



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CRIMINAL DIVISION**

**CRIMINAL REVIEW NO. 36 OF 2021**

**(Being Criminal Case No. 397 of 2021 before the Chief Resident Magistrate Court sitting at Dalton Magistrate Court)**

**THE REPUBLIC**

**V**

**FAIZAL GAFFAR LATIF AND SEVEN OTHERS**

**Coram: Justice Vikochi Chima**

**Mr Modesai Msisha SC and Mr Chungu, Counsel for the State**

**Mr Mwakhwawa and Mr Wame, Counsel for the Defence**

**Mrs Moyo, Court Clerk**

**RULING**

1. The applicants applied to this court *ex parte* to have the Chief Resident Magistrate's court record reviewed in the matter and also to have the proceedings therein stayed pending the review. The Chief Resident Magistrate had refused to grant the prayer by the applicants for an adjournment of the trial of 20 September 2021 for a period of at least one month. The application for adjournment was made *inter partes*, by way of summons and supported by affidavits. There were two main grounds for the prayer. These were that:  
'The defence did not have enough time to prepare for the trial due to the late service of disclosures... The volume and nature of the disclosed material is such that the time originally set for the preparation of the trial is not enough.'
2. Following the magistrate's refusal to grant the adjournment, the applicants applied to the High Court to have the decision reviewed.
3. As things turned out, the *inter partes* application for review before this court was heard after the month period that the applicants were asking for in the magistrate's court. The

applicants asked for the court to make the same directions that it would have made had the application been heard in time.

4. Counsel for the respondent gave the history under the common law of the High Court's power to review decisions of lower courts. He stated that at first, the High Court, could through the writ of certiorari call for the record of the tribunal in order to determine the legality of the decision and that the jurisdiction was only exercised when it was demonstrated that there was an error apparent on the record. He went on to state that in order to have a formal and coherent regime for dealing with all matters where the High Court had the power to review the decisions of public bodies, Order 53 of the Rules of the Supreme Court (White Book) was put together. This Order addressed both the issues of substance as well as procedure. Order 53 was adopted in Malawi as part of the White Book pursuant to the Courts Act. Counsel for the respondent submits that with the coming in of the Courts (High Court) (Civil Procedure Rules) 2017 (the "CPR"), Order 53 has been adopted almost in its entirety under Order 19 of the CPR. According to counsel for the respondent, Order 19 is comprehensive and covers all matters of judicial review however arising.
5. Counsel for the respondent stated that in Malawi, the jurisdiction to review is to be found in the Constitution as well as various statutes. He, however, contended that the present application was invalid for being inconsistent with the Constitution, incompetent and without merit.

## I. THE HIGH COURT'S REVIEW JURISDICTION UNDER THE CONSTITUTION

6. Counsel for the respondent contends that the High Court's review powers under section 108 of the Constitution relate to **laws, actions or decisions of the Government** and that there is no mention of the decisions of other courts. He argues that the omission was deliberate and rational as decisions of other courts are reviewed only through appeal. He submits that any law purporting to give jurisdiction to the High Court beyond the express powers **in regard to review** would be unconstitutional. He further argues that when section 108 (2) talks of "**other jurisdiction and powers** which may be conferred by the Constitution or any other law", this jurisdiction and these powers should be with regard to matters **other than review**.
7. Section 108 of the Constitution states:
  - (1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.
  - (2) The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, **for conformity with this Constitution**, save as otherwise provided by this Constitution and **shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.** (emphasis supplied)
8. Subsection 2 deals with the High Court's original jurisdiction to review laws, actions or decisions of government **for purposes of conformity with the Constitution**. For one to argue that lower courts are excluded from this first part, one needs to interpret

“Government” as excluding the judiciary. Yet we know “Government” includes the judiciary.<sup>1</sup> Secondly, we need to bear in mind that the review powers of the High Court with regard to review of **laws, actions or decisions of Government** have been specifically stated to be for **the purpose of conformity with the Constitution**. It may be a popular notion that the High Court’s powers as regards review are mostly seen as exercised with regard to the executive and legislature but to then go on and read the provision to exclude court decisions as being outside this part of the provision would be imposing on it a foreign interpretation. Review powers of the High Court in lower courts decisions is meant in the final analysis to ensure the same thing that is meant to be accomplished with regards to review of the legislative as well executive actions, that is bringing the decisions in conformity with the Constitution. Thus, I do not agree that the first part of the provision excludes (by not specifically mentioning) lower courts’ decisions from being reviewed by the High Court. The provision goes on to state that the High Court shall have **other jurisdiction and powers** as may be conferred on it by the Constitution **or any other written law**. Counsel for the respondent’s argument that since the Constitution has already conferred the review jurisdiction in the first part and has specifically mentioned the components that can be the subject of review and has excluded lower courts’ decisions, cannot exclude further review powers being given in this second part unless the provision expressly stated that the review powers in the first part of the provision are the **only review powers** the High Court is to have and that **other jurisdiction and powers** does not include **further review powers**. Thus review and supervisory powers that are under the Courts Act and Criminal Procedure and Evidence Code can also fall under this second ambit of the provision. The sum of it all is that there is no conflict between what the Constitution provides and what the impugned review provisions of the Courts Act (sections 25, 26, 27 and 28) and the Criminal Procedure and Evidence Code (sections 360, 362 and 363) provides.

9. Further, review of a matter is not interference with a presiding officer’s powers of decision-making which is what section 103 of the Constitution is against. The High Court does not dictate to the judicial officer what conclusions he/she should come to in any matter.

## II. THE HIGH COURT’S SUPERVISORY AND REVIEW POWERS UNDER THE COURT’S ACT AND THE CRIMINAL PROCEDURE AND EVIDENCE CODE

10. Counsel for the respondent contends that if section 25 of the Courts Act be held to be valid, then the power of review under the Criminal Procedure and Evidence Code is to be exercised by the High Court of its own motion under section 360 of the Criminal Procedure and Evidence Code, and that there is no power of review under the Criminal Procedure and Evidence Code on application of a party. It is further argued that if section 26 of the Courts Act be held to be valid, then such an application for review would have to be under Order 19 of the CPR since section 26 provides no mechanism for its implementation.

---

<sup>1</sup> Section 4 of the Constitution

Additionally, counsel states that while the applicant has no right to be heard by virtue of section 28 of the Courts Act, the applicant is entitled to be heard under Order 19 of the CPR. It is counsel's submission that when read together with section 26, section 28 confirms that the powers of review under sections 25 and 26 of the Courts Act are limited to demonstrating a clear error apparent on the face of the record (the certiorari jurisdiction). And that the exercise of the statutory discretion given to a trial court is not an error of law; that it may be appealable but that it is not reviewable as it does not constitute an error of law. It is argued that if the discretion is exercised erroneously, the remedy for criminal cases is an appeal under Part XIII of the Criminal Procedure and Evidence Code.

11. Section 25 of the Courts Act states:

'The High Court shall exercise powers of review in respect of criminal proceedings and matters in subordinate courts in accordance with the law for the time being in force relating to criminal procedure.'

12. Section 26 of the Court's Act states:

(1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, **if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal**, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record under subsection (1), the matter or proceeding in question shall be stayed in the subordinate court pending the further order of the High Court.

13. Section 27 of the Court's Act provides thus:

'Where an appeal lies from any judgment in any civil matter and no appeal is brought, no proceedings by way of review shall be entertained at the instance of the party who could have appealed.'

14. Section 28 of the Court's Act stipulates:

'No party shall have any right to be heard, either personally or by a legal practitioner, before the High Court when exercising its powers of review or supervision under sections 25 and 26: Provided that no order shall be made to the prejudice of any person unless such person has had an opportunity of being so heard.'

15. Section 360 of the Criminal Procedure and Evidence Code states:

'The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.'

16. First, as already pointed out, the revisionary provisions in the Courts Act and Criminal Procedure Evidence Code are not in conflict with section 108 (2) of the Constitution. Secondly, the review provisions under the Courts Act and the Criminal Procedure and evidence Code must be read together to produce a coherent regime. It is clear that section 26 of the Courts Act states that a party to criminal proceedings can apply to the High Court for a matter to be reviewed. Section 360 of the Criminal Procedure does not preclude a party from applying for review. Actually, it does not specify the means by which the High Court gets to know about a matter which it then finds necessary to call for the record. It may be because a party or other interested person moved the court or it may be on the court's own motion.

17. Order 53 was an implementation mechanism for judicial review proceedings in civil matters and that the regime is indeed continued in Order 19 of the CPR. Order 53 was not used for review proceedings in criminal matters before the coming in of the CPR. Thus there is no reason to worry about what would be the implementation mechanism now. The same one(s) that were used then are the same one(s) to apply now. There is no need for specialised forms. The underlying principle is substantial justice should be done without undue regard to technicalities.<sup>2</sup>

18. Counsel for the respondent submits that section 360 of the Criminal Procedure and Evidence Code is generally exercised at the end of the trial that was before a subordinate court. He points out that this provision appears under part XIII which deals with Appeals and Review. He submits that since section 360 is supposed to be read with sections 362 (1) and 353 (2) (a) (b) and (c) and 356 of the Criminal procedure and Evidence Code and that the remedies the court can award after review are limited to those in sections 353 (2) (a) (b) and (c) and 356 (same as on appeal), his point is that review and appeal happen at the end of the subordinate court trial. He further argues as follows that:

‘On a correct construction of section 360 the following words must be given their proper meaning in context:

(a) “finding” must mean a verdict either acquitting or convicting and not an order such as an adjournment. The fact that finding is followed by “sentence or order passed” points to “finding” being a step which leads to sentence or other order that comes after a finding.

(b) “sentence” must mean that whatever finding was made was at the end of the proceedings.

(c) “order recorded or passed” must mean an order in the nature of a sentence.’

19. Counsel submits that based on the meanings of these words in context and also on the fact that the remedies that the High Court can grant on review are also the same that are granted on appeal, then it must mean that the powers under section 360 are exercisable only by the High Court of its own motion and not at the behest of any party (since the appeal process already caters for aggrieved parties) and that such powers are only used after the subordinate court has made its findings and passed its orders. He also submits that section 26 of the Courts Act cannot be read together with section 360 of the Criminal Procedure and Evidence Code.

20. Section 361 states that:

‘(1) Any Resident Magistrate may call for and examine the record of any criminal proceedings before a subordinate court of the first, second, third or fourth grade, for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior subordinate court.

(2) If any Resident Magistrate acting under subsection (1) considers that any finding, sentence or order of the subordinate court of the first, second, third or fourth grade is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the High Court.’

21. Section 362 provides:

‘(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been forwarded under section 361, or which otherwise comes to its knowledge, the High Court, by way of review, may exercise the same powers as are conferred upon it on appeal by sections 353 (2) (a), (b) and (c), and 356.

---

<sup>2</sup> Section 3 of the Criminal Procedure and Evidence Code

(2) No order made in exercise of the powers conferred in this section shall be made to the prejudice of an accused unless he has first had an opportunity of being heard either personally or by a legal practitioner in his own defence.

(3) The proceedings by way of review may take place notwithstanding—

(a) that an appeal lies from the finding made, or sentence imposed, in the proceedings under review; and

(b) that the time limited for the bringing of such appeal has not elapsed—

(i) the time limited for the bringing of an appeal against the finding made, or the sentence imposed, in such proceedings has elapsed; or

(ii) the accused has declared in writing that he does not intend to appeal against either such finding or such sentence.

(4) The exercise of the High Court of its powers of review under this section in relation to any proceedings shall not operate as a bar to any appeal which may lie against the finding made, or the sentence imposed, in such proceedings:

Provided, however, that such review shall operate as a bar to such appeal if the proceedings by way of review took place in open court and the accused had an opportunity of being heard either personally or by a legal practitioner.

## 22. Section 363 stipulates

‘(1) The High Court may, if it thinks fit, when exercising powers of review, hear any party either personally or by a legal practitioner.

(2) No party has any right to be heard either personally or by a legal practitioner before the High Court when exercising its powers of review but nothing in this subsection shall be deemed to affect section 362 (2).’

## 23. Section 353 (2) states that:

‘After perusing the record of the case and after hearing the appellant or his legal practitioner if he appears, the court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal by any aggrieved person from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial;

(ii) alter the finding maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence;

(iii) with or without such reduction, or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal by any aggrieved person from any other order, alter or reverse such order;

(c) in an appeal by the Director of Public Prosecutions from a finding of acquittal—

(i) if the finding of acquittal was arrived at without the defence having been called, remit the case to the subordinate court with a direction to proceed with the trial and to call on the defence;

(ii) in any other case, convert the finding of acquittal into one of conviction and either make an order under section 337, 338 or 339 or pass sentence or remit the case to the subordinate court for sentence, and in any of the cases mentioned in this subsection the court may make any amendment or any consequential or incidental order that may appear just and proper...’

24. It would have been arguable to follow the *ejusdem generis* rule in section 360 if the list of items ended at “order” and was followed by general words, however, the provision goes further to state that the High Court can also satisfy itself as to the “regularity of any proceedings of any such subordinate court”. With this phrase then, it becomes difficult to make a construction of the terms used in the provision based on the *ejusdem generis* rule. The genus of “finality” does not fit. Giving the words their ordinary meaning gives the best interpretation here. Even though reviewing the regularity of proceedings can be done at the end of the trial, it cannot be said that it should be confined to that period, especially if one

considers the clear wording of section 346 of the Criminal Procedure and Evidence Code (which is in contradistinction to section 360) and also section 26 of the Courts Act.

25. Section 346 of the Criminal Procedure and Evidence Code states that:

“Save as hereinafter provided, any person aggrieved by any **final judgment or order**, or any sentence made or passed by any subordinate court may appeal to the High Court.”

26. The clear wording of section 346 is that an appeal lies against a **final judgment** or order or sentence. No use of the word final is in section 360. Thus it is hard to confine reviews to final orders even though the remedies upon review may be the same as those given under section 353 (2) upon appeal. Secondly section 26 of the Courts Act is clear that reviews can be done at any stage of a trial, whether criminal or civil. Counsel for the respondent had submitted that section 26 of the Courts Act cannot be read with section 360 of the Criminal Procedure and Evidence Code. Why this should be so, he did not explain. With section 26 of the Courts Act being very clear that reviews can be done at any stage, section 360 of the Criminal Procedure and Evidence Code would have to be abundantly clear to limit reviews to the end of subordinate court trials.

27. Review and appeal are parallel processes with certain similarities and differences. An appeal is always initiated by a party to the case but a review can be had on the High Court’s own motion or indeed at the instance of a resident magistrate or just an interested party. Secondly, an appeal usually deals with the final judgment in a matter while review can be done at any stage and may even just deal with the regularity of the proceedings. Unless an appeal is dismissed summarily under section 351 of the Criminal Procedure and Evidence Code, parties are guaranteed audience before the court,<sup>3</sup> while parties are not guaranteed audience in a review provided no order is to be made to the prejudice of any person (otherwise, such person will have to be heard). An appeal is time limited<sup>4</sup> unless an extension of time is granted by the court while a review is not time bound. A review can still take place even though an appeal lies from the finding made or sentence imposed and the time for bringing the appeal has not elapsed. In a civil matter, however, if an appeal lies against any judgment and no appeal is brought, no proceedings by way of review will be entertained at the instance of the party who could have appealed.<sup>5</sup> A review may also take place even though the accused has declared in writing that he does not intend to appeal against the orders.<sup>6</sup> The exercise of the High Court’s powers of review is only a bar to an appeal so long as the review took place in open court and the accused had an opportunity of being heard either personally or by a legal practitioner.<sup>7</sup> Just as the High Court can summarily dismiss an appeal if it is vexatious or frivolous, it also has the discretion to refuse to call for a file if the application for review tends towards the same. The High Court may grant similar remedies in both processes with the exception that in review, the moment

---

<sup>3</sup> Section 353 of the Criminal procedure and Evidence Code

<sup>4</sup> Section 349 of the Criminal Procedure and Evidence Code

<sup>5</sup> Section 27 of the Courts Act

<sup>6</sup> Section 362 of the Criminal Procedure and Evidence Code

<sup>7</sup> Ibid

the High Court calls for the file, the proceedings stand stayed in the subordinate Court. Further, the High Court may remove the proceedings and deal with them itself or may transfer them to another subordinate court with such directions for the further conduct of the same.<sup>8</sup>

### III. THE MERITS OF THE APPLICATION

28. The applicants were aggrieved by the decision of the Chief Resident Magistrate in refusing their prayer for an adjournment. Section 250 of the Criminal Procedure and Evidence Code gives discretion to the court whether or not to grant an adjournment. The ground for asking an adjournment was that the defence had been served with disclosures one month late and that the disclosures were voluminous necessitating a recovery of the lost month of preparation. That seems a reasonable request. In the first place, if the timelines provided for such a period of time for disclosures, they could not be abridged through the backdoor by the defence. The court should not have sanctioned that for that impeded on the applicants' right to fair trial. Of course, there is need to balance the right to a fair trial and right to be tried within a reasonable time. But once the timelines were set, which timelines appear reasonable, there was no reasonable cause to allow the state to benefit from their wrong. The Chief Resident Magistrate states in her ruling refusing the adjournment that the defence should have come to her to advise before the trial date that the defence had not complied with the directions. I am not sure whether by that she means putting in a certificate of non-compliance which used to be the process in civil matters in the recent past. It may be courteous so to do but it is not mandatory. Thus my finding is that the applicants' application was meritorious.
29. Counsel for the respondent had argued that if the applicants were aggrieved with the decision for the refusal of the adjournment, then ought to have reserved this issue so that it constitutes grounds for impeaching the decision on appeal. Section 5 of the Criminal Procedure and Evidence Code states that:
- '(1) Subject to section 3 and to the other provisions of this Code, no finding arrived at, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal of complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless such error, omission or irregularity has in fact occasioned a failure of justice.
- (2) **In determining whether any error, omission or irregularity has occasioned a failure of justice the court shall consider the question whether the objection could and should have been raised at an earlier stage in the proceedings.'**
30. The above provision shows that one is supposed to raise an objection in a trial court at the right time and not wait for the appeal process. The applicants had done that in the trial court and the court had rejected their application. Yet since the issue would affect the preparation for trial, it becomes more reasonable to have that decision reviewed before the case comes to conclusion rather than to wait for appeal.

---

<sup>8</sup> Section 26 of the Courts Act



**IV. DIRECTIONS**

31. This court will issue no other direction than that the court seized with the matter should continue hearing the matter and determine it according to law and to what the justice of the matter entails, for the defence already got the month they requested by default.

**Made this day the 8th of February 2022**

  
**Justice Vikochi Chima**

