



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL DIVISION**

CRIMINAL CASE NO. 1 of 2021

THE REPUBLIC

And

**CHARLES MCHACHA
SYMON VUWA KAUNDA
LLOYD MUHARA
BRIGHT KUMWEMBWE**

CORAM: Honourable Justice Annabel Mtalimanja

Mr. Victor Chiwala, of Counsel for the State

Mr. Chrispin Khunga, of Counsel for the State

Mr. Imran Saidi, of Counsel for the State

Mr. Chancy Gondwe, of Counsel for the 1st Defendant

Mr. Chimwemwe Sikwese, of Counsel for the 2nd Defendant

Mr. Fostino Maere, of Counsel for the 3rd Defendant

Mr. Gift Katundu, of Counsel for the 4th Defendant

Mrs. Choso, Court Clerk

RULING ON PRELIMINARY OBJECTIONS

Mtalimanja, J

1. The Defendants were initially before the Principal Resident's Magistrate Court sitting at Lilongwe in Criminal Case No. 1363 of 2020 with offences of Inducing a public officer to perform functions corruptly, contrary to section 24 A(2) of the Corrupt Practices Act, Cap. 7:04 of the Laws of Malawi (hereinafter the "CPA"), as read with section 34 of the CPA, Use of insulting language, contrary to section 182 of the Penal Code, Cap. 7:01 of the Laws of Malawi), Giving false information contrary to section 14 (1)(a) of the CPA and Neglect of official duty, contrary to section 121 of the Penal Code.
2. On 6th January, 2021, the State appeared before that Court to commit the Defendants to the High Court for trial. The PRM discharged all the 4 Defendants from the offences under the CPA on the ground that no consent to prosecute had been granted by the Director of Public Prosecutions (hereinafter the "DPP"). The PRM ordered that his court would only proceed with the offences under the Penal Code. The Court also ordered that the State was at liberty to recommence the proceedings on the charges under the CPA once there was consent from the DPP.
3. Upon grant of the consent by the said DPP, the matter was recommenced as Criminal Case No. 99 of 2021 against the Defendants on the charges under the CPA. The matter was allocated to the Senior Resident

Magistrate. On the State's Application, this matter was committed to the High Court as Criminal Case No. 1 of 2021.

4. This Criminal Case No. 1 of 2021 was set down before this Court for 27th April, 2021 for plea and directions. On this date, the Defendants took plea and the Court ordered that trial would commence on 8th June, 2021.
5. On 13th May, 2021, the Defendants were committed to the High Court for trial on the charges under the Penal Code in Criminal Case No. 1363 of 2020. On 27th May, 2021, the State applied and were granted, *ex parte*, an order to consolidate the cases Criminal Case No. 1 (being Criminal Case No. 1366 of 2020 before H/W Shyreen Chirwa) and Criminal Case No. 1366 of 2020 before H/W Nyimba. It must quickly be noted here that there was a typographical error in the citation of the case before HW Shyreen Chirwa as Criminal Case No. 1366 of 2020 instead of Criminal Case No. 99 of 2021.
6. When the case was called on 9th June, 2021, prior to taking fresh plea, following the consolidation of the files committed from the Court below, the Defendants raised preliminary objections. Counsel Maere, for the 3rd Defendant, filed a Notice of Preliminary objections and skeletal arguments in support thereof. For the 1st Defendant and 4th Defendant, Counsel Gondwe and Counsel Katundu, respectively, raised oral objections. For the 2nd Defendant, Counsel Sikwese concurred with his fellow defence counsels. The objections though raised separately, are resting on the same issues that can be summarized as follows:
 - a. the Anti-Corruption Bureau (hereinafter the "ACB") has no powers to prosecute the offences under Penal Code;
 - b. the offences under the Penal Code are statute barred;
 - c. the particulars of the charge of Neglect of official duty are not sufficiently particular; and
 - d. the order of consolidation was not obtained procedurally.

Does the ACB have powers to prosecute the offences under the Penal Code?

7. The Defendants argue that under the CPA, the prosecutorial mandate of the ACB is limited to offences under that Act, such that there is lack of jurisdiction to prosecute the charges before this Court that are premised on the Penal Code. It is argued that by virtue of section 2 (1) of the CPA, the CPA has supremacy over the Criminal Procedure and Evidence Code, Cap. 8:01 of the Laws of Malawi (hereinafter the “CPEC”) and any other written law. Therefore, so goes the argument, since section 2 (1) provides that the ACB can prosecute offences under the CPA subject to the directions of the DPP, it means that the ACB can only prosecute offences under the CPA and not any other law. It is also argued that since the powers of the ACB are derived from statute, the DPP cannot extend the powers that Parliament gave to the ACB.
8. In response, the State contend that section 10 (1)(f) of the CPA does not provide that the ACB cannot prosecute any other offences. Section 100 of the Constitution allows the DPP to appoint any other person in the public service as public prosecutor. Therefore, having been duly appointed to prosecute the offences under the Penal Code under the delegated authority of the DPP, the State has the due power to prosecute the Defendants in these proceedings, so goes the argument.
9. An examination of the law is always a good place to start to gain a clear perspective. The ACB, a creature of statute, has many functions, among of which, and relevant to this present discussion, is the power to prosecute any offence under the CPA. Section 10 (1)(f) of the CPA provides that subject to the directions of the DPP, the ACB shall prosecute any offence under it. The import of this provision is that any offence created under this Act falls within the prosecutorial mandate of the ACB. Further, it means this prosecutorial mandate shall be exercised under the directions of the DPP.

10. As indicated, the Defendants argue that by virtue of this provision, the ACB is precluded from prosecuting any other offences, other than offences created by the CPA. This Court is of the considered view that this argument is misconceived as the Defendants have conflated issues. The charge sheet before this Court constitutes offences under two different statutes i.e. the CPA and the Penal Code. Consequently, there are two different legal regimes at play as it were.

11. On one hand, as correctly submitted by the Defendants, the mandate to prosecute the offences under the CPA is governed by its sections 2 and 10. To this the Court will also add section 42, under which the requisite consent to prosecute is granted by the DPP. On the other hand, the mandate to prosecute the offences under the Penal Code is not governed by the CPA. The Penal Code establishes a regime of offences separate from the CPA.

12. As correctly submitted by the State herein, by virtue of section 100 of the Constitution and section 79 of the CPEC, the DPP has power to appoint, generally or in any case or class of cases, any person employed in the public service as a public prosecutor. In terms of section 80 of the CPEC, a public prosecutor so appointed may appear and plead without any written authority before any court in which any case of which s/he has charge is under inquiry, trial or appeal.

13. The State argues, correctly in this Court's view, that the prosecutors from the ACB are public officers, therefore entitled at law to be appointed public prosecutors by the DPP. Having been so appointed they have the power to prosecute the offences under the Penal Code cited in the charge sheet. Clearly, section 10(1)(f) of the CPA does not proscribe the appointment of prosecutors within the ACB as public prosecutors under the CPEC. It is thus this Court's view that it is absurd to interpret section 10 (1)(f) of the CPA to mean that the DPP cannot appoint officers from the ACB as public prosecutors to prosecute any other offences under any law other, including the Penal Code.

14. The Defendants argue, on the premise of section 2 (1) of the CPA, that the CPA overrides the CPEC. Now, it is always important to read and interpret the law in its entirety. Thus section 2 (1) must not be read in isolation. Rather it must be read in its entirety, along with section 2 (2). Section 2 provides as follows:

“(1) *Save as otherwise provided, the provisions of this Act shall apply notwithstanding anything to the contrary contained in the Criminal Procedure and Evidence Code or in any other written law;*

(2) *Subject to subsection (1), all offences under this Act shall be inquired into, tried and otherwise dealt with in accordance with the provisions of the Criminal Procedure and Evidence Code.”*

15. This section must be understood on the premise that it is the application section of the CPA. It is not intended to oust the CPEC as it were. It is intended to outline the scope of the application of the CPEC over matters falling within the scope of the CPA. Section 2 of the CPA does not in any way and cannot be interpreted to preclude the exercise of the DPP of the power to appoint officers within the ACB as public prosecutors. Contrary to the Defendant’s argument, by so appointing these officers, the DPP is not usurping statute.

16. This court observes that sometimes, as is in the present case, cases investigated and prosecuted by the ACB, involve offences under the CPA and other statutes like the Penal Code. The alleged offences being founded on the same facts or forming part of a series, prosecutorial discretion is exercised to prosecute the offences together in the same charge sheet. Where this is the case, it is within reason and expedience, for the officers within the ACB to be appointed public prosecutors to enable them prosecute those offences within their mandate under the CPA, alongside those under any other law.

17. Whilst the State has the prerogative to mix charges from the CPA and the Penal Code or indeed any other law, the prosecution of each regime of offences will be conducted according to the applicable laws.
18. On this understanding, the Court finds that the officers from the ACB are competent to prosecute offences under the Penal Code, or indeed any other law, other than the CPA, where duly appointed public prosecutors by the DPP. The objection on this aspect is therefore dismissed.

Are the offences under the Penal Code statute barred?

19. It will be recalled the Defendants stand charged with the offences of Use of insulting language and Neglect of official duty contrary to sections 182 and 121 of the Penal Code, respectively. The Defendants argue that, on the premise of section 302A of the CPEC, these offences are statute barred, therefore, they cannot be tried of the same.
20. In response, the State contends that the offences are not statute barred since the proceedings were commenced in December, 2020, within the prescribed time limit of 12 months. Further, the State contends that owing to the objections by the Defendants, it has not been possible to expedite the processes.
21. Indeed section 302A provides for time limitations for trials within the High Court. However, upon perusal of the record of the proceedings culminating to this stage, this Court agrees that the offences are not statute barred.
22. It will be recalled that the current proceedings were commenced in the PRM Court. An examination of the court record shows that the State commenced the proceedings against the Defendants in December 2020. The particulars of the offence of using insulting language and neglect of official duty allege that the said offences were committed in January 2020 and June 2019 respectively. On this score, this Court agrees that for the

offences committed in January, the proceedings were commenced within 12 months of the offence as stipulated in section 302A.

23. It is this Court's considered opinion that the intervening fact of the State committing the Defendants to the High Court did not stop and restart the clock for purposes of reckoning the time. This Court thus finds that the State commenced the proceedings against the Defendants on the charges in the Penal Code within the stipulated time limit.

24. Again, a perusal of the record shows that the action suffered objections in the Courts below. Also, the matter suffered long adjournments on account of the Covid 19 spate the country suffered. All this the Court is highlighting to show that the failure to complete the trial within the 12 months period cannot all be attributed to the State.

25. This Court further observes that the charge sheet constitutes a combination of felonies and misdemeanors. The law in section 127 of the CPEC allows the State to charge felonies and misdemeanors in the same charge if the offences are founded on the same facts or form, or are part of, a series of offences of the same or similar character.

26. In the case of *Republic v Abdul Rehman Abdullah and others, Criminal Case No. 4 of 2017*, the Court dealing with a similar objection premised on section 302A, stated that

“The Applicants herein are charged with both felonies and misdemeanors. And the court recalls, in its ruling of the 14th day of February 2018, that Counsel for the Applicants had strongly argued against the State's prayer to sever the charges against the Applicants and their co-accused. Counsel wanted all charges in relation to all the other banks to be tried together. Those charges, just like the charges herein contained misdemeanors and felonies.

With that in mind, a clear and practical reading of sections 302A and 261 of the CP&EC, will have the effect that, in such a case, it would be impractical to apply those provisions and discharge the Applicants from the misdemeanor charges. All the offences charged are claimed to have occurred as part of a series of offences of the same or similar character. The cited provisions would therefore not be applicable.

All in all, on the observations herein, the delays in this trial cannot wholly be attributable to the conduct of the State. The Defence should also shoulder a fair blame for the delay. The Applicants having been charged with a combination of misdemeanors and felonies, arising from or forming part of a series of offences of the same or similar character, sections 302A and 261 of the CP&EC not apply and the application must fail.”

27. Similarly in the present case, the Defendants stand charged with a combination of offences that are felonies and misdemeanors. This Court also concludes that it is not practicable to apply section 302A wholesale.
28. It has been argued that the language of the legislator in section 302A is peremptory such that the Court is bound to strictly abide by the timelines. As a general rule, in keeping with the policy behind this provision, courts must indeed ensure compliance with the prosecution time limits prescribed by the law. However, this Court reminds itself of the principle in section 3 of the CPEC that substantial justice should be done without undue regard for technicality in applying the Code.
29. Where circumstances justify doing so, it is this Court’s considered opinion that the court can and should waive the time limitations in section 302A in order to allow substantial justice to be done by trying a case on its merits. This Court is fortified in adopting this position from the fact that the law allows a waiver of the time limitations in section 302A (2)(where time for commencement of trial runs from a date of arrest where the accused person was at large) and section 302A(3) (where time for completion of trial is

extended where the delay to complete trial is not attributable to any conduct on the part of the prosecutions).

30. From the foregoing this Court finds that the offences that were allegedly committed in January are not statute barred. For those allegedly committed in June 2019, the time limit in section 302A will be waived on the principle that substantial justice should be done. The Defendants will therefore proceed to take plea and be tried on the charges under the Penal Code accordingly. The objection on this aspect is therefore dismissed.

Are the particulars of the charge of Neglect of official duty not sufficiently particular?

31. The particulars of the offence of Neglect of official duty in Counts 8 and 10, allege that the 3rd and 4th Defendants, respectively, willfully neglected their official duty under the Public Service Act. The 3rd and 4th Defendants argue that the charge does not give sufficient particularity in that it does not disclose where in the Act there is such kind of a duty. This, so the argument goes, leaves the Defendants guessing which duty it is and where in the Act it is provided for.

32. Section 128 (a)(iii) of the CPEC provides that the particulars of an offence shall be set out in ordinary language, giving reasonable information as to the commission of the offence and avoiding as far as possible the use of technical terms.

33. Upon examination of the particulars of Counts 8 and 10, this Court agrees with the Defendants that the said particulars lack reasonable information so as to put the Defendants on notice as to what exactly the State is alleging and how to respond to the same.

34. This objection is sustained and the State is ordered to amend the particulars of Counts 8 and 10 accordingly before the Defendants take plea.

Was the order of consolidation obtained procedurally?

35. As indicated, the State was granted, *ex parte*, an order consolidating the present cases Criminal Case No. 1 (being Criminal Case No. 99 of 2021 before H/W Shyreen Chirwa) and Criminal Case No. 1366 of 2020 before H/W Nyimba. The Defendants argue that the consolidation was granted un-procedurally, in that Criminal Case No. 1366 of 2020 before H/W Nyimba was consolidated directly without a file being opened in the High Court after the committal proceedings in the court below.
36. This Court observes that indeed there were irregularities in the consolidation process. It appears indeed that the file from the court below was directly consolidated with the present file. Ideally, there should have been a file opened in this High Court after the committal process in Criminal Case No. 1363 of 2020. It is this file that would now have been consolidated with the present file.
37. Be that as it may, as submitted by the Defendants, this a procedural lapse. In this Court's view, this lapse is an irregularity that has not prejudiced the Defendants in any way. This is because, at the last sitting of this Court on 27th April, 2021, the State did inform the Court, in the presence of the Defendants, that once the court below had committed the Defendants to the High Court for trial on the offences under the Penal Code, they would be applying for consolidation. This was the premise and background of the *ex parte* Application for consolidation.
38. Since the Defendants were not prejudiced by the irregular consolidation processes, this Court concludes that there was no failure of justice. This Court thus holds that the irregularity is curable under section 5 of the CPEC.
39. From the foregoing, the preliminary objections are sustained only to the extent of the order to amend Counts 8 and 10 to provide sufficient particularity.

40.It is so ordered.

Made in Open Court this 10th Day of June, 2021.

A handwritten signature in black ink, appearing to read 'Annabel Mtalimanja', written in a cursive style.

Annabel Mtalimanja

JUDGE