



**IN THE HIGH COURT OF MALAWI**

**LILONGWE DISTRICT REGISTRY**

**CIVIL DIVISION**

**JUDICIAL REVIEW CASE NUMBER 33 OF 2020**

**BETWEEN:**

**THE STATE (On the application of the HUMAN**

**RIGHTS DEFENDERS COALITION) -----1<sup>ST</sup> APPLICANT**

**ASSOCIATION OF MAGISTRATES IN MALAWI-----2<sup>ND</sup> APPLICANT**

**MALAWI LAW SOCIETY-----3<sup>RD</sup> APPLICANT**

**AND**

**THE PRESIDENT OF THE REPUBLIC OF**

**MALAWI-----1<sup>ST</sup> RESPONDENT**

**SECRETARY TO THE CABINET (Also styled as)**

**CHIEF SECRETARY TO THE GOVERNMENT-----2<sup>ND</sup> RESPONDENT**

**AND**

**WOMEN LAWYERS ASSOCIATION----- AMICUS CURIAE**

**CORAM: THE HONOURABLE JUSTICE M.C.C. MKANDAWIRE**

**Soko, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants**

**Mwafulirwa, Counsel for the 3<sup>rd</sup> Applicant**

**Chisiza, Principal State Advocate Counsel for the Respondents**

**G. Kumwenda, Court Interpreter**

**JUDGMENT**

**Introduction**

1. On 14<sup>th</sup> of June 2020, I granted permission to the 1<sup>st</sup> and 2<sup>nd</sup> Applicants for judicial review in Judicial Review case number 33 of 2020. On the same day, Justice Ligowe of Mzuzu High Court Registry sitting some 400 kilometers away granted the 3<sup>rd</sup> Applicant permission for judicial review in judicial review number 16 of 2020.
2. It is clear from the court records that at the time Justice Ligowe was considering judicial review number 16 of 2020, counsel for the 3<sup>rd</sup> Applicant had brought to the attention of the judge my order in judicial review number 33 of 2020.
3. The Honourable Justice Ligowe observed that the two matters related to same issues although seeking different reliefs. The judge therefore ordered that matter number judicial review 16 of 2020 be consolidated with the matter judicial review 33 of 2020.
4. On 19<sup>th</sup> June 2020, I formally consolidated these two matters pursuant to Order 6 Rule 9 of the Courts (High Court) (Civil Procedure) Rules 2017. The two matters were therefore to proceed under judicial review number 33 of 2020.

5. On 8<sup>th</sup> July 2020, the Women Lawyers Association filed an ex-parte application for admission as Amicus Curiae. I accordingly appointed them as per their prayer.

### **The Case**

6. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants have their case anchored on the sworn statements of Mr. Gift Trapence and Patrick David Mwamale. Mr. Gift Trapence is the Chairperson of the 1<sup>st</sup> Applicant whilst Mr. David Mwamale is the President of the 2<sup>nd</sup> Applicant. The 1<sup>st</sup> Applicant is a Non-Governmental Organization duly registered as a company limited by guarantee and carries on various activities in furtherance of democracy, good governance, constitutionalism, human rights and rule of law.

7. The 2<sup>nd</sup> Applicant is a registered trade union of Magistrates in Malawi whose goal include to preserve, protect and uphold the rule of law, democracy, human rights and the constitution.

8. The 1<sup>st</sup> Respondent was the President of the Republic of Malawi and the head of Government the executive branch of the State. The 2<sup>nd</sup> Respondent is the Secretary to the Cabinet (who however uses the wrong and illegal moniker of Chief Secretary to the Government), a public office responsible inter alia, the Cabinet Office and conveying decisions of the Cabinet to appropriate persons or authorities.

9. The incumbent of the 1<sup>st</sup> Respondent in an interim capacity was Professor Arthur Peter Mutharika who is also the President of the Democratic Progressive Party.

10. Professor Arthur Peter Mutharika contested as a Presidential candidate during the 21<sup>st</sup> May 2019 Presidential elections whose result was nullified by the High Court of Malawi and the nullification was confirmed on appeal by the Supreme Court of Appeal. Consequently, upon the nullification a fresh election was ordered to be held within 150 days from 3<sup>rd</sup> of February 2020.

11. Since the judgment of the High Court and the Supreme Court were delivered, the incumbent of the 1<sup>st</sup> Respondent and his political party the Democratic Progressive Party have publicly displayed disenchantment with and denigrated the two judgments and the judicial officers involved.

### **Particulars**

- (a) On or about 5<sup>th</sup> February 2020 in a public address to the nation monitored on the State Broadcaster, the Malawi Broadcasting Corporation he stated that the judgment of the High Court nullifying the election is a serious subversion of justice, an attack on our democratic systems, an attempt to undermine the will of the people, and that the judgment inaugurated the death of Malawi democracy.
- (b) On 17<sup>th</sup> February 2020 the 1<sup>st</sup> Respondent incumbent party, Democratic Progressive Party staged demonstrations in Blantyre with the theme “Restoration of Democratic Justice” and allowed his supporters carrying placards denouncing the High Court ruling as “-----a fraudulent court ruling-----”and accused the five judges who adjudicated the case of receiving bribes to nullify the election. The incumbent of the 1<sup>st</sup> Respondent has never condemned these specific attacks on the courts by his supporters. The placards referred to are exhibits GT4(a) and GT4(b).
- (c) In the State of the Nation Address to the National Assembly on 5<sup>th</sup> June 2020 which is referred to as exhibit GT5, he stated that the court failed to show or prove that irregularities affected the result of the nullified election, suggested that the courts were wrong in nullifying the election, suggested that Parliament is superior over the courts and pleaded with the National Assembly to correct the wrong committed by the courts.

12. The attacks on the judiciary had been widely acknowledged and condemned by the Commonwealth Magistrates' and Judges' Association and its collaborators the Commonwealth Lawyers Association, the Commonwealth Legal Education Association, Judges for Judges, Magistrates' and Judges' Association of Malawi and Commonwealth Lawyers Association. The Applicants tendered exhibits GT6, GT7 and GT8 as statements that came from these institutions.

13. On a date yet unknown, the Government through the Chief Secretary wrote the Honourable the Chief Justice Andrew K.C. Nyirenda SC, the Honourable Justice of Appeal Twea SC and other Justices of Appeal indicating that they had accumulated leave days and that they should proceed on leave pending the mandatory retirement.

14. The Honourable the Chief Justice and the Honourable Twea SC did not voluntarily request to proceed on leave pending their mandatory requirement let alone expressed such intention by acceding to the suggestion communicated by the Secretary to the Cabinet.

15. To the contrary on or about 12<sup>th</sup> June 2020 the Chief Justice inquired from the 2<sup>nd</sup> Respondent if the communication that he proceeds on leave pending mandatory retirement is in the nature of a directive.

16. On 12<sup>th</sup> June 2020 before responding to the request for clarification from the Chief Justice, the Secretary to the Cabinet issued a "Public Notice" indicating that the Honourable the Chief Justice Andrew K.C. Nyirenda SC will proceed on leave pending retirement with immediate effect on the ground that he has accumulated more leave days than the remainder of his working days to retirement date. The public notice is exhibit GT9.

17. In the same Public Notice, the Secretary to Cabinet announced that the most senior Justice of Appeal will act as Chief Justice until such time as the 1st Respondent will appoint a successor.

18. The Applicant maintains that Government's acts in the circumstances and the predicate decision on which these acts are based amounts to forcing the Honourable the Chief Justice Andrew K.C. Nyirenda and the Honourable Justice Twea SC to proceed on leave without their voluntary election to do so.

19. The impugned decision/acts of the Government have been generally received with condemnation as an attempt to manipulate the judiciary, specifically the Supreme Court of Appeal. This can be seen through statements released by the Evangelical Association of Malawi dated 13<sup>th</sup> June 2020 which is exhibit GT10 and Malawi Law Society dated 13<sup>th</sup> June 2020 which is exhibit GT11.

20. It is the position of the 2<sup>nd</sup> Applicant that in order to safeguard the separation of powers, constitutionalism, rule of law the 2<sup>nd</sup> Applicant should proceed to challenge the Government decision effectively compelling the Chief Justice and Justices of Appeal to proceed on leave without their voluntary election to do so.

21. The 3<sup>rd</sup> Applicant has relied on the sworn statement of Mr. Burton Chigongondo Mhango Chairman of the Malawi Law Society. The 3<sup>rd</sup> Applicant wants judicial review of the following decisions:

(a) The decision by the Executive Branch of Government, which is headed by the 1<sup>st</sup> Respondent and where the 2<sup>nd</sup> Respondent is a senior member to forcefully make the Chief Justice of the Republic of Malawi to go on leave pending his statutory retirement, which retirement should be on or around the 21<sup>st</sup> of December 2021.

(b) The decision by the Executive Branch of Government, which is headed by the 1<sup>st</sup> Respondent and where the 2<sup>nd</sup> Respondent is a senior member, to forcefully make the Honourable Justice of Appeal Edward Twea SC to go on leave pending his statutory retirement which retirement should be on or around the 9<sup>th</sup> of April 2021.

(c) The decision by the 2<sup>nd</sup> Respondent (who is a senior member of the Executive Branch of Government), made in writing on the 5<sup>th</sup> of June 2020 and later through a Public Notice dated 12<sup>th</sup> June 2020, to effect the decision under a. above.

(d) The decision by the 2<sup>nd</sup> Respondent (who is a senior member of the Executive Branch of Government) made in writing on the 10<sup>th</sup> of June 2020 to effect the decision under b. above.

(e) The pending action as per the said Public Notice by the 2<sup>nd</sup> Respondent to proceed in the near future, and before the expiry of the tenure of office of the Chief Justice, to proceed to appoint another judge or any other person to the position of the Chief Justice of the Republic of Malawi.

22. The 3<sup>rd</sup> Applicant referred to a letter that the 2<sup>nd</sup> Respondent wrote the Chief Justice Andrew Nyirenda on 5<sup>th</sup> June 2020 which is marked as exhibit BCM-2. The Chief Justice wrote the 2<sup>nd</sup> Respondent seeking clarification as to whether the letter was a demand or request. A copy of the letter is tendered as BMC-4. The Respondents have not replied to the said letter. A similar letter was also written to Justice of Appeal Edward Twea on 10<sup>th</sup> June 2020 which is tendered as exhibit BMC-3. The Honourable Justice of Appeal Edward Twea also wrote. The letter is exhibit BMC-5. The Respondents have not replied. In the case of the Chief Justice, he was supposed to retire on 21<sup>st</sup> of December 2021. In the case of the Justice of Appeal Edward Twea, his date of retirement is 9<sup>th</sup> April 2021.

## **Grounds for Judicial Review**

23. The three Applicants have couched their grounds for judicial review as follows:

- a) The Respondents' decision and acts constitute an abuse of executive authority and are therefore illegal and unconstitutional.
- b) The Respondents have misdirected themselves on the law and have committed an error of law as to leave pending relinquishment of public office.
- c) The Respondents have misdirected themselves on matters of law and have committed errors of law as to the deferment and accumulation of leave in the context of a constitutionally secured office.
- d) The Respondents' decision and acts in the circumstances are illegal and in bad faith and amount to a threat to judicial independence.
- e) The Respondents' decision and acts are *ultra vires* and illegal as the Chief Justice and/or any other Justice of Appeal cannot be forced to proceed on leave without their free election and/or consent consistent with the principles for accumulation and deferment of leave by holders of constitutional office.
- f) To the extent that the Respondents' decision and acts are illegal and unconstitutional, compliance with the same by the Chief Justice and Justices of Appeal would also be illegal and unconstitutional.
- g) The 1<sup>st</sup> Respondent's appointment of a successor to the current Chief Justice and any other Justice of Appeal before they vacate office or voluntarily proceed on leave pending due retirement would be illegal and unconstitutional.



h) Any term of employment contract that would enable the Respondents to make and implement any of the decisions made by the Respondents as set out would be illegal, unconstitutional and invalid to the extent of the such unconstitutionality.

### **The Reliefs Sought**

24. The Applicants seek the following reliefs: -

a) A declaration that the Chief Justice, Justices of Appeal and any other Judicial Officer cannot be compelled to cease or be relieved from the duty to serve in the judicial office without due process premised on incompetence or misbehavior in that office

b) A declaration that on the true construction of section 30 of the General Interpretation Act as read with section 44 of the Employment Act and Section 119 of the constitution it is legally impossible during the tenure of office of a Judicial Officer at the rank of Judge or Justice of Appeal or Chief Justice to accumulate in excess of the contracted entitlement per annum unless expressly deferred and accumulated with the consent of the Judicial Officer.

c) A declaration that the Respondents have no authority to force any judicial officer to leave office whether by way of leave or retirement without due cause.

d) A declaration that each and every one of the Respondents' decisions set out above is illegal, unconstitutional and invalid.

e) A declaration that the decision of the Respondents contained in the letters of 5<sup>th</sup> June 2020 and 10<sup>th</sup> June 2020 and in the Public Notice of 12<sup>th</sup> June 2020 are unreasonable in the *Wednesbury* sense

f) An order quashing the impugned decision in *toto*.

g) A mandatory order directing the Respondents to reverse their decision complained of and recognize the Honourable the Chief Justice Andrew Nyirenda as the Chief Justice of the Republic of Malawi until his age of retirement.

h) A mandatory order directing the Respondents to expressly reverse and withdraw their decisions complained of and to recognize the Honourable Justice Edward Twea as a Justice of Appeal of the Republic of Malawi until his age of retirement.

i) An order of costs of this proceeding on an indemnity basis.

### **Commencement of the hearing**

25. On the 9th of July 2020, this matter came up for hearing. All the parties were present. It however transpired on this day that the Respondents had not filed any response. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants informed the court that on 8th July 2020, he got a letter from the Attorney General representing the Respondents informing him about the withdrawal of the letter to the Chief Justice Andrew Nyirenda and the Honourable Justice of Appeal Edward Twea. There was also a letter to the Honourable Justice R.R. Mzikamanda withdrawing his appointment as Acting Chief Justice of the Republic of Malawi.

26. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants however said that due to the nature of the case and Public Interest in the matter, he had instructions from his clients that the matter be adjudicated upon by the court. Counsel also prayed to the court that the Respondents should be personally condemned to pay costs of these proceedings.

27. Counsel for the 3<sup>rd</sup> Applicant concurred with what counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants had said. He further told the court that since the source of the reliefs they are seeking are declaratory in nature, the

court had to pronounce itself in this matter. That the judgment from this case would also be to the benefit of the legal world.

28. On the issue of costs, counsel for the 3<sup>rd</sup> Applicant shared the same view. He said that since the Respondents personally made the decisions, they had to be condemned to pay costs of these proceedings.

29. Counsel Chisiza who is representing the Respondents confirmed having received the court's order. He also confirmed that the Respondents had complied with the court's order by furnishing the Applicants with all the relevant letters as requested by them. Counsel informed the court that they have not filed any defence by the 1<sup>st</sup> of July 2020 as ordered by the court because they found that the decision made by the 2<sup>nd</sup> Respondent had no backing of the law. The 2<sup>nd</sup> Respondent was advised to reverse the decision. Unfortunately, due to the political climate, they failed to conclude the issue with the former Chief Secretary to the Government.

30. When the new Government came in after the Fresh Presidential Elections held on 23<sup>rd</sup> of June 2020, the new Chief Secretary was engaged. The decision by the former Chief Secretary to the Government was reversed. Letters were written to the Honourable Chief Justice Andrew Nyirenda and Honourable Justice of Appeal Edward Twea informing them about the reversal of the decision.

31. It was therefore counsel's view that since the objective of judicial review is to review the decision making process or the decision itself, since the decision is now reversed, it means that there is now no decision at all. Counsel said that the reversal of the decision on its own is an admission that the decision was never made. The court should not really base on something that is purely academic.

32. In conclusion, counsel pleaded with the court to consider the matter withdrawn.

33. On the issue of costs, counsel said that he had nothing to say. He however informed the court that he would not be representing the Respondents on this issue. He left the issue of costs to the discretion of the court.

34. The Applicants' counsel in reply to this referred to Order 12 Rule 42 of the Courts (High Court) (Civil Procedure) Rules 2017 which deal with withdrawal and discontinuance of a claim. Counsel argued that the Respondents have not filed any application for discontinuance /withdrawal.

35. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants said that there was a lot at stake in this matter. He further argued that this will be a judicial pronouncement that it will remain on record and that will be used as a point of reference. On the issue of costs, it was submitted that since counsel for the Respondents had nothing to say, it means that he agrees with the proposition that the Respondents should personal pay the costs.

36. Counsel for the 3<sup>rd</sup> Applicant concurred with what his colleague had said. He stressed the fact that the reliefs prayed for are not academic. It was his submission that these issues are as live as at the beginning and that the court had to make a determination.

37. Counsel for the Respondents clarified that he did not mean that the proceedings were withdrawn. All he meant was that the decision was reversed.

38. After having listened to both sides, I ordered that the matter should proceed for adjudication. I was satisfied that the Respondents had not withdrawn this matter. All that had happened was reversal of

the letters to the concerned Justices. Even if such reversal of decision was taken to be withdrawal, the Respondents had not complied with Order 12 Rule 42 of the Civil Procedure Rules as to how matters can be discontinued. I also considered the fact that there was a lot at stake in this matter. The doctrine of separation of powers and the foundation of judicial independence were on trial. I also took judicial notice of the public interest in this matter. It would therefore have been a betrayal of judicial accountability if I followed the road map proposed by the Attorney General to have the matter closed. Much as I appreciate that there was reversal of the decision, but it is imperative that a formal judicial pronouncement should be made. The judicial pronouncement would also assist and educate Malawians on the doctrine of separation of power and judicial independence.

39. Having observed that the Respondents did not even file a defence and that the decision by the former Chief Secretary to the Government had been reversed by the new Chief Secretary to the Government, I ordered that all that I required from the parties and Amicus Curiae were written submissions on the matter. I gave each party 14 days to file written submissions. Let me thank both sides for the wonderful submissions that were made. I am also particularly indebted to the Women Lawyers Association for providing the court with a lot of insights on international and regional standards.

40. Before I further delve into this matter, my attention has been drawn to the names of the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent has been cited as Secretary to the Cabinet (Also styled as) Chief Secretary to the Government. I note that all the written communication that originated from the 2<sup>nd</sup> Respondent are headed Chief Secretary to the Government.

41. A look at the Republic Constitution and the Public Service Act 1994 shows that there is no such office known as Chief Secretary to the Government in the entire Public Service of Malawi. Section 92(4) of the Republic Constitution provides that there shall be a Secretary to the Cabinet who shall be appointed by the President. This section prescribes the duties and responsibilities of this officer. The Secretary to the Cabinet have charge of the cabinet office, be responsible for arranging the business, and keeping the minutes of the cabinet, convey the decisions of the Cabinet to appropriate persons or authorities and have such other functions as the cabinet may direct. The Cabinet as per Section 92(1) of the Constitution is part of the Executive. Section 16 of the Public Service Act also refers to the office of the Secretary for the Cabinet. In this Section, the Secretary to the Cabinet is head of the Public Service. The Act does not however define Public Service. It is not clear as to how the term Chief Secretary to the Government came into existence. Section 33 of the General Interpretation Act prescribes the procedure that the President may follow to change title in public office. You do not just wake up and donate a name to a public office without complying with Section 33.

42. This court puts it on record that with immediate effect, the name Chief Secretary to the Government, which name has been unconstitutionally put in use on times without numbers, should not be in use anymore in this our Republic of Malawi. If anyone has particularly fallen in love with this name, appropriate steps should be taken to comply with section 33 of the General Interpretation Act. I have however taken judicial notice of the fact that Government recently had issued a public notice that with immediate effect, the title Chief Secretary to the Government should no longer be in use. Instead, the title Secretary to the Cabinet should be the one in use. That is a step in the right direction

## **Chronology of events**

43. The genesis of this case is from the letters which were written by the 2<sup>nd</sup> Respondent to the Honourable Chief Justice Andrew K.C. Nyirenda and Honourable Justice of Appeal Edward Twea SC. The first letter which went to the Chief Justice dated 5th June 2020 was as follows:

**Cabinet**

**Office of the President and**

**Private Bag 301**

**Lilongwe**

**5<sup>th</sup> June 2020**

**Ref. No. CS/S/001**

**Right Honourable Andrew K.C. Nyirenda**

**Chief Justice**

**Malawi Supreme Court of Appeal**

**P.O. Box 30244**

**Chichiri**

**Blantyre 3.**

Dear Rt. Honourable Justice Nyirenda,

**LEAVE PENDING RETIREMENT**

I write in respect of the above matter, My Lord, and wish to advise that according to employment records kept by this office, you were born on 26<sup>th</sup> December 1956. This means that you will attain the current mandatory retirement age of sixty-five (65) years on 26<sup>th</sup> December 2021. Our records further show that you have accumulated leave days of Five Hundred and Seventy-Two (572).

Therefore, in terms of MPSR 1.184(1), I would like to officially inform you that you will be due for retirement from the service on 26<sup>th</sup> of December 2021, the date you will attain the mandatory retirement of Sixty-Five (65) years. However, since you have accumulated leave days of Five Hundred and Seventy-Two (572), I request you to proceed on leave pending your retirement as the conditions of service do not provide commutation of leave days. The specific provision is in clause 12 of the Conditions of Service for Judicial Officers.

Let me state that Government will accord to you, My Lord, all the retirement benefits of a former Chief Justice as approved.

May I avail myself the opportunity presented by the occasion to thank you most sincerely for the services that you rendered to the Government whilst serving as Chief Justice of the Supreme Court of Appeal and High Court of Malawi and in various capacities during the years of your tenure. I wish you the best of luck in your future endeavors.

**Your Sincerely**

**Lloyd A. Muhara**



44. On 14<sup>th</sup> June 2020, a similar letter was written to Honourable Justice of Appeal Edward Twea SC. The only difference between these two letters were the dates of birth and retirement.

45. On 12<sup>th</sup> June 2020, the Honourable Chief Justice Andrew K.C. Nyirenda wrote the 2<sup>nd</sup> Respondent as follows:

**Appeal**

**Chief Justice's Chambers  
Malawi Supreme Court of**

**P.O. Box 30244**

**Chichiri, Blantyre 3**

**Malawi**

**12<sup>th</sup> June 2020**

**The Chief Secretary to the Government**

**Office of the President and Cabinet**

**Private Bag 301**

**Capital City**

**Lilongwe 3**

The Chief Secretary,

**RE-LEAVE PENDING RETIRMENT**

Your letter of 5<sup>th</sup> June 2020 Reference No. CS/S/001 refers.

You will recall Chief Secretary that immediately you delivered the above letter to me, I raised several misapprehensions and informed you that it

would be appropriate if I had audience with His Excellency the State President.

Subsequently, I sent you a note to advise that the meeting with His Excellency would be pended until I had a prior meeting with you, to include the Minister of Justice and the Attorney General. It would appear that because of time constraints, owing to the circumstances around us, it might not be easy to meet soonest.

On account of the pressing nature of the matter at hand, I write to raise two critical issues around it, which would have been the subject matter of our meeting.

The first issue is to find out whether your letter is a request as you state in the second paragraph thereof or a directive, as implied in the third and fourth paragraphs.

The second issue is to confirm that the letter is on the directions of His Excellency the State President, according to what you said verbally when you were handing the letter to me.

Please accept Chief Secretary, assurances of my highest consideration and esteem.

**Yours faithfully**

**Andrew K.C. Nyirenda**

**Chief Justice**

46. On the 12<sup>th</sup> of June 2020, the 2<sup>nd</sup> Respondent released a Public Notice which was as follows:

## **PUBLIC NOTICE**

### **PROCEEDING ON LEAVE PENDING RETIREMENT**

Government wishes to inform the general public that the Right Honourable Andrew K.C. Nyirenda, S.C., Chief Justice of Malawi will proceed on leave pending retirement with immediate effect.

The Honourable Chief Justice has accumulated more leave days than the remainder of his working days to retirement date.

In accordance with the constitution, the most Senior Justice of Appeal will act as Chief Justice until such a time as His Excellency the President will appoint a successor.

**Lloyd A. Muhara**

**Chief Secretary to Government**

**12th June, 2020**

47. At the time when the 2<sup>nd</sup> Respondent had released the Public Notice above, there was no response to the inquiry made by the Honourable Chief Justice Andrew Nyirenda SC.

48. On 14<sup>th</sup> June 2020, Justice of Appeal Edward Twea S.C., through the Registrar of the Supreme Court and High Court of Malawi responded to the letter written by the 2<sup>nd</sup> Respondent. The relevant contents are as follows:

Dear Sir,

### **LEAVE PENDING RETIREMENT**

I in spite of everything, acknowledge receipt of your letter Ref. No. CS/S/001 of 10<sup>th</sup> instant. I wish to confirm my date of birth and date on which I am due to retire 9<sup>th</sup> April 2021. Further, I confirm that I, and all

the Justices of Appeal have accumulated leave days. The actual number are actually being reconciled.

With due respect, kindly be informed that I decline your request that I proceed on leave pending retirement. It was agreed by all Justices of Appeal, except two, and our Responsible Officer, the Chief Justice, in accordance with Clause 12(2) of the Judiciary Conditions of Service for Judicial Officers, that we shall not proceed on leave pending retirement until new Justices of Appeal are appointed, to replace those retiring within one year, or until the mandatory retirement age of 65, whichever is soonest.

We are all actually aware that the clause provides that accumulated leave days shall not be commuted for cash. My opting to continue working, notwithstanding the accumulated leave, just like my colleagues, is not motivated by the quest to cash in the leave, as your letter seems to imply. We have all opted to continue working, so that the Supreme Court of Appeal, which now sits as the whole bench, is not rendered inoperational in the interest of the affairs of the State and the People.

I will however refer your concerns to the Honourable Chief Justice and the Judicial Service Commission.

I thank you for your good wishes.

**Yours faithfully**

**Edward B. Twea SC**

**Justice of Appeal**

49. I have looked at the communication from the 2<sup>nd</sup> Respondent who was posing as Chief Secretary to the Government. My assessment of the matter is that there is only one fundamental issue that merits judicial review. This relates to whether the Respondents had the constitutional

or legal mandate to make a decision on the matters of leave for judicial officers?

50. A lot has been submitted by the parties on Judicial Independence, Rule of Law and Separation of powers. Our starting point therefore should be the Malawi constitutional Legal Framework. Section 4 of the Constitution binds all executive, legislature and judicial organs of the State at all levels of government. Malawi is a constitutional democracy built on constitutional supremacy. Constitutional supremacy is unequivocally pronounced in Section 5 of the Constitution. This Section provides that “any act of government or any law that is inconsistent with the provisions of this constitution shall, to the extent of such inconsistency, be invalid”. The Republic constitution has entrenched the doctrine of separation of powers whereby judicial independence has received a lot of prominence. Sections 7, 8 and 9 of the Constitution create the three separate organs of the State. The constitution is further built on a number of principles and values. One such key value is the rule of law. This is clear in section 12(1)(b) and (f) of the constitution. In a nutshell, this section provides that all those purporting to exercise public power should only do so to the extent of their lawful power. Therefore, a public functionary cannot seek to exercise public power that they do not have: See the case of **The State and MACRA and Others Ex Parte Registered Trustees of NAMISA and others Constitutional Reference No, 3 of 2019.**

51. Judicial independence is implicit in the doctrine of separation of powers which enables each branch of government operate without intrusion or interference from either of the other branches. The doctrine of separation of powers therefore recognizes the value of courts functioning independently. A system of checks and balances is inherent in the doctrine, which also means that each branch is accountable to the

others and the public. The three branches of government are separate but equal.

52. The existence of an independent judiciary is one of the core elements of modern constitutionalism and a cornerstone of democracy and good governance.

53. The separate status, function and duty of the judiciary has been specifically provided for in section 9 of the constitution. This section provides: -

***“The judiciary shall have the responsibility of interpreting, protecting and enforcing this constitution and all laws and in accordance with this constitution in an independent and impartial manner with regards only to relevant facts and the prescriptions of law.”***

54. The Malawi Constitution formally recognizes the principle of judicial independence. Section 103 of the Constitution provides that all courts and persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority.

55. In order to re-enforce judicial independence, Section 114 of the Constitution provides that the Chief Justice and all other holders of judicial Office shall receive salary and other employment benefits for their services as determined by the National Assembly. Pursuant to Section 114 of the Constitution, the National Assembly in 1997 approved the Judicial Service Conditions of Service Regulations 1997. For purposes of these regulations, the Registrar of High Court and Supreme Court is the Responsible Officer.

56. Judicial Independence in Malawi has been further strengthened through the enactment of the Judicature Administration Act No 11 of 2000. This Act has empowered the Judiciary to have administrative and

financial control of its affairs. The Act even introduced the office of the Chief Courts Administrator who shall be subject to any general or specific directions of the Chief Justice.

57. From all this legal framework, the judiciary has been given mandate to administer its own affairs such as budgeting, budget control, planning, human resource control, strategic planning, public relations, legal education and training, policy formulation, judicial administration, monitoring and evaluation just to mention a few.

58. It must be acknowledged that judicial independence and judicial accountability co-exist. The two are not inconsistent. The judiciary should not treat itself as ungovernable; or elitist. It must be accountable to the other branches of government, to itself and the people. Courts exist to serve the public and, to that extent the people have a legitimate interest in the administration of justice because, in truth, judicial officers get their power from the people. Judicial accountability is well embedded in our Constitution.

59. Section 104 of the Constitution establishes the Supreme Court of Appeal for Malawi. This is a superior court of record. It is the highest appellate court of the land. Section 108 of the Constitution establishes the High Court of Malawi. Apart from being a court of first instance, the High Court also hears appeals from subordinate courts like the Magistrates Courts and the Industrial Relations Court and other Tribunals established under any law. The judiciary is therefore accountable through the process of appeals from the lower courts to the highest court. In terms of continental and regional integration, natural and legal persons can even access supra national institutions such as the African Court of Human and Peoples' Rights- **see Urban Mkandawire vs Republic of Malawi Application Number 003/2011** and **Kajoloweka vs Republic of Malawi Application Number 055/2019**. In the COMESA

Court of Justice See **Malawi Mobile Ltd vs Malawi Government/COMESA (Ref NO1 of 2015) and Ref NO1 of 2017 respectively).**

60. There is also judicial accountability through the scrutiny of judgments by members of the academia and the vibrant press. Members of the public can also constructively criticize decisions of the courts.

61. Trials and judgments of the courts are conducted in open courts-keeping the work of the courts continuously before the public gaze. Recently we have seen and experienced a more robust approach by the judiciary whereby court proceedings have even been televised or covered live on radio stations. There is the duty to give reasoned decisions promptly. A failure to give judgments promptly offends the obligations to be accountable. The judiciary has also strived to publish annual reports on its activities.

62. The other area that has been insulated in as far as judicial independence is concerned is the security of tenure of judicial officers. The appointment, tenure and removal of judges is enshrined in Section 111 of the Constitution. The Chief Justice is appointed by the President and confirmed by the National Assembly by a majority of two-thirds of the members present and voting. All other Judges are appointed by the President on the recommendation of the Judicial Service Commission. According to Section 119(1) of the Constitution, a person holding the office of Judge vacate that office on attaining the age of sixty-five years or such other age as may be prescribed by Parliament. Judges may be removed from office by the President only for incompetence in the performance of the duties of his or her office or for misconduct. But before such removal, the motion for their removal should be debated in the National assembly, passed by a majority of the votes of all the members of the National Assembly and submitted to the President as a



petition of the removal of the Judge concerned. It is therefore clear that the Constitution jealously guards judicial independence. The Constitution further provides a complementary relationship amongst the three branches of Government.

### **International and Regional Standards**

63. Article 14 of the **International Covenant on Civil and Political Rights** enshrines the right to equality before the law and fair trial. It is crucial under these rights that Tribunals should be “Competent, Independent and Impartial”.

64. The United Nations ‘Basic principles on the Independence of the Judiciary provides guidance on the structures and process States must enact in order to have an independent properly functioning judiciary. Article 1 of these Principles provides that the Independence of the Judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.

65. The Bangalore principles of Judicial Conduct reinforce that it is imperative to have an independent Judiciary. Judicial Independence is a pre-requisite to the rule of law and a fair trial. In performing his or her duties, a judge must be free from any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or any reason.

66. The Universal Charter of the Judge adopted by the International Association of Judges, promotes principles such as the rule of law, judicial independence and impartiality and security of tenure.

67. The International Bar Association’s Minimum Standards of Judicial Independence promote various principles which enable judiciaries around the world to adjudicate matters independently and impartially.

68. The “Commonwealth Latimer House Principles” provides that an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, endangering public confidence and dispensing justice.

69. The African Charter on Human and Peoples’ Rights in Article 26 imposes a duty on African States to secure judicial independence, and to establish and strengthen National Institutions dedicated to protecting human rights in the Charter. Further, the African Commission on Human and Peoples’ Rights in a resolution requested that States incorporate “Universal principles establishing the independence of the judiciary, especially with regards to security of tenure” and “refrain from taking any action which may threaten directly or indirectly the independence and the security of Judges and Magistrates. This resolution was made during the 19<sup>th</sup> Ordinary Session March 26-April 4 1996 ACHPR/Res.21(xix) 96.

### **Finding and Conclusion**

70. I have deliberately referred to a lot of national, regional and international legal instruments in order to underscore the fact that judicial independence is very pivotal to rule of law and fair trial. It is from the foregoing legal framework that I have to decide whether the decision and action taken by the Respondents to forcibly send on leave pending retirement the Hon. Chief Justice Andrew K.C. Nyirenda and Hon Justice of Appeal Edward Twea can hold water here.

71. Before I do that, let me hasten to say that the in his State of the Nation Address (SONA) which is exhibit GT5, the 1<sup>st</sup> Respondent wondered as to who holds the Judiciary accountable yet the President and the Executive as well as the Parliament are held accountable by the House and the people. I find it very unfortunate that the 1<sup>st</sup> Respondent who was Head of State was not aware as to how the Judiciary is held

accountable. From the legal framework that I have looked at, it is very clear that both the Executive and the Legislature hold the Judiciary accountable. In terms of appointments of Judges and the discipline mechanisms, the President has powers to appoint Judges and he also has powers to dismiss them subject to satisfying the requirements of Section 119 of the Constitution. The National Assembly has oversight powers through the Public Finance Committee to hold the Judiciary accountable on how it has appropriated the resources that were given to it. The Registrar of High Court and Supreme Court of Appeal together with the Chief Courts Administrators represent the Judiciary during such accountability meetings. Parliament has powers to determine the terms and conditions of service for the Judiciary. Decisions of courts are appealable to superior courts and this on its own is an accountability mechanism. Court hearings are done in open court and the public has got the opportunity to follow proceedings. This on its own is accountability to the public. The Judiciary publishes annual reports which are accessed by members of the public and court users.

72. The 1<sup>st</sup> Respondent also made a very dangerous statement. On page five of the SONA, the 1<sup>st</sup> Respondent said the following:

***“And let us also admit that we sometimes do what is not right because the court has said so. But let us remember that Parliament is more supreme above the courts. We are elected members who represent the people and we have the authority to make laws for the judiciary to interpret.”***

With due respect to the 1<sup>st</sup> Respondent, I see nowhere in the Constitution of Malawi or any other law in Malawi where it is said that Parliament is more supreme above the courts. According to Section 5 of the Constitution, it is the Constitution that is Supreme. The Executive, Legislature and the Judiciary as per Sections 7, 8 and 9 of the Constitution

have separate status, function and duty but they are all equal. I therefore take it that the 1<sup>st</sup> Respondent deliberately wanted to mislead the citizens of Malawi. What he said has no grain of truth at all.

73. From the totality of the submissions that came before me, it is very clear that each of these branches or arms of Government regulate their own administrative arrangements. The issue of leave administration is a purely internal matter for the Judiciary and is regulated by Regulation 12 of the Judicial Service Conditions of Service Regulations. According to the communication that was sent to the 2<sup>nd</sup> Respondent by Honourable Justice of Appeal Edward Twea SC, dated 14<sup>th</sup> June 2020, in accordance with Regulation 12(2) of the Judiciary Conditions of service for Judicial Officers, the issue of leave days had already been agreed upon.

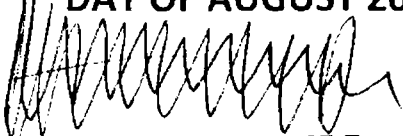
74. The Respondents had no constitutional or legal basis upon which to compel the Chief Justice and Honourable Justice Edward Twea SC to go on leave pending retirement. Issues of judicial administration and human resources management remain the preserve of the Judiciary and do not require the intervention of the President, Cabinet and Secretary to the Cabinet. The Judiciary has its own Responsible Officer the Registrar who is mandated to deal with matters of this nature. If need arises, such matters can also be handled by the Judicial Service Commission.

75. The Respondents breached the doctrine of separation of powers and the said decision was illegal and unconstitutional. I therefore grant the Applicants reliefs sought as itemized in paragraph 24 of this judgment.

77. The issue of costs has exercised my mind. Counsel for the Applicants made submissions that the Respondents should personally pay for costs of these proceedings. I have gone through the written submission that was presented to the court. I have also taken into account the response that was made by Counsel for the Respondents. The court was categorically informed by the Respondents' Counsel that he was not

going to represent them on the issue of costs. I therefore found it inappropriate for the court to decide on the issue of costs in the absence of the Respondents.

78. I therefore order that the issue of costs be deferred until the Respondents are heard. The court will within seven days from today inform the concerned parties the date and time when we should convene so that the court hears both sides.

DELIVERED THIS *27<sup>th</sup>* DAY OF AUGUST 2020 AT LILONGWE  
  
M.C.C. MKANDAWIRE  
JUDGE