IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL CASE NO. 35 OF 2014

THE REPUBLIC

-v-

PAUL MONTFORT MPHWIYO & 18 OTHERS

Coram: Hon. Justice Esme Chombo

Dr. Steven Kayuni, Director of Public Prosecutions; Mr. Chibwana, Mr. Salamba, Mr. Gamadzi, and Ms. Chikankheni – Public Prosecutors

All Accused Persons present

Mhango/Kaonga/Nkhutabasa, Counsel for Defence

Munkhondia, Official Court Interpreter

RULING ON APPLICATION BY ACCUSED PERSONS TO NULLIFY PROCEEDINGS AND FOR PERMANENT STAY OF TRIAL AND RECUSAL OF TRIAL JUDGE

A. INTRODUCTION

On 10th March 2021, the Accused Persons filed a summons, applying for nullification of proceedings, according to them, for want of jurisdiction and they

attached a sworn statement deponed by all the Accused Persons with three exhibits (**AA1, AA2,** and **AA3**). In addition, Counsel Kaonga of Wilkinson Associates filed arguments in support. The application for nullification was premised on the submission that since the Registrar of the High Court had not provided the documents the Accused Persons had requested for pertaining to the extension of tenure of this trial Court, then it was to be concluded that there was no 'extension of tenure that complies with' section 119 of the Constitution. In the alternative, the Accused Persons through Counsel Kaonga argue that even if the extension was granted, 'the same was not done in compliance with section 119 (1) of the Constitution'. According to the Accused Persons through Legal Counsel, therefore, this Court lacks the jurisdiction to continue presiding over this criminal trial.

The Director of Public Prosecution (DPP), through the sworn statement of Mr. Chibwana of Counsel and skeletal arguments in opposition filed on 9th April 2021, oppose the application and submit that it be thrown out for being 'vexatious, frivolous, and intended to waste Court's time.' In addition, the DPP on 19th April 2021 also filed the Affidavit of the Registrar of the High Court and Supreme Court, Her Honour Gladys Gondwe, whereby she exhibited documents described as *'confirmation of the extension of tenure of Honourable Justice Esme Chombo'* (marked '**GG1**').

On 20th April 2021, the first accused person filed a sworn statement in reply in which he interprets the documents filed by the Honorable Registrar and concludes that the extension was not in compliance with section 119 (1) of the Constitution. There were no skeletal arguments attached to support the positions adopted in the second sworn statement. The1st Accused person's prayers can be summarized as follows:-

a. That the case be permanently stayed;

b. That the trial Judge recuse herself from hearing this case;
c. That the Honourable Registrar be ordered to produce original documents of the documents she tendered, and
d. That the Honourable Chief Justice be summoned to appear before this Court *'to be cross-examined on the matters surrounding the extension of office of the Honourable Justice Chombo'*;
e. The nullification of these proceedings.

The Accused Persons have premised their application under section 42 (2)(f)(i), and section 46 (2) & (4) of the Constitution, as well as section 294 of the Criminal Procedure and Evidence Code ('CP & EC') as read with paragraph 2 of the Criminal Procedure (Trials without Jury) (Amendment) Order 2020.

Even though the Defence have gone to great lengths to distinguish different grounds for their various prayers, they could reasonably be summarized to two foundational points:- i) the Defence's interpretation of the actions/decisions of the Judicial Service Commission, the Office of the Chief Justice, the Office of the Presidency and/or the Office of the Chief Secretary to the Government (as it was then called) pertaining to the extension of tenure of Justice Esme Chombo, as the Trial Judge herein; ii) the Defence's objections/reservations to the manner in which the Trial Judge has discharged her case management responsibilities in this case thus far.

Whatever the reason for the convoluted presentation of the issues might be, this court has the judicial responsibility to distil the issues and ensure that its determination provides clarity in the interests of justice. Therefore, on that understanding, this Court will address the issues in the following order:-

1. Whether or not these Criminal Proceedings provide the appropriate forum to seek the redress of reviewing the propriety or otherwise of actions/decisions of the Judicial Service Commission, and/or the Honourable Chief Justice, and/or the Chief Secretary to the Government;

2. Whether or not this Court (sitting as a Criminal Court) is the appropriate forum to seek the redress of summoning the Honourable Chief Justice for the Defence to cross-examine him on the matters surrounding the extension of office of the current Trial Judge;
3. Whether the Defence have articulated sufficient grounds that could lead a fair-minded and well-informed observer, having considered the facts, to conclude that there was a real possibility that the Trial Judge was or would be biased;
4. Whether a permanent stay should be granted in this case.

B. DETERMINATION

1. Whether or not these Criminal Proceedings provide the appropriate forum to seek the redress of reviewing the actions/decisions of the Judicial Service Commission, and/or the Honourable Chief Justice, and/or the Chief Secretary to the Government

The Defence are seeking orders from this court based in part, on their interpretation of the documents exhibited by the Honourable Registrar. In summary, the documents placed in evidence the following matters: -

a. The Judicial Service Commission sat on 24th August 2018 and among other things, directed that a recommendation to extend the period of service of Honourable Justice Esme J. Chombo by thirty (30) months after 23rd December, 2018, be made to the appointing authority, in accordance with section 119 (1) of the Constitution of the Republic of Malawi';

b. The Honourable Chief Justice, Honourable Andrew Nyirenda, SC, as Chairperson of the Judicial Service Commission, on 19th October, 2018 wrote the then State President seeking '*extension of service for Justice Chombo.*' However instead of recommending the thirty months that the

JSC had in the Minutes 'directed', the Honourable Chief Justice instead recommended an extension of 18 months and one of the reasons advanced, and which is currently being cited by the Defence to allege bad faith on the Trial Court was, that (quoted verbatim) '*The Commission felt we should seek 30 months extension to be on the safe side. My own assessment is that with proper case management the matter should be concluded within 18 months from January, 2019 ... In any case, ... we might also be seen as rewarding the Judge ahead of completing the matter...*'

c. The Memo of the Honourable Chief Justice to the then President was approved on 21st October, 2018, by an endorsement on the first page of the Memo with the words '*Approved*';

d. On 3rd November, 2018 the Honourable Chief Justice wrote Justice Chombo communicating the extension of tenure for 18 months and specifically requiring *'proper and determined case management to complete the assignments within the extension';*

e. On the 21st May 2020 the Office of the Chief Secretary to the Government wrote to Justice Esme Chombo communicating an extension of tenure for 12 months with effect from 1st June, 2020 in line with section 119 (1) of the Constitution;

f. On 5th June 2020 the Judicial Service Commission through JSC Minute No. 42/20 granted a further extension for completion of the present Criminal Trial;

g. By letter of 16th June, 2020, Justice Chombo communicated that the Chief Justice had communicated to her that the Chief Secretary had communicated to the Chief Justice of the further extension of tenure and she was in receipt of the said communication which she noted had not been copied to the Chief Justice;

h. On 17th June 2020, the Honourable Chief Justice wrote a Memo to the President seeking an extension of tenure for 12 months.

In other words, the substance of the sworn statements and skeletal submissions of the Defence dwell on the actions/decisions of the Judicial Service Commission ('JSC') and/or the Honourable Chief Justice, and/or subsequently the Chief Secretary to the Government, and/or the Honourable Registrar. To illustrate, in paragraph 16 of the sworn statement of 8th March 2021, the Accused Persons assert that '*...our rights may have been violated by ... the Judicial Service Commission and the President in not performing their constitutional duties';* and in paragraph (d) of the second sworn statement by Paul Mphwiyo, he asserts that *'the JSC which must act in consultation with the President recommended one thing and the Chief Justice, on his own, recommended something else...'* and in paragraph (e) the 1st Accused asserts that *'there can thus be said to be no consultation herein and the purported extension is a nullity.'*

Regardless of how the Defence have couched their submissions, it would be clear to the fair-minded observer that what the Defence are actually calling upon this Court to do, is to review the action/decisions of the Judicial Service Commission and/or the President, and/or the Honourable Chief Justice, and/or the Chief Secretary to the Government. This Court declines to do so because this is a criminal case in which the parties are the State (the Republic) and the 19 Accused Persons herein. It is neither a case in which the Judicial Service Commission, or the President, or the Honourable Chief Justice, or the Chief Secretary to the Government are parties, nor a case in which the substantive issue before the Court are the actions/decisions of the aforementioned authorities. The law is very clear on which procedure and law should be followed and applied when the actions or decisions of public bodies or authorities are being called into question – that law and procedure is not the criminal law and procedure which is properly governing these proceedings.

However, this Court will not, and does not have to, go on to articulate which procedure and law ought to have been followed, because it will draw wisdom from Chikopa, JA, who, in the case of ***Mac Donald Kumwembe v. The Republic,*** **MSCA Criminal Appeal No. 13 of 2015,** held as follows: '*... courts are not best placed to give advice and/or guidance. As much as possible therefore they should not be asked for the same.* In ***Maziko Sauti Phiri v Privatisation Commission*** *the Constitutional Court, held that 'it is not the business of the courts to give parties appearing before them gratuitous advice/guidance. That is the duty of counsel.*' Therefore, this Court shall not provide legal advice to the Accused Persons on the procedures and law to apply when what they seek is the determination of the validity/legality or lack thereof of the decisions/actions/communications of the above-mentioned authorities that is the duty of their Legal Practitioners.

Therefore, the application by the Defence calling upon this Court to review the actions/decisions/communications of the Judicial Service Commission, and/or the Honourable Chief Justice, and/or the Chief Secretary, and/or the Honourable Registrar which would of necessity precede any determination of the issue of nullification of proceedings, is declined. Since as stated above, this Court is not the appropriate forum for the review of the said decisions/actions/communications of the named authorities, it therefore logically follows that this Court should similarly decline, and does decline, to entertain the application for nullification of proceedings in that regard. To that end, since there has been no Court of law with appropriate mandate that has impugned the decisions/actions/communications pertaining to the extension of tenure as communicated to the Trial Judge, this Court will would have proceeded, as it has always done, on the mandate as communicated to it through the communications exhibited by the Honourable Registrar, Her Honour Gladys Gondwe. The application for nullification by the Defence is therefore dismissed.

2. Whether or not this Court (sitting as a Criminal Court) is the appropriate forum to seek the redress of summoning the Honourable Chief Justice in order for the Defence to cross-examine him on the matters surrounding the extension of office of Trial Judge

It is the considered view of this Court that the reasoning above applies to this issue as well. If the Defence desire to call into question the Honourable Chief Justice's discharge of his responsibilities as the Chairperson of the Judicial Service Commission pertaining to extension of tenure of the Trial Judge, then they must do so following appropriate procedures and the law and not seek to do so through disguising the issue as a preliminary issue before the Trial Court in this criminal matter. Their application is therefore dismissed.

3. Whether the Defence have articulated sufficient grounds that could lead a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the Trial Judge was or would be biased

The Defence have, though not in detail, stated that according to them, and here I will quote their paragraph verbatim:

> *The recusal of Justice Chombo from the case on the basis of issues surrounding her second extension, the nexus with the Ministry of Justice in procuration of the said extension which also happens to be the domain of the Office of the DPP, and also the pressure on time on her which renders her Court incapable of fairly and justly and without bias dealing with the matter.*

It is important, before going into the principles of law to note one fact – the 1st Accused, Paul Mphwiyo speaks of '*issues surrounding her second extension, the nexus with the Ministry of Justice in procuration of the said extension which also happens to be the domain of the DPP*', but has not clearly articulated those issues nor give any evidence.

There exists in Malawi sufficient judicial precedents for recusal applications and how they must be handled. The case that adequately covers those precedents as well as espouse the test that is '*now universally followed*', is that of ***Kumwembe and Another v The Republic; Kasambara v The Republic,* Criminal Appeals No. 5 & 6 of 2017 (unreported)** (hereinafter 'Criminal Appeals No 5 & 6 of 2017'), for this reason, these will be extensively relied on when assessing this part of the application.

Hon. Justice Mwaungulu, JA, SC, in the **Criminal Appeals No 5 & 6 of 2017,** articulated principles that have already been canvassed in earlier decisions, one such principle is that Courts must resist attempts by the parties to choose judges through recusal applications (page 12). He went on (page 13) to hold that:

> *Parties ... have a right to require a judge to recuse on proven grounds. Equally, the recusal is not automatic. A judge will not recuse on just the mere suggestion; a judge will also not stubbornly refuse a request for recusal. Bias must be determined objectively and subjectively....*
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> *Subjectively, the convictions of a judge must be investigated to determine if those convictions would passionately – without dispassion - lean to a preconceived outcome. The convictions must be external to the facts or law under consideration. A judge cannot be biased for convictions on the facts and the law arising in a case. Where, subjectively, there is proof of bias or possibility of bias, a judge must consider recusal unless parties think that, despite those convictions, the judge can nevertheless act impartially.* ***There must be proof otherwise a judge's impartiality is presumed. The test – now universally followed – is that of a fair-minded and informed observer.*** (Emphasis added)

Who is this fair-minded and informed observer? JA Mwaungulu, SC, after analyzing comparable foreign precedents articulated as follows (page 14 – 15):

"The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in ***Johnson v Johnson*** *(2000) 201 CLR 488, 509, para53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.*

Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of any article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that ***the context*** *forms an important part of the material which must consider before passing judgment. (*Emphasis added*)*

JA Mwaungulu, SC, went on to discuss the need for proof to be met by the party seeking the recusal of the Judge as follows: -

A party who requests a judge's recusal ***must prove conduct or misconduct of a judge that would to a fair-minded person or observer prevent a judge from acting with impartiality. Otherwise, a judge's impartiality will be presumed.*** In *Porter v Magill* the court stated:

> *The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead to a fair-minded and informed observer to conclude that there was a real possibility ... that the tribunal was biased.*

In relation to bias, it must be demonstrated that the conduct complained of can found bias – and, therefore, colour decision making and outcome of the case. This has two sides to it. First, the conduct or statement must be such that it shows that an otherwise impartial judge would decide one way or for or against one party. The conduct or statement itself must be such that it is prejudicial or that must show partiality. .... The conduct must be understood as a whole. (Emphasis added)

As explained above, '*A party who requests a judge's recusal* ***must prove conduct or misconduct of a judge that would to a fair-minded person or observer prevent a judge from acting with impartiality. Otherwise, a judge's impartiality will be presumed.***' Has the 1st Accused provided proof of the conduct or misconduct of the Trial Judge? As can be seen, the 1st Accused seeks the recusal of the Trial Judge on two aspects – what he calls the nexus '*of the second extension'* with the Ministry of Justice, and '*the pressure on time on her'* and from those assertions he proceeds to conclude that that *'renders her Court incapable of fairly and justly and without bias dealing with the matter.'* This Court will address the two parts separately. (Emphasis added)

The 1st Accused bases his first conclusions, it appears, on the fact that the Chief Secretary to the Government communicated the extension of tenure through the

Solicitor General and Secretary for Justice. As pronounced in the **Criminal Appeals No 5 & 6 of 2017, '*the context* forms an important part of the material which must consider before passing judgment.' Has the 1st Accused addressed the issue, or provided any proof, of the context for the channeling of the communication from the Chief Secretary to the Government through the Office of the Solicitor General and Secretary for Justice? Has the 1st Accused addressed in anyway why he connects the channeling of the communication through the Solicitor General & Secretary for Justice by the Office of the Chief Secretary to the Trial Judge? The answer to both questions, I find, is in the negative.

The 1st Accused draws his conclusions from the documents tendered into Court by the Honourable Registrar. Would any fair-minded and informed observer attribute partiality on the Trial Judge based on the communications exhibited into this Court by the Honourable Registrar? My answer to that question is an emphatic No – without providing any tangible evidence in Court **the context** within which the channeling happened, a fair-minded and informed observer would not automatically attribute/connect any of those processes to the Trial Judge as the 1st Accused has done. Similarly, where as shown by the communication from the Trial Judge to the Honourable Chief Justice on 16th June 2020, that the Honourable Chief Justice had communicated to the Trial Judge the extension from information received by him from the Chief Secretary, a fair-minded and informed observer would not impute any bad faith on the Trial Judge by virtue of the fact that the Chief Secretary had channeled his communication through the Office of the Solicitor General.

The 1st Accused has also premised his application for recusal on what he calls '*pressure on time on her*'. The Court record will show that the processes in this case commenced in September, 2015 before the very Trial Judge. Due to

several preliminary applications and processes including at the instance of the Accused Persons, the Accused Persons took plea only around November 2016. Similarly, among other things, due to the Defence objection with reasons to the Prosecution's application for a ten-day sitting each month, the Trial Judge had, whilst reserving the mandate to review the decision in the interests of justice, granted a five day sitting each month, from November 2016 to around November, 2018. Thus, in total, by November, 2018, this trial including the pre-trial processes had taken around three years (Sept. 2015 – Nov. 2018). In effect, the 1st Accused premises his application for recusal on his views concerning the Trial Judge's discharge of case management responsibilities.

In the persuasive authority of ***In R v Chaaban*** [2003] EWCA Crim 1012, it was observed:

> *35. ... The trial judge has always been responsible for managing the trial. That is one of his most important functions. To perform it he has to be alert to the needs of everyone involved in the case.* ***That obviously includes, but it is not limited to, the interests of the defendant. It extends to the prosecution, the complainant, to every witness (whichever side is to call the witness),*** *to the jury, or if the jury has not been sworn, to jurors in waiting.* ***Finally, the judge should not overlook the community's interest that justice should be done without unnecessary delay. A fair balance has to be struck between all these interests.*** *(Emphasis added)*
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> ...
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> *37.... nowadays, as part of his responsibility for managing the trial, the judge is expected to control the timetable and to manage the available time. Time is not unlimited.* ***No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The***

entitlement to a fair trial is not inconsistent with proper judicial control over the use of time. *At the risk of stating the obvious, every trial which takes longer than it reasonably should is wasteful of limited resources. It also results in delays to justice in cases still waiting to be tried, adding to the tension and distress of victims, defendants, particularly those in custody awaiting trial, and witnesses...* (Emphasis added)

38. In principle, the trial judge should exercise firm control over the timetable, where necessary, making clear in advance and throughout the trial that the timetable will be subject to appropriate constraints. ***With such necessary even-handedness and flexibility as the interests of the justice require as the case unfolds, the judge is entitled to direct that the trial is expected to conclude by a specific date and to exercise his powers to see that it does.*** (Emphasis added)

At the time this Trial Court granted the Defence petition of five (5) days a month sitting, it reserved the right to review that schedule in the interests of justice. Subsequently indeed as the Court record will show, this Trial Court kept on adjusting the dates of sitting per month until around fifteen (15) days a month were reached. At all times those adjustments were done within the Trial Judge's mandate of case management. This Court is persuaded by the wisdom in the ***R v Chaaban*** case and repeats that wisdom by stating that the Trial Judge at all times had the authority '*... to control the timetable and to manage the available time.*' Consequently, for the 1st Accused to use the Trial Judge's case management decisions to impute bias when the case has taken close to five (5) years due to various reasons, is in the view of this Court, clearly aimed at causing more needless delays to this trial. It is the considered view of this Court

that a fair-minded and informed observer would not reach the conclusions reached by the 1st Accused on the basis of the Trial Judge's discharge of her case management responsibilities. In view of the foregoing, the application for the recusal of the Trial Judge is declined and thrown out as it appears to be misguided, and at best speculative.

4. Whether a permanent stay should be granted in this case.

The Defence applies for a permanent stay of these proceedings according to them *'due to the unfairness that the accused have been made to go through due to the quest for a speedy trial by the Court'*. As indicated already, it must be appreciated that this trial, including pre-trial processes commenced on or around September, 2015. By November 2018, close to 3 years and 2 months had passed – from November, 2018 to date, that is close to 2 years and 4 months, making a total of around five (5) years and 6 months. The Defence argue that the five and a half years this trial has taken is unfair speed, which must lead to a permanent stay. The Defence have cited no authority to support their position.

Regardless, this Court will proceed to address the issue. A permanent stay puts a complete end to the trial. A permanent stay is different from a stay pending the hearing of the matter by a Court of higher jurisdiction such as the Supreme Court of Appeal. What the Defence are seeking is the same as a complete nullification of these criminal proceedings – that is, the Defence, using different terminology are still seeking the nullification of the entire trial (using another term this time). They seek that nullification on the basis of the case management responsibilities of the Trial Court. As held in the ***R v. Chabaan*** **case** *'... nowadays, as part of his responsibility for managing the trial, the judge is expected to control the timetable and to manage the available time. Time is not unlimited.* ***No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they***

need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time.' Consequently, for the Defence to seek permanent stay of these proceedings on the basis of the discharge of the Trial Court's case management responsibilities is disingenuous to say the least.

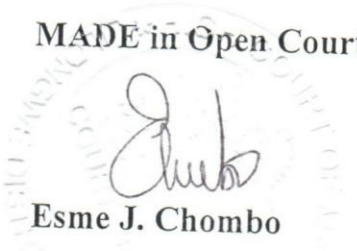
Their application is therefore dismissed.

C. CONCLUSION

In conclusion, therefore, the application by the Defence is dismissed in its entirety for the reasons given in the preceding paragraphs.

On another note, and in view of the expiry of the Trial Judge's mandate on 1st June 2021, it is clear that not much can be done within the remaining period before the due date. In my view therefore, the only option is to refer the matter to the Judge President, Criminal Division for further directions.

MADE in Open Court this day of the Lord 20th May 2021.



Esme J. Chombo

JUDGE