



**THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
FINANCIAL CRIMES DIVISION
CRIMINAL CASE NUMBER 10 OF 2023
(Before Hon. Justice Kapindu PhD)**

BETWEEN

THE REPUBLIC

-AND-

RT. HON DR SAULOS KLAUS CHILIMA

CORAM: HON JUSTICE R.E. KAPINDU,

Saidi, Khunga, Likwanya, Chiwala, Counsel for the State

Kaphale, SC, B. Theu, Soko, Counsel for the Defendant

Mombera, Court Reporter,

Dzikanyanga, Court Interpreter

RULING

Kapindu, J

1. These are proceedings in which the State, through the Anti-Corruption Bureau (ACB), is prosecuting the Vice President of the Republic of Malawi, the Right Honourable Dr. Saulos Klaus Chilima, for various alleged crimes.
2. The various criminal charges that the state wishes to prefer against him have been particularized in a Charge Sheet that was filed with the Court, and also served on the defence, on 29th June, 2023.
3. Three principal issues have come up for the Court's determination. These are, firstly, the issue of delay in the service of the Charge Sheet, and secondly, the issue of failure by the State to make disclosures before the Defendant takes plea. The defence also wishes to make an application for variation of the Defendant's bail conditions. The Court will deal with these issues in turn.
4. Firstly, the defence calls upon the Court to adjourn the matter to a later date because, having been served with the intended Charge Sheet only on the 29th of June, 2023, at around 4 pm, they have not even had the benefit of two clear days within which they could analyse the Charge Sheet, consult with their client, provide him with the requisite legal advice thereon and to make a decision, pursuant to section 151(1) of the Criminal Procedure and Evidence

Code (CP & EC), on what objections they may raise before plea is taken. That section provides that:

“(1) Every objection to any charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later.”

5. The import of this provision is that every objection to a charge on a Charge Sheet should be made once the charge or charges have been read out to an a Defendant but before plea is taken.
6. Kaphale, SC, proceeded to indicate in advance that as a matter of fact, it is the intention of the Defendant to avail himself of the right prescribed under section 151(1) of the CP & EC to raise objections against the charges that the prosecution seeks to prefer against him.
7. In response, the prosecution, through Counsel Khunga, has stated that the Notice of Plea and Directions Hearing in the instant matter was filed with the Court and served on the defence on 26th June, 2023. He argued that this therefore provided the defence with sufficient time to prepare for and proceed with the plea and directions hearing today.
8. Counsel Khunga proceeded to indicate that whilst it is true that the intended Charge Sheet was only served on the 29th of June, 2023, as indicated by Kaphale, SC, the substance of the Charge Sheet remains the same as the one that was laid before the Chief Resident Magistrate Court. He further invited the Court to observe that Counsel Theu and Counsel Soko were already part of the defence team in the lower Court. In view of these factors, it was his

submission that there should be no prejudice on the Defendant if the Court proceeds to take his plea today, notwithstanding the fact that he has not been given two clear days notice of the Charge Sheet.

9. The prosecution has therefore prayed that the plea and directions hearing should proceed today.

10. On this issue, firstly, the Court agrees with the prosecution that when one carefully examines the intended Charge Sheet, the substance thereof is the same as the Charge Sheet that was earlier laid before the Chief Resident Magistrate Court. Thus, even though the Charge Sheet was served on the defence less than two clear days to the time for commencement of today's proceedings, when that issue is considered on its own, there would be no prejudice on the part of the defence. Section 3 of the CP & EC is clear that the principle that substantial justice should be done without undue regard for technicality must at all times be adhered to in applying the Code.

11. That said, the Court must emphasise that the prosecution should have done better by serving the defence with the intended Charge Sheet much earlier than they did, more so bearing in mind the very point that they make, namely that the substance of the Charge Sheet remains the same as the charges that were presented before the Chief Resident Magistrate Court.

12. Under these circumstances, one would therefore have expected that the intended Charge Sheet herein would have been served together with the Notice of Plea and Directions on the 26th of June, 2023.

13. Pausing here however, the Court reckons that the Defendant has appointed Kalekeni Kaphale, SC to take lead of the defence team, and the Notice of Appointment of Legal Practitioners was only filed on Friday, the 30th of June, 2023.

14. The right to legal representation is a very important right, and these courts have, time out of number, emphasized its sanctity. Section 44(4) of the Constitution, states that:

“Wherever it is stated in this Constitution that a person has the right to the services of a legal practitioner or medical practitioner of his or her own choice, that right shall be without limitation, save where the State is obliged to provide such services of a legal practitioner or medical practitioner, in which case an Act of Parliament may prescribe that the choice of the legal practitioner or medical practitioner should be limited to those in Government service or employment.”

15. The emphasis made on the right to legal representation in this provision, particularly as it relates to the choice of a legal practitioner, as a right without limitation save in narrowly constricted circumstances, shows the premium that the Constitution places on this right.

16. It is on this basis that the Court is persuaded to agree with the defence that Kaphale, SC, having just been appointed at this early stage of the proceedings, needs time to examine the Charge Sheet and, together with the other members of the defence team, provide any necessary legal counsel to the Defendant and also to receive any further instructions that the Defendant may provide. This

is indeed more so in view of the fact that any objections to the Charge Sheet that the Defendant might wish to make must, under section 151(1) of the CP & EC, be made before plea is taken.

17. Kaphale, SC then raised the second issue for determination in the present matter, which is that disclosures should be made prior to the Defendant taking plea. Kaphale, SC and Counsel Bright Theu who made representations on this issue on behalf of the Defendant, emphasized that the provision of advance disclosures to the defence before plea is taken is important in order to comply with the right of the Defendant to a fair trial, which includes the right, under section 42(2)(f)(ii) of the Constitution, to to be informed with sufficient particularity of the charge.

18. The Court must mention that it observed that there were some inconsistencies in the defence arguments. Kaphale, SC begun by stating that the practice by the ACB and the Director of Public Prosecutions (DPP) has been to serve the defence with full disclosures before plea taking, notwithstanding that the law does not seem to expressly make that requirement. He proceeded to argue that this practice however accords with the right to a fair trial under the Constitution.

19. Counsel Khunga for the defence countered that argument, arguing that in fact the practice by the ACB and the DPP was the opposite. In response to Counsel Khunga's contention, Counsel Theu then seemed to depart from Kaphale, SC's assertion that the practice is such that disclosures are made before plea. Instead, Counsel Theu argued that the existing practice, which is as stated by the prosecution, is merely a practice and not a prescription of law, and that it

should, in any event be viewed and reviewed in the light of fair trial imperatives under section 42(2) of the Constitution.

20. The Court is mindful that the requirement for disclosure of evidence is an important one in criminal proceedings. It seeks to ensure, among other things, that there is general equality of arms between the prosecution and the defence, that the Defendant should likewise have adequate time to examine the evidence and prepare for his or her defence, and that generally both the prosecution and the defence must have equal knowledge of the case against the Defendant.

21. The Court however does not find it necessary to go beyond this statement and deal with the intricacies of the law, practice and constitutionality of the issues raised by the parties, especially by the defence. The Court states this in view of the general principle of constitutional law that where it is possible to decide any case, whether civil, criminal or *sui generis*, without reaching a constitutional issue, that is the course which should be followed. The principle of constitutional avoidance permits this Court to resolve an issue quickly, without miring itself in a painstaking exercise in discursive constitutional analysis, wherever such approach (that is to say constitutional avoidance), serves the interests of justice.

22. It appears to the Court that this is an instance where the application of the principle of constitutional avoidance is merited. The Court would rather look at the issue from a pragmatic perspective, based on the unique circumstances of the present matter.

23. It is common cause that the Defendant was arrested on 25th November, 2022. Today is 3rd July, 2023, almost eight months later. The Court has not been provided with any reasons why, after all this time, the prosecution would still prefer that the Defendant takes plea before he sees or accesses the evidential material based upon which his prosecution is being pursued.
24. In an oft-cited decision, the Supreme Court of Appeal held that “*Where there is no evidence it would seem only natural that there should be no arrests. We therefore find it rather perverse that law enforcement should arrest with a view to investigate.*”¹ The essence of this passage is the point that this Court has every reason to believe that the State followed this direction and that it based its arrest of the Defendant on available evidence. It is such evidence whose disclosure is now being demanded by the defence, some eight months down the line.
25. The Court is inclined to find that this is a fair and reasonable demand, and one that is in the interests of justice, given the long period that the prosecution has taken since the Defendant was arrested. It is only fair and just that he be furnished with the material based on which he was arrested and indeed based on which the State is pursuing the prosecution herein before he takes plea.

¹ See *Kettie Kamwangala v Republic*, Malawi Supreme Court of Appeal, Criminal Appeal No.6 of 2013, per Chikopa, JA.

26.If the prosecution might wish to provide further disclosures in future, the State may make necessary representations in that regard, within the law, as the matter progresses.

27.The Court therefore orders that:

- (a) This matter be adjourned to Wednesday, the 19th of July, 2023 at 10 o’Clock in the forenoon for plea and directions hearing.
- (b) That the State must provide disclosures of all relevant evidential material that they have against the Defendant within 7 days from the date hereof.
- (c) Upon the defence’s own request, the Defendant’s application for variation of bail conditions will be heard on the said 19th of July, 2023 at 10 o’Clock in the forenoon or as soon thereafter as Counsel can be heard on the matter.

28.It is so ordered.

R.E. Kapindu

JUDGE

Postscript:

1. The Court has heard the representations made by Counsel Khunga for the prosecution, that a period of 7 days is insufficient for the prosecution to produce and serve the relevant disclosures as directed by the Court, because the evidence is largely in digital form and will require special expertise to

separate it from other evidence that relates to other persons. He states that the prosecution will need a period of three weeks to make such disclosures.

2. The Court grants the prosecution's request in this regard and orders that the State should make the said disclosures within 21 calendar days from the date hereof.
3. The plea and directions hearing will proceed on Tuesday, the 1st of August, 2023.
4. However, hearing of the Defendant's application for variation of bail conditions will still be heard on the 19th of July, 2023 at 10 o'Clock in the forenoon as earlier directed.

R.E. Kapindu

JUDGE