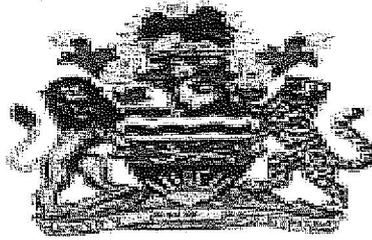


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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

JUDICIAL REVIEW CASE NO. 20 OF 2021

(Before Hon Justice D. Madise)

THE STATE (ON THE APPLICATION OF LEONARD EMMANUEL MBULO.....CLAIMANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS1ST DEFENDANT

THE DIRECTOR OF ANTI-CORRUPTION BUREAU.....2ND DEFENDANT

Coram.

Hon Mr. Justice D Madise

Mr. G. Kadzipatike for the applicant

Mr. V. Chiwala, Mr. A. Likwanya, Ms G. Rapozo, Mr Limbe and Ms Wasili for
the respondents

Mr. Mathanda clerk

JUDGMENT

Madise, J

INTRODUCTION

1, The Claimant sought leave to move for judicial review against the decision of the 1st Defendant committing the Claimant's trial in Criminal Case No. 886 of 2020: Republic versus Leonard Emmanuel Mbulo to the High Court. The Claimant was charged with the offence of corrupt transactions by or with agents contrary to section 27 (4) as read with section 34 of the Corrupt Practices Act. The particulars of the offence were as follows;

Leonard Mbulo of Mbulo Attorneys falsely pretended that his Worship Peter Kandulu wanted K600, 000.00 in order to pass judgment of the case in their favour within a period of 2 weeks, and that he received K100, 000.00 from Young Su Yoon in the presence of GVH Kamtagwala Mumba.

2, The 1st Defendant upon application by the 2nd Defendant issued a Certificate of Summary Procedure Case pursuant to section 289 of the Criminal Procedure and Evidence Code (CP&EC) to have the matter tried in the High Court. The Claimant being aggrieved with that decision, instituted judicial review proceedings arguing that the 1st Defendant's decision:

- a) Was made without any reasons as to why the matter was a proper one for committal to the High Court
- b) Was made arbitrarily by a party to the proceedings who was essentially judge-shopping

3, On 28 April 2021 I granted leave to allow the Claimant move for judicial review. The Claimant then took out a notice for the hearing of the judicial review on 1st May 2021 in form 86A. Hearing took place on 13th October 2021.

Relief sought

A declaration that the 1st Defendants' decision committing the Claimant trial to the High Court was unconstitutional, procedurally improper and unreasonable. In support of the application for judicial review the Claimant filed a sworn statement and skeleton arguments which have been opposed by the Defendants.

ISSUES FOR DETERMINATION

4, whether the 1st Defendant's decision's in exercise of his powers are amenable to judicial review or not;

Whether the 1st Defendant's decision committing the Claimant's criminal trial in the Senior Resident Magistrate's Court to the High Court is invalid or not;

Whether, assuming the response to above are in the affirmative, this Honorable Court should proceed to granting an order like to certiorari quashing the 1st Defendant's said decision or not;

Whether the Claimant is also entitled to costs of these proceedings or not;

THE EVIDENCE

5, The Court heard evidence from the Claimant in support of the present judicial review. The Court also heard evidence from the 1st Defendant and Mr. Victor Chiwala, for the 2nd Defendant. In summary the Claimant's evidence is that the certificate of committal herein is invalid and unlawful. The Claimant's reasons for contending as such are that the said certificate, albeit negatively affecting his Constitutional rights to a fair trial and to a trial before an independent and impartial [tribunal], was issued before granting the Claimant herein a chance to be heard.

6, The Claimant further deponed that the certificate of committal was discriminatory, for the 1st Defendant failed to disclose the criteria for only picking the Claimant's file from the rest as warranting committal to the High Court of Malawi; the decision to commit him to the High Court violates his rights to have two forums of appeal; that the decision contravened his Constitutional right to a fair trial as he is being tried in the Judiciary where the 1st Defendant is allowed to tamper with the Judiciary internal-system of allocation of cases and is able to move files willy-nilly from one forum to another, without any reasons provided to the Claimant.

7, The 1st Defendant testified on his own behalf. Counsel Victor Chiwala testified on behalf of the 2nd Defendant. The 1st Defendant in essence testified that he issued the committal certificate in issue herein pursuant to section 289 of the Criminal Procedure and Evidence Code and thus acted within the confines of the law. The 1st Defendant further argued that his decision complained of herein amounts to prosecutorial powers and not ordinarily reviewable by way of judicial review. The 1st Defendant concluded by stating that the Claimant's claims herein do not raise any rare and exceptional circumstances warranting judicial review.

8, The 2nd Defendant on the other hand contended that the 1st Defendant's decision complained of herein is not tantamount to interfering with judicial independence. That the 2nd Defendant's reasons for contending as such are that they have the liberty of commencing proceedings in any Court, more so when the lower Court and the High Court of Malawi have concurrent jurisdiction in as far as the Claimant's charges on the record as concerned. The 2nd Defendant further submitted that the 1st Defendant's decision complained of herein was not made in bad faith, and is not discriminatory and not unconstitutional.

Preliminary Issues

What is Judicial Review?

9, Judicial Review is the most effective means by which courts control administrative actions by public bodies. (including inferior courts and tribunals). It is a supervisory jurisdiction which reviews administrative action rather being an appellate jurisdiction. For judicial review proceedings to be entertained by courts the following preliminary issues must be satisfied.

Public Law

10, Only decisions or actions which are made in a constitutional or public law context are amenable to judicial review. This therefore means that even if a body is susceptible to judicial review not every decision will be reviewable if it is outside the ambit of public law. A clearer example will be matters of employment which are generally regulated by contract within the ambit of private law. On the issue of public law and judicial review Lord Diplock stated in O'Reilly vs. Mackman [1983] 2 AC 237.

It would in my view as a general rule be contrary to public policy and as such an abuse of process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions (governing judicial review) for the protection of such authority.

In the above case, the Applicants duly took process under the head of judicial review and the relevant law is the Republican Constitution and disciplinary regulations made under the Mzuzu University Act No:12 of 1997.

The Parties

11, Judicial review can and must not be brought by or at the instance of the government. In general, judicial review lies against anybody charged with the performance of a public duty. In this matter before me, the Claimant sought leave to move for judicial review against the decision of the 1st Defendant committing the Claimant's trial in Criminal Case No. 886 of 2020: Republic versus Leonard Emmanuel Mbulo to the High Court. The Claimant was charged with the offence of corrupt transactions by or with agents contrary to section 27 (4) as read with section 34 of the Corrupt Practices Act. The particulars of the offence were as follows;

Leonard Mbulo of Mbulo Attorneys falsely pretended that his Worship Peter Kandulu wanted K600, 000.00 in order to pass judgment of the case in their favour within a period of 2 weeks, and that he received K100, 000.00 from Young Su Yoon in the presence of GVH Kamtagwala Mumba.

The 1st Defendant upon application by the 2nd Defendant issued a Certificate of Summary Procedure Case pursuant to section 289 of the Criminal Procedure and Evidence Code (CP&EC) to have the matter tried in the High Court. The Claimant being aggrieved with that decision, instituted judicial review proceedings arguing that the 1st Defendant's decision was issued without any reasons as to why the

matter was a proper one for committal to the High Court. I find this to be proper case for judicial review

Locus Standi

12, An Applicant in a judicial review proceeding must have “*sufficient interest*” in the matter. The purpose is to exclude the so called busy bodies. There must be a direct or personal interest. Whether a general interest qualifies within the meaning of *locus standi* is a question of law and fact. However, courts have in recent times adopted a much broader and more flexible approach. The more important the issue and the stronger the merits, the more readily will a court grant permission notwithstanding the limited personal involvement of the Applicant.

13, In Inland Revenue Commissioners vs. National Federation of Self Employed & Small Business Ltd [1982] AC 617 HL, it was held that a group of taxpayers did not have standing to impugn the Inland Revenue Commissioners dealings with other taxpayers. The above notwithstanding the court may grant a relief if the same can be effectively enforced.

14, In this matter the Applicant is an accused person in criminal case No. 886 of 2020: Republic versus Leonard Emmanuel Mbulo. The Respondents are public offices created by the constitution. The Applicant is challenging the actions taken by the 1st Respondent. I find that he has *locus standi*.

The Grounds

15, Judicial review proceedings must not issue merely because the decision maker has made a mistake. The Applicant must show that there has been a departure from accepted norms. That the decision making process has been characterized by illegality, procedural impropriety and irrationality. This is called the tripartite

distinction. Based on the above this court is convinced that this is suitable case for judicial review.

CLAIMANT'S FINAL SUBMISSIONS

Judicial Review proceedings

16, **Section 5 of the Republican Constitution for Malawi [1994]** authoritatively provides as hereunder:

'Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.'

Section 4 of the Republican Constitution for Malawi provides as below:

'This Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government.....' Our emphasis added

Section 46(2) of the Republican Constitution for Malawi [1994] also provides as below:

'Any person who claims that a right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled—

(a) to make application to a competent court to enforce or protect such a right or freedom.'

17, **Section 108 (2) of the same Republican Constitution** provides as follows:

'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.'

17, The Claimant submitted that the Supreme Court of Appeal in the case of *Air Malawi Ltd v The Ombudsman MSCA Civil Appeal No. 1 of 2000* had this to say:

“It is trite law that judicial review is directed at reviewing the decision-making process. It does not direct its inquiry into the merits of the case. On the other hand reviewing a case is wider and goes into the merits of the case and considers the whole evidence adduced to see if the decision arrived at can be supported on the evidence.”

18, That in the *State and Another v The Director General – Immigration and Citizenship Services and Another Judicial Review Case No. 19 of 2020*, His Lordship Mr. Justice Kenyatta Nyirenda brilliantly opined as hereunder:

‘..the provisions of section 108(2) of the Constitution were made robust enough to ensure that no action or decision by a public body escapes enquiry by the judiciary.’

19, The Claimant also cited *White v and Another v Attorney General and Another* [1993] 16(2) MLR 903 (HC) and *Blantyre City Assembly v The Ombudsman* [2004] MLR 15 (HC) and *Chioza v Board of Governors of Marymount Secondary School* [1996] MLR 109 (HC),

20, The Claimant also cited *Re Constitution of the Republic of Malawi: Ex-Parte Lunguzi* [1994] MLR 72 (HC), *Banda and Another v Attorney General* [1995] 2 MLR 797 (HC), *Chief Constable of North Wales Police v Evans* [1982] 3 All ER

141 and The State on the Application of Pemphero Mphande and Another v Blantyre City Council and Another Judicial Review Cause No. 137 of 2018.

21, That in *S v Council, University of Malawi; Ex Parte: University of Malawi Workers Trade Union* [2015] MWHC 494 (27 July 2015), the Court, with Justice Kapindu presiding, had this to say:

'I should mention that I deliberately use the full term "judicial review of administrative action here" because in modern day Malawian constitutional law, which inextricably intersects with administrative law, there are two types of judicial review, viz:

- (a) judicial review of administrative action and*
- (b) constitutional judicial review.*

The former is the review procedure by courts of conduct by public authorities or bodies that requires the procedure under Order 53 of the Rules of the Supreme Court, 1965 (or for those of another procedural school of thought, the procedure provided for under Order 54 of the Civil Procedure Rules, 1998).

The latter review process (Constitutional judicial review) is premised on Section 108(2) of the Constitution as read with Sections 4, 5, 11(3), 12(1)(a) and 199 of the Constitution, where the Courts review conduct by the Government or law for consistency with the Constitution. It need not be administrative action.'

22, Constitutional right to be given valid reasons in writing for any decision adversely affecting one's fundamental rights and freedoms

Section 43 of the Republican Constitution for Malawi (1994) provides as hereunder:

'Every person shall have the right to —

(a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and

(b) be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected.'

23, That in *Chirwa v Chirwa and National Compensation Tribunal [2002-3] MLR 33 SCA*, it was held as below:

'The appeal partly succeeds. It is ordered that the matter should revert to the respondent to reconsider its decision and in the event that it decides to refuse to give the appellant additional compensation it must support the decision with valid reasons, which must be in writing and supplied to the appellant.'

24, That *In the matter of the Constitution of the Republic of Malawi and In the Matter of the Removal of MacWilliam Lunguzi* [supra] the Court noted that section 43 of the Constitution of the Republic of Malawi does nothing more than restate the principles of natural justice that a man or woman shall not be condemned unheard. That provision provides as follows:

"Every person shall have the right to:

- (a) *lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and*
- (b) *be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected or threatened if those interests are known.”*

The Constitutional right to be heard

25, That in *Shaba v ADMARCC* Civil Cause No. 1194 of 1992 (unreported) the Court held as below:

“by not giving the plaintiff the opportunity to be heard, not only was the defendant in breach of its own conditions of service, but also that its conduct was repugnant to the principles of natural justice. The result is that the purported dismissal is null and void. As I have already indicated above, such unlawful dismissal could not be acquiesced to or ratified.”

The Claimant also cited *Mbewe v The Registered Trustees of Blantyre Adventist Hospital* [1997] 1 MLR 403 (HC), and *Kondowe and Other v Malawi National Council of Sports* [1993] 16(1) MLR 213 (HC)

26, The Constitutional principle of Judicial independence

Section 9 of the Republican Constitution for Malawi provides as hereunder:

‘The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial

manner with regard only to legally relevant facts and the prescriptions of law.'

Section 103 (1) of the same Republican Constitution provides as hereunder:

'All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority.'

The law on equality before the law

27, **Section 20 (1) of the Republican Constitution for Malawi [1994]** states as below:

'Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.'

28, **Section 12 (1) (e) of the Republican Constitution for Malawi [1994]** equally provides a below:

'..... as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.'

The Claimant cited **In the matter of admission of David Nyamilandu and in the matter of Legal Education and Legal Practitioners Act (Cap 3:03 of Laws of**

Malawi) Constitutional Case no: 1 of 2008 and Zimbabwe Lawyers for Human Rights and IHRD in Africa v Zimbabwe (2009) AHRLR, it was held as below:

'Unfettered power in the hands of an officer is tantamount to unrestrained power based on vague and unsubstantiated reasons of a danger to public order and destroys the right to equality before the law....'

29, That it is also important to note that the principle of equality before courts of law can be found *expressis verbis* in article 14(1) of the International Covenant on Civil and Political Rights, according to which "*all persons shall be equal before the courts and tribunals*" The High Court of Malawi in The State and Others Ex Parte Mayeso Gwanda equally opined as below, while quoting Edwards v People of State of California^{314 US 160}:

'Where it was stated that we should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a State to test, qualify, or limit his rights as a citizen of the United States. The mere state of being without funds is a neutral fact – constitutionally an irrelevance, like race, creed or colour.'

Constitutional right to fair trial

Section 42 (2) (f) (i) of the Republican Constitution for Malawi states as below:

(2) *'Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right —*

(f) as an accused person, to a fair trial, which shall include the right—

(i) to public trial before an independent and impartial court of law within a reasonable time after having been charged;

30, That in Gwede v Attorney General[2002-3] MLR 59 SC, it was opined as below by the apex Court:

‘In his submissions, Counsel for the appellant suggested that the trial of the appellant in the Regional Traditional Court breached articles 10 of the Universal Declaration of Human Rights. The article states:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his right, obligation and of any criminal charge against him.”

Essentially, article 10 gives a right to a fair and public hearing before an independent tribunal. We are not convinced, nor was the learned Judge in the court below, that the trial of the appellant in the court below was not fair. We are equally not convinced that the court which tried the appellant was not independent and impartial.’

31, That the court in the case of Republic v Mbewe and Others (184 of 2004) ((184 of 2004)) [2005] MWHC 55 (18 May 2005) the court reaffirmed this position when it stipulated that it is trite law that an accused person is entitled to a fair trial before an independent and impartial tribunal.

40, In Water Valente v Her Majesty the Queen [1985] 2 SCR 673 it was held as below:

'Any accused charged with an offence has the right:

'To be presumed innocent proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'.

Constitutional right to appeal

Section 41 of the Republican Constitution for Malawi states as follows:

'Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.'

The Claimant cited People v Jones(1981) 125 Cal App 3d 298, where it was held as below:

'Here, we have a case in which the defendant without any fault of his own was deprived of the right to an effective presentation of his appeal... It would be a violation of the fundamental rights of the defendant to hold that an effective possibility of appealing the convictions was properly taken away by our system of justice.'

Analysis of the law and facts

32, In conclusion the Claimant submitted that the 1st Defendant contended that his decision to commit the Claimant's criminal trial from the lower Court was reasonable and not ultra vires. The 2nd Defendant on the other hand contends that the 1st Defendant has powers to commit criminal trials to the High Court of

Malawi; that there is no procedural unfairness tantamount to interfering with Judicial independence as regards the 1st Defendant's committal of the Claimant's trial to the High Court of Malawi; that the decision complained of herein was not made in bad faith, is not discriminatory and is not unconstitutional; that the 1st Defendant is only answerable to the Legal Affairs Committee of the National Assembly and not this Honorable Court; and that it is flawed to suggest that the 1st Defendant herein was required to first grant the Claimant herein a chance to be heard before committing his criminal trial to the High Court of Malawi.

33, That for the record, Defendants' contention that this Honorable Court lacks jurisdiction the 1st Defendant's decision herein, but the Legal Affairs Committee of the National Assembly. Going through the Claimant's application for leave to move for Judicial Review, the court will note that the Claimant herein argues that the 1st Defendant's unilateral decision to commit his criminal trial in the lower Court to the High Court of Malawi is invalid and unlawful for being:

- a) Issued without any valid reasons as to why the only the Claimant's criminal trial in the lower Court is a proper one for committal to the High Court for trial;
- b) Issued arbitrarily by a party to the proceedings who is essentially judge-shopping;
- c) Issued in contravention of the principle of independence of the Judiciary as enshrined in sections 103 and 9 of the Constitution

- d) Issued without first affording the Claimant herein the right to be heard;
- e) Issued in contravention of section 20 (1) of the Constitution as it was issued without disclosing the criteria for singling out the Claimant's case out of thousands of cases in Malawi;
- f) In contradiction with the Claimant's Constitutional right to fair-trial under section 42 of the Constitution.

34, The Claimant stated that the Claimant's claims herein revolve around serious and fundamental breaches of the Claimant's Constitutional rights and freedoms occasioned by the 1st Defendant's unilateral decision to commit the Claimant's criminal trial in the lower Court to the High Court of Malawi, as clearly particularised above.

35, That in terms of **Section 46 (2) of the Republican Constitution for Malawi [1994]**, only this court has jurisdiction to determine these [alleged] breaches of the Claimant's said Constitutional rights and freedoms and certainly not any other forum including the National Assembly's Legal Affairs Committee as mistakenly and erroneously contended by the Defendants herein. The Defendants' assertions that the 1st Defendant is not answerable to this Honorable Court by way of Judicial Review in exercise of his functions, the said functions purportedly being Executive functions and not administrative functions, is equally erroneous.

36, That the 1st Defendant herein is a creature of the Constitution - to - wit- the Executive arm of Government. That section **4 of the Republican Constitution for**

Malawi [1994] binds all arms of Government, the Executive arm inclusive, and requires them to always abide by its dictates. That the Defendants assertion that the 1st Defendant's exercise of his powers is not amenable to Judicial Review to this extent thus stands erroneous and flawed. It is only right and proper that this Honorable Court should disregard it in its entirety and the Claimant so prays.

37, That the Defendants herein have also cited a decision per Honorable Justice Nriwa in The State and Director of Public Prosecutions and Attorney General Ex-Parte Thomson Mpinganjira Judicial Review Cause No. 30 of 2020 and another decision in The State and the Director of Public Prosecutions Ex Parte Gift Trapence and Another Misc. Civil Cause No. 16 of 2016 per Honorable Justice Prof. Kapindu wherein where their Lordships held that the exercise of powers by the 1st Defendant herein are not amenable to Judicial Review. The Defendants have thus prayed that Your Lordship should adopt this reasoning and proceed to dismissing the Judicial Review proceedings herein with costs. For purposes of emphasis, the Claimant herein strongly stated that the above decisions are in no way binding on this court. They are simply decisions from the same Honorable Court wherein Your Lordship also sits.

38, That the Claimant prays that this Honorable Court should also not follow the reasoning therein but rather, Your Lordship should consider the serious violations of the Claimant's Constitutional rights and freedoms including the Constitutional right to a fair trial occasioned by the 1st Defendant's unilateral, unreasonable, invalid and unlawful decision of committing the Claimant's criminal trial in the lower Court to the High Court of Malawi in view of sections 4, 5, 9, 43, 46 (2) and 108 of the Republican Constitution for Malawi, reproduced above.

39, That the charge which the Claimant herein is answering is within the jurisdiction of the lower Court. Meaning, the lower Court can ably and competently dispose of the Claimant's said criminal trial. That the 1st Defendant disregarding this and deliberately, unjustifiably and unilaterally opting the High Court of Malawi to instead preside over the Claimant's criminal trial raises more questions than answers. Clearly, the 1st Defendant is Judge shopping.

40, That it is unreasonable and flawed on the part of the Defendants to argue that it is only prudent that the Claimant's criminal trial should take place in the High Court simply because the Claimant herein is a well-known lawyer in town. What happens when a well-known lawyer is tried in the Magistrate's Court and not the High Court of Malawi? Is the Magistrate's Court not competent enough to adjudicate a well-known lawyer's criminal trial? Is a well-known lawyer answering criminal charges any different from any other accused person?

41, That all these questions buttress and vindicate the Claimant's very point that the 1st Defendant's decision complained of herein is entirely unreasonable in Wednesbury sense. Otherwise, a reasonable Director of Public Prosecutions can never transfer a trial which properly falls within the jurisdiction of a particular lower Court to the High Court of Malawi for no valid reasons at all in writing; without first granting the affected Accused person a chance to be heard and only singling out the said Accused person's case out of the litany of cases.

42, That there is a litany of cases being properly brought before and or being tried in the lower Courts as stated above; the same Cases which could have also been properly handled by the High Court of Malawi. For example, in the case of the *Republic vs Herbert Mandala and others*, Criminal Case Number 15 of 2017, the

Anti-Corruption Bureau was prosecuting the accused person in that case under the Corrupt Practices Act with the Consent of the DPP before the Chief Resident Magistrate Gladys Gondwe in Mzuzu, as she then was. However, the DPP did not issue the Certificate he has issued herein committing the case to the High Court.

43, That the Defendants herein thus by unjustifiably singling out the Claimant's trial and committing it to the High Court of Malawi amongst the said numerous cases has thus acted in a discriminatory manner as against the Claimant. It is the same Republican Constitution for Malawi which in strongest terms bars such acts of discrimination.

44, That another angle from which discrimination should be viewed by this court is that the Defendants herein are depriving the Claimant of forums for appeal in case of unfavorable outcome of this case. If this matter over which this court has competent jurisdiction is tried by the High Court as a Court of first instance as the Defendants wish, then the Claimant will have one forum for appeal instead of two forums. Yet other accused persons similarly situated with the Claimant herein are allowed by the same Defendants to have two forums for appeal.

45, That the 1st Defendant also must have considered the constitutional principle of equality before the law under section 12 (1) (e) of the Constitution. The 1st Defendant, being a party to this case, must have placed himself on equal footing with his fellow party to the case before this court. This is what the Constitution demands of him. Using the archaic section 289 of the Criminal Procedure and Evidence Code to gain advantage over the Claimant to move the case from one forum to another is an action that offends the principle of equality of persons before the law.

46, That the right to fair trial under section 42 entails that the Claimant herein, being an Accused person must know what is going on with his case blow by blow. The Defendants are required to be transparent to the Claimant. Further, the principles of natural justice under common law demand that before a decision that is detrimental to a person is made, such person must be afforded opportunity to be heard.

47, That the Claimant appreciates that the 1st Defendant has discretion to institute criminal proceedings in any Court in as far as section 99 of the Republican Constitution is concerned. This discretion is however not immune from review by this Honorable Court in instances like the ones present wherein a Claimant alleges breach of fundamental Constitutional freedoms and rights by the said decision. For, as clearly stated above, only Your Lordship has the necessary jurisdiction under the Republican Constitution for Malawi [1994].

48, It is thus the Claimant's prayer that this Court should equally find as such and further that this Honorable Court should make a like order like to certiorari quashing the said decision in its entirety. The Claimant also makes a prayer for costs of these judicial review proceedings.

DIRECTOR OF PUBLIC PROSECUTION'S SUBMISSION

Powers of The Director of Public Prosecutions

49, Section 99(2) of the Constitution states that:

“(2) The Director of Public Prosecutions shall have power in any criminal case in which he or she

considers it desirable so to do—

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;”

Furthermore, section 100 of the Constitution of the Republic of Malawi further stipulates that:

“(1) Save as provided in section 99 (3), such powers as are vested in the office of the Director of Public Prosecutions may be exercised by the person appointed to that office or, subject to his or her general or special instructions or to an Act of Parliament, by—

*(a) persons in the public service acting as his or her subordinate; or
(b) such other legally qualified persons on instructions from the Director of Public Prosecution.*

2. notwithstanding subsection (1) -

a. the person appointed to the office of Director of Public Prosecutions shall be accountable to the Legal Affairs Committee of Parliament for the exercise of such powers in his or her own behalf and those powers exercised on his or her behalf by subordinates in accordance with subsection(1);”

50, Section 289 of the Criminal Procedure and Evidence Code asserts that:

“Notwithstanding anything contained in Part VIII, in any case where a person is charged with an offence, the Director of Public Prosecutions may issue a certificate in writing that the case is a proper one for trial by the High Court as a summary procedure case and such case shall, upon production to a subordinate court of such certificate, be dealt with by the subordinate court in accordance with this Part.”

The Reviewability of Decisions of the Director of Public Prosecutions

51, The DPP submitted that in the case of the *State & Another, Ex Parte: Trapence & Another* (Constitutional Cause No. 1 of 2017) MWHC 799 (20 June 2018) (Unreported), the Court was called upon to determine whether the powers of the Director of Public Prosecutions stipulated under section 99 of the Constitution are amenable to judicial review. The court observed that the powers of the Director of Public Prosecutions are executive and amenable to judicial review only in rare and exceptional circumstances. The court further stated that:

“Ordinarily, officers, holding executive powers are accountable to constitutional bodies such as in this case, the LAC. As such, any other mechanism for holding them accountable as if they were holders of administrative powers, would not be appropriate. Under Section 100(2) of the Constitution the law provides for accountability in the exercise of powers vested in the DPP. It provides as follows:

(2) Notwithstanding subsection (1)—

(a) the person appointed to the office of Director of Public Prosecutions shall be accountable to the Legal Affairs Committee of the National Assembly for the exercise of such powers in his or her own behalf and those powers exercised on his or her behalf by subordinates in accordance with subsection (1).

On the face of it, and foremost, the DPP is accountable to LAC and not to the known judicial review the actions and decisions of the DPP. This shall therefore mean that if there are issues as to how the DPP has carried out her/his duties, the same shall be referred to the LAC which oversees the exercise of constitutional powers by the DPP. In this regard, Applicants should have respected the constitutional mechanism by inquiring first with the LAC as to how the DPP took-over and discontinued a case which they had interest to prosecute. The answers are there with the LAC as the DPP furnished the LAC with reasons.

It is not enough to mention about section 100(2) of the Constitution and eclipse section 101(2) of the said Constitution which buttresses section 110(2). It provides thus:

(2) In the exercise of the powers conferred on him or her by this Constitution or any other law, the Director of Public Prosecutions shall be subject only to the general or special directions of the Attorney General but shall otherwise act independent of the direction or control of any other authority or person and in strict accordance with the law:

Provided that the Director of Public Prosecutions or the Attorney General may be summoned by the Legal Affairs Committee of Parliament to appear before it to give account for the exercise of those

powers.

...The LAC is made responsible for overseeing the due exercise of constitutional duties vested in the DPP.

...As the oversight constitutional responsibility lies on the LAC. So long as the DPP proves that he or she has accounted to the LAC, no more is required from him or her. This principle of separation of powers is to be respected at all times as one of the pillars of our democracy. It does not matter that there is a public duty under Section 43 of the Constitution. The specific duties enshrined in Section 99(2) are hardly subject to the requirements of Section 43 of the Constitution because they do not fall under the ambit of administrative actions."

52, That Justice Kapindu further asserted in *The State and The Director of Public Prosecutions ex parte Gift Trapence and Timothy Mtambo* Miscellaneous Civil Cause No. 16 of 2016 (High Court), that:

*"It would appear to me that the exercise of prosecutorial decisions of the DPP is a species of executive action rather than administrative action. Guided by comparison case law such as *Association of Regional Magistrate of Southern Africa v. President of South Africa and others* the amenability of such executive action to judicial review is more circumscribed and limited."*

53, That it should be further noted that in the case of *R v Inland Revenue Commissions ex parte Mead* (1993) ALL ER 772; the Court held that although a decision to prosecute an adult is amenable to judicial review, the circumstances in which such challenge can occur are rare and extreme (emphasis added). That in *R*

v. DPP ex p C (1995) 1 Cr App R 136 it was held that the decision not to prosecute was reviewable in exceptional circumstances where it is demonstrated that it was arrived at as a result of fraud, corruption, bad faith or because of unlawful policy.

54, That in the Fijian case of Matululu v Director of Public Prosecutions (2003) FJSC2 4 LRC 712 stipulates the extreme circumstances under which prosecutorial decisions are reviewable:

- (1) *“In excess of the DPP’s constitutional or statutory powers;*
- (2) *Contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion;*
- (3) *In bad faith;*
- (4) *In abuse of process of the court in which it was instituted although the proper forum for review of that action would ordinarily be the court involved and;*
- (5) *Where the DPP had fettered his or her own discretion by a rigid policy preventing her to prosecute a certain offence.”*

Discussion of the law

55, The DPP submitted that in the case of The State and The Director of Public Prosecutions ex parte Gift Trapence and Timothy Mtambo (op cit) clearly asserts that since the decisions of the 1st Defendant emanate from the Constitution, therefore, executive in nature, the amenability of such decisions to judicial review

shall only occur in rare and exceptional circumstances since the 1st Defendant is under the Constitution accountable to the Legal Affairs Committee of Parliament.

56, That Section 289 of the CPEC which empowers the 1st Defendant to issue a certificate in writing, certifying the matter as fit for trial before the High Court, is an exercise of a prosecutorial power. That Justice Kapindu in *ex parte Gift Trapence and Timothy Mtambo* (op cit) asserted that prosecutorial powers are executive in nature than administrative.

57, That it therefore follows, from the conclusions made in *ex parte Gift Trapence and Timothy Mtambo* (op cit) that prosecutorial powers exercised by the 1st Defendant are in ordinary circumstances not amenable to judicial review, save in rare and exceptional circumstances. The court's reasoning in the above quoted case is applicable to the present case under section 289 of CPEC. Therefore, the 1st Defendant submitted that the prosecutorial powers granted to him under section 289 of the CPEC are not ordinarily amenable to judicial review. That the Claimant has not shown that rare and exceptional circumstances exist justifying the amenability of the Defendant's decision to judicial review.

58, That in the cases of *R v. DPP ex p C* (op cit), *Koostack v A-G of Alberta* (op cit) and *Matululu v Director of Public Prosecutions* (op cit) provide guidance on what constitutes rare and exceptional circumstances warranting judicial review of the decisions of the 1st Defendant. The summarized instances of rare and exceptional circumstances from these cases are:

- a. bad faith
- b. Illegal/ultra vires actions

- c. failure to exercise independent discretion
- d. abuse of the court process
- e. unreasonableness
- f. impropriety

59, The 1st Defendant submitted that there is no bad faith, unreasonableness, impropriety, neither was the decision to certify the matter for trial to the High Court made ultra vires. Furthermore, the process of summary committal is one that is discretionary and provided for by law, thus the same cannot be said to be a failure to independently exercise discretion or indeed an abuse of court process.

60, That in the case of *R v Secretary of state for the Home Department Ex – p Ruck Shanda Begum*[1989] 1 LR 110, 112F which asserted that where the court is convinced that there is no arguable case fit for further consideration it should not grant the application for leave for judicial review. As argued above, since the Claimant's claim has not exposed any rare and exceptional circumstances warranting the reviewability of the 1st Defendant's decisions by way of judicial review beyond the constitutionally provided accountability measures; the Claimant has no arguable case fit for judicial review.

Submissions

61, The 1st Defendant submitted that the 1st Defendant's exercise of prosecutorial powers is reviewable by way of judicial review only in rare and exceptional circumstances. That the Claimant's claim does not raise any rare and exceptional circumstances warranting judicial review of the 1st Defendant's actions.

Prayer

The 1st Defendant prays that the Claimant's grounds for the application for judicial review are without merit and be dismissed and the Claimant condemned in costs.

ANTI CORRUPTION BUREAU'S SUBMISSIONS

62, The 2nd Defendant submitted that it is trite law that Judicial Review is concerned with the decision making process and not the merits of the decision made. They cited the cases of the, *John Mwandenga v Secretary for Health and Population* Civil Cause Number 9 of 2003 High Court of Malawi Mzuzu Registry [unreported], *The State v Registrar General ex parte Msenga Mulungu & 8 Others* Miscellaneous Civil Cause Number 14 of 2010 High Court of Malawi Mzuzu Registry [unreported], *The State and Road Traffic Directorate ex parte Vincent Mibulo* Miscellaneous Civil Application Number 12 of 2010 High Court of Malawi Mzuzu Registry [unreported], *The State and Ministry of Public Works ex parte Sonia Fumbo* Civil Cause Number 147 of 2009 High Court of Malawi Mzuzu Registry [unreported].

63, That in terms of a remedy obtaining in Judicial reviews, Justice Chikopa then in the case between *State v Chief Secretary to the President and Cabinet ex-parte Dr. Bakili Muluzi*, Miscellaneous Civil Application no 3 of 2011 held that;

'A decision of a public authority may therefore be quashed where the authority acted without jurisdiction or exceeded its jurisdiction, or failed to comply with the rules of natural justice where such rules are applicable, or where there is an error of law on the face of the record or the decision is unreasonable in the Wednesbury sense'.

64, That the position in Malawi as stated above is also the position prevailing at Common law. The classic formulation is that by Lord Greene in the case between Associated Provincial Houses Ltd v Wednesbury Corp. [1948] 1 KB 223, popularly known as the Wednesbury case. He said courts can only interfere if a decision is so unreasonable that no reasonable authority could ever come to it. Examples are bad faith, perversity [see Lord Brightman's sentiments in Pulhofer v Hillingdon LBC[1986] 3 All ER 353], absurdity implying that the decision maker has taken leave of his senses [see Lord Scarman's sentiments in R v Secretary of State for the Environment ex parte Notts CC[1986] AC 240]. In Council of Civil Service Unions v Ministers for the Civil Service [1985] AC 374 Lord Diplock equated unreasonableness to irrationality which he described as applying to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

65, That in the case between Chief Constable of North Wales Police v Evans[1982] 1 WLR 1155 AT 1160 the court held as follows:

'it is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question'.

66, That in Malawi, Judicial Review is provided under Section 108(2) of the Constitution as read together with Order 19 of the Courts (High Court) (Civil Procedure Rules) Act. Summary procedure cases are provided under Section 289 and Section 291 of the Criminal Procedure and Evidence Code:

whether it was lawful for the director of public prosecutions to issue a certificate of summary procedure trial pursuant to section 289 of the criminal procedure and evidence code.

67, The 2nd Defendant submitted that as it stands now, the law, in particular under section 289 of the Criminal Procedure and Evidence, allows the Director of Public Prosecutions to issue a certificate of summary procedure case to commit a matter to the High Court. According to the facts of this case, the Director of Public Prosecutions acted pursuant to section 289 of the Criminal Procedure and Evidence Code. There is no law that has invalidated section 289 of the Criminal Procedure and Evidence for being unconstitutional and no court of competent jurisdiction, being the High Court, has ever declared the section invalid.

68, That it is trite law that a law is the law until a competent court declares it invalid (our own emphasis). In the case of Dr. Bakili Muluzi v The Director of Anti-Corruption Bureau Civil Appeal no 17 of 2005 MSCA, where the applicant wanted the court to ignore section 4 of the Civil Procedure (suits by or against the government or public officers) Act cap 6.01 of the Laws of Malawi for being archaic, Chief Justice Lovemore Munlo held that;

"all Acts which have not been amended or repealed by Parliament or declared unconstitutional by a competent court are valid. The Courts are by virtue of section 9 of the Constitution duty bound to protect and enforce not only the Constitution but also all laws in accordance with the Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescription of the law. As an officer of the Court, Counsel is also under a duty to respect any law which has not been declared inconsistent with the Constitution by a competent court of law. Counsel cannot pick and choose as to which laws he will obey and to which laws he will ignore to follow".

69, That in the case of *The State (on application of Lin Xiaoxiao, Liu Zhigin and others) and The Director General Immigration and Citizenship Services, and Attorney General* Judicial Review no 19 of 2020 Counsel representing the Attorney General argued that the prevailing laws under were archaic and that the Court should simply ignore such laws for being unconstitutional. Justice Kenyatta Nyirenda held that;

"I cannot ignore a law for being archaic as the law is the law until is it declared invalid. In the present case, Counsel for the accused, not heeding to the holding in the above case which was in the public domain as it related to the Covid 19 pandemic want to mislead this court to just ignore a law, a statutory provision made by parliament when he is aware that such a provision has not been declared invalid".

70, That the 2nd Defendant accordingly submitted that considering that section 289 of the Criminal Procedure and Evidence Code has not been declared unconstitutional or invalid by any competent court of law in Malawi, The Director of Public Prosecutions acted lawfully by issuing a certificate of summary procedure case pursuant to section 289 of the Criminal Procedure and Evidence Code.

71, That the 2nd Defendant respectfully submitted that the Court should dismiss the ground raised by the Claimant that the Director of Public Prosecutions acted unlawfully by issuing a Certificate of Summary Procedure Case as it has been shown from the foregoing paragraphs that the Director of Public Prosecutions issued the certificate pursuant to a law which has not been declared invalid by any competent court of law in Malawi and it has not been repealed by Parliament.

Whether there was procedural unfairness tantamount to interfering with the judiciary when the director of public prosecutions issued a certificate pursuant to section 289 of the criminal procedure and evidence code to have a matter committed to the high court.

72, That the first issue raised by the Claimant's counsel is whether the Director of Public Prosecutions is interfering with the judiciary when he argued that the certificate which the DPP issued pursuant to section 289 of the Criminal Procedure and Evidence Code violated the constitutional principle of the independence and impartiality of the Judiciary under sections 9 and 103 of the Constitution.

73, That Counsel had failed to explain how a certificate issued by the Director of Public Prosecutions under a statute is influencing or directing the judiciary or the presiding magistrate or the Judge in the discharge of their duties. That the 1st and 2nd Defendant, as parties to the case are the competent authority to decide where to commence a criminal case and not the judiciary as the defense would like the court to believe.

74, That in an adversarial system like the one in Malawi, the court does not commence cases, it is the parties to a case that decides where to commence a case subject to the statutes that provides for procedure for example in this case the Criminal Procedure and Evidence Code. Counsel for the Claimant may have to read the Constitution, the Court's Act and the Criminal Procedure and Evidence Code to appreciate the fact that a court does not commence criminal proceedings but the Director of Public Prosecutions.

75, That further, section 99 (2) (a) of the Constitution of Malawi gives power to the Director of Public Prosecutions to institute criminal cases in any court other than a court-martial). That from the foregoing, it is clear that under the circumstance, that

you cannot blame the Director of Public Prosecution, in exercise of the powers conferred on him by section 99 (2) (a) of the Constitution of the Republic of Malawi, when he decides to commence a matter in the High Court, as it is the case herein.

76, That under the Criminal Procedure and Evidence Code it is trite law that criminal cases are instituted in the Magistrates Court pursuant to section 83 of the code. However, Section 108 of the Constitution of Malawi gives the High Court unlimited original jurisdiction to hear any criminal matters including the matter herein.

77, That both the Magistrates Court and the High Court have concurrent jurisdiction to conduct trials (see part VII and part X of the Criminal Procedure and Evidence Code). The concurrent jurisdiction of the Magistrates Court and the High Court to conduct criminal trials is also provided for in the Criminal Procedure and Evidence Code (see part VII and part X of the Criminal Procedure and Evidence Code).

78, That the 2nd Defendant is alive to section 83 of Criminal Procedure and Evidence Code that the Magistrate Courts is the court of first instance in Criminal matters. However, much as instituting a case is restricted to the Magistrates Court, the law has provided for procedure for holding a trial in the High Court in particular under sections 262 and section 298 of the Criminal Procedure and Evidence Code. As is the case herein, the 2nd Defendant opted to use section 262 of the Criminal Procedure and Evidence Code to have the case committed to the High Court.

79, By making the provision in the Criminal Procedure and Evidence Code, it is crystal clear that Parliament, representing the wishes of Malawians, envisaged a

situation where certain matters would need to be tried in the High Court and they provided for a procedure that would allow such matters to be tried in the High Court provided that the Director of Public Prosecutions upon being satisfied that a matter is fit to be tried in the High Court issues a certificate of summary procedure case to have the matter tried in the High Court. It is on such basis that the 2nd Defendant having followed all the requirements under section 289 of the Criminal Procedure and Evidence Code, proceeded to make an application before the Subordinate Court that this matter is being committed to the High Court.

80, That the 2nd Defendant respectfully submitted that the Court should dismiss the ground raised by the Claimant that the Director of Public Prosecutions as a party to the case is doing judge shopping or interfering with judicial independence or administration of justice as it has been shown from the foregoing paragraphs that the Director of Public Prosecutions and the 2nd Defendant, as a party to the case with powers to commence criminal proceedings have the discretion to decide where to commence a criminal matter either in the Magistrate Court or the High Court pursuant to section 289 of the Criminal Procedure and Evidence Code.

Whether the decision by the state to prosecute the suspect in the high court was made in bad faith, it is discriminatory and unconstitutional

81, That the Claimant has, under paragraph 7 to 9 of his Sworn Statement and paragraph 4.2 to 4.6 of his skeleton arguments, attempted to show that this procedure is discriminatory by providing a list of cases prosecuted by the Anti-Corruption Bureau in the lower court. In response, the State submitted that it is trite law that every case has its own facts and reasons for commencing in the Magistrates Court or the High Court. The State submits that there are numerous cases which the Anti-Corruption Bureau has prosecuted in the High Court as well

pursuant to section 289 of the Criminal Procedure and Evidence as it is the case herein.

82, That for the avoidance of doubt, the State committed the following cases to the High Court pursuant to section 289 of the Criminal Procedure and Evidence, *R v Mpinganjira Criminal Case no 1 of 2020*, *R v Dr. Bakili Muluzi and others Crim Case no 1 of 2009*, *R v Hon. Charles Mchacha, Hon. Symon Vuwa Kaunda, Justice Llyod Muhara and Kumwembe Criminal Case no 1 of 2021*, *R v Jean Mathanga and others Criminal case no 8 of 2020*, *R v Dennis Spax John Kambalame Criminal case no 108 of 2002*, to mention but a few.

83, That as it has been shown above, there are numerous people who have had their cases committed to the High Court in the same manner and fashion as the case herein. This include the trial of the Honorable Justice Lloyd Muhara who is the Judge of the High Court. From the foregoing paragraphs, the argument that the State is discriminatory against the accused person when other matters were tried in the Magistrates Court is unmeritorious as there are numerous cases which have been tried in the High Court as shown in paragraph 3.0.9 herein.

84, That in addition to the arguments raised *supra* it is trite law that all rights other than those prescribed under section 45 of the Constitution of the Republic of Malawi may be limited. This notion is reinforced by 44 (1) of the Constitution of the Republic of Malawi, which provides that some rights can be derogated where the limitation is prescribed by law, is reasonable, recognized by international human rights standards and necessary in an open and democratic society. It is clear that, if the certificate of summary procedure case is discriminatory against the accused person, which we don't believe to be the case and without prejudice, then that discrimination falls under the exemption that some rights can be limited if the

limitation is prescribed by law vis-à-vis under section 289 of the Criminal Procedure and Evidence Code.

85, That the 2nd Defendant submitted that the Court should dismiss the ground raised by the Claimant that the Director of Public Prosecutions and the 2nd Defendant acted in a discriminatory manner against the Claimant as it has been shown from the foregoing paragraphs that the Director of Public Prosecutions and the 2nd Defendant treats each case according to the facts of the case. Further, the 2nd Defendants submits that the right not to be discriminated against is derogable according to section 44 of the Constitution of the Republic of Malawi particularly when the limitation is provided for under the law which in this case is section 289 of the Criminal Procedure and Evidence Code.

Whether the director of public prosecutions acted unreasonably by not according the accused person a right to be heard or by not giving him reasons for committing the matter to the high court before issuing the certificate of summary procedure case

86, That the Claimant submitted under paragraph 4.7 of their skeleton arguments that the Director of Public Prosecutions failed to furnish them with reasons for committing the matter to the High Court. The State submitted, as it did before in the lower court, that section 289 of the Criminal Procedure and Evidence code cited *supra* is clear that the court shall not hold a preliminary inquiry on the reasons why the matter is to be committed to the High Court.

87, That further, it is a fact that the right to be heard accorded to an accused person is limited to the Court giving him audience to narrate his version of the story or to give evidence that will prove his innocence and does not extend to being consulted when the 1st and 2nd Defendants are making prosecutorial decisions. The Director

of Public Prosecution and the 2nd Defendant cannot be consulting an accused person on how they want to conduct their trial simply because they are occupying a public office. It is a clear misunderstanding of the law that the Claimant thinks that he has a right to be heard whenever a prosecutor is deciding which court he intends to commence a case. That argument is unattainable at law and is clearly misplaced.

88, That the governance and accountability structure for the Director of Public Prosecution does not include accused person as provided for in the Malawi Constitution under section 99 (3) and section 101 (2) respectively. That the two provisions cited above clearly indicates the accountability structures for the Director of Public Prosecutions for any decision he makes in the discharge of his duties including the decision to issue a certificate of summary procedure case to have a matter committed to the High Court.

89, That they have read the cited provisions together with section 42 of the Constitution of the Republic of Malawi and it is clear that the DPP is only accountable to the Legal Affairs Committee of Parliament and the Attorney General to the exclusion of any person including the accused person herein.

90, That at Common Law, it is clear that when the DPP is discharging his duties, including the decision to issue a certificate for summary procedure as it is in this case, such decisions are executive decisions whose power of scrutiny or review only rests with the Legal Affairs Committee of the National Assembly. It is trite law that even the Judiciary is slow to review executive decisions. In the case between *The State and Director of Public Prosecutions and Attorney General and Ex-Parte Thomson Mpinganjira* Judicial Review Case number 30 of 2020 where the applicant sought leave for judicial review against the decision by the Director of Public Prosecutions to commit the applicant to the High Court for prosecution. Justice N'riva, Judge of the High Court, held that;

“committal proceedings should not, in general terms, be subject to judicial review. He went on to say that the DPP is constitutionally required to give account before the Parliamentary Legal Affairs Committee on how she or he has exercised the powers conferred on her. The acts of the DPP, in committal proceedings, among others, are not administrative but executive”.

91, The 2nd Defendant also cited *The State and the DPP ex-parte Gift Trapence and Timothy Pagonachi Mtambo* Miscellaneous Civil Cause no 16 of 2016.

That under common law, and in the case of *Attorney-General v Edward Jack Shamwana* (1981) Z.R. 12 (H.C.) where the applicants were questioning the certificate of committal issued by the DPP under section 255 of their Criminal Procedure Code which is framed exactly as section 289 of the Malawi Criminal Procedure and Evidence Code, the court held that;

“Section 255 of the Criminal Procedure Code is mandatory. The certificate of committal issued by the Director of Public Prosecutions prohibits the holding of a preliminary inquiry by a Subordinate Court and compels that court to commit the accused for trial before the High Court forthwith. No subordinate court has any jurisdiction in the matter and by law no subordinate court can query the powers of the Director of Public Prosecutions to issue a certificate of summary committal under sections 254 and 255 of the Criminal Procedure Code”.

92, Section 255 of the Zambian Criminal Procedure Code provides as follows;

Section 255 of the Criminal Procedure Code (Zambia). *No such preliminary inquiry as is referred to in Part VII shall be held in respect of any case in which*

the Director of Public Prosecutions has issued and the prosecutor has produced to a subordinate court a certificate issued under the provisions of section two hundred and fifty-four, but the subordinate court before whom the accused person is brought shall, upon production of such certificate, and whether or not a preliminary inquiry has already been commenced, forthwith commit the accused person for trial before the High Court upon such charge or charges as may be designated in the certificate.

93, That the 2nd Defendant submitted that the Court should dismiss the ground raised by the Claimant that the Director of Public Prosecutions acted unreasonably by not giving him a right to be heard as it has been shown from the foregoing paragraphs that the Director of Public Prosecutions is answerable to the Legal Affairs Committee of Parliament and the Attorney General when he is making executive decisions. Further, it would be absurd and unheard of for the Director of Public Prosecutions and the 2nd Defendant to be giving a right to be heard to an accused person on how he intends to conduct his case in general or in particular which Court he intends to commence a criminal case.

Whether criminal proceedings were commenced in the matter and if the answer is in the affirmative, what are the implications of commencement on summary procedure case?

94, That it is not in contention that proceedings herein were instituted in the Magistrate Court. Criminal Proceedings must be commenced in the Subordinate Courts according to **Section 67(1) (a) of the Criminal Procedure and Evidence Code**, which states that:

The High Court may inquire into and try any offence subject to its jurisdiction at any place within Malaŵi:

Provided that—

(a) except where the High Court, for any special reason (to be recorded on the minutes of the proceedings), shall otherwise direct, no criminal case shall be brought under the cognizance of the High Court, unless the case shall have been previously investigated by a subordinate court, and the accused person shall have been committed for trial before the High Court, or unless the accused person has been committed for trial by summary committal procedure

95, That Counsel for the Claimant however argued that the fact that Counsel for the State contacted him on two occasions to inform him that he was ready to proceed with trial and had witnesses ready entails that the State intended to have the matter heard in the Magistrate Court but proceeded to change its mind in a bid to forum shop. However, it must be noted that no witnesses were ever paraded and for all intents and purposes, trial never commenced in the Magistrate Court. Counsel for the State went on both occasions to Court with the intention of adjourning the matter as a Certificate of Summary Procedure was yet to be obtained.

96, The 2nd Defendant stated that upon production of the Certificate of Summary Procedure Case to the Subordinate Court, the Court record in a case where depositions were taken or exhibits produced shall be transferred without delay to the High Court. This entails that the fact that trial has commenced is not in itself a bar to having the matter committed to the High Court. As has already been stated, in this case, no witnesses were paraded in the Magistrate Court and this in itself precludes any prejudice that the Claimant herein would suffer with regards to the trial if the matter is committed to the High Court.

97, That the 2nd Defendant therefore submitted that no trial having commenced in the Magistrate Court, no witnesses having been paraded, the Claimant would not in any way suffer prejudice if the matter were committed to the High Court. The 2nd Defendant further submits that even if the matter were to have commenced in the Magistrate Court, commencement of a matter does not disqualify a matter from being committed to the High Court. The 2nd Defendant humbly prays to this Honorable Court to dismiss all the grounds raised in the application for Judicial Review and the Orders prayed for in the application with costs to the 2nd Defendants.

THE FINDING

98, The facts in this case are not in dispute and I need not re state them here. I will start by agreeing with my senior brother Chikopa then in the *State v Chief Secretary to the President and Cabinet ex-parte Dr. Bakili Muluzi*, Miscellaneous Civil Application no 3 of 2011 in which he held that;

'A decision of a public authority may therefore be quashed where the authority acted without jurisdiction or exceeded its jurisdiction, or failed to comply with the rules of natural justice where such rules are applicable, or where there is an error of law on the face of the record or the decision is unreasonable in the Wednesbury sense'.

99, I'm in further agreement with my brother Kapindu, Jin *The State and The Director of Public Prosecutions ex parte Gift Trapence and Timothy Mtambo* (op cit) that prosecutorial powers exercised by the 1st Defendant are in ordinary circumstances not amenable to judicial review, save in rare and exceptional

circumstances. The DPP's power can be challenged where there is clear evidence of illegality, bad faith and unreasonableness. The Claimant has moved this court to review the decision to move his case to the High Court which the Claimant alleged violated this basic rights under the constitution. The law in section 99 and 100 of the constitution is clear on the power and role of the DPP. Section 99(2) of the Constitution states that:

"(2) The Director of Public Prosecutions shall have power in any criminal case in which he or she

considers it desirable so to do—

(b) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;"

100, Furthermore, section 100 of the Constitution of the Republic of Malawi further stipulates that:

"(1) Save as provided in section 99 (3), such powers as are vested in the office of the Director of Public Prosecutions may be exercised by the person appointed to that office or, subject to his or her general or special instructions or to an Act of Parliament, by—

(a) persons in the public service acting as his or her subordinate; or

(b) such other legally qualified persons on instructions from the Director of Public Prosecution.

2. notwithstanding subsection (1) -

a. the person appointed to the office of Director of Public Prosecutions shall be accountable to the Legal Affairs Committee of Parliament for the exercise of such powers in his or her own behalf and those powers exercised on his or her behalf by subordinates in accordance with subsection(1);”

101, Section 289 of the Criminal Procedure and Evidence Code asserts that:

“Notwithstanding anything contained in Part VIII, in any case where a person is charged with an offence, the Director of Public Prosecutions may issue a certificate in writing that the case is a proper one for trial by the High Court as a summary procedure case and such case shall, upon production to a subordinate court of such certificate, be dealt with by the subordinate court in accordance with this Part.”

What the Claimant is challenging is the exercise of the powers under section 289 of the CP&EC based on the alleged violation of the rights enshrined in the constitution. The evidence shows that the matter commenced in the lower court, plea of not guilty was entered and recorded on 18 February 2021. On day one the state brought their witnesses but the case collapsed because counsel for the accused was away in Zomba. On day two the case failed again as there were no witnesses. In a sudden turn of events the DPP decided that the proper forum was in the High Court.

102, He did not give any reasons for the change of forum and the Defendants have argued he was not mandated to furnish reasons. The Claimant alleged that this was forum shopping. The Claimant was taken to a subordinate court for his trial where his case was registered. Plea was taken and what awaited was the parade of witnesses. What happened for the DPP to change the forum to the High Court? The law allows him to do so. However I find that, that notwithstanding the DPP was

legally bound to give reasons why the courts were being changed. I'm mindful that the law allows the DPP to choose the type of court to try an accused. The question is why did the DPP not produce the certificate before trial had started? What made him change his mind to go the High Court?

103, The Claimant contends that the said certificate, albeit negatively affecting his Constitutional rights to a fair trial and to a trial before an independent and impartial [tribunal], and that the same was issued before granting the Claimant herein a chance to be heard. The law does not require the accused to present his side of the story. But I find that the DPP was duty bound to give reasons as to why the forum was being changed. The accused was entitled to be told why the forum was being changed since both levels of courts had concurrent jurisdiction. The law cannot allow the DPP to change forums Willy-nilly where rights of the accused are concerned. In the absence of reasons one would speculate the motives for such a move.

104, The concern of the court in a judicial review proceeding is whether the correct procedure or process of decision-making has been observed. It is not the concern of the court as to the merits of such decision nor anything else outside the procedure and process to have been followed. A decision of a public authority may therefore be quashed where the authority acted without jurisdiction or exceeded its jurisdiction, or where there is an error of law on the face of the record or the decision is unreasonable in the Wednesbury sense.

105, The 2nd defendant submitted that no trial having commenced in the Magistrate Court, no witnesses having been paraded, the Claimant would not in any way suffer prejudice if the matter were committed to the High Court. The 2nd Defendant further submitted that even if the matter were to have commenced in the Magistrate

Court, commencement of a matter does not disqualify a matter from being committed to the High Court.

106, In my considered view trial had commenced in the magistrate court. Now fair trial entails that the accused must be informed of all the processes taking place and the reasons thereon. An accused person must not be ambushed so that he wakes up one day only to be told that his trial is now in the High Court. There must be reasons given as why the forum has changed. Whether it was the complexity of the evidence or the law that was supposed to be communicated to the lower court and the accused. Suffice to say that the accused had no right to respond or query the decision.

107, I'm in agreement with the Defendants that upon production of the Certificate of Summary Procedure Case to the Subordinate Court, the Court record in a case where depositions were taken or exhibits produced shall be transferred without delay to the High Court. This entails that the fact that trial has commenced is not in itself a bar to having the matter committed to the High Court. However I do not agree with the Defendants that the law does not mandate the DPP to give reasons as why a venue has been changed. Fair and public trial demands otherwise.

108, To allow the DPP to operate as such would undermine the dictates of a fair and public trial. It is my finding that the DPP was duty bound to inform the accused why his trial was being moved to the High Court. There must be a proper reason why a trial is taken from a lower court to the High Court especially where the case had already commenced and was triable by a subordinate court.

109, An accused person whose offence is triable by a subordinate court must enjoy all the levels of appeal available and there must be good reasons why such an

entitlement is curtailed. Was the case complex as to require the services of a judge? Was the judicial officer involved in the original criminal matter a judge of the High Court as to demand a fellow judge to try the case?

110, I see no reasons why this matter was being transferred to the High Court when there is sufficient evidence that such cases under the CPA are normally tried in the lower court. Magistrates Court and the High Court have concurrent jurisdiction to conduct trials (see part VII and part X of the Criminal Procedure and Evidence Code). Is the DPP telling this court that the lower court was not fully equipped to deal with the evidence and the law before it?

111, I agree with the Defendants that in an adversarial system like the one in Malawi, the court does not commence cases, it is the parties to a case that decides where to commence a case subject to the statutes that provides for procedure for example in this case the Criminal Procedure and Evidence Code. This court is not stopping the DPP from proceeding with the criminal case in the court below. It is not the business of this court to examine whether the decision to change forum was merited or not. This court is here to examine how that decision was arrived at and not why it was made.

112, Suffice to say that in the present Constitutional dispensation, the DPP or indeed any person would not take such a huge step as removing a file from a court of competent jurisdiction to another court of concurrent jurisdiction without providing any valid reasons to the Court or the Accused person. If trial had not commenced in the court below and there was an application for a certificate to move the case to the High Court I could have dismissed this application for judicial review. I restate *Chief Constable of North Wales Police v Evans*[1982] 1 WLR 1155 AT 1160the court held as follows:

'it is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question'

113, In the absence of reasons I find the certificate to have been issued in bad faith and the DPP's failure to exercise independent discretion and only acted on instructions from the ACB. In these premises I find that the certificate is invalid and I order that the case should go back to the original court where the accused shall be prosecuted and tried according to law. I order that the case should proceed in the court below within a reasonable time taking into account the limitation period set by the law as the DPP shall deem fit. The prayers that there was discrimination, that there was no right to be heard and that there was forum shopping and interference with judicial process must fail. I have searched the evidence and I find that the Claimant has failed to provide sufficient evidence and legal authorities with regard to the present case to substantiate these claims.

114, I do not agree that the 1st Defendant is only answerable to the Legal Affairs Committee of the National Assembly and not this Honorable Court. Section 108 (1) of the Constitution of the Republic of Malawi provides as follows;

(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.*

115, In this matter the DPP was performing executive functions which are amenable to judicial review. I restate the case of *State and Another v The Director General – Immigration and Citizenship Services and Another Judicial Review Case No. 19 of 2020* in which my brother Justice Kenyatta Nyirenda opined that

‘..the provisions of section 108(2) of the Constitution were made robust enough to ensure that no action or decision by a public body escapes enquiry by the judiciary.’

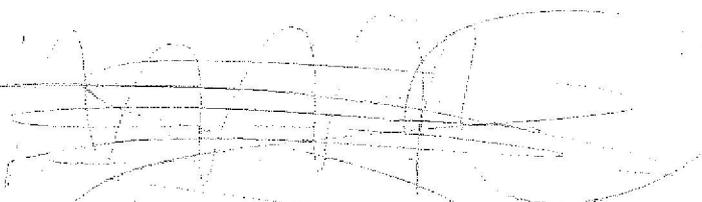
116, The Claimant’s claim that there were no reasons given for the sudden change of venue herein do raise rare and exceptional circumstances warranting judicial review. The application for judicial review is granted as per the above determination. I therefore grant a like order to certiorari quashing the 1st Defendant’s decision.

Costs

These are the exclusive preserve of the court. I make no order as to costs.

I so order

Made in chamber at Blantyre in the Republic on 22nd April 2022



Dingiswayo Madise

Judge