



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

**MISCELLANEOUS CRIMINAL APPLICATION NUMBER 47 OF 2022  
(Before Honourable Justice Masoamphambe)**

**BETWEEN:**

**BON ELIAS KALINDO.....APPLICANT**

**GILBERT KHONYONGWA.....INTERESTED PARTY**

**-AND-**

**THE REPUBLIC.....RESPONDENT**

**CORAM: THE HONOURABLE JUSTICE TS MASOAMPHAMBE**

**. Gilbert Khonyongwa, of Counsel for the Interested Party  
Tepeka, Official Court Interpreter**

**RULING**

**INTRODUCTION**

This is an application by the interested party seeking this court to call for the record of the court below in Criminal Case Number No. 306 of 2021 before the Chief Resident Magistrate (East), to review and give directions as regards to the court below order for costs made against the interested party Gilbert Khonyongwa on 20<sup>th</sup> January, 2022. The interested party brings this application under Section 26 of the Courts Act.

## FACTUAL BACKGROUND

The Interested Party on 12<sup>th</sup> December, 2021 attended in the court below and represented the accused (applicant) herein. Plea was taken and the accused was granted bail with the matter being adjourned to 20<sup>th</sup> January, 2022 for hearing. The Interested Party at that time had forgotten that another matter he was handling the case of *Republic v Kambala and 3 Others*, Criminal Case No. 934 of 2021 before the Chief Resident Magistrate in Lilongwe, which was given three days from 19<sup>th</sup> to 21<sup>st</sup> January, 2022. The interested party realised about the clashing of the dates on the morning of 19<sup>th</sup> January, 2022 and upon such realisation, he immediately called the Public Prosecutor, Assistant Commissioner of Police, Mr Mangani to inform him about his predicament. The interested party requested the public prosecutor to liaise with a fellow public prosecutor in Zomba to ask the court below for an adjournment as the Lilongwe case was scheduled earlier than the Zomba case and it involved multiple accused persons and defence lawyers who are seven in number. Some of them are senior to him.

The Public Prosecutor, however, opposed the request of the Interested Party. He argued that the two courts in Zomba and Lilongwe had the same jurisdiction, both being Chief Resident Magistrate Courts. The prosecutor maintained that he would still go to Zomba regardless of the Interested Party's position. He insisted to proceed with the hearing. The Interested Party pleaded with the prosecutor not to summon the witnesses. He refused to do so. The Interested Party then informed the prosecutor that he will brief his colleague Counsel Timothy Chirwa to address the court on his behalf for an adjournment. The Interested Party was, on 21<sup>st</sup> January, 2022, shocked when Counsel Timothy Chirwa informed him that the matter was adjourned, but that on the application of the State the Interested Party was personally condemned to pay all the costs incurred by the State. He had been condemned for unprofessional conduct.

It is for this reason that the Interested Party makes the present application. He invites this court to call for the record of the court below in Criminal Case No. 306 of 2021 before the Chief Resident Magistrate (East) to review the order of the lower court on costs made against him on the 20<sup>th</sup> of January, 2022.

## ISSUES FOR DETERMINATION

1. Whether this Honourable Court should exercise its supervisory powers to call for the court record in the Court below in order to review the costs order made against the interested party.
2. Whether a Chief Resident Magistrate has the jurisdiction to award costs.

## INTERESTED PARTY'S POSITION

Counsel invited the court to have regard to section 26 of the Courts Act, which provides for general supervisory powers of the High Court over subordinate courts. The said section is worded as follows:

*“(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.”*

Counsel further submitted that the above powers are exercisable even when proceedings in the court below are still under way. In that regard, **Mwaungulu J**, as he then was, in *Republic v Genti* [2000-2001] MLR 383 (HC), stated that section 26 is a general supervisory and superintendency provision applicable to criminal matters still pending in subordinate

courts. This is why section 26(2) clearly stipulates that once the file is called to the High Court, the proceedings in the court below are automatically stayed.

Furthermore, Counsel argued that it does happen that court dates may clash and that is why the Criminal Procedure and Evidence Code, in section 250, grants power to adjourn cases. The said section 250 provides that:

*“(1) The court may in its discretion, before or during the hearing of any case, adjourn the hearing to a time and place to be then stated to the parties.”*

Counsel further submitted that the power to adjourn is thus discretionary. Like all discretionary powers, it must be exercised judiciously. Lord Sterndale MR in the case of **Ritter v Godfrey** [1920] 2 KB 47, page 52 stated thus on the issue of discretionary power:

*“But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised and therefore, there must be some grounds for its exercise for a discretion exercised on no grounds cannot be judicial.”*

Counsel further submitted that the court below exercised its discretionary power judiciously in this matter by adjourning the matter. This was a just and fair course to take in the circumstances because there was no way the Interested Party could have undertaken defence in both cases in Zomba and Lilongwe at the same time. Counsel further stated that he duly reached out to the prosecutor before he could travel to Zomba in a bid to prevent the wastage of time and Government resources on a matter that fell to be adjourned. He asked the prosecutor not to travel to Zomba and not to summon his witnesses to court on 20<sup>th</sup> January, 2022. These factors were enough to influence the Chief Resident Magistrate to adjourn the case. All in all, Counsel denies that he never acted unprofessionally as he had sent Counsel Timothy Chirwa to cover him in court by asking for an adjournment on his behalf.

Counsel submits that it is the prosecutor who acted unprofessionally and he did this in the following manner:

- (i) In Chapter 4 of the Malawi Law Society Code of Ethics, which bind the Public Prosecutor by virtue of him being a licensed legal practitioner and therefore a compulsory member of the Malawi Law Society under Section 67(1) of the Legal Education and Legal Practitioners Act 2018, it is stipulated that a lawyer has a duty to deal with all other lawyers honourably and with integrity. This is expounded in Rule 3 thereof to mean *inter alia* that a lawyer must agree to reasonable requests by another lawyer for extensions of time, waivers of procedural formalities and similar accommodations unless the client's position would be normally prejudiced. Counsel further insists that the prosecutor conducted himself unprofessionally as he should have reasonably accepted the request for adjournment of the matter in Zomba. There was no reason for him to travel to Zomba and summon the witnesses when reasonable grounds were communicated for seeking the adjournment.
- (ii) In chapter 1 of the Code of Ethics, it is stipulated that a lawyer shares the responsibilities of all persons to society and the justice system. Rule 5 expounds this principle by stating that a lawyer must be courteous and candid in dealing with others. In rule 6, this principle entails that a lawyer's position must not be used to take unfair advantage of any person or situation. Counsel further avers that the Public Prosecutor was not courteous in his dealings with the interested party as he refused to accede to the reasonable request for an adjournment, but also, he tried to blame the interested party personally for the costs of his travelling to Zomba to proceed with the hearing. Thus, the Public Prosecutor used his position in court to take unfair advantage of the interested party to get him to pay costs of the adjournment.
- (iii) Finally, in chapter 12 of the Code of Ethics, a lawyer has a duty to advance the clients cause resolutely and to the best of the lawyer's ability subject to limitations imposed by law or professional ethics. Rule 21 expounds that it is a duty of a lawyer to treat with fairness all witnesses and others involved in a matter. Further, Rule 28(b) and (c) states that this principle means that when engaged as prosecutor, a lawyer exercises a public function involving much discretion and power. Thus, prosecutor did not treat the interested party with fairness and he tried his best to prevent the accused from being represented by the Interested Party by

pushing for the commencement of the hearing in the absence of the interested party.

Counsel further submits that what makes the situation worse is that the Chief Resident Magistrate, a creature of statute, does not have jurisdiction to make costs order in the circumstances of this case at all. Section 110 (1) of the Constitution provides that:

*"There shall be such courts, subordinate to the High Court, as may be prescribed by an Act of Parliament which shall be presided over by professional magistrates and lay magistrates."*

Further, Counsel avers that this means that subordinate courts like that of the Chief Resident Magistrate herein are established by an Act of Parliament and are therefore creatures of statute, principally the Courts Act and the Criminal Procedure and Evidence Code, and legislation subordinate thereto. Even the Supreme Court of Appeal itself is a creature of statute and concerning its jurisdiction, the apex court stated thus in *Chihana v Republic* [1992] 15 MLR 86 (SCA):

*"Mr Mhango has argued further that even if the Court finds that the learned judge's ruling in the court below was interlocutory and that in view of section 11(1) of the Supreme Court Act, (Cap 3:01) this Court cannot entertain the appeal, the Court must exercise its inherent jurisdiction to hear the appeal on jurisdiction because the issues raised are fundamental and go to the root of the matter. We are here dealing with the question of jurisdiction. Whether or not the matter is fundamental and whether or not it goes to the root of the matter, it can only be entertained by this Court if the Court has jurisdiction to hear it. This Court is a creature of statute and its powers are derived from statute. In *R v Jefferies* [1969] 1 QB 120 where an appellant intended to appeal when he had no right of appeal and asked the court to exercise its inherent jurisdiction, it was stated:*

*"Whatever may be the powers of courts exercising jurisdiction that does not derive from statute, the powers of this Court are derived from and confined to, those given by Criminal Appeal Act, 1907."*

*We can do no more but apply those words to our case. The Supreme Court Act does not give this Court any inherent powers in hearing appeals. Its powers must essentially be derived from and confined to those given by the Supreme Court Act, (Cap 3:01)."*

Counsel clarifies that the above dictum is equally applicable to magistrate courts because they are made creatures of statute by Section 110 (1) of the Constitution. They can therefore not exercise any jurisdiction apart from that which is granted to them by statute. With regard to costs orders in criminal proceedings, the jurisdiction of magistrates to make costs order is given by Section 142 of the Criminal Procedure and Evidence Code. The section provides that:

*"(1) It shall be lawful for a judge or a magistrate to order any person convicted before him of an offence to pay to the public as the case may be, such reasonable costs as to such judge or magistrate may seem fit, in addition to any other penalty imposed."*

*"(2) A judge or magistrate who acquits or discharges a person accused of an offence may, if the prosecution for such offence was originally instituted on summons or warrant issued by a court on application of a private prosecutor, and the judge or magistrate considers that the prosecutor had no reasonable grounds for making his complaint, order such private prosecutor to pay to the accused such reasonable costs as the judge or magistrate may deem fit."*

Further, Counsel states that costs orders in criminal proceedings can only be made at the end of the trial and not during the course of proceedings, where there is a conviction and acquittal or a discharge. Thus, a costs order can therefore not be made where there is a mere adjournment and under the section there is no power to make a costs order against a legal practitioner representing an accused person. Counsel submits that the Chief Resident Magistrate had no jurisdiction to order costs and by making it personally against the Interested Party when he had no power to do so, subject to that this causes grave acts of injustice against the Interested Party. Therefore, Counsel argues that this is a proper case for this court to intervene by using its supervisory powers by calling for the record of the court below and reversing the costs order against the Interested Party.

## ANALYSIS AND DETERMINATION

### **Powers of the High Court under Section 25 of the Courts Act**

First, this court is grateful to the Interested Party in submitting his skeleton arguments and sworn statement in support of his case, which was brought on ex parte basis. This Court has power to review decisions of subordinate courts in criminal proceedings according to Section 25 of the Courts Act, **which** provides that:

*"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."*

The above provision also works hand in hand with Section 26 of the Courts Act, which gives the High Court supervisory and revisionary powers over all subordinate courts.

Section 360 of the Criminal Procedure and Evidence Code provides that:

*"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."*

The above provision gives the High Court the power to call for the record of criminal proceedings before any subordinate courts with the aim of reviewing the correctness or legality of their proceedings or decisions. In this present case, the Interested Party applies to this court to call for the file of the Chief Resident Magistrate, Zomba for review of the costs order made against him. Therefore, this court has the mandate to establish whether the file of the court below should be called for review or not.

### **Jurisdiction of the lower court in award costs in criminal proceedings**

The common law rule was that the Crown neither receives nor pays costs. The rule could be excluded by necessary implication in the Australian case of *Affleck v The King* (1906) 3 CLR 608, a probate case, Griffith CJ said at 630:

*"There is no doubt that at common law the Crown is by its prerogative exempt from the payment of costs in any judicial*



*proceeding, and that this right cannot be taken away except by Statute. The words of the Statute need not, however, be express: It is sufficient if the abolition of the privilege appears by necessary implication. The reason formerly given for the rule was that it was beneath the dignity of the Crown either to receive or pay costs. In the case of Attorney General v. Corporation of London, Lord Cottenham L.C., put the rule on the ground of reciprocity of right and obligation, and said that in cases in which the Attorney General sued for the Crown he ought not to receive costs unless he could if unsuccessful have been ordered to pay them."*

Section 58 of the Courts Act is clear that the powers of courts of magistrates is provided for in the Courts Act and in the Criminal Procedure and Evidence Code or any other written law:

*"In exercise of their criminal jurisdiction the powers of courts of magistrates shall be as provided for in this Act, in the Criminal Procedure and Evidence Code and in any other written law."*

Clearly, from the above provision, the position in Malawi is that any power to award costs in criminal cases must be conferred by statute. The Criminal Procedure and Evidence Code is silent on award of compensatory costs particularly where one party seeks an adjournment. There is, therefore, a presumption that costs will not be awarded in a criminal matter. Accordingly, if a party is seeking costs in a criminal matter or if a court so decides to award compensatory costs in a criminal matter it must be clearly pointed out that there is a legislative intention to overcome the presumption that costs will not be rewarded.

The next question I should grapple with is whether it can be said that the adjournment sought by Counsel Timothy Chirwa on behalf of the Interested Party is not a criminal matter or the fact that it was sought within a criminal matter irrespective of its nature it was still part of the criminal proceedings and therefore no award of costs ought to have been made. Whilst the Interested Party argues and submits that the lower court does not have jurisdiction to award costs in criminal matters, a criminal matter has been defined under section 2 of the Courts Act as follows:

*"“Criminal matter” means a matter requiring a person to answer for an offence under any written law other than revenue law."*

At this point, the background of the matter becomes relevant. The Interested Party submitted that he duly reached out to the prosecutor before he could travel to Zomba in a bid to prevent the wastage of time and Government resources on a matter that fell to be adjourned. He asked the prosecutor not to travel to Zomba and not to summon his witnesses to court on 20<sup>th</sup> January, 2022. These factors were enough to influence the Chief Resident Magistrate to adjourn the case. Counsel thus denies that he never acted unprofessionally as he had sent Counsel Timothy Chirwa to cover him in court by asking for an adjournment.

I have carefully considered these facts. It is true that adjournment is a discretion of the trial court. It is to be exercised, like any other discretion, fairly and justly on reasonable grounds which must be properly recorded. See **Minister of Finance and others v Mhango and others** [2011] MLR 174 (SCA). The purpose of granting an adjournment, *inter alia*, is to give a party seeking it, an opportunity to be in a position to properly present his case or defence. The court has power to refuse favourable exercise of this discretion where it thinks the applicant is taking an advantage of the existing situation or abusing the court process in any way as may be demonstrated by the facts before it. It should also be observed that the main purpose of court during a trial, is to sustain the matter by giving the parties full opportunity to prosecute or defend their cases.

It is trite also and in tenor to the immediately above principles that a trial court would normally grant an adjournment if in doing so gives the party seeking it a fair opportunity to fully put its case and if, in the view of the court, the party has not before, abused a similar court's discretion. Moreso, since the trial court has power to order compensatory costs in favour of the party who was ready to proceed with the trial of the case but for the adjournment.

In *Sali v SPC Ltd* (1993) 67 ALJR 841, the majority of the High Court observed (at 843–844):

*“In Maxwell v Keun, [[1928] 1 KB 645] English Court of Appeal held that, although an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to any other party. That proposition has since become firmly established and has been applied by appellate courts on many occasions. Moreover, the judgment of*

*Atkin LJ in Maxwell has also been taken to establish a further proposition: an adjournment which, if refused, would result in a serious injustice to the applicant should only be refused if that is the only way that justice can be done to another party in the action. However, both propositions were formulated when court lists were not as congested as they are today and the concept of case management had not developed into the sophisticated art that it has now become.*

*In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources, the competing claims by litigants in other cases awaiting hearing in the court as well as interests of other parties ... What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.* (Emphasis supplied)

A similar approach was expressed by Gleeson CJ in *State Pollution Control Commission v Australian Iron and Steel Pty Ltd* (1992) 29 NSWLR 487 at 493–494:

*“The courts of this State are overloaded with business, and their workload has, over a number of years, increased at a greater rate than any increase in the resources made available to them. The inevitable consequence has been delay. This, in turn, has brought an ever increasing responsibility on the part of the judges to have regard, in controlling their lists and the cases that come before them, to the interests of the community, and of litigants in cases awaiting hearing, and not merely to the concerns of the parties in the instant case. The days have gone when courts will automatically grant an adjournment of a case simply because both parties consent to that course, or when a decision to grant or refuse an adjournment sought by one party is made solely by reference to the question whether the*

other party can adequately be compensated in costs.” (Emphasis supplied)

In my view, there must be a clear power conferred by the Courts Act or the Criminal Procedure and Evidence Code or any other written law in order for a court to award costs in criminal proceedings. Irrespective of the nature of an adjournment, be it civil or otherwise, the deciding factor in awarding costs was the nature of the proceedings itself and not the application for adjournment sought.

I have gone through the proceedings in the lower court that led to the order of costs. Without any express provision in the Courts Act and in the Criminal Procedure and Evidence Code to order payment of costs in which an adjournment of the lower court criminal proceedings was necessary, I should set aside the order of costs that the learned court below erroneously made. The order of costs made against the Interested Party is therefore set aside. It is so ordered.

Made in Chambers, this 22<sup>nd</sup> day of June, 2022 at Zomba.

  
Texious Masoamphambe  
JUDGE