IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CRIMINAL DIVISION

MISC. CRIMINAL CASE NO. 04 of 2022

(Being Criminal Case No. 43 of 2022 before the Senior Resident Magistrate's Court sitting at Lilongwe)

JOSHUA CHISA MBELE ..... APPLICANT

and

THE REPUBLIC ..... RESPONDENT

CORAM: Honourable Justice Annabel Mtalimanja

Mr. Khonyongwa, for the Applicant

Mr. Masanjala, Mr. Mphalale (deceased), Mr. Kaunde, Mr. Chuma, for the Respondent

Mrs. Kalumbi, Court Reporter

Mrs. Khonje, Court Clerk

ORDER

Mtalimanja, J

1. The Applicant stands charged before the Senior Resident Magistrate Court (the "SRM") sitting at Lilongwe with, *inter alia*, the offence of criminal libel,

contrary to section 200 of the Penal Code, Cap. 7:01 of the Laws of Malawi. He contends that this offence does not meet the constitutional test in section 44 (1) of the Constitution of reasonableness, recognition by international human rights standards and necessity in an open and democratic society. He has now approached this Court with this Application, pursuant to section 9 (2) and (3) of the Court's Act, Cap. 3.02 of the Laws of Malawi, as read with O.19, r. 7 (1) of the Courts (High Court)(Civil Procedure) Rules, 2017 (" the CPR"), seeking the following determination and relief:

a) that his challenge of the constitutionality of section 200 of the Penal Code be referred by this Court to the Chief Justice for certification as a constitutional matter and be dealt with in terms of section 9 (2) and (3) of the Court's Act as read with O.19, r.2 of the Court (High Court)(Civil Procedure) Rules, 2017; and

b) that the proceedings before the SRM be stayed pending the said referral and determination of the constitutional question.

2. In opposition, the Respondent's position is that this Application is premature and lacks legal basis since there are currently no proceedings before the High Court to trigger section 9 (2) of the Courts Act. The Respondent contends that this Application should have been brought before the SRM, being the court seized of the matter; or, alternatively, the Applicant should have first commenced proceedings before the High Court. Further, the Respondent contends that the Applicant has failed to demonstrate the constitutional merits to justify the matter being certified as a constitutional matter.

3. As I understand the Application and the Respondent's response, there are two issues to be determined by this Court; firstly, whether the said Application is properly before this Court and secondly, whether there is merit in referring the matter to the Chief Justice for certification as a constitutional matter fit for disposal by a panel of three Judges as stipulated by section 9 (2) of the Courts Act. In disposing of the matter, I will first consider whether there is merit in referring the matter to the Chief Justice for certification and then consider whether the Applicant is properly before this Court.

4. Regarding the question whether there is merit in the Application, the Applicant submitted that the criminal libel law in section 200 of the Penal Code does not meet the international human rights standards to which Malawi subscribes, in particular the African Charter on Human and People's Rights (the "ACHPR") as well as the International Covenant on Civil and Political Rights (the "ICCPR"). The Applicant invited the Court to consider the case of *Rafael Marques de Morais v Angola*[1], in particular the View of the United Nations Human Rights Committee to the effect that the use of criminal defamatory provisions is against the spirit of article 19 of the ICCPR.

5. The Applicant also invited the Court to consider the case of *Lohe Issa Konate v The Republic of Burkina Faso*[2] where the African Court on Human and People's Rights held that criminal defamation is an affront to freedom of expression and much more so where the reputation in question is that of public figures.

6. The Applicant also submitted that section 200 of the Penal Code does not meet the limitation test prescribed in section 44 of the Constitution that limitations and restrictions must be reasonable, recognized by international human rights standards and necessary in an open and democratic society.

7. The Applicant finally submitted that he had made out the case that section 200 of the Penal Code does not meet the constitutionality test, such that it would be unfair and unjust for the criminal proceedings before the SRM to proceed; therefore the said proceedings ought to be stayed, pending the referral of the matter by this Court to the Chief Justice for certification as a constitutional matter to be dealt with in terms of section 9 (2) and (3) of the Courts Act as well as O.19, r. 2 of the CPR.

8. In response, the Respondent contends that the Applicant has failed to demonstrate any constitutional merits of the Application. Further, it is

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[1] Communication No. 1128/2002,
U.N. Doc. CCPR/C/83/D/1128/2002 (2005)., University of Minnesota Human Rights Library (umn.edu), last visited on 13th June, 2022.

[2] Judgment Appl.004-2013 Lohe Issa Konate v Burkina Faso -English.pdf (african-court.org), last visited on 13th June, 2022.

contended that the fact that the Applicant has cited constitutional provisions does not mean it ought to be certified as a constitutional matter, as a matter of course. It is also contended that the Constitution being the supreme law of the land that provides for rights and duties of the people, it ought to be guarded jealously against being used as a shield against criminal proceedings.

9. According to the Respondent, the Applicant is intending to delay the criminal proceedings against him such that he is searching for ways to evade the justice and conclusion of the matter. If the Application is granted, so goes the argument, it would be detrimental to the State and the criminal justice system by creating a very contentious precedent at law.

10. At this point I must state that the Respondent did not file any skeleton arguments on the question whether there was any merit in referring the matter to the Chief Justice for certification as a constitutional matter. This notwithstanding, the Respondent made oral submissions in response to the Applicant's legal arguments.

11. Regarding the *Lohe Issa Konate v The Republic of Burkina Faso* case, it was the Respondent's submission that it was natural for the Court to decide in the manner that it did because the offence was a strict liability offence and the accused person in that case was a journalist. Further, that upon conviction, he was sentenced to 6 months imprisonment and ordered to pay $169, 000, court tax $328 and damages in the sum of $17,000. This, according to the Respondent, is distinguishable from the Malawian scenario where the offence created by section 200 of the Penal Code is a misdemeanor, punishable with less than 3 years imprisonment.

12. To provide context I will reproduce the legal provisions in issue in full.

13. Section 200 of the Penal Code provides that:

> *"Any person who, by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another*

person, with intent to defame that other person, shall be guilty of the misdemeanor termed "libel".

14. Section 34 of the Penal Code provides that:

"When in this Code no punishment is specially provided for any misdemeanor, it shall be punishable with a fine or with imprisonment for a term not exceeding two years or with both."

15. The legislature having not specially provided for a punishment under section 200, libel is punishable with a fine or with imprisonment for a term not exceeding two years or with both.

16. Apart from creating the offence of criminal libel, the Penal Code also makes provision for several aspects related to the offence, including definitions of defamatory matter (section 201); publication (section 202); and unlawful publication (section 203). It also provides for cases in which publication of a defamatory matter is absolutely privileged (section 204) and where publication is conditionally privileged (section 205). Finally, it also provides for explanation as to good faith (section 206) and presumption as to bad faith (section 207).

17. Section 35 of the Constitution provides that:

"Every person shall have the right to freedom of expression."

18. Section 44 (1) and (2) of the Constitution provides that:

"(1) No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(2) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application."

19. Reading these provisions together, it appears to this Court that there is, *prima facie*, a latent discordance between the offence of criminal libel created by section 200 of the Penal Code on one hand and the right to freedom of expression guaranteed by section 35 of the Constitution on the other hand. In this Court's considered view, given the fact that the right to freedom of expression is not absolute, there is merit in exploring the *prima facie* latent discordance in light of section 44 (1) and (2) of the Constitution: in particular whether it can be said that the offence of libel in section 200 and the ancillary aspects thereof provided in section 201 to 207 of the Penal Code and its attendant punishment is reasonable, recognized by international human rights standards and necessary in an open and democratic society.

20. Coming to international human rights standards, article 19 of the ICCPR provides that:

> "1. *Everyone shall have the right to hold opinions without interference.*
>
> *2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
>
> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> > *(a) For respect of the rights or reputations of others;*
> >
> > *(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

21. Malawi ratified the ICCPR on 23rd December, 1993.

22. Article 9 (2) of the African Charter on Human and People's Rights provides that every individual shall have the right to express and disseminate his opinions within the law.

23. Malawi ratified the ACHPR on 17th November, 1989. Further, Malawi ratified the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Right on 9th September, 2008.

24. Section 211 of the Constitution provides that:

> *"1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by an Act of Parliament.*
> *(2) Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.*
> *(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic."*

25. Regarding this provision, in the case of *In the matter of CJ and In the matter of the Adoption of Children Act [2009] MLR 220 (SCA)*, the Supreme Court stated that:

> *"We think that the correct reading of that section is to follow the clear language that has been employed. If one does that one will find that the clear thread that runs through the fabric of all the subsections of section 211 of our Constitution is that all international agreements entered into prior to the Constitution or after the Constitution are only binding if they are not in conflict with the clear provisions of our statutes. Put differently, whether an international agreement forms part of our law, regardless of when it was entered into, will depend on whether there is no Act of Parliament that provides to the contrary. And the question whether customary international law forms part of our law will depend on whether it is consistent with our Constitution or our statutes."*

26. The Supreme Court further went on to state that:

"In all cases therefore the courts will have to look at our Constitution and our statutes and see if the international agreement in question or the customary international law in question is consistent or in harmony with the law of the land and the Constitution. In doing so the courts will try as much as possible to avoid a clash between what our laws say on the subject and what the international agreements or conventions are saying on the subject, but where this is not possible, the provisions of our Constitution and the laws made under it will carry the day."

27. Applying this reasoning to the present case, Malawi having ratified the ICCPR and the ACHPR, there is merit in exploring whether section 200 as read with sections 201 to 207 of the Penal Code is consistent with and in harmony, not only with section 35 of the Constitution, but also with article 19 and article 9 (2) of the ICCPR and ACHPR respectively.

28. Pausing here I wish to express, in passing, wonder why in the citation of the *In the matter of CJ and In the matter of the Adoption of Children Act* case, being a case involving a child, her full name is published in the Law Reports, as opposed to only her initials or any appropriate identifying marker to preserve her identity. Ordinarily, in keeping with the best interests of the child, particularly preservation of the right to privacy, the identity of the child was supposed to be masked in the Report.

29. Coming back to the present case, the process of exploring whether the offence of criminal libel is a restriction or limitation to the right to freedom of expression that is reasonable, recognized by international human rights standards and necessary in an open and democratic society, is in this Court's mind, the very process envisaged by section 9 (2) of the Courts Act, which a Court must undertake to establish the constitutionality of the law in question.

30. It will be recalled that the Respondent has taken the view that the Applicant claims that this matter raises constitutional questions as a ploy to derail the ongoing criminal proceedings. This Court does not agree with this. As concluded above, there is, *prima facie*, a latent discordance between the

offence of criminal libel and the right to freedom of expression as guaranteed by the Constitution that is worth a more comprehensive exploration in light of section 44 thereof and under Malawi's obligations under applicable international human rights instruments, in order for the Court to make a definitive finding on the point.

31. This Court has addressed its mind to the Respondent's submissions on the cases of *Rafael Marques de Morais v Angola* and *Lohe Issa Konate v The Republic of Burkina Faso*.

32. In the *Lohe Issa Konate v The Republic of Burkina Faso*, Mr. Lohe Issa Konate brought an Application before the African Court on Human and People's Rights (the "Court") alleging that the punishment in the form of a term of 12 months imprisonment, $3000 fine, $9000 damages and $500 costs imposed by the High Court of Ouagadougou and confirmed by the Burkina Faso Supreme Court on charges of defamation, public insult and contempt of court violated his right to freedom of expression which is protected under various international treaties to which Burkina Faso is a party, notably, article 19 of the ICCPR and article 9 (2) of the ACHPR. The background to the conviction and impugned punishment was that the Konate had published 3 different articles in the L'ourgan Weekly against the Prosecutor of Burkina Faso titled *Counterfeiting and laundering of fake bank notes – the Prosecutor of Faso*; *3 Police Officers and Bank official - Masterminds of Banditry*; and *The Prosecutor of Faso – a Saboteur of Justice and Miscarriage of Justice – the Prosecutor of Faso: a rogue Officer*.

33. Konate was seeking the Court to declare in law that his punishment, especially his conviction as well as his being ordered to pay a huge fine, civil damages and court costs were in violation of the right to freedom of expression. He also was seeking the Court to note that Burkina Faso's laws on defamation and insult were repugnant to the right to freedom of expression or failing this, declare that the jail term for defamation was a violation of the right to freedom of expression, and order Burkina Faso to amend its laws accordingly.

34. In denying the allegations the State of Burkina Faso stated that it had ratified all international human rights conventions and treaties and denied violation of article 19 and 9(2) of the ICCPR and the ACHPR respectively. It further stated that its national laws and enforcement thereof were neither vague nor uncertain. Furthermore, it stated that the conviction and punishment were a necessary and proportionate response to protect the rights of the Prosecutor, considering the gravity of the statements made against him by the Applicant and the fact that he had suffered.

35. Regarding the merits of the Application, the Court considered the domestic Burkinabe law alongside its international obligations under, *inter alia*, the ICCPR and the ACHPR. In disposing of the matter, the Court unanimously declared, *inter alia,* that Burkina Faso had violated articles 19 and 9 (2) of the ICCPR and ACHPR respectively, due to the existence of the custodial sentences on defamation in its laws. The Court also unanimously ordered Burkina Faso to amend its legislation in order to make it compliant with articles 19 and 9 (2) by repealing custodial sentences for acts of defamation; and adapting its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality in accordance with its obligations under the Charter and other international obligations.

36. Having considered this case, it is this Court's considered view that, contrary to the Respondent's submissions dismissing it as irrelevant to the present Application, it is as a matter of fact, actually relevant. This is on account of the fact that the case depicts the very exploration and analysis of section 200 of the Penal Code against the constitutional provisions as well as international human rights treaties that Malawi has ratified and are part of the law that is required to be done.

37. Regarding the *Rafael Marques de Morais v Angola* case, Rafael Marques de Morais, an author, journalist and also the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President dos Santos in an independent Angolan newspaper. In these articles, he stated, *inter alia*, that the President was responsible for the destruction of the country and the calamitous situation of State institutions and was accountable for the

promotion of incompetence, embezzlement and corruption as political and social values.

38. Following this publication he was arrested and initially detained without being informed of the reason for such detention, then was charged with materially and continuously committing crimes characteristic of defamation and slander against the President and the Attorney General under the Angolan Press Law and Penal Code. He was released on bail, whose terms were that he was not to leave Angola and also not to engage in certain activities that are punishable by the offence committed and that create the risk that new violations may be perpetrated. During his trial and in pursuance to a provision in the Angolan Penal Code, the Court ruled that evidence he presented to support his defence of the truth of the allegations and the good faith basis upon which they were made, including the texts of speeches of the President, Government resolutions and statements of foreign State officials, was held to be inadmissible.

39. He was convicted of abuse of the press by defamation, finding that his newspaper article contained offensive words and expressions against the Angolan President. The Court found that he had acted with intention to injure and sentenced him to six months' imprisonment and to pay a fine, compensatory damages and court tax. He appealed to the Supreme Court of Angola, which quashed the trial court's judgment on the defamation count, but upheld the conviction for abuse of the press on the basis of injury to the President. The Supreme Court considered that his acts were not covered by his constitutional right to freedom of speech, since the exercise of that right was limited by other constitutionally recognized rights, such as one's honour and reputation, or by the respect that is due to the organs of sovereignty and to the symbols of the State, in this case the President of the Republic. It affirmed the prison term of six months, but suspended its application for a period of five years, and ordered him to pay a court tax and damages to the victim.

40. Subsequent to this, under Communication No. 1128/2002, de Morais submitted Communication to the Human Rights Committee claiming that he

was a victim of violations by Angola of articles 9, 12, 14 and 19 of the ICCPR. He contended that his critical statements about President dos Santos were covered by his right to freedom of expression under article 19, which requires that citizens be allowed to criticize or openly and publicly evaluate their Governments, as well as the ability of the press to express political opinion, including criticism of those who wield political power.

41. He also contended that the unlawful arrest and detention on the basis of his statements, the restrictions on his rights to free speech and movement pending trial, his conviction and sentence, and the threat that any expression of opinion may be punished by similar sanctions in the future, constituted restrictions on his freedom of speech.

42. He argued that these restrictions were not provided by law within the meaning of article 19 (3) of the ICCPR, given (a) that his unlawful detention and subsequent travel restrictions had no basis in Angolan law; (b) that his conviction was based on provisions such as article 43 of the Angolan Press Law (abuse of the press) and article 410 of the Angolan Criminal Code (injury), which lacked the necessary clarity to qualify as adequately accessible and sufficiently precise norms, enabling an individual to foresee the consequences that his statements may entail; and (c) that the terms of his bail prohibiting him to engage in certain activities that [...] create the risk that new violations may be perpetrated were equally unclear and that he had unsuccessfully requested clarification of the meaning of this restrictions.

43. He also denied that the restrictions imposed on him pursued a legitimate aim under article 19 (3) (a) and (b) of the ICCPR. In particular, respect of the rights or reputation of others could not be interpreted so as to protect a President from political, as opposed to personal, criticism, given that the aim of the Covenant is to promote political debate. Nor were the measures against him necessary or proportionate to achieve a legitimate purpose, considering (a) that the limits of acceptable criticism are wider regarding politicians as opposed to private individuals, who do not enjoy comparable access to effective channels of communication to counteract false statements; (b) that he was convicted for his statements without having had an opportunity to

defend the factual basis of these statements or to establish the good faith basis on which they were made; and (c) that the use of criminal rather than civil penalties against him, in any event, constitutes a disproportionate means of protecting the reputation of others.

44. In considering de Morais's Communication, the Human Rights Committee referred to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in article 19 (3) of the ICCPR: it must be provided for by law, it must serve one of the aims enumerated in article 19, (3) (a) and (b), and it must be necessary to achieve one of these purposes.

45. The Committee noted that de Morais's final conviction was based on Article 43 of the Press Law, in conjunction with Section 410 of the Criminal Code. The Committee further noted that even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims.

46. The Committee observed that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance of the right to freedom of expression and of a free and uncensored press or other media in a democratic society, the severity of the sanctions imposed on the author could not be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition.

47. Ultimately, the Committee took the view that the facts before it revealed violations of *inter alia*, article 19 of the ICCPR. Further, that Angola, as a State party to the Covenant, was under an obligation to take measures to prevent similar violations in the future. The Committee also took the view that bearing in mind that, by becoming a party to the Optional Protocol, Angola

had recognized the competence of the Committee to determine whether there had been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, it had undertaken to ensure all individuals within its territory or subject to its jurisdiction enjoyed the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation had been established, the Committee wished to receive from Angola, within 90 days, information about the measures it had taken to give effect to the Committee's Views. Angola was also requested to publish the Committee's Views.

48. Cognizance must first be taken of the fact that the views of the Human Rights Committee in this case were expressed within the context of the individual complaints procedure under the Optional Protocol to the ICCPR, pursuant to which Rafael de Morais submitted the Communication to the said Committee. Cognizance must also taken of the fact that Malawi accepted the individual complaints procedure under the said Protocol on 11th June, 1996. This Court thus is of the view that the facts of the case and the Views of the Committee are relevant at this stage and persuasive in determining whether there is merit in this Application herein.

49. This Court is of the considered view that the case above provides insightful context about the extent of the obligation for member States, including Malawi, created under article 19 of the ICCPR. Further, just like the *Lohe Issa Konate v The Republic of Burkina Faso* case, it also aptly depicts the very exploration and analysis of section 200 of the Penal Code against the constitutional provisions as well as international human rights standards that Malawi has ratified and are part of the law that is required to be done.

50. From the foregoing consideration of the statute in question, sections 35 and 44 of the Constitution and the international human rights framework on the right to freedom of expression, this Court is satisfied that there is merit in questioning the constitutionality of section 200 of the Penal Code. Therefore, it is this Court's finding that the question raised by the Applicant concerning the constitutionality of section 200 of the Penal Code is indeed fit for referral to the Chief Justice under section 9 (3) of the Courts Act for certification as a constitutional matter to be dealt with under section 9 (2) of the said Act.

51. To recap, the second limb of the Application relates to the propriety of the Application. It will be recalled that it was the Respondent's submission that the Applicant has made an application for certification of proceedings when there are no such proceedings before the High Court, which expressly and substantively relate to or concerns the interpretation or application of a provision of the Constitution in terms of section 9 (2) of the Courts Act. The Respondent further submits that if the Applicant was minded to lodge a constitutional challenge of the defamation law, he should have first commenced an action by way of summons in the High Court in terms of O.5, r.1 of the CPR.

52. According to the Respondent, as per the case of *Dr. Bakili Muluzi v The Director of the Anti-Corruption Bureau (MSCA Civil Appeal No. 17 of 2005),* a constitutional challenge of a statutory provision cannot be made without giving the Attorney General three months notice in terms of section 4 of the Civil Procedure (Suits by or Against Government or public officers) Act, Cap. 6:01 of the Laws of Malawi. It was further submitted that in terms of the same *Dr. Bakili Muluzi* case, the commencement procedure of cases involving the interpretation of a statutory provision should be the same as commencement of proceedings in ordinary cases. Applying this case to the present matter and following the introduction of only one mode of commencing proceedings under the CPR, the proper approach for the Applicant should have been commencement of proceedings by way of summons after giving the Attorney General three months' notice, so went the argument.

53. Context is very crucial in legal proceedings. Therefore, as a starting point, it must be pointed out, at the risk of stating the obvious, that this Application has arisen and been lodged by the Applicant within the context of criminal proceedings ongoing before the SRM; and the nature of the business before this Court remains the same: an Application within the context of criminal proceedings. To state the obvious, again, the parties in these proceedings are *The Republic v Joshua Chisa Mbele.*

54. In this Court's considered view, the fact that the Applicant has raised a question about the constitutionality of a penal provision within the context of

the criminal proceedings does not change the nature of the underlying proceedings into civil proceedings. The underlying nature remains the same even if constitutional questions arise within the course of the proceedings.

55. This Court is fortified in holding this view on account of a reading of section 6A as read with section 9 of the Courts Act. It will be observed that the Courts Act does not create a Constitutional Court or a Constitutional Division of the High Court but merely provides that proceedings expressly and substantively relating to or concerning the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges. This Court understands these provisions to mean that even where the business before the High Court relates to or concerns the interpretation of the Constitution, thus triggering the application of section 9(2) of the Act, the nature of the underlying proceedings remains the same. What changes is just the composition of the bench hearing and disposing of the matter.

56. A perusal of the scheme of the law envisaged in O.19 of the CPR, particularly O.19, r.7 (5) further fortifies this view. O.19, r. 7 (5) provides that:

> "*The decision of the Court shall be remitted to the original court which shall decide the proceeding before it in accordance with the decision of the Court.*"

57. Reading this Rule together with section 9 of the Courts Act takes this Court back to the same conclusion that the underlying proceedings, within the context of which a constitutional question has arisen, remain the same, hence the requirement for the decision of the court to be remitted to the original court for final disposal.

58. Coming back to the nature of the proceedings herein, the said proceedings being criminal, it is this Court's considered view that the CPR are not applicable to the same. This is on account of O.1, r.3 (1) of the said CPR, which restricts the application of those Rules to civil proceedings in the High Court. It appears to this Court therefore and I conclude that in this Court, the Applicant cannot competently invoke O.19, r.7(1) of the CPR or indeed the CPR generally, within these criminal proceedings as he has done.

59. I must quickly state that in arriving at this conclusion I have addressed my mind to O.19, r.1 of the CPR which provides that:

> "*This Part shall apply to a proceeding on the interpretation or application of the Constitution which is certified by the Chief Justice under rule 2 and shall be dealt with in the manner specified under section 9 (2) of the Act.*"

60. In this Court's considered view, much as on the face of it, this Rule appears to convey the meaning that Part 1 of O.19 applies to every proceeding on the interpretation or application of the Constitution which has been so certified by the Chief Justice, this does not appear to be what was intended by the legislature. O.19, r. 1 of the CPR, which must be read with O.1, r. 3 (1) thereof, expressly restricts the application of the Rules to civil proceedings in the High Court. Had it been that the legislature intended to extend the application of the CPR to criminal proceedings, even in limited sense, it would have expressly provided so. Without an express provision to that effect, this Court finds that it would be an absurd reading of the CPR to construe and extend the application of O.19 to proceedings other than civil proceedings.

61. As indicated, the Respondent argues that if the Applicant was minded to lodge a constitutional challenge of section 200 of the Penal Code, he should have first commenced an action by way of summons in the High Court in terms of O.5, r.1 of the CPR. Clearly this argument is premised on a misapprehension of the extent to which the CPR applies. Against the finding that the CPR does not apply to the present proceedings, this argument is deemed untenable. The argument is also untenable in so far as it suggests a procedure whereby a party must commence separate proceedings, in a separate procedural regime, namely civil procedure, in order to answer questions arising in another proceeding under a different procedural regime, namely criminal procedure. This is not what the framers of section 9 (2) of the Courts Act intended.

62. The Respondent further argues, on the authority of the *Dr. Bakili Muluzi* case, that the constitutional challenge herein cannot be made without giving the Attorney General three months notice in terms of section 4 of the Civil

Procedure (Suits by or Against Government or public officers) Act, Cap. 6:01 of the Laws of Malawi.

63. This Court finds this argument to be untenable as the *Dr. Bakili Muluzi* case is distinguishable from the present case. As stated above, these proceedings are not a civil suit but are criminal in nature.

64. Section 4 of the Civil Procedure (Suits by or against the Government or Public Officers) Act (Cap 6:01) of the Laws of Malawi provides that:

> "*No suit shall be instituted against the Government, or against any public officer until the expiration of three months next after notice in writing has been, in the case of the Government, delivered to or left at the office of the Attorney General, and in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims.*"

65. As the long title to this Act makes clear, the Civil Procedure (Suits by or against the Government or Public Officers) Act is "an Act relating to Civil Suits by or against the Government or Public Officers." The underlying proceedings herein being criminal proceedings and not being a suit against the Government or a public officer, this law cannot be invoked as submitted by the Respondent.

66. It appears to this Court that the Respondent's argument that the Applicant ought to have served the Attorney General also stems from a presumption that the Attorney General will become a defendant once the matter is certified. This Court is alive to the fact that in cases where the CPR apply, the scheme of the law is that in matters relating to or concerning the application or the interpretation of the Constitution, the processes should be served on the Attorney general, whether the Attorney General is a party to the proceeding or not. This is so on account of O.19, r.8 of the CPR. However, it must be observed that the latter part of O.19, r.8 clearly shows that the Attorney General does not automatically become a party in constitutional matters

unless he or she is sued directly as a party. For clarity, it must be restated that this position depicts the procedure where the CPR apply.

67. Presently, since O.19, r.8 of the CPR is not applicable, the Respondent's argument that the Application ought to have been served on the Attorney fails, in so far as it is premised on the CPR.

68. That said, I must quickly state that I have addressed my mind to the fact that at law, the Attorney General is a Law Officer and custodian of the Constitution – see *Professor Arthur Peter Mutharika and the Electoral Commission v Dr. Saulos Klaus Chilima and Dr. Lazarus Chakwera MSCA Constitutional Appeal No. 1 of 2020*. By virtue of this position, it is imperative that the Attorney General be put on notice of any matter that relates to the Constitution, including challenges of constitutionality of any law.

69. As was stated in the case of *Jam Willem Akster v The Republic (Constitutional Referral No. 2 of 2021)*:

> *"The Attorney General being a Law Officer responsible for the rule of law and constitutionalism, is to be put on notice where the constitutionality of a provision in a Statute is being litigated in a court of law. We are of the view, as observed above, that once the Attorney General is put on notice, he or she may exercise his or her discretion whether to join the proceedings."*

70. I cannot agree more. Therefore, in the event a constitutional question arises in a criminal matter that is certified by the Chief Justice for disposal under section 9 of the Courts Act, the Attorney General must be indeed notified, not as a defendant, but as Law Officer.

71. Having concluded that O.19 of the CPR is not applicable to criminal proceedings, the question that has vexed this Court is, having concluded that the question raised by the Applicant concerning the constitutionality of section 200 of the Penal Code is fit for referral to the Chief Justice under section 9 (3) of the Courts Act for certification as a constitutional matter to be

dealt with under section 9 (2) of the said Act, under what law should the Applicant have proceeded?

72. The Courts Act does not confer power on a magistrate court to refer a matter to the Chief Justice for certification of a matter as being of a constitutional nature. The application of the CPR being restricted to the Hight Court in civil proceedings, the said Rules do not apply in the subordinate courts.

73. As was stated in the case of *Mpinganjira v Lemani and another [2000 – 2001] 295 (HC)*

> *"The power and/or the jurisdiction of the magistrate is derived from statute. The Act of Parliament that establishes the subordinate courts does not confer on them inherent jurisdiction and/or powers."*

74. Therefore, presently, in the absence of any statutory provision to this effect, the SRM does not have power to refer the question of the constitutionality of section 200 of the Penal Code, or indeed any other question, to the Chief Justice for certification. Therefore, contrary to the Respondent's submission, the Applicant could not bring this Application before the SRM.

75. Coming to the High Court, it is this Court's considered view that in the absence of a provision akin to O.19 of the CPR to apply in criminal proceedings, there is a lacuna in the procedural law in the High Court, in so far as applications for certification and dealing with matters relating to the application or interpretation of the Constitution that arise within criminal proceedings are concerned.

76. This notwithstanding, it goes without saying, and it has indeed happened, just like in the present case, that questions about the constitutionality of penal provisions arise now and again within criminal proceedings that require certification by the Chief Justice under section 9 of the Courts Act. Thus, since section 41 of the Constitution guarantees the right of access to any court of law or tribunal with jurisdiction for final settlement of issues as well as the right to an effective remedy by a court of law or tribunal for acts violating the

rights and freedoms granted by the Constitution, there must be a way of addressing the lacuna.

77. In this Court's view, the remedy lies in inherent jurisdiction, which the High Court, unlike the magistrate court, has. Thus, in the absence of any statutory provision akin to O.19 of the CPR, the High Court sitting as a criminal court can invoke its inherent jurisdiction to give effect to the spirit of the law to allow challenges of constitutionality of Acts of parliament, among others, arising within criminal proceedings.

78. In light of the finding that the SRM lacks the power to refer the question of the constitutionality of section 200 of the Penal Code to the Chief Justice for certification, I find that the Applicant is appropriately before this Court, it being the Court that can grant him an effective remedy. Further, this Court hereby invokes its inherent jurisdiction to grant the Applicant the reliefs sought for, namely:

a). Referral of the question whether section 200 of the Penal Code, which creates the offence of libel, is in conformity and in harmony with section 35 of the Constitution and with international human rights standards, in particular article 9 (2) of the African Charter on Human and People's Rights and article 19 of the International Covenant on Civil and Political Rights, to the Chief Justice for certification as matter falling within the ambit of section 9 (2) of the Courts Act; and

b). an Order Staying the proceedings before the Senior Resident Magistrate Court sitting at Lilongwe in Criminal Case No. 43 of 2022, pending the Referral in a) above, and in the event the matter in duly certified by the Chief Justice, the determination of the question of the constitutionality of section 200 of the Penal Code by the High Court constituted in terms of section 9 (2) of the Courts Act.

79. In passing and without deciding, I must state that I have addressed my mind to the question, in the event the matter is certified by the Chief Justice, what procedural rules the panel dealing with the question of the constitutionality of the penal provision would use. In this Court's considered view, again, in passing, this can be resolved by the panel regulating its own procedure since the Court has inherent power to do so.

80. It is so ordered.

Made in Chambers this 20th Day of June, 2022.

Annabel Mtalimanja

JUDGE