



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
JUDICIAL REVIEW CAUSE NO.7 OF 2020

BETWEEN

THE STATE

AND

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

THE MINISTER OF FINANCE.....3RD RESPONDENT

EX-PARTE

M.M & 18 OTHERS.....APPLICANTS

CORAM: *Madalitso Khoswe Chimwaza* *ASSISTANT REGISTRAR*

Hilda Soko

Lead Counsel for the applicants jointly
prosecuting with:

Immaculate Maluza

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Ms.Catherine Zude

Court Clerk

ASSESSMENT OF COMPENSATION

INTRODUCTION

1. The applicants sought the review of the failure by the 1st Respondent to put in place a credible system of ensuring that officers of the Malawi Police Service (MPS) should discharge their duties in a manner that was not in violation of the Constitution and the Police Act, by among other things, resorting to sexual assault, rape, physical abuse, plunder and emotional violence to bring order and peace in the two areas of Mbwatalika and Mpingu, following the untimely death of Superintendent Usuman Imedi.
2. The applicants sought review of the failure by the 1st Respondent to conduct prompt, proper, effective and professional investigations into the complaints of sexual assault and rape made by the applicants including complaints of all other women and girls that were sexually molested, harassed, assaulted and raped by the officers of the Malawi Police Service at Mbwatalika and Mpingu in Lilongwe on 8th October, 2020.
3. The applicants sought various remedies before the Court, including a declaratory order that the omission by the 1st Respondent violated the applicants right to dignity and equality contrary to section 19(1) and 20 of the Constitution and that the failures amounted to torture, cruel, inhuman and degrading treatment and punishment contrary to section 19(3) of the Constitution. The applicants further sought an order for compensation for the violation of their constitutionally guaranteed rights in accordance with section 46(4) of the Constitution.
4. On 13th August, 2020 the Court delivered its judgment where it declared the failures by the 1st respondent, which resulted in various acts of violence against the applicants amounted to torture, cruel, inhuman and degrading treatment and punishment contrary to section 19(3) of the Constitution. The Court further held that the failures violated the applicant's right to dignity and equality as provided for under section 19(1) and 20 of the Constitution. The Court further held that the failure by the 2nd Respondent violated the applicant's right of access to justice as provided for under section 41 of the Constitution. The court awarded Compensation for the violation of human rights in accordance with Section 46 (4) of the Constitution, hence these assessment proceedings.

Issue for Determination

The only duty for this court is to determine the quantum of compensation to be awarded

THE EVIDENCE

5. Pursuant to **Order 12 Rule 19(1) of the Courts (High Court Civil Procedure Rules, 2017** the court conducted the assessment of damages the same way as a trial. During the hearing for assessment all the 18 applicants adopted their witness statements while others gave oral evidence and were subjected to cross examination by the defence.

6. The court will give a brief narrative of the evidence in order to put issues into perspective and for proper understanding of the degree of the violations complained of. Each applicant had a different experience from the other.
7. **MM was the first applicant** who adopted her witness statement and exhibit AK2 a medical report for her attendance to counseling at Saint John of God Hospital. She said that on 8th October, 2019, police officers came to their village following the fracas which led to the death of a police officer. On this day at around noon she saw teargas all around her house, she went inside and locked herself with her five year old child as the husband was not around. She said she failed to run away because she was nursing a six months old baby and she was also recovering from caesarian operation. While in the house two police officers clad in police uniform, carrying guns came to the house and forced the door open. They demanded the whereabouts of the husband and she responded that she did not know. They then demanded that she should take off her clothes but she denied as by then she was carrying her baby in her hands. One of the police officers snatched the baby from her hands and put him on the floor. He forced himself on her and raped her in the presence of her five year old child and left.
8. As a result of the forced sexual act she experienced excruciating pain on the abdomen as the CS wound had not fully healed. When she explained the ordeal to her husband he left the matrimonial home and now she is struggling to take care of the two children. She lamented that since the day of the incident no police officer had been arrested in connection to the rape and now she was living in fear because the perpetrator was still out there and this was giving her more stress and mental torture. She said as result of the conduct of the police officers from the Malawi Police Service in raping her, failing to conduct prompt and meaningful investigations and failing to arrest the person who raped her had violated her rights to dignity, equality and access to justice. The action further amounted to torture, cruel inhuman and degrading treatment and punishment.
9. When cross examined she admitted that she did not go to the hospital immediately after the incident because the nearest hospital is a private paying hospital and she had no money to pay. She also said prior to the rape she was recovering from a Caesarean Section (CS) which was done on 6th May 2019, and she had been advised to stay away from sex for four months. She said she was raped in the presence of her two children one born in 2014 and the young one born in 2019. She further acknowledged that she started feeling better after attending counseling sessions at Saint John of God but she was struggling to raise the two children because her husband left her after the incident.
10. **A.K. was the second applicant** who adopted her witness statement and exhibit AK2 a medical report from Saint John of God hospital where she attended

counseling sessions to help her with stress and anxiety that she was suffering after the incident. In her evidence she said on this day at around 2:00pm she noticed that there were disruptions in the area as police officers had invaded the location and people were running away. She decided to go and pick her child from a nearby school. On her way back, she met two police officers who questioned why she was moving about and she explained that she went to pick her child from school, but they started using abusive language and one of them commanded her to undress. She refused but the officer followed her dragged her into the nearby bush where he raped her without using any protective wear. One officer took away her phone Samsung galaxy which has not been recovered up to now.

11. As a result of this rape she has suffered loss of marital benefits because her husband left the matrimonial house when he became aware of the incident leaving her to take care of two children aged 20 and 17 years. She said before this incident she used to do business of selling maize and she could sell up to 500 bags in a year at K10, 000.00 each, but now she can no longer do that due to the mockery and humiliation she faces when she goes to the market. Therefore economically her life has been affected.
12. She lamented that since the incident was reported at Area 30 police Headquarters no police officer has been arrested for the crime that was committed against her, thereby violating her Constitutional rights. She said the conduct of the police officers from the Malawi Police Service in raping her, failing to conduct prompt and meaningful investigations and failing to arrest the person who raped her, had violated her rights to dignity, equality and access to justice. The action further amounted to torture, cruel inhuman and degrading treatment and punishment as the police actions were fueled by vengeance for the death of a fellow police officer.
13. When cross examined A.K told the Court that she was raped by a police officer who did not use any form of protection. She said she knew that he had no condom because her body was messed up with semen. She admitted that she did not go to the hospital immediately because the nearest hospital is private and she had no money. She went to the hospital after 8 months in June, 2020. She admitted that she already had diabetes before this incident. However her health deteriorated after this incident. She said her phone was also taken by the Police on this day it was a Samsung galaxy but she did not give the value of the phone because it was bought by her son in China.
14. **C.T was 3rd applicant** who also adopted her witness statement and exhibit AK2 a medical report from Saint John of God Hospital, where she attended counseling sessions to deal with her stress and anxiety that she suffered after the incident. In her statement she said on this day she was not feeling well and she slept in the house while her mother-in-law's young sister ES was looking after her. Around 11 O'clock in the morning she heard people making noise and running about the village. When she went to check she saw police officers firing tear gas

at the people. She went back into the house and ES told her to leave the house as well but she refused because she was not feeling well on this day. She said while in the house with ES by her side she heard a huge bang on the door and it was broken into. Two police officers entered and asked what they were doing, ES responded that CT was sick and she was looking after her. Then one police officer ordered ES to take away the beddings from CT and she complied. They asked both of them to take off their clothes but they refused and the officer started beating them and forcefully undressed them and one officer forced himself on ES while the other went for CT and raped them at the same time in the presence of each other and left.

15. CT said at the time she was raped she was already two months pregnant. When her husband heard about the incident he left the matrimonial house for seven months leaving her to take care of herself throughout the pregnancy period. She said she suffered ridicule throughout the pregnancy as people were teasing her that she got pregnant after police officers raped her and that the twins she gave birth to are for the police officers. Along the way she developed migraines due to stress and anxiety and she had to go for counseling at Saint John of God to get better. She said although her husband has now returned home, life is no longer the same as he does not have sex with her as they used to before this incident and it is no longer a happy marriage. She feels isolated as people in the community laugh at her and ridicule her for what happened. Further being undressed and getting raped in the presence of ES left her with low self-esteem and her respect, privacy and dignity lost.
16. Since the 16th December 2019, when they reported rape at Area 30 police headquarters no police officer has been arrested in relation to the rape. She said as result of the conduct of the police officers from the Malawi Police Service in raping her, failing to conduct prompt, meaningful investigations and failing to arrest the person who raped her had violated her rights to dignity, equality and access to justice. The actions further amounted to torture, cruel inhuman and degrading treatment and punishment as they were fueled by vengeance for the death of a fellow police officer.
17. When cross examined she admitted that prior to the incident she already had the problem of migraine headaches as evidenced by her health passport indicating that she went to the hospital on 3/7/2019 and 19/7/2019. She said prior to the incident she was staying happily with her husband. She said she was raped when she was already two months pregnant and now she has twins that she gave birth to. Her husband deserted her after the incident, He only returned after four months from the birth of the twins.
18. When re - examined CT said after the incident she suffered stress because her husband left her without any support while she was pregnant. After child birth she was still under stress because members of the community used to mock her and ridicule her that her children their father is a police officer.

19. **ES was 4th applicant** who also adopted her witness statement and exhibit AK2 a medical report from Saint John of God hospital. She told the court that on this day it was around 11:00am when she noticed people running randomly and the police were throwing teargas all over, and when the canisters finished they started using sharp objects like panga knives chasing people. She said when she noticed this she locked the house where she was together with CT. She said suddenly, they heard a huge bang on the door and it was forced open. Two police entered the house and asked what they were doing and ES explained that she was there taking care of CT who was not feeling well. They ordered her to uncover the blankets from CT where she was sleeping and she complied. They then ordered each one of them to take off their clothes but they refused, and then one police officer pointed a gun at ES and forcefully undressed her and raped her. The other police officer did the same to CT who is a daughter in-law and raped her right there in front of each other and without using any protection and they left.
20. As a result of the incident ES said she is suffering ridicule and shame because some relatives and friends within the community are aware of the rape and they call her a wife of a police officer. This has affected her business of Mandasi which she was failing to do due to contemptuous language spoken against her. She said she was greatly humiliated when she was raped in the presence of a daughter in-law CT and this has left her with low self –esteem as she has lost respect, privacy and dignity. Due to the stress and anxiety she had to undergo counseling therapy at Saint John of God.
21. Although the rape incident was reported at Area 30 police headquarters on 16th December, 2019, no effective investigation has been done, no police officer has been arrested or tried. The conduct of the Police officers from Malawi Police Service in raping her and their further conduct in failing to make prompt, proper, effective and professional investigations leading to the arrest of the perpetrator of the rape have violated her Constitutional rights to dignity, equality and access to justice. The action further amounted to torture, cruel, inhuman and degrading treatment and punishment.
22. During cross examination she told the court that she was raped by a police officer in the presence of her daughter in- law CT. she said they were both raped at the same place and time in the presence of each other, because the police officers were two. She said CT was a wife to her elder sister’s son and therefore daughter in- law. She said she was raped by one police officer and CT was raped by the other. She did not go to the hospital immediately because she needed money to go to a private paying hospital. She went to the hospital on 23rd October, with the assistance of Malawi Human Rights Commission. She went on to say that prior to the incident she was doing business but she stopped because she cannot endure the shame at the market.

23. **EB was the 5th applicant** who adopted her witness statement and exhibit AK 2 medical report from Saint John of God Hospital. She said on this day she was at home because she was not feeling well. While in the house she noticed that there was tear gas and so she treated herself by washing her face with water, while doing that two police officers entered the house. One of them was wearing a full MPS camouflage uniform while the other had put on a camouflage trousers with a black T-shirt and this was around 9:00am. They asked where her husband was and she told them he was not around but still they searched the whole house. They went back to her in the sitting room and asked her to undress, but she refused and told them that she has a Caesarian wound. Then one of the police officers pointed a gun at her and told her that she choose between being killed or allowing them to do what they wanted with her. She then gave up and the police officer forcefully undressed her and raped her violently while pressing on the CS wound. This was the officer who wore a camouflage trouser and black T-shirt. When this was happening the other officer went out of the house.
24. EB said after the rape she felt excruciating pain on CS wound. She said she experienced the lower abdomen pain for two weeks and later she developed genital warts a sexually transmitted disease. She said all this is because of the rape because the time she was raped, she had not yet started having sex with her husband and after the rape she has not slept with him or any other man. She said this rape has damaged her marriage because when her husband heard about the rape he got angry and left the matrimonial home. She said when this happened she started living with her mother in-law who also told her to go back to her parents. She is suffering economically because the husband left her and his family has been verbally abusing her in order to force her to leave the house. She can no longer do the second hands clothes business or interact with people freely because of the shame and ridicule that she faces at the market or at church. She said she only started feeling better when she went for counseling at Saint John of God because the rape had brought her trauma, anxiety and stress.
25. She lamented that the conduct of the Police officers from Malawi Police Service in raping her and their further conduct in failing to make prompt, proper, effective and professional investigations leading to the arrest of the perpetrator of the rape have violated her Constitutional rights to dignity, equality and access to justice. The action further amounted to torture, cruel inhuman and degrading treatment and punishment.
26. During cross examination she told the court that she used to do business of selling second hand clothes before the incident that happened on 8th October, 2019. She said she had no child although she was nursing a wound because prior to this rape attack she had undergone caesarian section for child birth but the baby passed away immediately. She said at the time of the attack she had not yet started having sex with her husband. She also said that she did not know where her husband was because he deserted her soon after the incident because he could not stand the shame. She further said that she developed genital warts

after the rape, since that time she did not sleep with any other man not even her husband because he deserted her.

27. **AM was 6th applicant** who adopted her witness statement and exhibit AK2 a medical report from Saint John of God Hospital where she went to psychosocial counseling. She stated in her statement that she was a small scale business lady selling wrappers (zitenje), vegetables, tomatoes and onions at M'bwatalika Trading center. On this day while at her place of business she saw an armored police vehicle and land cruiser coming from the direction of Lilongwe towards Msundwe. Later she saw a group of people running from Msundwe side saying that a Police officer was killed by an angry mob at Msundwe. Within a short time she saw people burning tyres and closing the road to stop the police returning from Msundwe not to pass through M'bwatalika. The police vehicles stopped where the tyres had been burnt and they got off and started firing tear gas and people at the trading centre and surrounding villages started running for their dear lives.
28. AM said she quickly covered her merchandise and left to hide in the house which is near the market. After sometime she went back to the market thinking the police had left only to find them eating various food items which they had taken from different places of trade around the market. Then the villagers started shouting at the police calling them thieves, this provoked anger again in the police officers and they got agitated and started searching for the villagers again. AM said she run to hide in her house again and when she peeped through a window she saw four police officers coming towards her house and they forcefully broke the door and entered with force. All the four police officers searched her house to see if the husband was there but they did not find him and so three of them went out leaving one officer inside. This officer who had a gun ordered her to take off her clothes but she denied, however the officer pointed a gun at her, asked her to choose whether to obey the instruction or to be shot dead. She nervously accepted for fear of being killed and he immediately forcefully stripped her naked and raped her without using any protection and then left.
29. She said after that she run out of the house, in a traumatized state to the gardens where other people had fled to and stayed there for four days because there was news that the relations of the deceased police officer were also coming back to the village with other police officers for revenge. She further said that this incident has affected her health because her viral load significantly increased after the incident and she had to be given a different drug combination. She also said she was depressed because her husband left her as he described her as a prostitute because of the rape by the police officer. Her family and friends in the community and at the market they ridicule her and call her the wife of a police man, as such she has lost all her respect and dignity. She can no longer do her business freely.

30. She said she suffered mental and psychological trauma as a result of the incident, loss of sense of self-worth as a woman, until when she went to Saint John of God for counseling and she now feels better but she is struggling to make ends meet as the husband left her. She lamented that the conduct of the Police officers from Malawi Police Service in raping her and their further conduct in failing to make prompt, proper, effective and professional investigations leading to the arrest of the perpetrator of the rape have violated her Constitutional rights to dignity, equality and access to justice. The action further amounted to torture, cruel inhuman and degrading treatment and punishment.
31. When cross examined she told the court that she saw four police officers through a window coming towards her house. She knew that they were police officers because they wore police uniform. She continued to say that he delayed to go to the hospital because the hospital can only be accessed at a fee and in her case she had no money to pay at the hospital. She further said that she was no longer married because her husband deserted her after the incident. When Cross examined further, AM said that it was true she was already on Ant-Retroviral Treatment (ART) before this incident. She admitted to have gone to the hospital in February 2020 complaining of headache and malaria
32. When re-examined, the witness said her husband left her because he was being ridiculed and humiliated by members of the community because his wife had been raped by a police officer.
33. **EM was the 7th applicant** a guardian ad litem for ES in this case. He adopted his witness statement where he stated that the daughter was 16years old and a student doing form 2 at Mpingu CDSS and a self- boarder. He admitted that he was not there when the whole incident happened. He also conceded that indeed the two medical reports contained conflicting results and they were not detailing the type of treatment that the daughter received.
34. ES was called to the witness stand to give evidence under oath after the court had conducted a voire dire and was satisfied that she was old enough and intelligent to give evidence on Oath. In her testimony she told the court that she was a student at Mpingu CDSS a self-boarding. On 8th October, she went to school. At around 11:00 AM she and her friends saw some primary school children running away going home. Then she saw police officers throwing tear gas. The head master then advised all students to leave the school because he was not going to manage to protect every child. She said she was with E and L. Having arrived home safely, they heard a cry from the neighbor's house and in no time they heard a knock on their door and the person asked who was in the house. She saw four police officers, three entered the house and one stayed outside. The three who entered the house commanded her and her two friends to go into the bedroom and told them to undress and they took off their clothes. They undressed in the presence of the police officers and one of her friends was menstruating. The police officers asked her to show them the menses and she

did. ES said her friend E who was menstruating was allowed to leave the house without being touched, but for her one of the Police officers defiled her. She said after he had done that he threatened her not to tell anyone about the incident or else he was going to kill her.

35. Afterwards she ran out of the house in a traumatized state to Nsalu because she was confused. She said up to now she has not been able to go back to school because she is ridiculed by her friends and members of the society. She said she did not go to the hospital immediately after the incident because the situation was tense and she had no money to pay at the private hospital. However afterwards she started discharging yellowish stuff and she was feeling itching in her private parts.
36. She said she suffered mental and psychological trauma as a result of the incident, loss of sense of self-worth as a girl, until when she went to Saint John of God for counseling and she now feels better but she is struggling to go back to school because of the stigma. She lamented that the conduct of the Police officers from Malawi Police Service in defiling her and their further conduct in failing to make prompt, proper, effective and professional investigations leading to the arrest of the perpetrator of the rape have violated her Constitutional rights to dignity, equality and access to justice. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment as it was fueled by vengeance for the death of a fellow police officer.
37. When cross examined by Counsel ES said that she went to KCH and the medical report was attached. She denied that it was not true that the police just inserted a finger in her private parts, she said she was actually raped by a police officer. She admitted that there were two medical reports and that the correct one was where it stated that she was pushed down and the police officer forced himself on her and threatened her not to disclose. She said the other medical report was obtained by the Human rights group that assisted her to go to the hospital.
38. **DK was 8th applicant** an adult female who adopted her witness statement together with a medical report obtained from Saint John of God as her evidence for the counseling sessions she attended. She stated in her statement that on this day she was attending a village bank meeting after dropping her child at school in the morning when she got news that there was fracas at Msundwe. Within a short while she noticed that there was smoke at the trading centre as a result of tear gas and so she decided to go and pick her child from school. Upon arriving home she closed the door, but immediately it was opened again and she thought it was her husband but to her surprise, three police officers entered. One of them remained in the house and started questing about her husband, but his two friends who were waiting outside told him not to waste time but hurry-up and do what he intended to do. The officer then pushed DK down and pulled down her skirt and tore her underwear and raped her without any protection in the presence of her two year old child she had brought from school. She said after

being raped the police officer stepped on her lower abdomen with his boot and she felt a lot of pain. She said she did not go to the hospital because she had no money to pay at a private hospital.

39. After the rape DK says her husband did not receive the news well, the marriage life is no longer the same since her husband sent her back to her parent's home immediately after the incident. Although she came back to the matrimonial home life is not the same, he does not have sex with her without using protection (condom) and it only happens when he wants and under strict conditions. She lamented that the rape by a stranger in the presence of her child is the worst experience of her life and still traumatizes her. This is made worse by the fact that the child recalls the event and recounts it every time he sees a police officer and he narrates the story in his own way everything that happened. DK said she is ridiculed by her in-laws and members of the community such that she no longer carries out her business at the trading centre.
40. She said she still keeps the torn underwear hoping that one day she may need it as evidence in a criminal trial. She also stated that she could remember the face of the police officer who raped her. She said she did not report to the police about the incident because she was afraid that she might be abused and victimized further. The matter was reported to area 30 Police Headquarters with the encouragement of stakeholders but since then, no police officer has been arrested or tried for this rape.
41. By not taking any action to see the perpetrators brought to justice, the conduct of the officers from Malawi Police Service has resulted in the violation of her Constitutional rights to dignity, equality and access to justice. She further said the actions of the Police officers against her were unlawful and violated her right to privacy, dignity and protection under law. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment as they were actuated by vengeance for the death of a fellow police officer.
42. During cross examination she told the court that she first went to the hospital 2days after the incident on 10/10/2019 but she had no medical report to show. She said although she had no medical report it does not mean that she was not raped.
43. **ES was the 9th applicant** who also adopted her witness statement and the attached medical report from Saint John of God, where she attended counselling sessions. She said, on this day around 9:00am, while bathing she heard loud voices of panic from the neighborhood and saw smoke in the air and then she realized that it was teargas as it made her eyes tearful. She got scared and ran out of the bathroom with a wrapper only to pick her child from school and came back home. She wanted to run out of the house for hiding but she failed because her other child was still at school and thought she should wait for him. While in the house around 12:00 noon she heard dogs barking outside and in no time, two police officers wearing camouflage police uniform appeared and

broke down the door and forced themselves into the house. They asked about her husband and she told them he was not around. One of them ordered her to take off her clothes but she refused. This officer took the child away from her and forced her down and removed her clothes forcefully and raped her without using any protection and in the presence of her child and left.

44. ES said she felt hopeless and defeated as she could not do anything to protect herself from the rape by the police officer. She said her marriage has broken down because the husband left her for his home village arguing that the marriage was over because she might have been infected with HIV. She further complained that the police officers also destroyed her merchandise that she used to sell in the form of rice and tomatoes which they threw down and stepped on it. Therefore she is economically handicapped at the moment.
45. The matter was reported to Area 30 Police Headquarters on 16th December, 2019 with the encouragement of stakeholders but since then no police officer has been reported to have been arrested or tried for this rape. By not taking any action to see the perpetrators brought to justice, the conduct of the officers from Malawi Police Service has resulted in the violation of her Constitutional rights to dignity, equality and access to justice. She further said the actions of the Police officers against her were unlawful and violated her right to privacy, dignity and protection under law. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment.
46. When cross examined by Counsel she admitted that prior to this incident her marriage used to have problems just like any other marriage. She also admitted to have failed to go to the hospital immediately because she had no money to pay the private hospital and there was a fracas which also made it difficult.
47. **EW was 10th applicant** who also adopted her witness statement and the medical report from Saint John of God where she attended counseling sessions. She stated in her statement that on this day she had gone to do piecework together with her friend MK when they saw police vehicle heading towards Msundwe. After sometime the vehicles returned and stopped at Mpingu and the police started firing teargas at the trading centre. She later heard that there was tension at the trading centre following the death of a police officer. She left the workplace with her friend and upon arrival at the village the place was deserted as people had fled to hide in the gardens. While at the house three police officers approached their house and asked why they were still in the village and they responded that they were not aware of what was happening. Two of the three police officers started beating EW together her friend MK with sticks from a nearby tree and left. Later, unexpectedly two police officers returned to the house and broke the door of the house with force and proceeded to the bedroom where EW and MK were hiding and ordered them to undress. They both refused, but the police officers used force and took off the clothes and some parts were torn. One police officer inserted his fingers in the private parts of

MK and noticed that she was menstruating he left her. The other officer forcefully raped EW while she was two months pregnant and this gave her stress and anxiety until she lost the pregnancy (miscarried) after a short while. EW said she later lost the pregnancy due to the severe beating she had on this day and the rape. She suffered bodily pain, shame and humiliation at the same time.

48. The incident was reported to Area 30 Police Headquarters on 16th December, 2019 but no police officer has been arrested or gone through trial for this crime. The actions of the Malawi Police Service against her were unlawful and violated her Constitutional rights to privacy, dignity and equal protection and access to justice under the law. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment.
49. During cross examination she told court that she was married and that it was true she was raped on 8th October, 2019. She conceded that she did not know the contents of her medical report because she does not know how to read. She said she went to the hospital for both rape and the beating that she suffered at the hands of the police, although the medical report is silent on rape.
50. **MK was the 11th applicant** a *guardian ad litem* for M a minor aged 17, who adopted his witness statement. The court however conducted *voire dire* and found the minor witness intelligent enough to give evidence on her own and allowed the minor M to testify in chief under oath. She told the court that on this day she was doing piece work with her friend and they saw police vehicles passing but they did not know what was happening. Immediately, they knocked off and went to the village. They met 3 police officers who asked where everybody was and they responded that they did not know and then one officer ordered them to sit down, while beating them and left. M said they decided to hide inside the house because they thought the police would not come again. While in the house the police officers came back and hit the door of the house with a gun and it fell down. The police officers entered the house and one of them commanded her to undress. When she complied one of the police officers inserted his dirty fingers into her private parts and when he noticed that she was menstruating he started beating her seriously and left. The other police officer raped her friend EW. She did not go to the hospital because of the tense situation and that she had no money to pay.
51. M. told the court that after this incident she is suffering ridicule from members of the society and she went through trauma and anxiety. The incident was reported to Area 30 Police Headquarters on 16th December, 2019 but no police officer has been arrested or gone through trial for this crime. The actions of the Malawi Police Service against her were unlawful and violated her Constitutional rights to privacy, dignity and equal protection and access to justice under the law. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment.

52. **SB was the 12th applicant** who adopted her witness statement and the attached medical report from Saint John of God where she went for counseling. She said on this day she had returned from her garden and found her in-law EB crying and screaming with pain. She decided to go and check on her, but to her surprise she bumped into two police officers at the veranda of EBs house. One officer asked her what she wanted but before she could respond he started chasing her and she run back to her house and locked the door. The officer broke the door of the house and found her inside. He asked her to undress. She refused, but the police officer forcefully took off her clothes as he insisted that he wanted to see her naked body. He then forcefully opened her legs and harshly inserted his dirty fingers in her vagina and stirred several times, which made her feel pain.
53. As a result she got swollen for four days and she could not walk properly. She said when she told her husband about the incident he emotionally supported her to recover but after a few days members of the community started ridiculing, naming and shaming the family including the husband. This the husband could not bear and so left the matrimonial house leaving her to take care of their three children alone.
54. The incident was reported to Area 30 Police Headquarters on 16th December, 2019 but no police officer has been arrested or gone through trial for this crime. The actions of the Malawi Police Service against her were unlawful and violated her Constitutional rights to privacy, dignity and equal protection and access to justice under the law. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment.
55. When cross examined she responded that the police officer forcefully took off her clothes and inserted his fingers into her vagina. She said she did not tell outsiders about her ordeal but her husband only, but still the news spread in the community and she is suffering ridicule and name calling. The husband has also deserted as a result of the incident that happened and she is suffering taking care if three children on her own.
56. **DT was the 13th applicant** who adopted her witness statement and the attached medical report from Saint John of God where she attended counseling sessions to deal with her stress and anxiety. She said on this day she was attending a meeting organized by World Relief Organization. While the meeting was going on they saw police officers hurling teargas all over and immediately the meeting ended prematurely. On her way home she met a certain man who advised her to avoid the main road because the police were acting violently. She continued going home in the company of some young boys, but suddenly a police vehicle appeared in the opposite direction and instantly she together with the boys started running away. She managed to reach her house but suddenly the police officers caught up with her, forced the door open and found her.
57. One police officer forcibly undressed her and started fumbling her breasts and nipples and her private parts. He then kicked her and stepped on her lower

abdomen as the other officer told him not to rape her because she was unkempt. She said she suffered humiliation, shame trauma as she was gripped with fear. When her husband heard of the attack he left the matrimonial house as he was also being humiliated by members of the community, who were calling his wife as police officers wife. She said she went to Saint John of God for psychosocial support where she received counseling service.

58. The incident was reported to Area 30 Police Headquarters on 16th December, 2019 but no police officer has been arrested or gone through trial for this crime. The actions of the Malawi Police Service against her were unlawful and violated her Constitutional rights to privacy, dignity and equal protection and access to justice under the law. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment.
59. When cross examined she responded that she was not raped but the police officer touched and fondled her breast, teats and private parts and kicked her on the stomach. She said she is suffering name calling and ridicule from members of the community who came to know about her ordeal.
60. **AL was the 14th applicant** who adopted her witness statement and the attached medical report from Saint John of God where she attended counseling sessions. She told the court that on this day she was doing piece work at Kaliyeka Construction Co. when the foreman advised everyone to leave the place because there was violence at the trading centre caused by the police. She left and went home where upon arrival she met police officers who were five in number.
61. Three of them entered her house and asked where her husband was and one of them who was wearing a police uniform followed her to the bedroom. She said she was ridiculed by the police who called her a prostitute because she had no husband but had a child. The police officer who entered the bedroom started touching her breast, teats and inserted his fingers in her private parts. She said as a result of this incident she suffered trauma, humiliation and shame. She had to go for counseling for her to start living her life normal again.
62. She said the incident was reported to Area 30 Police Headquarters on 16th December, 2019 but no police officer has been arrested or gone through trial for this crime. The actions of the Malawi Police Service against her were unlawful and violated her Constitutional rights to privacy, dignity and equal protection and access to justice under the law. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment.

This witness was not cross examined.

63. **LM was the 15th applicant** the *guardian ad litem* for L. He adopted the witness statement as his evidence in chief. He admitted that he was not there when his daughter was being sexually harassed by the police.
64. The court conducted *voire dire* to assess the competence of L. as a witness to give evidence under oath and the court found her to be a competent witness to

testify. She testified and told the court that she was 17years old and that before the incident she used to go to school as she was in form 2 at Mpingu CDSS. She said on this material day while at school she saw primary school children running away and then a police vehicle followed which threw tear gas at her school. The head teacher instructed all students to go home, and she left with E and E.

65. She said upon arrival at home, she saw four police officers who came to the house and forcefully opened the door. She said with her friends they run and hid in the bedroom but the police officers called them out and they commanded her and her friends to undress. They complied and she remained with a bra and underwear. She said she told them that she was having her monthly period but they insisted that she should still undress so that they can check. The police officers asked the girls to walk out of the house naked but they stopped each other. One police officer kicked E back into the bedroom. L said she managed to escape while naked fortunately she met a woman who covered her with a wrapper after running for distance. She said she ran to the garden and after sometime she went back to the house to check on E but she was not there. She said after this incident she has not been able to go back to school because she is ridiculed by her peers as she is called by her peers as a wife of a police officer which humiliates her.
66. The incident was reported to Area 30 Police Headquarters on 16th December, 2019 but no police officer has been arrested or gone through trial for this crime. The actions of the Malawi Police Service against her were unlawful and violated her Constitutional rights to privacy, dignity and equal protection and access to justice under the law. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment.
67. When cross examined she admitted that the only thing that happened to her was the beating and the shameful undressing while menstruating in the presence of the police officers. She said the only thing she was battling with was the shame, ridicule, stress and anxiety. She further said her performance at school has been greatly affected because she lost concentration and she told her parents to find another school for her, she cannot go back to the same school because of the stigma.
68. **EC was the 16th applicant** who was the *guardian ad litem* for EC a girl Of 17years old. He adopted his witness statement but he conceded that he was not there when his daughter encountered the ordeal.
69. The court conducted a *voire dire* to assess the competence of EC to give evidence and court found EC to be a competent witness to testify under Oath. She told the court that she was 17years old and she was student at Mpingu CDSS doing form 2. She adopted the witness statement sworn by her guardian ad litem and the exhibit attached which is a medical report from Saint John of God where she attended counseling sessions. She said she went to the same school with E and L and on this day after being released from school they went home and hid under

a bed. When the police broke into their house they were commanded to undress but they refused. One police officer ordered them to board the police vehicle while naked but his friends stopped him. She said the police officer who tortured her most was wearing a police uniform and had a gap on his front teeth. One of the four police officers did not take part and he was the one who stopped his friends from forcing the girls to board the vehicle while naked. She said when she undressed and the police officer with a gap in between his front teeth noticed that she was saying the truth he assaulted her with a big stick while she was still naked.

70. After the incident EC said she has been living in fear and she is no longer comfortable to go to the same school because her school mates who came to know about the incident were isolating her, calling her names and shaming her. As a result her performance has completely gone down such that she no longer wants to continue with school at this place. The actions of the Malawi Police Service against her were unlawful and violated her Constitutional rights to privacy, dignity and equal protection and access to justice under the law. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment.

She was not cross examined by both counsel.

71. **FC was the 17th applicant** who testified under oath after the court conducted a *voire dire* and was satisfied that she is competent to testify under oath. She also adopted her witness statement. She said she was born on 1st October, 2002 and she was doing form III at Mpungu CDSS. She said on this day she heard that there was a fracas at the trading centre. While at home as she was preparing relish for lunch she heard teargas canisters fired near her compound. Her eyes got teary and she rushed to wash them with water. When she went outside she saw a police vehicle going round the house and people were shouting, calling out her name to run away. She ran back into the house but it was too late the police officers had already gotten off the vehicle and demanded that she should open the door. The police banged the door, broke it down and entered the house. She said by then she was nursing her sick grandfather. The police officers who were clad in a full police uniform, a tie and hat, four in number pulled her out to the veranda and started beating her. They alleged that she was one of the people who were chasing them at the trading centre and throwing stones at them. She denied but they insisted and told her to kneel down while kicking her and beating her with sticks. One of the police officers caressed her breasts and forcefully and violently touched her private parts and he inserted his penis in her vagina without any form of protection. She said after the incident she felt traumatized as the police had threatened to come back after one hour. She then decided to pick her sick grandfather to another village using Kabaza.
72. She said after this incident she was not able to go to school for a while because she was feeling pain on the lower abdomen due to the roughness and hard

experience that she encountered as the police officer stepped on her with his shoe. She said she is mocked by members of the community as well as fellow students at school such that she has stopped going to school due to stigma, shame and embarrassment. She said she did not report the matter to the police because she was afraid of another attack since she was raped by a police officer.

73. The matter was finally reported to the police with help from other stakeholders on 16th December, 2019 but since then no police officer has been arrested regarding the rape and no one has gone through trial for the same. The actions of the Malawi Police Service against her were unlawful and violated her Constitutional rights to privacy, dignity and equal protection and access to justice under the law. The actions further amounted to torture, cruel, inhuman and degrading treatment and punishment. She was not cross examined.
74. **PY was the 18th applicant** the *guardian ad litem* for a minor **TT** who has mental disability. She adopted her witness statement which was attached with a medical report from Saint John of God. She told the court that on this day she went to the garden at 5:00am leaving her daughter who has mental disability in the house with other relations. While at the garden she heard that Police officers were harassing residents at Mpingu trading center in retaliation for the death of their fellow police officer. She said she got concerned about her daughter and immediately left the garden.
75. Upon arrival at the house she found the daughter naked and she had semen and blood on her body and on the mat where she was dumped. She said she shouted for help but no one came to help her as the village had been deserted. She covered her daughter with a wrapper 'chitenje'. Her child could not talk or even identify the assailants due to her mental condition and the state of abuse that she was in. This left her helpless. She later learnt that infact it was the law enforcement officers (the Police) who had sexually attacked the women and girls in the village including her daughter in vengeance for their friends death. She said she failed to take her daughter to the hospital immediately because of the age of the child (17years) she could not carry her on her back. She needed transport and money to pay at the private hospital, but she had none. She said after the incident of this day her daughter's condition has deteriorated. She has developed a habit of soiling herself including on her beddings a thing she never used to do. She has developed sores in her private parts and she usually has foul smelling discharge.

Burden and Standard of Proof

76. The burden of proof lies on the on the one who asserts in the affirmative, this being a civil matter and in this case burden is on the claimants. The standard of proof required is proof on a balance of probabilities, which is lower than in

criminal cases where the state is expected to prove the elements of the offence beyond reasonable doubt. *Miller vs Minister of Pensions' Woolmington vs DPP*.

77. During the hearing of these proceedings the respondents during cross examination insisted on the availability of medical reports for rape and defilement from the victims and tried to highlight the fact that they went to the hospital after some months from the date of the incident, therefore their evidence should not be believed.
78. It is unfortunate that the respondent were questioning the evidence of the applicants which could have been relevant if the police had performed their duty diligently as required by law and they were prosecuting a criminal case. In a criminal trial this line of cross examination could have been relevant especially by the defence to disprove the case of the victim.
79. For purposes of clarity, the essence of the present assessment of compensation is the fact that the Malawi Police Service failed to perform their Constitutional and Statutory duty, regarding the investigations on the sexual violations complaint of the 18 women and girls. It is unimaginable that having failed to do their job, timely and properly they expected the women to present evidence of medical reports, as if this was now a criminal case. This is a civil matter and the standard of proof applicable is on the balance of probabilities.

Reasoned Analysis of the law and facts

The Law on Damages

80. The cardinal principle in awarding damages is *restitution intergrum* which means, in so far as money can do it, the law will endeavor to place the injured person in the same position as he was before the injury was sustained- Halsbury's Laws of England 3rd Ed. Vol.IIp.233 para. 400. The principle was further enunciated in *Livingstone vs Raywards Coal Company*³, Lord Blackburn observed:-

'Where any injury is to be compensated by damages, in setting a sum of money to be given for reparation you should as nearly as possible get the sum which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'.
81. The High Court in the case of *Ngosi t/a Mzumbazumba Enterprises vs H. Amosi Transport Co. Ltd*⁴ sets the basis for assessment of damages or compensation:

'Assessment of damages... presupposes that damages have been proved. The only matter that remains is the amount or value of the damages (compensation)'

¹ [1935] UKHL 1, AC 462

² [1947] 2 ALLER 372

³ (1879-80) L.R.APP

⁴ [1992] 15 MLR(HC) at 370

82. The rule is that prior to assessment, the injured party has provided proof of damage sustained. *YanuYanu Co. Ltd vs Mbewe*⁵ (SCA) 11 MLR 405.

Damages for Violation of Human Rights:

83. **Section 15 (1) of the Constitution**⁶ guarantees the respect and upholding of human rights in the following terms:

‘The human rights and freedoms enshrined in this chapter shall be respected and upheld by the executive, legislature, 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.’

84. **Section 46(2) (a) of the Constitution** provides that:

‘Any person who claims that a right or freedom guaranteed by this constitution has been infringed or threatened shall be entitled:-

(a) To make application to a competent court to enforce or protect such a right or freedom.

85. Further **section 46 (4)** empowers the court to award compensation in the following terms:

A court referred to in subsection 2(a) shall have the power to award compensation to any person whose rights or freedoms have been unlawfully denied or violated where it considers it to be appropriate in the circumstances of a particular case.

86. The High Court in the case of **Nicholus Treva Malunga vs Attorney General**⁷ has re-iterated the notion that a person whose constitutional right has been infringed should get a remedy from the courts. The Court held that:

‘In this case the plaintiff seeks a specific public law, constitutional remedy of damages, separate and distinct from any common law remedy that he may be entitled to. In essence the competency or otherwise of the relief sought by the plaintiff turns on a proper construction of section 46(2) (a) of the Constitution. [...] court further held that:

‘when exercising this constitutional jurisdiction, the court is concerned to uphold or vindicate, the constitutional right which has been contravened.’

87. The United Kingdom Supreme Court, has held that assessing compensation for violation of constitutionally guaranteed rights aims at upholding the minimum standard of human rights. In the case of **Commissioner of Police of the Metropolis vs DSD and Another**⁸ the court stated that”

⁵ 11 MLR (SCA) at 405

⁶ Constitution of the Republic of Malawi, Act No. 20 of 1994

⁷ Civil Cause No. 85 of 2018 HC PR (Unreported)

⁸ [2018]UKSC 11(21 February,2018)

'It is a well settled principle that the award of compensation for the breach of a convention right is different from an award for civil damages. The compensation for the breach of a convention right is to uphold a minimum standard of human rights, whereas in a civil action it is to compensate the individual for loss.'

88. The UK Supreme Court stressed that:

'Compensation is instead geared towards 'the upholding of standards' concerning the discharge of the duty of the state to conduct proper investigations into criminal conduct which falls foul of article 3'⁹.

89. In the South African case of **Fose v Minister of Safety and Security**¹⁰ per Ackerman, J. on p. 826 para 69, he sated as follows:-

'I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the rights entrenched in the constitution cannot properly be upheld or enhanced.' (emphasis supplied)

90. It will be noted that the right to compensation for victims of sexual violence against women and girls is universally acknowledged in various international and regional treaties some of which Malawi is a party to.

Measure of Damages

91. On the measure of damages the principle of *restitution intergrum* has been upheld in assessing damages for violation of human rights and provides that the victim is to be restored to a position they were in before the occurrence of the violation.

92. In the case of **Vancouver (City) v Ward**¹¹ where the Supreme Court of Canada was called upon to decide on a strip search that was conducted by a correction officer on Ward. The court found that strip searches are inherently humiliating and degrading, the breach significantly impacted on Wards personal rights and compensation was required. In deciding on the damages, the court stated as follows:

'To be appropriate and just, an award of damages for violation of rights must represent a meaningful response to the seriousness of the breach and objectives of the compensation. Where the objective of the compensation is engaged, the concern is to restore the claimant to the position he or she would have been in had the breach not been committed.'

93. The African Commission on Human and People's Rights emphasized the principle of *restitution intergrum* in the case of **Open Society Initiative v Cote d'Ivoire**¹², where it was stated that:

⁹ Ibid pg21

¹⁰ 1997 (3) SA 786 CC

¹¹ 2010 SCC 27

¹² (2015) ACHPR 198, Communication 318/06

‘...the main aim of redress of human rights violation is founded on the restitution intergrum principle, which requires that the victim is reinstated in the situation prior to the violation. Where it is impossible to reinstate him, any violation will be resolved through compensation. The compensation should be fair, adequate, effective, sufficient, appropriate and proportionate to the prejudice suffered.’

94. In the case of **Oatile v The Attorney General**¹³, Justice Dingake stated the following:

‘...an award of compensation will go some distance towards vindicating the infringed constitutional rights. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and deter further breaches.’(emphasis supplied).

Breach of Constitutional and Statutory Duty

95. In the present case the respondents’ liability does not arise from a road accident or personal injury claim but from a breach of Constitutional and Statutory duty by failing to perform duty as provided by law.

96. The Malawi Police Service is established under **section 153(1) of the Constitution** with the following constitutional mandate: ‘it shall be an independent organ of the Executive which shall be there to provide for the protection of public safety and the rights of persons in Malawi in accordance with the prescriptions of the Constitution and any other law’.

97. In the case of **Rep vs Cheuka & 3others**¹⁴, the Court observed the duties of the MPS as envisaged under section 15(1) of the Constitution in the following terms:

“It is submitted that section 15(1) of the constitution obliges all organs of Government and its agencies as well as legal and natural persons to uphold the Human Rights enshrined in the Constitution. Therefore, the accused are not exempt either in the capacity of agents of government or in their natural capacity from observance of section 15(1) of the constitution, being the upholding of the human rights provided for in the constitution.”

98. It is clear that under section 15(1) of the Constitution the MPS as an organ of the executive is engendered to respect and uphold the human rights enshrined in the Constitution one of which is to protect the right to dignity of any person.

99. The Police Act¹⁵, clearly spells out the general functions of the MPS especially under section 4 in this manner that;

The police service shall be employed in and throughout Malawi for:

- (a) The prevention, investigation and detection of crime

¹³ 2010(1) BLR 404 (HC)

¹⁴ Criminal Case No. 73 of 2008

¹⁵ Cap 13: 01 of the Laws of Malawi

- (b) The apprehension and prosecution of offenders
 - (c) The preservation of law and order
 - (d) The protection of life, property, fundamental freedoms and rights of individuals [...] (f).
100. According to the wording of this provision in the Police Act ‘*The police service shall*’ connotes that the law has imposed a positive duty, to ‘*investigate and detect crime*’ with a view to ‘*apprehend and prosecute offenders*’. (**emphasis supplied**) The Constitution and the Police Act have imposed on the MPS a positive duty to investigate breaches of the law including incidents of rape and sexual and physical violence or assault. The Malawi police service is bound by these laws.
101. Apart from domestic laws and the Constitution, Malawi has chosen to be bound by international human rights treaties it ratified and that means it has obligations at the international level as a state¹⁶.
102. The most relevant to the present case is the CEDAW.¹⁷ The CEDAW committee has affirmed that the positive obligation to investigate, prosecute and punish perpetrators of crime including cases of sexual violence and rape rests with the state.¹⁸ Where the state has undertaken to investigate, the investigation must be effective in order to comply with the positive obligation under the constitution and under international human rights instruments.
103. In its decision in **Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v Sudan**, the ACPHR set out the criteria for an investigation into violence against women, providing that:
- ‘...for a state ‘to discharge itself from [due diligence] responsibility, it is not enough to investigate’ but rather the investigations must be effective.’¹⁹*
104. Similarly, the Inter-American Court on Human Rights has held that:
- ‘the obligation to investigate effectively ‘has a wider scope when dealing with the case of a woman who is killed or, ill-treated or, whose personal liberty is affected within the framework of a general context of violence against women’²⁰.*
105. The IACHR has further held that:
- “when an act of violence against a woman occurs, it is important that the authorities in charge of the investigations, conduct it in a ‘determined and effective manner ‘taking into account society’s obligation to reject violence*

¹⁶ *Mayeso Gwanda vs State*, Constitutional case No. 5 of 2015

¹⁷ Convention on the Elimination of Discrimination Against Women

¹⁸ Communication 245/02 Zimbabwe Human Rights NGO Forum vs Zimbabwe, para 68-70; *Malawi African Association and Others v Mauritania* (2000) ACHPR

¹⁹ Communication 279/03-296/05 Sudan Human Rights organization & centre on Housing Rights and Evictions (COHRE) v. Sudan para.150

²⁰ IACHR, *Gonzalez et al v. Mexico (cottonfields case)* 2009) 16November, 2009 at para 293

against women and the state obligation to eliminate it and to ensure that victims have confidence in the state institutions for their protection”²¹.

106. In the **Zimbabwe Human Rights Forum v Zimbabwe**²², the ACPHR confirmed that:

‘State cannot delegate their duty to investigate and prosecute to the victims of violation. The state has an obligation to investigate and cannot rely on the victims to initiate the procedure.’

107. The CEDAW Committee has affirmed due diligence when considering complaints of the failure of the state to effectively investigate and prosecute cases of violence against women, (VAW). The committee has found that the failure to effectively investigate and prosecute sexual violence against women is a violation of the right to non-discrimination under articles 1, 2, 3, and 5 of the CEDAW.²³

108. In **C K (A child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police/ Inspector General of National Police Service & 3 others**, 11 girls were defiled by different perpetrators. The police did not take any initiative to investigate and prosecute the matters despite being reported by the victims. It was argued on behalf of the victims that the neglect, omission, refusal and failure of the police to conduct prompt, effective, proper and professional investigations into the eleven petitioners’ respective complaints violated their respective fundamental rights and freedoms. The Court held that the petitioner suffered physical harm in form of internal and external wounds from the perpetrators assaults and some suffered consequences of unwanted pregnancies vested on children not physically mature to bear children. The court confirmed that the harm suffered by the petitioners was a gender based sexual violence amounting to discrimination under Article 1 of the CEDAW.

109. The CEDAW committee has also determined that, where state officials fail to take effective action to respond to a victims attempt to seek state assistance after having experienced violence, it is a violation of the state’s obligation to take all appropriate measures to prevent and protect women from violence. This shows that a state can be held liable under international law not only for its officials’ actions but also for its officials’ inaction.²⁴

110. The Supreme Court of Appeal in South Africa, in the case of **S v Chapman**²⁵ held that:

‘rape is a very serious offence, constituting as it does, a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim... for too long rape has been used as a tool to relegate the women to second class citizens, over whom men can exercise their power and control, and in so doing, strip them of their right to equality, human dignity and bodily integrity... We

²¹ Fernandez Ortega et al, v Mexico (2010) 30 August, 2010 at para 193.

²² supra

²³ Communication No.5/2005, Hakan Goekece et al v Australia, views, 6th August, 2007.

²⁴ Bonita Meyersfield, ‘Developments in International Law and Domestic Violence’, INTERRIGHTS Bulletin, Vol.16. No.3 (2011), p.110.

²⁵ [1997] ZASCA 45 at para. 3

(the court) have determined to protect the equality, dignity and freedom of all women and we (the court) shall show no mercy to those who seek to invade those rights’.

111. In the present case therefore, where the women were sexually and physically abused, raped, by police officers no effective investigations have been conducted and no arrest has been made, cannot be described differently. The incident happened on 8th October, 2019 and a formal complaint was lodged on 16th December, 2019 with the support of Human Rights groups that came to assist the victims. After lodging the complaint no arrests have been made even as at this time of the judgment.
112. Such failure to promptly and effectively investigate the sexual violence, contributes to the impunity of perpetrators of such crimes and reduces the number of women who report such cases because they lack confidence in the state security institutions. The failure by the MPS in executing this duty of ‘investigating and detecting the crime’ with a view to ‘apprehend and prosecute the perpetrators’ of the rape and sexual violence against the women resulted in the violation of the rights of these women. As already found by the Court the sexual violence in particular that included rape resulted in a breach of the right to equality –non-discrimination. It resulted in the violation of the right to dignity, inhuman and degrading treatment and punishment, rights guaranteed under section 19(1), 19(3) and 20 of the Constitution.
113. This court would like to condemn in absolute and strongest terms the trivial attitude that the claimants in this case were just sensationalizing the whole issue, after all it was just ‘sex’ or that they are being compensated just because they are women and girls or that because the perpetrators are alleged to be police officers. **NO.** The rape and sexual violence crimes committed against these women and girls goes beyond sex as it goes deep to intrusion into the personal privacy of a woman and desecrating her body without her consent. It goes deep to demeaning the dignity and integrity of a woman. The perpetrators being police officers had an unfair advantage over the women due to their position as officers of the state. They abused their position, they failed in their duty and this cannot be tolerated.
114. It has to be noted that it is globally acknowledged that sexual and gender based violence is one of the most pervasive violations of human rights in the world, and one of the critical threats to sustainable development, but ironically one of the least prosecuted, socially tolerated and largely unpunished crime²⁶.
115. Malawi in recent years, has witnessed a high prevalence of sexual violence against women and girls in spite of progressive laws enacted to combat the vice²⁷, and this remains a huge concern. Where state agencies such as the police

²⁶ UNDOC, 2019

²⁷ Constitution of the Republic of Malawi, (as amended in 2017); The Penal Code, (as amended in 2010) The Child Care, Protection and Justice Act, (2010); The Gender Equality Act, (2013); The Prevention of Domestic Violence Act,(2006).

join the bandwagon of abusers and systematically use rape and sexual assault as a weapon against women and girls, it is retrogressive conduct that erodes the gains that have been made in terms of enacting progressive laws aimed at combating it and enabling access to justice for women and girls.²⁸

116. It is time that such institutionalized discrimination against women and girls using sexual violence, perpetrated by state machinery be condemned in strongest terms. If left unaddressed, the sexual violence against women and girls poses serious negative consequences for current and future generations in the efforts to achieve poverty reduction and Sustainable Development Goals (SDG)²⁹.
117. There is therefore no better opportunity than now to ensure strengthened and sustained efforts for effective access to justice for women and girls who have suffered sexual violence. Effective access to justice is an essential human right and it starts with effective investigation of violation of the human rights.

As earlier on stated the basis for compensating the victims of violation of human rights as in the present case, is section 46(2) of the Constitution.

118. The rationale for the award of damages apart from compensating the victims, is to uphold the rule of law and protect the integrity of the Constitution and its human rights provisions, and to uphold principles of accountability, by ensuring that the people can still feel safe that they have protection of their rights and that all state organs are mandated to protect and uphold the rights.
119. Damages have been paid in cases where the claimant was male and the rights that were violated did not involve sexual. See the case of **Nicholus Treva Malunga vs Attorney General**, where damages were awarded for the violation of the claimants right to fair trial which includes the right to be tried within a reasonable time under section 42(2)(f)(vii) of the constitution. On assessment a total sum of K5,000,000.00 was awarded as damages for violation of the aforementioned constitutional right.

Factors Considered in Assessing the Quantum

120. In arriving at the appropriate quantum the court will be guided by comparable cases locally and the jurisprudence that has developed from other jurisdictions. The sexual violence as a violation of human rights is not an isolated case for Malawi. It has been widely condemned in other jurisdictions to which I will draw inspiration from the decided cases.
121. In *Granger Nkhwazi and Commercial Bank of Malawi Limited*, the Court observed that 'Section 46 (4) of the Constitution entails that the compensation must be effective, adequate and full. The Court must not give bonus or make payments beyond compensating the person whose rights are violated. The compensation must be just and equitable in all circumstances of the case and considering the losses the victim has suffered'

²⁸ MDHS, 2015/16 National Statistics website last visited on

²⁹ Sustainable Development Goals, SDG 5, www.undp.org

122. The court will consider the severity of damage, the seriousness of the violation. The South African Courts have recognized rape as a ‘horrifying crime’ and that award of damages involving rape cases should be substantial. In **N v T**³⁰ where a child of eight years was raped the court in South Africa stated that:
- ‘Rape is a horrifying crime and is cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims. Any award of damages in a situation of this kind should be substantial.’*
123. In further considering the circumstances of the violation, the court made observations in the case of **Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police**³¹ that:
- ‘Rape is unlike any other sort of injury incurred by accident or neglect. Survivors of rape bear social stigmatization which an accident victim does not. Rape is not about sex, it is about anger, it is about power and it is about control. It is a form of violence intended to create terror, to dominate, to control and to humiliate. It is an act of hostility and aggression. Forced sexual intercourse is inherently violent and profoundly degrading’.*
124. The observations made in the above case, resonates well with the encounter of the women and girls of Msundwe, who during the hearing of evidence in court had expressed that they suffered psychological trauma and anxiety, they suffered stigma, humiliation and shame. The young girls indicated that they had stopped going to school because they could no longer bear the ridicule, had low self-esteem and confidence.
125. The court will also consider the facts related to the applicants individually. Although there are no local cases for comparison but the court will still refer to comparative cases from other jurisdictions although they may not be binding on the court but they are persuasive. The court is mindful that every case has to be decided on its own facts.
126. The Inter- American Court of Human Rights (IACtHR) in the case of **Cantu v Mexico**³² in determining the award, the court stated that the victim was a girl at the time when the violations occurred, whose situation of particular vulnerability was taken into account when the reparations were awarded. The court ordered the state to pay Ms Cantu \$60,000 for serious human rights violations she suffered as a result of rape, inability to bring justice to her case and for her changed living conditions she endured as a result of the rape.
127. In the **Institute for Human rights and Development in Africa and finders group Initiative on behalf of TFA (a minor) vs The Republic of Cameroon**³³, the court awarded TFA the sum of \$90,000 as compensation for violations of her rights after the state failed to investigate the crime of rape perpetrated against her.

³⁰ 1994 (1) SA 862 (c)

³¹ Doe v Metropolitan Toronto Board of Commissioners of Police and the status of Public oversight of the Police in Canada, 1998 CanLIIDocs. 149

³² Cantu Mexico, Preliminary objections, merits Reparations and Costs, Inter-Am Ct. H.R. (Ser.C) No. 216, 73 (August 31, 2010) para 206

³³ No. 006/Com/002/2015

128. In the case of **Equality Now and Ethiopian Women Lawyers Association (EWLA) vs The Federal Republic of Ethiopia**³⁴, the Commission awarded a victim of rape the sum of \$150,000.00 as compensation for the violation of her right to dignity and freedom from torture, cruel and degrading treatment.
129. In the South African case of **Flanagan vs Minister of Safety and Security**³⁵, in 2017 the court awarded the sum of ZAR200,000.00 as general damages for trauma and psychological harm to victim of sodomy who was sodomised in police custody.
130. The court will also pay special attention to a victim of rape who is living with an impairment. This approach was taken in the case of **Bridgman NO v Witzenberg**³⁶ and it placed the appropriate value upon the loss of dignity of a victim with impairment which was unique from the rest.
131. The Court will take into account the overall context in which the breach occurred. Jurisprudence suggests that the harm is elevated if it was caused by a constitutional duty bearer like the MPS in this case. Where the police officers are the perpetrators of a rape or any sexual/physical violence, a punitive element should be considered in determining the amount. In the case of **Philander v Minister of Safety and Security**³⁷, the applicant was raped by South African Police Service officers. In awarding damages the court held that;
- ‘What is more significant, taking into account... the psychological impact both the assault and the rape had on the plaintiff which was committed by members of the SAPS, whose core function is to provide safety and protection to members of the public’.*
132. In the present case there is unchallenged evidence that the perpetrators of the sexual violence and rape that failed to be investigated was committed by members of the Malawi Police service. This on its own is an aggravating factor that will be taken into account when considering compensation to be awarded to the women. This is because the Malawi Police Service had a Constitutional and statutory duty to provide for the protection of the public safety and the rights of persons in Malawi³⁸.
133. The court will also consider submissions on quantum filed by both parties. The claimants submitted that the women be awarded a global sum of MK1,200,000,000.00 as compensation for the violation of their right to dignity, equality and for the further violation of their right of access to justice and for the torture, inhuman and degrading treatment. For the minors they submitted a global sum of MK 925,000,000.00. On the other hand the respondents submitted that the women should be awarded a global sum of K11,800,000.00

³⁴ African Commission on Human and Peoples Rights, Communication 341/2007

³⁵ (497/2017) 2018 ZASCA

³⁶ 2017 (3) SA 435 (WCC) at para 223

³⁷ (473/2011) [2013] ZANWHC 51 (6th June, 2013 at para 37

³⁸ Sections 15 (1) and 153 of the Constitution, Section 4 of the Police Act

for the violation of their rights, while the girls be awarded a global sum K3,600,000 for the violation of their rights.

134. The court has considered both submissions and observed that the proposed award submitted for the claimants was way too high without undermining extent of the violations of their rights. On the other hand the proposed award submitted by the respondents is way too little to reflect the severity of the violation of the rights of the women which takes into account that the crimes have not been effectively investigated no perpetrators of the crime have been arrested and to crown it all that the perpetrators were public officers who had a Constitutional and Statutory duty to protect the rights of the people. Therefore the court will make an award that is fair, just and reasonable in the circumstances.

The Awards for the minors:

In this case there were six minors who sued through their guardian ad litem as follows:

135. **18th applicant, PY a guardian ad litem for TT, a minor, 17years old**, living with a mental disability. This girl was raped mercilessly and left in a shameful condition as she could not run away or call anyone for help. As a result of the rape she developed wounds in her private parts and they recur every two months to three months. Her mental condition had deteriorated as she defecates on herself a thing she never used to do before this incident because she used to tell her guardian whenever she wanted to respond to the call of nature. This has undoubtedly increased the burden of care on the guardian.

The court will make an award that will take into account the fact that in her condition there will be need for continued medical attention to mitigate her suffering. The award has also taken into consideration the fact that the perpetrators of the crime were police officers who had the constitutional and statutory duty to respect and uphold her right to dignity as a minor, as well as provide protection of public safety under sections 15(1) and 153(1) of the constitution. These crimes resulted in the violation of the right to dignity, inhuman and degrading treatment and punishment, rights guaranteed under section 19(1), 19(3) and 20 of the Constitution. For the violation of TTs right to dignity, and being subjected to inhuman, and degrading treatment, she is awarded a lump sum of **K10,000,000.00**.

136. **7th applicant EM, guardian ad litem for ES**, a minor aged 16. She was in form 2 at Mpingu CDSS a self-boarding school during the time of sexual assault. She was striped naked and was physically assaulted with a wooden rod. She was assaulted through having fingers placed in her private parts by a police officer who ended up having forced sexual intercourse with her without any protection. She was exposed to the danger of acquiring sexually transmitted diseases as she started feeling lower abdomen pains, signs of discolored urine and smelly discharge after the sexual assault. As a student at school she faced a lot of bullying and mocking by her peers and some members of the community and this had greatly affected her education.

The Court will make an award that will also take into consideration the fact that the perpetrators of the crime were police officers who had the constitutional and statutory duty to respect and uphold her right to dignity as a minor, as well as provide protection of public safety under sections 15(1) and 153(1) of the constitution. These crimes resulted in the violation of the right to dignity, inhuman and degrading treatment, rights guaranteed under section 19(1), 19(3) and 20 of the Constitution. For these reasons she is awarded a lump sum of **K8,500,000** which will enable her recover her dignity by starting life anew.

137. **17th applicant FC a minor of 17years.** She suffered sexual assault at the hands of the police when she had her private parts touched by four police officers. She was subsequently raped by one police officer. She told court that she had dropped out of school after the sexual attack, because being a form III student at Mpingu CDSS she could not stand the stigma and shame from her peers at school. This affected her performance as most of the times she was failing to focus on her studies. She went on to say that she still lives in fear.

The Court will make an award that will also take into consideration the fact that the perpetrators of the crime were police officers who had the constitutional and statutory duty to respect and uphold her right to dignity as a minor, as well as provide protection of public safety under sections 15(1) and 153(1) of the constitution. These crimes resulted in the violation of the right to dignity, inhuman and degrading treatment and punishment, rights guaranteed under section 19(1), 19(3) and 20 of the Constitution. For this suffering she is awarded **K8,500,000** to help restore the dignity she lost as a result of the violation. This may also help her find a full boarding school and continue her education.

138. **11th applicant MK a minor of 17 years.** She suffered sexual and physical assault at the hands of the police when she and her friends were severely beaten up. She was forced to undress in front of the police officers. One of them went over her and inserted his dirty fingers in her private parts. When he noticed that she was menstruating he beat her again seriously. She told the court the whole experience was frightening, degrading and humiliating. She was not raped because of her condition at the time. She suffered embarrassment and even now she experiences public ridicule and her life is no longer the same as she has low self-esteem.

The court will make an award that will also take into consideration the fact that the perpetrators of the crime were police officers who had the constitutional and statutory duty to respect and uphold her right to dignity as a minor, as well as provide protection of public safety under sections 15(1) and 153(1) of the constitution. These crimes resulted in the violation of the right to dignity, inhuman and degrading treatment and punishment, rights guaranteed under section 19(1), 19(3) and 20 of the Constitution. For the suffering and the violation of her dignity, loss of respect, degrading and inhuman treatment she went through she is awarded **K7,500, 000.00**.

139. **16th applicant EC a minor of 17 years** she suffered sexual and physical assault at the hands of the police. She said she was severely beaten up by the police. She was forced to undress in the presence of the police and she was humiliated and

deeply traumatized as result of this incident to the extent that she did not want to go back to the same school. Her private parts were forcefully groped by the police officers who did not rape her when they noticed that she was menstruating. She told the court that she has nightmares stress and anxiety due to the horrific experience she had.

The court will make an award that will also take into consideration the fact that the perpetrators of the crime were police officers who had the constitutional and statutory duty to respect and uphold her right to dignity as a minor, as well as provide protection of public safety under sections 15(1) and 153(1) of the constitution. These crimes resulted in the violation of the right to dignity, inhuman and degrading treatment, rights guaranteed under section 19(1), 19(3) and 20 of the Constitution. For the violation of her right to dignity, being treated inhuman and in a degrading manner she is awarded **K7,500,000** in order for her to recover from her suffering and to enable her find a full boarding school for continuing with her education.

140. **15th applicant LM a minor of 17 years whose guardian was MS.** She suffered sexual and physical assault at the hands of the police when she and her friends were severely beaten up by the police. One of the police officers forced himself on top of her and he insisted that she should show him her underwear with a sanitary pad to confirm that she was menstruating. When she showed him he left her and she managed to escape. She was humiliated to be undressed in front of the police officer and she run out of the house naked. She said since the incident she is suffering shame and ridicule and her life is not the same.

The court will make an award that will also take into consideration the fact that the perpetrators of the crime were police officers who had the constitutional and statutory duty to respect and uphold her right to dignity as a minor, as well as provide protection of public safety under sections 15(1) and 153(1) of the constitution. These crimes resulted in the violation of MS's right to dignity, not to be treated inhumane and degrading treatment, rights guaranteed under section 19(1), 19(3) and 20 of the Constitution. For her suffering she is awarded **K7,500,000**.

Awards for the women:

141. **1st applicant, M.M** The police officer forced her to undress and raped her in the presence of her 5years old child who recounts the ordeal and tells it to his friends. She felt pain as the CS wound had not yet healed. Her husband left her together with the two children. she is a single parent suffering shame and reproach in the community. In view of the violation of her right to dignity that she suffered at the hands of the police and the failure to get the perpetrators of the crime prosecuted thereby denying her the right to access justice she is awarded **K6,500,000.00**
142. **2nd applicant, AK** a woman who was on her way from picking her child from was dragged into a nearby bush where a police officer raped her without using any protection. She has suffered shame and humiliation as her marriage has crumbled as well. She is still suffering shame and reproach because of the breakdown of the marriage as well. She is awarded **K6,500,000.00** for the

violation of her dignity and being degraded in this manner and consequently not accessing justice against the perpetrator of the crime.

143. **3rd applicant, CT** was raped right at her house in the presence of ES. She suffered a lot of stress and anxiety as she was two pregnant at the time. When her husband learnt about it he left her and she had to nurse the pregnancy alone for 7 months. She was humiliated because people did not know her condition before the sexual attack and they called her names that she was carrying the police officers pregnancy. she still suffers shame and humiliation as people still refer to her baby twins as children of the police officer. For the violation of her right to dignity and being subjected to degrading treatment she is awarded **K6,500,000.00**.
144. **4th applicant, ES** was looking after her daughter in law CT on this material day when the police officers stormed their house and asked them to undress. Upon refusing she was physically and forcefully undressed by the police officer when pointed a gun at her. She was subsequently raped by this police officer in the presence of her daughter in law CT. she said as a result of the sexual assault she has lost her dignity and self- worth and respect since the most shameful thing was done to her. For the violation of her right to dignity and for being subjected to inhuman and degrading treatment in the presence of another person she is awarded **K6,500,000.00**
145. **5th applicant, EB** was raped right inside her house as she was nursing CS wounds for birth of a child that died in her womb. At the time of the sexual attack she had not yet started having sex with her husband because she had not yet healed. She lamented to have developed genital warts after the rape and she was sure that it was as a result of the rape because she did not sleep with any other man as her husband deserted her. For all the violations of her right to dignity, being subjected to degrading treatment as a woman as a result of the failure to access justice, due to the inaction of the Malawi Police service she is awarded **K6,500,000.00**.
146. **6th applicant, AM** was also raped at her house. she said after the sexual attack she stayed away from her home for four days sleeping at the garden because she had been informed that the police were coming to take further revenge for their friends death. Her husband deserted her because he could not stand the shame and humiliation that was being poured on his wife. For the violation of her right to dignity and for being subjected to degrading treatment due to the failure by the Malawi police to discharge their duty to protect her and her rights to access justice she is awarded **K6,500,000.00**.
147. **8th applicant, DK** was in her house on this day when she was raped by an officer of the Malawi police service. The incident happened in the presence of her two year old child. The police man who forcefully pushed her down, pulled her skirt, tore her underwear and raped her, stepped on her groin and left her helpless. This rape experience has left her with low self- esteem, she has lost her dignity. Her marriage has suffered as her husband chased her from the matrimonial home immediately after the incident. Although he brought her back the marital happiness is lost. She has suffered humiliation from members of the community.

Her business has since collapsed because her merchandise was destroyed by the police. For all the suffering that she went through as a result of the violation of her right to dignity, and being subjected to degrading treatment, the failure to access justice, due to the actions of the police by failing to bring the perpetrator of her crime to book, she is awarded **K6,500,000.00**

148. **9th applicant, ES** was happily married helping her husband with business before this incident. She was raped by the police officer who found her at her house. She said after the incident her husband deserted her such that she longer benefits from the business she was helping him with. She has low self-esteem as she lost her dignity when she was treated without respect by the police. For the violation of her right to dignity and being treated in a degrading and humiliating manner she is awarded a sum of **K6,500,000.00**.
149. **10th applicant, EW** was beaten by a police officer who also raped her violating her dignity and respect. Instead of being protected and having her rights protected as per the mandate given to the police by the Constitution. She is awarded **K6,500,000.00** as compensation for the sexual assault she suffered.
150. **12th applicant, SB** was sexually abused by a police who run after her and followed her to her bedroom, pulled her from under the bed where she was hiding. The police officer forcefully inserted his fingers in her private parts and left. He did not rape her. Her husband came to know about the incident and he deserted her. For this violation of her right to dignity and respect and being treated in a degrading manner she is awarded a sum of **K4,500,000.00**.
151. **13th applicant, DT** was sexually abused as she was touched her breasts and fondled her private parts without her consent by the police officer. The incident happened when she had just finished her menstruation. For the violation of her rights she is awarded **K4,500,000.00**.
152. **14th applicant, AL** was sexually abused by one of the three police officers who invaded her house. She was ridiculed that by being called a prostitute because she had a child without husband. The police officer violently touched her breasts, teats, and her private parts without her consent and left. She was not raped. For this violation of her dignity and being treated in a degrading manner, she is awarded **K4,500,000.00**.

ORDER

153. For the avoidance of doubt the Respondents are ordered to pay compensation as follows:
 1. PY for TT is awarded MK10,000,000.00
 2. EM for ES is awarded MK8,500,000.00
 3. FC is awarded MK8,500,000.00
 4. MK is awarded MK7,500,000.00
 5. EC is awarded MK7,500,000.00
 6. LM for MS is awarded MK7,500,000.00
 7. MM is awarded MK6,500,000.00

8. AK is awarded MK6,500,000.00
 9. CT is awarded MK6,500,000.00
 10. ES is awarded MK6,500,000.00
 11. EB is awarded MK6,500,000.00
 12. AM is awarded MK6,500,000.00
 13. DK is awarded MK6,500,000.00
 14. ES is awarded MK6,500,000.00
 15. EW is awarded MK6,500,000.00
 16. SB is awarded MK 4,500,000.00
 17. DT is awarded MK4,500,000.00
 18. AL is awarded MK4,500,000.00
154. The claimants are also awarded costs of these proceedings to be assessed if parties do not agree.
155. The compensation shall be paid within 90days from the date of order 9th March, 2021. The money shall be paid into court for onward distribution to the victims who shall be required to produce relevant identification materials.
156. This order of compensation shall not operate as a bar to any subsequent prosecution of the individual perpetrators of the crimes that were committed against the women and girls in this case.

Right of appeal

157. Either party aggrieved by this order of assessment has the right of appeal to the Supreme Court.

Made in Chambers this 9th day of March 2021 at High Court Lilongwe Registry.



Madalitso Khoswe Chimwaza

ASSISTANT REGISTRAR