 at para 113** the Supreme Court of Canada explains overbreadth as follows:

> "Overbreadth allows courts to recognise that the law is rational in some cases, but that it overreaches in its effect in others...For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the specific individual."

[17] The Claimant explains that due to overbreadth which causes uncertainty of the offence, the police have tended to abuse it. He cites the case of **Republic v Pempho Banda & 18 others Review Case No. 58 of 2016 (HC, Zomba Registry)** where the High Court noted that the manner in which the "women were arrested and tried...was based on a biased and discriminatory reasoning by the police as well as a clear lack of evidence to support such a charge, but was done merely to embarrass, label and harass the 19 women."

[18] The issue of certainty and clarity of the offence is well articulated in the case of **Mayeso Gwanda v The State Constitutional Case No. 5 of 2015,** (to be referred hereinafter as **MAYESO GWANDA CASE)** where the court emphasised that it resulted in too much discretion being left in the hands of the police:

> "Clarity and certainty in criminal matters are imperative and that is why courts guard jealously the principles that no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly ascertainably punishable by law when the act was done."

This court should tackle head on whether the alleged uncertainty exists and causes the police and other possible users, such as the courts, to abuse it.

[19] The definition of "soliciting" as regards the offence of soliciting for an immoral purpose was considered by the Hong Kong High Court in the case of **Hksar V Cen Zhi Cheng [2008] HKLRD 96** and defined as follows:

> "The shorter Oxford English Dictionary defines the word 'solicit' in a number of ways. The most apt of these definitions would appear to involve an individual seeking to obtain something or some response from another, or to persuade them to do something. In my view to solicit someone for an immoral purpose within the terms of [the applicable law, which parallels that at issue in our case] would include enticing or persuading that person to do some act or thing or seeking from them some response, so as to bring about an eventuality or state of affairs which is sexually immoral." (Our emphasis).

[20] An example need not be drawn from far away but the present in which, according to the facts by the State, the Claimant persuaded or enticed the victim to engage into sexual immorality conduct. The offence does not target the actual sexual intercourse as an immorality but the act of persuading or enticing another into an act of sexual immorality. The actual sexual immorality need not be fulfilled so long as there was persuasion or advances, if we may say so, towards it by the Claimant.

[21] On the issue that section 180 (e) of the Penal Code is not sufficiently clear (on paragraph 76 of the skeletal arguments) in support of originating motion by the Claimant, we totally agree with him when he says:

> "An offence should provide the public and the police with a clear standard of what constitutes prohibited conduct, yet the broad articulation of Section 180 (e) leads to the continued arrest of persons in circumstances where the police are not aware that any offence has been committed. Thus, the offence, by its nature leads to unlawful and arbitrary arrests. Whether a prescribed law is void on vagueness ground, is therefore an important aspect for consideration in any inquiry into whether a law justifiably limits constitutional rights."

[22] The Claimant cited the case of **Fantasy Enterprises CC t/a Hustler the shop v Ministry of Home Affairs and another Case No. A159/96** wherein the Namibian High Court held that 'the words employed in a penal provision which limits the exercise of a fundamental freedom must at least provide an intelligible standard from which to gain an understanding of the act enjoined or prohibited so that those to whom the law apply know that whether they act lawfully or not.'

[23] In the Claimant's arguments, we have seen in theory that a vague law is impermissible worldwide, but we have not seen any where he argues how the Section turns into being vague. It ought to be explained clearly how the Section is vague and not just reiterating that vague offences are unjust and not to be permitted. It is accepted that vague laws offend several important values, but we want to see how Section 180 (e) of the Penal Code offends such values. Further, it is suggested that the Section is arbitrary in application. It has not been demonstrated clearly how it is arbitrary. One is not arrested on suspicion of immorality just like that without being backed by facts. Any suspicion must be based on reasonable grounds otherwise the arrest would be suspicious and arbitrary. The Claimant cites the Kenyan High Court case of **Anthony Nyenga Mbuti and 5 others v Attorney General and 3 others [2015] e KLR at para 140** when the court cautioned that arrests based on a suspicion or belief that one is likely to commit a crime are purely subjective. We see that this case is not relevant to issue at hand as any arrest based on mere suspicion, more so if the suspicion is baseless or unfounded, is the fault of the arresting officer and not the formulation of the law. We wonder if Section 180 (e) allows, in the manner it is structured, arbitrary arrests on mere suspicion; and we wonder if that is what happened in this case where the arrest was affected after the victim complained to police of the conduct of the Claimant. We are afraid that we find it imperative to refer to the facts of the case in a subtle manner because a law does not happen or live in a vacuum, but in prevailing circumstances which constitute facts of the case.

[24] There is also the issue that Section 180 (e) of the Penal Code violates several rights, such as the right to dignity in para 44 to 48 of the Claimant's skeletal arguments. Nowhere does it explain clearly how Section 180 (e) violates the right to dignity as enshrined in Section 19(1) of the Constitution. That it violates the right to dignity is left in the air leaving one to speculate wildly as to how. The Claimant has cited the case of **Republic v Pempho Banda and others Review Case No. 58 of 2016** where 19 sex workers were arrested and charged with the offence of living on the earnings of prostitution under Section 146 of the Penal Code. In this case, the High Court noted that 'it cannot be disputed that an unlawful interference with a person's right to personal freedom amounts to a violation of their right to liberty and can be an affront to their dignity.' We still wish to ask if the arrest was unlawful in the present case as may have been in the Pempho Banda case. Where does the unlawfulness arise? At this stage we cannot conclude that the arrest was unlawful since there would be no basis for such a conclusion. It has not been demonstrated that the arrest was unlawful and therefore an affront to the Claimant's dignity.

[25] Even if it were that the arrest was unlawful, this would not be tantamount to saying that the offence was unconstitutional. The arrest is an operative act by the police and if they carry out an arrest without following the law, their actions would be without the necessary mandate and therefore unlawful. The blame would squarely lie on the police. If what they did was in contravention of the Constitution, then it would be the acts of the police to be termed unconstitutional and not the legal provision. The rights to dignity and privacy are limitable

rights so long as the arrests are carried out according to law. It is not surprising that in the Pempho Banda case (supra) the High Court noted that:

> "It has long been settled that the arrest and detention of a person are a drastic infringement of his basic rights, in particular the rights to freedom and human dignity, and that, in the absence of due and proper legal authorisation, such arrest and detention are unlawful."

[26] It is submitted by the Claimant that the High Court in **Mayeso Gwanda Case** (supra) noted the offence of a rogue and vagabond, in terms of Section 184 (1) (c) of the Penal Code, is overly broad, resulting in too much discretion left in the hands of the police. Further that the charge violated the Applicant's right to dignity, and it stated as follows:

> "What evidence was there that the Applicant intended to commit an offence?....There was no investigation, there was no evidence that the Applicant intended to commit an offence or an illegality...His dignity was violated. He was presumed guilty until proven otherwise. All because he appeared to be of no means. He was not treated as a human being. And where a person's dignity is violated or compromised, it likely creates a chain reaction, that is, several of the individual human rights end up being violated."

[27] Again, with due respect, the above ought to be analysed cautiously and apply it relevantly to the present case. In the **Mayeso Gwanda Case** (supra) the Judge is talking about evidence in the lower court and earlier on, the question arose whether to use a statement by the State which gave facts as they happened which were the basis of the charge of soliciting. Is it really a question of too much discretion being left in the hands of the police or it is mere police ineptitude in dealing with this offence and that they were supported by magistrates who readily and quickly convicted offenders without adequate and pertinent evidence, hence, the police were encouraged to use the offence anyhow. No wonder the police arrested the Applicant on the basis of how he looked. The Judge is attacking the acts of the police and magistrates who have misapplied Section 184 (1) (c) of the Penal Code and failing to meet the requirements of the offence. This cannot be the basis of declaring the offence Section unconstitutional but rather the actions of the arrester as unlawful and finding that the magistrate's erred in convicting the Applicant. The point remains that this **Mayeso Gwanda Case** (supra) has also not helped to show how Section 180 (e) violates the right to dignity.

[28] The Applicant argues further that the State's use of Section 180 (e) violated the right to freedom from cruel, inhuman and degrading treatment. In para 49 he says that 'it could be argued that Section 180 (e) creates the potential for people to be subjected to inhuman or degrading treatment and that the treatment of the accused person *in the present case* would attest to that (our emphasis).'

[29] The issue that the Section violates the right to freedom, begs the question, 'how?' The Claimant submits that the application of Section 180 (e) of the Penal Code in the present case violated the accused's right to freedom and security of a person, as protected under Section 19 (6) of the Constitution, in that he was arrested and detained arbitrarily by police (our emphasis). The question is how he was arrested and detained arbitrarily by police. There is reference to

the **Mayeso Gwanda Case** (supra) where the Judge found that the applicant had been incarcerated for three days and nights in police cells that were congested. This arbitrary arrest and detention amounted to a violation of the applicant's right to freedom and security of person. It appears to us that the judge was talking about the conduct of the police in the course of carrying out their responsibilities of arrest and detention. This is not what is in issue but whether the Section in issue is unconstitutional. If the Section is unconstitutional, it does not matter how the police conduct the arrest or detention since the Section they are applying is unconstitutional or has the potential to mislead the police in carrying out their duties.

[30] Let us firstly address what was referred to before that when the Claimant refers to application of Section 180 (e) in the present case, impliedly he forces the court to consider facts in the case which facts, he said, the Respondent should not necessarily bring out in his statement. Admittedly, this means we cannot completely avoid referring to the facts of the present case when necessary although such reference will be limited and will not be the basis of answering the question whether the Section is constitutional or not.

[31] Further he says Article 9 of the International Covenant on Civil and Political Rights similarly recognises and protects both liberty of a person and security of person. The Human Rights Committee's General Comment 35 explains that liberty of persons concerns freedom from confinement of the body, whilst security of the person concerns freedom from injury to the body and the mind, or bodily and mental integrity. The right of liberty herein prohibits arbitrary arrest and detention and arrest or detention that lacks any legal basis is arbitrary. It defines arbitrariness as to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. We are afraid to say that all that is being said here appears to refer to police conduct more than to the actual penal law.

[32] The Claimant cites Article 6 of the African Charter on Human and Peoples' Rights as follows:

> "Every individual shall have the right to liberty and to security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

[33] The African Commission, in **Amnesty International and others v Sudan, 48/90-50/91-52/91-89/93, November 1999** concluded that Article 6 must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to security forces in a democratic society. This seems to support what we said above that Claimant is talking basically of police actions, and not attacking the constitutionality of a particular penal provision (see para 56).

[34] In conclusion on this aspect, it has not been shown satisfactorily and clearly how Section 180 (e) of the Penal Code through the above exposition can be said to be unconstitutional by violating the right to freedom and security without talking of the police abuse of their powers in the way they use the Section.

THE RIGHT TO PERSONAL PRIVACY

[35] Coming to the fact that the Section violates the right to personal privacy as enshrined in Section 21 of the Constitution, following the above, Section 180 (e) does not provide for

arbitrary or unlawful interference with the suspect so as to be declared unconstitutional. The actual offence is soliciting for immoral purposes and the facts show that that is what he did or committed and the police arrested him after the victim complained to them. If one is alleged to have committed an offence you become a suspect and questions pertaining to your conduct leading to the commission of the offence will naturally be asked by the police. You cannot use the veil of 'right to privacy' so as to declare the Section offensive to the Constitution, or to avoid prosecution. You have the right to remain silent at your own peril, and not the right to kill prosecution.

[36] The words of the offence, 'any person who in a public place solicits for immoral purposes' are technical in nature and the law has given clarification to what conduct is referred to as above alluded to, and as such we do not see any nexus with Section 21 of the Constitution. Just to amplify on it, if the Claimant had not committed any such offence and the police approached him and started asking him about his sexual orientations, then the actions of the police would be unconstitutional for they would be intruding in his private life. It is not the same where Claimant is suspected to have committed the offence. Hence, Section 180 (e) is not in any way to be found unconstitutional as it has not been proved so under this head of violating the right to privacy (see Zambian case of **The People v Paul Kansonkomona [2015] HPA/53/2014**).

[37] In para 58 of his arguments the Claimant says that the Human Rights Committee, in General Comment 16, explains that 'the obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against interferences and attacks as well as to the protection of the right.' The General Comment explains that "even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event reasonable in the particular circumstances." He finishes by saying that 'in this context a police officer's interference with a person who goes about her daily business negates the right to be left alone.' We do not think so. The reasoning of the Claimant seems confused here. Why end up talking about the police actions and not the actual penal law which is in issue by the General Comment above? After all, the police did not arrest him or her (as the Claimant wishes it to be called) while she was prying her trade on the streets of soliciting men for immoral purposes, but upon the victim complaining to police about the Claimant who pretended to be a woman while soliciting for immoral purposes. This was the basis of arrest. He does not explain how interference by the law in this case as provided for by Section 180 (e) is not in accordance with the provisions, aims and objectives of the Covenant. As such the argument falls off.

THE RIGHT TO FREEDOM OF EXPRESSION

[38] As to the right to freedom of expression the Claimant states that the accused's right to freedom of expression and personal autonomy includes both the negative right of (sic) not to be subjected to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty.

[39] We agree with the Claimant that the right to freedom of expression constitutes the foundation stone for every free and democratic society and is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights. We observe that it is true that the right of the

accused person, as an expression of free choice, to live his life in accordance with his gender identity must be respected. However, we fail to see how Section 180 (e) is associated with this right so as to conclude that Section 180 (e) does not comply with Section 19 of the Constitution (which provides for the right of expression). In the present case, the Claimant was not arrested because of his choice of dress but because he solicited for immoral purposes. Section 180 (e) does not talk about manner and choice of dressing, as such, it can hardly be said that it violates the right of expression when it does not prohibit any type of dressing. We fail to establish the relevance of arguments of the Claimant in this area in that Claimant was not arrested because of his gender, but for his conduct of soliciting for immoral purposes. Section 180 (e) is not a gender specific offence.

THE RIGHT TO BE PRESUMED INNOCENT

[40] This right is entrenched in Section 42(2) (f) (iii) of the Constitution as part of the right to fair trial. The Claimant argues that in the present case (his case), he was deemed to be guilty purely on the basis of her gender expression. Then at para 70 he quotes what Justice Ntaba said, in **Mayeso Gwanda Case** (supra) that the charge of being rogue and vagabond (s184 (1) of the Penal Code then, now made unconstitutional), is vague in that it does not sufficiently explain what the prohibited conduct is and gives police officers too much discretion to determine the ambit of prohibited conduct. This violates the principle of legality and the right to be presumed innocent until proven guilty.

[41] We fail to appreciate the argument as it does not explain how the right to be presumed innocent is violated by Section 180 (e) of the Penal Code. We do not think that the Section presumes one guilty before he is tried. As a suspect he was arrested and charged and the normal procedure was supposed to be followed. In our view there was nothing to show that he was presumed guilty before being tried in a court of law. We may add that Section 180 (e) of the Penal Code does not criminalise gender identity and does not offend the right to be presumed innocent.

CONCLUSION

[42] The Claimant was not arrested in a sweeping exercise but after a victim complained to the police that the Claimant was masquerading himself as a female with an aim of enticing men to have canal nature of him. Later such men were duped as the Claimant intimidated them and collected extra money or property belonging to such men. It is our finding that there was no violation under Section 180 (e) of the right to dignity. Further we find that Section 180 (e) does not violate a person's right to freedom from cruel, inhuman and degrading treatment. The Claimant was seducing men to have canal knowledge of him, thus, it was him who was violating the other peoples' right to privacy. The mere existence of the offence of soliciting for immoral purposes in the Penal Code does not violate one's enjoyment of the right to privacy. It does not even infringe on citizen's rights to freedom of expression as the offence is not gender specific. Arbitrariness of arrest is not spelt out in the offence Section. In any case, Claimant was arrested not based on suspicion but that a specific complaint was lodged to police by a victim.

[43] We find that there is no relationship between the rights that the Claimant has cited with the offence of soliciting for immoral purposes.

[44] We find that Section 180 (e) of the Penal Code does not at all interfere with constitutional rights, as such, we need not consider Section 44(1) of the Constitution which provides for justification of a law to limit human rights.

[45] We find that the offence of soliciting for immoral purposes does not contravene the alleged constitutional rights and therefore it is constitutional.

[46] Costs are in the cause.

MADE THIS DAY OF NOVEMBER 11, 2020, AT BLANTYRE IN THE REPUBLIC OF MALAWI.

SIGNED.....

H.S.B. POTANI

JUDGE

SIGNED.....

M.L. KAMWAMBE

JUDGE

SIGNED.....

J. CHIGONA

JUDGE