



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL CASE NO. 4 OF 2022

(Being Criminal Case No. 11 of 2021 – Lilongwe District Criminal Registry)

BETWEEN:

THE REPUBLIC.....APPLICANT

-AND-

AUBREY SUMBULETA.....DEFENDANT

CORUM : HONOURABLE JUSTICE R. M CHINANGWA

Gamadzi	State Advocate
Wasiri	State Advocate
Kanyenda	Accused Counsel
Amos	Court Clerk

RULING ON PRELIMINARY OBJECTIONS

Introduction

1. The accused has been charged with the offences of abuse of office under section 95 (1) of the Penal Code; indecent assault contrary to section 137 (1) of the Penal Code and sexual harassment contrary to section 6 of the Gender Equality Act.

2. On 6th December 2022 this court dismissed the accused preliminary objection that the matter be referred to the Chief Justice for certification as a Constitutional matter and that this matter be struck out or permanently stayed.
3. On the scheduled date of trial the accused raised another preliminary objection stating that this court lacks jurisdiction to try the accused without jury under section 294 (1) of the Criminal Procedure and Evidence Code. During the hearing of the matter, the court invited both parties to make submissions as to whether the High Court is an appropriate forum considering the magistrates court have jurisdiction to try the accused.

The Arguments

4. The accused argues that of Section 294(1) of the Criminal Procedure and Evidence Code is plain, clear and unambiguous in its wording. It states all trials in the High Court must be by jury subject to the relevant exceptions gazetted by the Minister under Section 294(2) of the Criminal Procedure and Evidence Code. The offences of sexual harassment; abuse of office and indecent assault are not caught by the gazetted exceptions. Thus, proceeding with trial without jury would be illegal as a matter of law and not procedure.
5. In response the State argued that trial by jury is not a fundamental/substantial rule but merely procedural in nature. The accused person's right to fair trial and other constitutionally guaranteed rights will not be violated if this matter is tried without a jury. Trials in Malawi in the democratic dispensation have been conducted without juries' as a matter of good practice, among others, as a cost cutting measure and therefore Government resources are prudently utilized without compromising accused person's right to fair trial. The application is made in bad faith and lacks merit. Substantial justice without regard to technicalities requires that this matter be prosecuted without a jury.

Issue for Determination

6. This court has to determine whether this matter must be tried by jury or not?

Analysis of the Law

7. Section 294 (1) of the Criminal Procedure and Evidence Code states that subject to subsection (2) all criminal trials before the High Court shall be by jury. A jury shall, except where otherwise specially provided, consist of twelve persons. Subsection (2) states that The Minister may, by Order published in the Gazette direct that any case or class of cases shall be triable by the High Court without a jury, and in any such case or class of

case instead of the procedure set out in this Part the High Court shall, with any necessary modifications, follow the procedure set out in Part VII for trials before subordinate courts.

8. The Criminal Procedure (Trials Without Jury) Order G.N 3/2008, Paragraph 2 provides the Schedule of cases or class of cases which shall be trial in the High Court without a jury as follows:

1. All offences under the Customs and Excise Act.
2. All offences under the Exchange Control Act.
3. All offences under the Taxation Act.
4. All offences under Chapter XIX of the Penal Code.
5. All offences under Chapter XXXIII of the Penal Code.”

9. The Criminal Procedure (Trials Without Jury) (Amendment) Order 2020, has added the following:

6. All offences under Chapter XXVI of the Penal Code.
7. All offences under Chapter XXXI of the Penal Code.
8. All offences under Chapter XLII of the Penal Code.
9. All offences under Chapter XLIII of the Penal Code
10. All offences under the Money Laundering, Proceeds of Serious Crime and terrorist financing act.
11. All offence under the Financial Crimes Act.
12. All offences under the Corrupt Practices Act.
13. All offences under the Acts administered by the Reserve Bank of Malawi.
14. All offences under Financial services laws as defined under section 2 of the Financial Services Act.
15. All offences defined as financial crimes under Section 2 of the Financial Services Act.
16. All offences jointly charged with the offences exempted in the Schedule herein.”

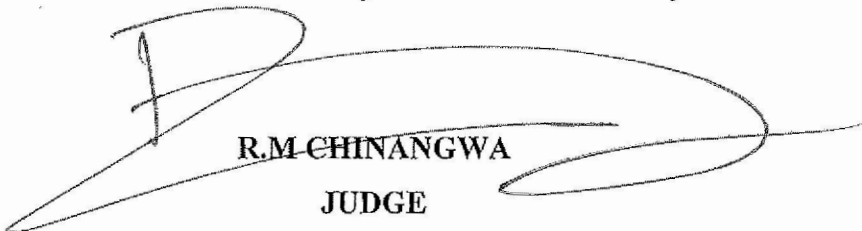
10. The accused has been charged with sexual harassment under the Gender Equality Act; abuse of office under Part X of the Penal Code and indecent assault under Part X of the Penal Code. Notably these offences are not listed as offences that can be tried without a jury under the Criminal Procedure (Trials Without Jury) Order.

11. From the foregoing law it is clear that the matter before this court has to be heard before a jury because the offences which the accused has been charged with are not exempted from trial without a jury. The State referred the court to *The Republic v Kettie Kamwangala* Criminal Case No. 43 of 2013 (delivered on 16th April 2020) unreported, which held that a statute may have retrospective application where it is clearly stated in the act as well as where it concerns matters of procedure. The Kamwangala case can be distinguished with this case on that score as in this matter the court is not considering retrospective application of the law on jury trial.
12. It is interesting to note that serious crimes such as murder; offences under Money Laundering, Proceeds of Serious Crime and terrorist financing and the Financial Crimes Act have been left to a single Judge in the High Court to determine without the assistance of the jury. This court is of the view that the law on trial with or without a jury should be revisited once again. It is this court's view that if serious offences are triable without a jury then all offences which are triable in the magistrates court but at the discretion of the Director of Public Prosecution are triable in the High Court, the said trial should be tried without a jury.

Finding

13. The application succeeds.
14. The matter is adjourned for directions on 26th June 2023 at 9am.

Pronounced this 22nd day of June 2023 at Blantyre


R.M. CHINANGWA
JUDGE