IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

FINANCIAL CRIMES DIVISION

CRIMINAL CASE NO 19 OF 2023

BETWEEN

THE REPUBLIC

- AND –

DR. DALITSO KABAMBE

HENRY MATHANGA

CORAM: THE HONOURABLE JUSTICE R.E. KAPINDU

Mr. I.N.K. Nyasulu, Mr. E. Chibwana, Counsel for the State.

Mr. P. Nkhutabasa, Mr. F. Maele, Counsel for the Defendants.

Mrs. Mombera, Court Reporter.

Mr. Dzikanyanga, Court Clerk/Interpreter.

RULING

KAPINDU, J

INTRODUCTORY

1. This is the Court's Ruling following a number of applications that the defence brought before the Court and which were argued yesterday. Before these applications were heard Counsel Kamudoni Nyasulu, representing the State, addressed the Court on some preliminary issues.

2. Mr. Nyasulu introduced himself to the Court as a Public Prosecutor appointed by the Director of Public Prosecutions (DPP) under section 100 of the Constitution as read with section 79 of the Criminal Procedure and Evidence Code (Cap. 8:01 of the Laws of Malawi) (CP & EC). The significance of specifically mentioning this fact will soon become evident in this Ruling.

3. Counsel Nyasulu began by reminding the Court that the matter had been set down for commencement of trial. In this regard, he stated that four State witnesses who were summoned to testify were in Court, ready to testify. He stated, however, that in view of a number of preliminary issues which had emerged and had to be dealt with by the Court, it was apparent that trial would not commence on the day as earlier envisaged. In the result, Counsel sought the Court's indulgence that it discharges the witnesses who had been summoned for the two scheduled days.

4. The Court, upon examining the record, agreed that there was indeed a cocktail of preliminary issues that needed to be addressed, and duly discharged the four witnesses for the two scheduled days as prayed for by Counsel. The witnesses will be required again to attend Court for testimony next time that the Court fixes the matter for commencement of trial.

5. With that issue dealt with, Counsel Nyasulu proceeded to inform the Court that the State required the Court's direction on several applications, including one to reinstate a previously discharged co-accused person, the Honourable Mr. Joseph Mwanamvekha, and to add two new co-accused persons, namely Mr. Cliff Kenneth Chiunda and Mr. Samuel Chilembwe Malitoni, based on the same facts. He informed the Court that there would be no changes to the disclosures.

6. Counsel Nyasulu proceeded to state, however, that the three individuals intended to be added to the case as co-accused persons had not yet been committed for trial to this Court, and that the hearing on committal had been set down for the 22nd of April 2024, before the Chief Resident Magistrate's Court sitting at Lilongwe. In this regard, the Prosecution sought to defer their applications until such a time that the three intended co-accused persons herein would have been committed to the High Court for trial and presented before the Court.

7. Counsel Nyasulu also acknowledged the defence's application to discharge the current two accused persons on various grounds. He stated, however, that unfortunately he had not fully reviewed the said application because, according to him, he thought it was just a bundle of documents without an accompanying Notice of Application. The Court must quickly mention here that upon scrutiny, the said bundle was in fact complete with a Notice of the said application, contrary to Counsel's observation. The proof of service, acknowledged in free hand and duly stamped by the State to acknowledge service, clearly showed that the State was served with the Notice of the Application together with the complete set of affidavits in support, exhibits thereto and Skeleton Arguments on the 5th of April 2024.

8. Counsel Nyasulu proceeded to caution, however, against proceeding to hear the defence's application. He worried that if the application were to be heard, and be successful, it would present the undesirable scenario where accused persons are cyclically discharged, then re-

accused by the State and brought back to Court for trial. In effect, he was questioning the pragmatic wisdom behind the defence's insistence to have their application to have the accused persons discharged heard and determined, when the defence was in full knowledge that the State had already clearly indicated its intention to fundamentally alter the nature of the charges once the three intended co-accused persons are committed to this Court for trial.

APPOINTMENT AS PUBLIC PROSECUTOR AND NON-RENEWAL OF PRACTISING LICENCE

9. On the part of the defence, Counsel Nkhutabasa representing the 2nd Defendant, began by raising a challenge concerning Counsel Nyasulu's eligibility to prosecute the case, given that he did not have a valid licence to practice. Counsel Nkhutabasa contended that it is mandatory under section 30(4) of the Legal Education and Legal Practitioners Act, 2017 (LELPA) that a legal practitioner may only practice if he or she has a valid licence to practice.

10. Counsel argued that the statutory provisions under the LELPA and other pieces of legislation do not exempt public prosecutors from the requirement of holding a valid practicing licence as a precondition for practicing law. He contended that the term *"legally qualified person"* as it is used under section 100 of the Constitution and section 79 of the CP & EC, necessarily entails that the person so appointed must have a valid practising licence.

11. Counsel Maele, representing the 1st Defendant, supported this line of argument, emphasising the change in the law that was brought about by the LELPA, 2017 and the importance of adhering to its spirit and letter. Counsel suggested that without a valid practicing licence, Counsel Nyasulu is not currently entitled to practice in the courts and hence he is not *"legally qualified"* for purposes of his being appointed and practising as a public prosecutor under the law.

12. In this regard, it was Counsel Maele's submission that Mr. Nyasulu should not be entitled to prosecute cases in that capacity, including the present one, unless and until he renews his legal practitioner's licence.

13. Displaying his learning and vast experience, Counsel Nyasulu provided the Court with a very comprehensive response. Counsel commenced his response by submitting that the term *"legally qualified person"*, as used in the relevant legal provisions, does not necessarily require one to be entitled to practice as a legal practitioner under the LELPA. Counsel sought to differentiate between those who are *"legally qualified"* and those who are *"entitled to practice"*. It was his submission that for purposes of appointment as a public prosecutor, the law only requires one to be *"legally qualified"* and not necessarily to be *"entitled to practice"* in the sense of having a valid legal practitioner's licence as required under section 30(4) of the LELPA.

14. Counsel argued that the Constitution and other laws may authorise certain individuals to prosecute criminal cases without a practising licence. Counsel drew a distinction between various categories of individuals who may take legal action. He classified individuals who may take legal action under the law into the following categories:

(a) Those persons with sufficient knowledge of the law;
(b) Those persons who are legally qualified;
(c) Those persons who are entitled to practice the law; and
(d) In criminal matters, anyone can take out legal action, in the sense that any person can institute criminal proceedings if permitted by a magistrate.

15. Counsel Nyasulu proposed that section 31 of the LELPA, which restricts legal practice, does not apply to his situation as a public prosecutor appointed under the Constitution and the CP & EC.

16. Counsel then referred to Section 82 of the CP & EC, which permits any person to conduct a prosecution, subject to obtaining permission from a magistrate. The section further allows such person to prosecute personally or through a legal practitioner, and imposes a hierarchy where the legal practitioner is subordinated to a public prosecutor in the conduct of a criminal matter in which the legal practitioner has also received instructions.

17. It was his contention that as a matter of fact, although the DPP himself has already renewed his own licence to practice, the position of DPP does not legally require one to have a valid practising license, as the Constitution demands competence and capacity for independent functioning rather than specific professional credentials for holding the position. He suggested that the renewal by the DPP of his practising licence is perhaps for his own personal interest.

18. State Advocates and the Attorney General, by contrast, Counsel Nyasulu argued, are required to hold valid practising licenses due to the nature of their work. He stated that the general nature of their work is work that should be done by a legal practitioner, unlike the specialised role of a public prosecutor whose work is not necessarily work that should be done by a legal practitioner. State Advocates and the Attorney General must, therefore, according to Counsel, necessarily have valid legal practitioners' licences and have them annually renewed.

19. Counsel then changed tack and shifted his discourse to the concept of a legally qualified person, with reference to Section 112 of the Constitution concerning the appointment of judges. Counsel argued that there is no requirement for a person admitted to practice as a legal

practitioner to continue to renew his or her practising licence in order to qualify for appointment as a judge. He dwelt on section 112(2) of the Constitution which provides that:

> *"For the purposes of this section, a person shall be regarded as entitled to practise as a legal practitioner or an advocate or a solicitor if that person has been called, enrolled or otherwise admitted as such and has not been subsequently disbarred or removed from the roll of legal practitioners or advocates or solicitors notwithstanding that the person—*
> *(a) holds or acts in any office the holder of which is, by reason of his or her office, precluded from practising in court; or*
> *(b) does not hold a practising certificate and has not satisfied any other like condition of his or her being permitted to practise."*

20. Analogously, Counsel reiterated his contention that the DPP is not required to possess a practising license. Counsel sought to draw an analogy between the qualifications of the DPP and those of judges and other office holders with legal roles, such as the Law Commissioner and the Ombudsman. Counsel stated that in the case of the Ombudsman for instance, the law only specifies sufficient knowledge of the law rather than formal legal qualifications.

21. He went further to argue that even Resident Magistrates do not need to be legally qualified and entitled to practice in order to hold that office. He stated that the President can appoint a person as a Resident Magistrate as long as such person is a fit and proper person for the position. Counsel in this regard was referring to section 34(a) of the Courts Act (Cap. 3:02 of the Laws of Malawi) which provides that:

> *"The court of a Resident Magistrate shall consist of a fit and proper person appointed by the President to be a Resident Magistrate."*

22. The Court however wishes to quickly comment on this point right at this juncture. Section 110(1) of the Constitution provides that:

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

23. Section 111 subsections (1)-(3) of the Constitution provides that:

> *"(1) The Chief Justice shall be appointed by the President and confirmed by the National Assembly by a majority of two-thirds of the members present and voting.*
> *(2) All other judges shall be appointed by the President on the recommendation of the Judicial Service Commission.*
> *(3) Magistrates and persons appointed to other judicial offices shall be appointed by the Chief Justice on the recommendation of the Judicial Service Commission and shall hold office until the age of seventy unless sooner removed by the Chief Justice on the recommendation of the Judicial Service Commission."*

24. It is evident from sections 110 and 111 of the Constitution that subordinate courts are envisaged by the constitutional scheme to be presided over by either professional magistrates or lay magistrates. The use of the word *"professional"* in this context clearly means *"legal professionals."* In this Court's mind, a legal professional can only be a person who is, at a minimum, a person qualified to be admitted to practice as a legal practitioner. This interpretation must be the read into the terminological distinction between resident magistrates and graded magistrates as envisaged under section 34 of the Courts Act. In the present constitutional scheme, section 34 of the Courts Act, drafted as it was under the old scheme of the 1966 Constitution, can no longer

be read in a way that ignores the regime established under the 1994 constitutional dispensation.

25. Perhaps it is apposite to look at the definitions of the terms *"professional"* and *"lay."* The *Black's Law Dictionary*, 9th Edition, defines these two terms as follows:

> *"professional, n. (1846) A person who belongs to a learned profession or whose occupation requires a high level of training and proficiency."*
> *"lay, adj. (14c) 1. Not ecclesiastical; not of the clergy. 2. Not expert, esp. with reference to law or medicine; nonprofessional"*

26. Thus, when the Constitution refers to *"professional magistrates"*, these must be persons who belong to a learned profession and who would have gone through a high level of training and proficiency. *"Lay magistrates"* on the other hand are magistrates who are not expert with reference the discipline of law.

27. Pausing here, the Court is mindful that under section 200 of the Constitution, all Acts of Parliament in force on the appointed day, which under section 215 of the Constitution is 18th May, 1994, continue to have force of law in the Republic, as if they had been made in accordance with and in pursuance of the 1994 Constitution. This therefore means that we must read the Courts Act as if it was made under the 1994 Constitution. Where we find any provisions in such an Act of Parliament, i.e one that was already in force as at 18th May, 1994, that are in conflict with the Constitution, then the first recourse for the Court, after declaring the inconsistency and consequent invalidity in terms of section 5 of the Constitution, is to adopt such an interpretation and application as would now make it consistent with the Constitution.

28. Section 10(2) of the Constitution provides, among other things, that in the application of any Act of Parliament, the relevant organs of

State, in this case the courts, must have due regard to the principles and provisions of the Constitution. Further, and even more revealing, according to section 11(3) of the Constitution, where a court of law declares a law to be invalid, instead of simply striking down such a law and requiring Parliament to remedy the defect, the Constitution provides that the court *"may apply such interpretation of that act or law as is consistent with this Constitution."* This therefore buttresses the point that to the extent that certain provisions of section 34 of the Courts Act may be viewed as being inconsistent with the Constitution, which is in fact the case, then a Court is entitled to apply to section 34 of the Courts Act such interpretation as is consistent with the Constitution. In this regard, it is perhaps prudent to set out the entirety of section 34 of the Courts Act:

> *"The courts of magistrates shall be constituted as follows—*
> *(a) the court of a Resident Magistrate shall consist of a fit and proper person appointed by the President to be a Resident Magistrate; and*
> *(b) the court of a magistrate of one of the following grades, that is to say, the first, second or third grades, shall consist of a fit and proper person appointed by the President to be a magistrate of each such grade respectively.*
> *(2) Any magistrate may sit in and constitute a court of a lesser grade than the court which he himself constitutes as if he were a magistrate of such lesser grade.*
> *(3) For the avoidance of possible doubts it is hereby declared that a court of a Resident Magistrate is of a higher grade than a court of a magistrate of the first grade."*

29. The scheme under section 34 of the Courts Act makes it apparent that magistrates are categorised into two broad groups: (1) resident magistrates and (2) graded magistrates. It proceeds to state that the court of resident magistrate is of a higher grade than a court of a magistrate of the first grade, which is the highest grade among the graded magistrates.

30. It is easy then to see how a reading of these provisions, in the light of section 110(1) of the Constitution which says that subordinate courts *"shall be presided over by professional magistrates and lay magistrates"*, shows that the resident magistrates are in fact the professional magistrates and the graded magistrates are the lay magistrates in terms of the Constitution.

31. Counsel Nyasulu correctly pointed out that the only broad qualification stated for appointment as a resident magistrate under the Courts Act is that the person appointed as a resident magistrate in terms of that section must be a *"fit and proper person"*. It does not state any other qualifications. However, it is also worthy to immediately note that the same qualification of one being a *"fit and proper person"* is applicable to all the graded magistrates as well under that section. If, therefore, Counsel Nyasulu's submission was anything to go by, it would mean that there would really be no criteria under the law for differentiating on who may be appointed as a resident magistrate as distinct from a graded magistrate, apart from the rather vague criterion of a *"fit and proper person."*

32. In addition, it is clear that contrary to Counsel Nyasulu's suggestion, where he stated that the President may appoint resident magistrates under section 34 of the Courts Act, such a position is in fact trumped by the scheme of section 111(3) of the Constitution which makes it clear that the appointment is made by the Chief Justice on the recommendation of the Judicial Service Commission.

33. The short and long of it is that when one reads section 110(1) of the Constitution together with section 34 of the Courts Act, a resident magistrate must be a person who is, at a minimum, qualified to be admitted to practice as a legal practitioner.

34. Moving on, Counsel Nyasulu concluded his submission by referring to a previous case involving what he said was a similar application that was dismissed by the Honourable Justice Dr. Kachale. This he stated, was in the case of ***Republic vs Raphael Kasambara, Wapona kita & Others***, Criminal Case No. 18 of 2014.

35. In reply to the State's response, Counsel Nkhutabasa offered a metaphorical retort involving the equivocation of a bat's identity as a foundational premise for his critique of a perceived inconsistency in Counsel Nyasulu's stance. Counsel Nkhutabasa stated that when he was a child, he was told of a story of a bat. Every time there was a meeting of the birds, the bat would refuse to attend the meeting claiming that it was not a bird but a mouse. Again, every time there was a meeting of the mice, the bat refused to attend the meeting claiming to be a bird. Mr. Nkhutabasa argued that this was in effect what Counsel Nyasulu was trying to do. He is a legal practitioner who, at the same time, is refusing to abide by the requirements of a legal practitioner to practice when it suits him, claiming to be a public prosecutor instead.

36. Counsel Nkhutabasa proceeded to argue that under section 2 of the LELPA, the definition of a legal practitioner includes anyone admitted to practice before a court and whose name is inscribed on the Roll. By this definition, he contended that Counsel Nyasulu is undoubtedly a legal practitioner who therefore needs a practising license in order to practice before the Court as mandated by Section 30(4) of the LELPA. He emphasised that the language of the provision is such that it mandatorily applies to all legal practitioners regardless of their role.

37. Counsel ended his arguments by emphasising that the instrument of appointment as a public prosecutor does not provide an exemption to a legal practitioner from the requirement of holding a valid practising license for a legal practitioner.

38. It is thus clear that the core of the debate between the parties hinges on whether the role of a public prosecutor, in this case Mr. Nyasulu, is distinct from that of a legal practitioner such that it obviates the need for a valid practising licence.

39. The Prosecution maintains that the constitutional and statutory framework in Malawi allows for such a distinction, whereas the Defence insists that the legal definition of a legal practitioner and the attendant obligations to hold a valid license apply universally to all legal practitioners in Malawi, including to Mr. Nyasulu in his prosecutorial capacity as a public prosecutor.

40. The Court must now consider whether the interpretation advanced by the Prosecution is reconcilable with the provisions and requirements of the LELPA as urged by the Defence.

41. The issues in the present case raise broader serious issues about the regulation of legal services and the practice of law before Malawian courts.

42. It is true that a person other than a legal practitioner can be appointed as a public prosecutor under section 100(1) of the Constitution as read with section 79 of the CP & EC, and that in such a case, such person, not being a legal practitioner, is obviously not required to take out a licence to practice under section 30(4) of the LELPA. Even if he or she volunteered to acquire one, he or she would be flatly refused by the Malawi Law Society and the Registrar of the Malawi Judiciary on such purported voluntarism. Yet, clearly, such a person is allowed under the law to practice before the courts, albeit in a limited sense.

43. Under section 100(1) of the Constitution, the law provides 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 Prosecutions."

44. Further, section 79 of the CP & EC provides that:

"(1) The Director of Public Prosecutions may, by writing under his hand, appoint generally, or in any case or any class of cases, any person employed in the Public Service or such other legally qualified person to be a public prosecutor.

(2) Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions."

45. The Court agrees with Counsel Nyasulu that the term *"legally qualified person"* as used under the Constitution and the CP & EC cannot be narrowed down to mean a legal practitioner with a valid practising licence.

46. To draw from the analogy that he drew in relation to qualification for appointment as a Judge under section 112 of the Constitution, the Court agrees that the scheme of the Constitution explicitly states that continued renewal of a legal practitioner's licence is not a necessary precondition for one to be considered for appointment as a Judge. If the term *"legally qualified person"* were to be narrowed down to mean a legal practitioner with a valid practising licence, it would mean that the Constitution allows for non-legally qualified persons to be appointed as judges.

47. Another exemplification of a *"legally qualified person"* could be a highly qualified legal academic. For instance, a professor of law, with a string of law degrees including undergraduate and post-graduate degrees from a recognised university or universities, who teaches criminal law and criminal procedure law at an accredited university, but never applied and was never admitted to practice law, is surely a *"legally qualified person"*. It would be absurd to argue otherwise. However, such person is not *"entitled to practice"* law in the country. It would be open to appoint such a person as a public prosecutor, and if so appointed, he or she would not need a legal practitioner's practising licence.

48. Subsequent provisions make the point that non-legal practitioners maybe appointed as public prosecutors even clearer. Section 80 of the CP & EC, for instance, provides that:

> *"A public prosecutor may appear and plead without any written authority before any court in which any case of which he has charge is under inquiry, trial or appeal; and if any private person instructs a legal practitioner to prosecute in any such case a public prosecutor may conduct the prosecution, and the legal practitioner so instructed shall act therein under the directions of the public prosecutor."*

49. The term public prosecutor is defined under section 2 of the CP & EC as follows:

> *""Public Prosecutor" means the Director of Public Prosecutions, or, subject to his or her general or special instructions or to an Act of Parliament—*
> *(a)persons in the public service acting as his or her subordinates; or*
> *(b)such other legally qualified persons acting on instructions from the Director of Public Prosecutions."*

50. A few things are observable from section 80 of the CP & EC. A person appointed as a public prosecutor, just as Counsel Nyasulu correctly argued, is permitted under that legal dispensation, to appear before any Court. That section has not expressly stated that only public prosecutors who are legal practitioners may appear before the High Court or Supreme Court of Appeal. The law in that section clearly says that a public prosecutor may appear and plead without any written authority before any court in which any case of which he has charge is under inquiry, trial or appeal. The fact that the provision envisages appearance of such a person in courts higher than subordinate courts is evident. There are no appeals heard and determined by subordinate courts and yet the provision allows such a person to appear in a court and to argue an appeal. Such appeal could only be in a Court higher than a subordinate Court.

51. That a non-legal practitioner appointed as a public prosecutor may appear before the High Court or indeed the Supreme Court of Appeal to argue a criminal case, is a conclusion that would certainly make many uncomfortable. Perhaps one would have imagined a situation such as that envisaged under section 25 of the LELPA. If this were so, where a non-legal practitioner is appointed as a public prosecutor and he or she seeks to appear in a Court higher than a subordinate Court, then he or she would petition the Honourable the Chief Justice for permission to appear in a specific criminal cause. The Chief Justice, in such a case, would have the opportunity to satisfy himself or herself that the person in issue has sufficient knowledge of Malawian law, is of good character, and is generally a fit and proper person to be allowed to appear and argue criminal cases in the superior courts. However, as far as this Court can see it, that does not seem to be the present state of the law.

52. The position seems to be that a public prosecutor appointed under section 79 of the CP & EC is, under section 80 of the same,

entitled to appear and plead without any written authority before any court in which any case of which he or she has charge, is under inquiry, trial or appeal. If this position is a position that is generally viewed as undesirable, the problem lies with the letter of the law and the remedy lies with Parliament changing the law.

53. The Court must acknowledge that it diligently and scrupulously examined the statutes to ascertain if there exists a particular provision under any law that stipulates that only parties to a case appearing in person or legal practitioners hold the right of audience in the High Court. The Court found no such provision. Section 30(4) of the LELPA simply requires that a legal practitioner must hold a practicing licence in order to practice law in Malawi.

54. It is perhaps significant to point out here, by way of caveat, that whilst the wording of sections 100 of the Constitution, 79 and 80 of the CP & EC seem to be couch the power of the DPP to appoint a public prosecutor in almost overboard terms, the power and discretion of the DPP to appoint persons to act as public prosecutors is administrative in nature, and that such exercise of discretionary power is not unfettered.

55. In appointing the appropriate legally qualified persons as public prosecutors to appear before the courts, and before the High Court and/or the Supreme Court of Appeal in particular, the DPP must exercise his or her discretionary powers reasonably and with judicious caution. In the case of ***Wee Chong Jin CJ in Chng Suan Tze v Minister for Home Affairs*** [1988] 2 SLR(R) 525, the Court of Appeal of Singapore stated, at paragraph 86, that:

> *"the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power."*

56. The principle that statutory discretion conferred on a public authority, even if on its face appears unfettered is in fact fettered, has also been expressed in England in multiple cases. For instance, in the case of ***R v Minister of Agriculture and Fisheries ex p. Padfield*** [1968] UKHL 1 (14 February 1968), Lord Reid stated that:

> *"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects must be determined by construing the Act as a whole and construction is always a matter of law for the court…It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the Committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the Court must be entitled to act…I have found no authority to support the unreasonable proposition that it must be all or nothing—either no discretion at all or an unfettered discretion. Here the words 'if the Minister in any case so directs' are sufficient to show that he has some discretion but they give no guide as to its nature or extent. That must be inferred from a construction of the Act read as a whole, and for the reasons I have given I would infer that the discretion is not unlimited, and that it has been used by the Minister in a manner which is not in accord with the intention of the Statute which conferred it.*

57. This position of the law was affirmed in the Malawian decision of ***Limbe v Minister of Justice*** [1993] 16(1) MLR 249 (HC), per Mkandawire, J at page 255.

58. Thus, in light of the foregoing, the general principles of administrative law must still guide the decision of the DPP in appointing persons as public prosecutors to take charge of cases in the High Court or Supreme Court of Appeal by ensuring that the decision that he or she makes is reasonable in the Wednesbury's sense. In ***Associated Provincial Picture Houses Ltd. Wednesbury Corporation*** [1948] 1 KB 223 (the ***Wednesbury's case***), Lord Greene stated, at page 229, that:

> *"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably.' Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."*

59. A Court would thus fault the DPP if his or her decision to appoint a particular person to appear as a public prosecutor in the superior courts, or indeed any court at all, was so outrageous in its defiance of logic or accepted standards in the courts, or indeed common sense, that no sensible person occupying that office, who had applied his or her

mind to the issue could have arrived at it. See ***Council of Civil Service Unions v Minister for the Civil Service*** [1983] UKHL 6 at para. 410, per Lord Diplock.

60. One would therefore expect that a DPP would, in all reasonableness, only appoint people who have the requisite levels of knowledge and competence in the law as to be able to competently meet the rigours and the demands of litigation in superior courts.

61. Pausing there, the court wishes to emphasise that the central issue before this Court is still differently nuanced. It is whether a legal practitioner, duly admitted to practice law before Malawian courts, who fails to renew his or her licence of practice, can circumvent that requirement on the basis that he or she is a duly appointed public prosecutor, under the abovesaid provisions, and that he or she must be treated in the same fashion as a public prosecutor who is not a legal practitioner.

62. The Court agrees with both parties that Counsel Nyasulu is a legal practitioner. By his own statement, his standing at the Malawi Bar is very senior. His name has remained inscribed on the Roll, in the combined capacities of *ex-officio* legal practitioner and legal practitioner for a cumulative 43 years and his name has never been removed from the roll of legal practitioners ever since.

63. As a legal practitioner, he is automatically a member of the Malawi Law Society, and thus subject to its Code of Ethics as well as the statutory disciplinary code under Part IX of the LELPA.

64. Legal practitioners, the Court must emphasise, are held to high statutory and ethical standards. As discussed above, they are subject to strict professional codes of conduct both under principal legislation, specifically the LELPA, and under subsidiary legislation in the form of rules and regulations made under the Act and a Code of Ethics. The legal profession is a noble and learned profession. These codes exist to

ensure that legal practitioners act in the best interests of their clients, uphold the rule of law, and maintain the integrity of the legal profession at all times. Allowing legal practitioners to circumvent their professional obligations as legal practitioners and to practice without a practising licence could undermine these ethical standards and put clients at risk.

65. It should be noted that a person who is not a legal practitioner is not bound by the statutory, ethical and disciplinary codes applicable to a legal practitioner.

66. The Court therefore emphasises the central significance of the requirement for legal practitioners to take out a licence to practice upon admission and for each year thereafter when they are desirous to continue practicing, to renew the licence of practice as a precondition for law practice (section 30(3) of the LELPA). Section 30(4) of the LELPA is indeed couched in mandatory terms that no legal practitioner may practice without holding a valid legal practitioner's licence.

67. In the case of ***Telekom Networks Malawi plc vs Globe Teleservices Limited PTE Limited***, MSCA Civil Appeal No. 10 of 2021, the Malawi Supreme Court of Appeal, per Kapanda, JA, emphasised the centrality of section 30(4) of the LELPA to law practice, stating that:

> *"The wording of section 30 (4) is clearly in mandatory terms and expressly precludes a Legal Practitioner to practice without a valid licence. This section is clear in what it provides i.e. a Legal Practitioner is not entitled to practice if he has no licence.* ***There is no any other way around it****...Put another way, an admission to practice entitles a person to become a Legal Practitioner while the practicing licence entitles a Legal Practitioner to practice in courts."* [This Court's emphasis].

68. The Court takes the view that in appreciating the legal context of the requirement for a legal practitioner's valid licence to practice as a precondition for law practice, we must look at the broader societal picture. This Court opines that the requirement for legal practitioners to hold a practicing licence is an important accountability mechanism. Licensing ensures that legal practitioners are subject to regulation and oversight by relevant legal authorities, including the tax authorities, the Malawi law Society, and the courts; and this helps to protect the public and to maintain the integrity of the legal system as a whole. Allowing legal practitioners to practice law without licence could eventually compromise the quality of legal services provided to clients and generally undermine public trust and confidence in the legal profession.

69. The requirement that all legal practitioners must hold a licence to practice also serves the purpose of ensuring that there is fairness and equality in the treatment of legal practitioners by the legal system. Allowing some legal practitioners to practice law under the guise of some special species of appointment could create an uneven playing field, where some legal practitioners are held to different standards than others. This could lead to perceptions of unfairness and inequality. Thus, this Court is of opinion that the removal of the category of ex-officio legal practitioners under the current version of the LELPA was a wise course to take.

70. It should further be borne in mind that legal practitioners, almost universally, are typically required to carry professional liability insurance to protect themselves and their clients in case of legal malpractice or negligence. In Malawi, the indemnity fund is established under section 106 of the LELPA. Under section 30(5)(d) & (e) of the LELPA, it is provided that:

> "*The Registrar shall not issue a licence to practice to a legal practitioner, unless the legal practitioner has –*
> *(d) paid an annual contribution to the Fidelity Fund as determined by the Society from time to time;*

(e) a valid annual professional indemnity insurance cover."

71. Unlicensed legal practitioners practicing law under any guise, would likely not have this insurance coverage, leaving clients vulnerable in the event of errors, negligence or misconduct.

72. Thus, in general, it can be stated that enforcing licensing requirements for legal practitioners is crucial in order to safeguard the integrity of the legal profession, protect clients, uphold ethical standards in the profession, ensure high quality legal services, ensure equal and fair treatment among legal practitioners, and to maintain public trust and confidence in the justice system, among other reasons.

73. For these reasons, the Court holds that since Counsel Nyasulu is a legal practitioner, and for as long as his name appears on the roll of legal practitioners, just like any other legal practitioner, whenever he appears to plead or argue cases before this Court, whether they be civil or criminal proceedings, then, unless he is appearing on his own behalf, the Court will require him to fulfil the requirements of a legal practitioner, and this includes fulfilling the mandatory requirement of having a valid licence to practice. He may not circumvent his obligations as a legal practitioner under the guise of being in the same category as lay public prosecutors or legally qualified public prosecutors who are not legal practitioners.

74. The Court must acknowledge that the decision of the Court in the case of ***Republic vs Raphael Kasambara, Wapona Kita & Others***, (referred to above) weighed very heavily on its mind. As Counsel Nyasulu stated, the learned Judge in that case was presented with a similar application. His conclusion was different from the conclusion that this Court has arrived at. Pertinently, this is what the learned Judge said:

"With specific reference to Mr Nyasulu, it has been argued that his alleged lack of a licence to practice law disqualifies

him from acting and cannot be saved by other statutes since he falls outside the ambit of section 38 of the Legal Education and Legal Practitioners Act (LELP Act). In any case the court has been reminded that practicing law without a valid licence is in fact an offence under section 24 of the LELP Act."

75. The learned Judge then concluded thus:

"*As regards the question of being legally qualified my court has taken the position that the phrase does not imply that persons must have a valid licence to practice the law to be so appointed. As pointed out by the State, section 80 of the CP&EC recognizes a distinction between a legal practitioner and a public prosecutor. The legal qualification contemplated under section 79 (1) of the CP&EC is sufficiently inclusive to include Mr Nyasulu, my court so finds."*

76. This Court does not fault the reasoning of the Court in that case as such, but would only say that perhaps the Court might not have gone on to address its mind to a further point or further points that this Court has proceeded to consider. That is all normal in the workings of these courts. The Court agrees with the Judge's analysis in ***Republic vs Raphael Kasambara, Wapona Kita & Others***, that *"the legal qualification contemplated under section 79 (1) of the CP & EC is sufficiently inclusive to include Mr Nyasulu."* This, the Court believes, is actually discernible from the analytical discourse that it has already expounded above.

77. What has, however, led this Court to depart from the ultimate conclusion that the Court reached in ***Republic vs Raphael Kasambara, Wapona Kita & Others***, is that this Court holds the view that if Counsel Nyasulu was a legally qualified person but not an

admitted legal practitioner, then he would have been allowed to appear before the High Court without a licence to practice. The law does not place on such a person the rights and obligations that it typically bestows upon a legal practitioner.

78. However, since he is an admitted legal practitioner, with the attendant rights and obligations that appertain to such a practitioner, Counsel Nyasulu cannot circumvent the applicable rigorous obligations for practicing law by simply saying to the Court that *"I am here not as a legal practitioner but a public prosecutor appointed by the DPP."* One of the core obligations of a legal practitioner is that he or she cannot practice law without a licence.

79. It is dialectically untenable, as far as this Court can see it, for Counsel to argue that public prosecution is not a species of law practice. It clearly is. Holding otherwise might, for instance, entail that in the same case, a prosecutor prosecuting a case on the prosecution side is not practising law whilst a defence lawyer, on his or her feet – going toe-to-toe against the prosecutor on the defence side, is practising law. This simply cannot be. Such a position cannot hold in logic, it cannot and should not hold in law, and it would defeat common sense. Both the prosecutor and the defence lawyer are practising law in the above illustrated scenario.

80. Notably, Counsel Nyasulu is before this Court representing a client – the State. If he did anything that a legal practitioner is not supposed to do in the conduct of the matter, he would have to be held accountable for such conduct as a legal practitioner. For instance, if something untoward happened, he could not be heard to say to the Malawi Law Society that his conduct of the case should be none of their concern because he was not appearing as a legal practitioner but only as a public prosecutor.

81. Allowing legal practitioners whose names are on the Roll to be practising in the courts under different guises other than a legal

practitioner could also pose the danger of creating an avenue for legal practitioners who fail to renew their licences of practice out of sheer non-compliance with the rules regulating law practice, to still appear and argue cases before the courts in a different capacity and under a different disguise, notwithstanding the clear non-compliance. This, again, could not have been the intention of the legislature.

82. Indeed, the Court believes that, unless he were regularly employed in the DPP's Chambers as one of the DPP's subordinates, Counsel must be billing the State for his services. The Court does not believe that he is providing legal services to the State on a pro-bono basis. So here we would have a legal practitioner, who has not renewed his practising licence, billing a client, perhaps simply as a *"consultant",* without the attendant billing obligations of a legal practitioner. The Court finds all this to be at odds with the overall object and purpose of the LELPA in so far as the conduct of legal practitioners in Malawi is concerned.

83. The Court also had the opportunity to read the decision of the Court in the case of ***Lucy Nkhoma vs Adam Mlumbe & Another***, Commercial Case No. 43 of 2016, where Mtalimanja, J made the following illuminating remarks:

> *"It is imperative that the integrity of the spirit of the legislation should be preserved and maintained at all times. As the court observed in the TA Kilipula case, any approach that is adopted in interpreting the Act [the LELPA] should not trivialize the Act nor the practice of the law. In my view, interpreting the Act in a manner that effectively allows a legal practitioner without a valid practicing licence to practice, compromises the very objective of the legislation. Allowing a legal practitioner without a current practice licence to commence proceedings under the guise of protecting the interests of the client, is in my view, allowing*

the unlicenced practitioner to practice via the back door. Such cannot reasonably have been the intention of the legislator."

84. In the instant matter, the Court holds the view that adopting an interpretive approach that would allow Counsel Nyasulu to practice law as a public prosecutor under the present circumstances would be to interpret the LELPA in a manner that effectively allows a legal practitioner without a valid practicing licence to find a way to continue to practice. This, to this Court's mind, would compromise the very objective of the LELPA.

85. Thus, like Mtalimanja, J in the ***Lucy Nkhoma case***, I likewise hold that allowing a legal practitioner without a current practice licence to conduct criminal proceedings in the High Court under the guise that he or she is a public prosecutor appointed under section 100 of the Constitution as read with section 79 of the CP & EC, would amount to *"allowing the unlicenced practitioner to practice via the back door [and] such cannot reasonably have been the intention of the legislature."* A valid practicing licence is mandatory for all legal practitioners to practice law under various shades and, as Kapanda JA aptly put it in ***Telekom Networks Malawi plc vs Globe Teleservices Limited PTE Limited,*** "*[t]here is no any other way around it."*

86. An issue was made again and again during argument that the Director of Public Prosecutions, from whom Mr. Nyasulu derives his authority as a public prosecutor, has his licence to practice already renewed. Counsel Nyasulu played that fact down, suggesting that it could be purely out of personal interest. The Court is mindful that under section 2 of the CP & EC, the DPP himself is also a public prosecutor under the Code. It is this Court's view that the learned DPP did not renew his licence to practice purely out of interest. He did so out of his informed appreciation of the law as discussed in this Ruling. Counsel Nyasulu, as a public prosecutor deriving his authority from the

DPP and himself also being a legal practitioner, should have taken the cue and had his own licence renewed.

87. Before closing, the Court wishes to point out, in a quest to providing fuller context to the discourse of the present decision, that in the previous (now repealed) version of the LELPA, the law had a way of exempting some Government lawyers from having a licence to practice as a prerequisite for practising law as a legal practitioner. Section 38 of the repealed LELPA provided for what were called "*ex-officio*" legal practitioners. It provided that:

> *"(1) Any person holding the office of Attorney General, Solicitor General, Chief Public Prosecutor, Parliamentary Draftsman, Principal State Advocate, State Advocate, Principal Legal Aid Advocate or Legal Aid Advocate in Malawi shall, so long as he holds such office, be ex-officio a legal practitioner and entitled to practise before the courts of Malawi.*
> *(2) Every person appointed by the Attorney General to plead before the courts of Malawi on behalf of the Government in any cause or matter shall be deemed to be a legal practitioner for the purpose of such cause or matter."*

88. In turn, section 23(3) & (5) of the repealed Act provided that:

> *"(3) No legal practitioner shall be entitled to practise unless he has had issued to him a current licence to practise.*
> *(5) This section shall not apply to a person permitted to practise as a legal practitioner under section 12 (3) or to a person who is an ex-officio legal practitioner or deemed to be a legal practitioner under section 38."*

89. The privilege of these public office holders being *ex-officio* legal practitioners was removed under the current LELPA. Thus, there is now no legal practitioner who has an exemption under the Act from having

his or her licence to practice renewed in order to practice law in the country.

90. The Court therefore orders and directs that as long as he is a legal practitioner, with his name inscribed on the roll of legal practitioners, then unless he renews his licence to practice, Counsel Nyasulu will not be permitted to have audience before this Court.

91. Pausing there, however, the Court must mention that there is one option available to Counsel Nyasulu in order for him to continue to practice as a public prosecutor, under section 100 of the Constitution as read with section 79 of the CP & EC, but without obtaining a licence to practice under section 30(4) of the LELPA. Under the present regime of the LELPA, Counsel Nyasulu may, as it were, formally retire from the legal profession. This is done by way of resignation as a legal practitioner and, in consequence, resignation from membership of the Malawi Law Society. Section 67 of the LELPA provides, in this regard, that:

> *"(1) A person whose name is inscribed on the Roll shall, without election or appointment, become a member of the [Malawi Law] Society from the date on which his name was inscribed upon the Roll.*
> *(2) A member of the Society by reason of subsection (1) shall remain a member until his name is* ***removed****, whether* ***at his own request*** *or otherwise and* ***upon approval by the Society, from the Roll.****"* [Court's emphasis]

92. Further, section 70 (1) of the LELPA sheds more light on the issue of resignation as a legal practitioner and from the Malawi Law Society by providing that:

> *"A member of the Society by virtue of section 67 (1) may not resign from the Society while his licence to practice is in force."*

93. Since he currently does not have a licence to practice in force, all that Counsel Nyasulu may have to do, if he is so minded, is to request for the Law Society's approval that his name be removed from the roll of legal practitioners in terms of section 67(2) of the LELPA, and upon such approval, the Registrar of the High Court and Supreme Court of Appeal would remove his name from the roll of legal practitioners, and he would also thereby cease to be a member of the Law Society by reason of section 67(2) of the LELPA.

94. Removal of his name from the roll of legal practitioners, at his own request, would not render him a legally unqualified person, and he may therefore practice, or continue to practice, as the case may be, as a public prosecutor pursuant to section 100 of the Constitution as read with section 79 of the CP & EC, without a valid licence to practice.

APPLICATION FOR DISCHARGE

95. The Court now turns to the application by the defence for the discharge of the two accused persons herein. The application pertains to two distinct charges. The first is an accusation of abuse of office, contrary to section 95(1) of the Penal Code (Cap. 7:01 of the Laws of Malawi). The second is an allegation of fraud other than false pretences under section 319A of the Penal Code.

96. The accused persons, through the present application, seek a discharge from both charges.

I. Abuse of Office under Section 95 of the Penal Code

97. The accused persons contend that the charge of abuse of office is time-barred pursuant to section 302A of the CP & EC. The offence under section 95(1) of the Penal Code is a misdemeanour, carrying a

sentence of not more than two years pursuant to the provisions of section 34 of the Penal Code which provides that:

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

98. The offence under section 95(2) of the Penal Code is classified as a felony. It is punishable by a maximum prison term of three years.

99. Section 302A of the CP & EC imposes strict temporal constraints on the commencement and conclusion of criminal proceedings for offences triable by the High Court, which carry a maximum penalty of less than three years of imprisonment. Section 302A of the CP & EC is in the following terms:

> *"(1) Subject to subsections (2) and (3), the trial of any person accused of an offence triable by the High Court other than any other offence punishable by imprisonment of more than three (3) years, shall —*
> *(a) be commenced within twelve months from the date the complaint arose; and*
> *(b) be completed within twelve months from the date the trial commenced.*
> *(2) Where the accused person is at large the period prescribed by subsection (1) within which to commence the trial shall run from the date the person is arrested for the offence.*
> *(3) Where the cause of the failure or delay to complete the trial within the period prescribed by subsection (1) is not attributable to any conduct on the part of the prosecutions, the court shall order of time as it considers necessary to enable the completion of the trial.*

(4)A person accused of an offence shall not be liable to be tried, or continue to be tried, for the offence if his trial is not commenced or has not been completed within the period prescribed by subsection (1), and in such case the accused shall stand discharged of the offence at the expiry of such period."

100. Section 302A(1) of the CP & EC specifically requires that the trial must be commenced within twelve months from the date on which the complaint arose and must be concluded within twelve months from the date on which the trial commenced.

101. In the present case, the 1st Defendant had his Caution Statement recorded on 8th December 2021. His Counsel argued that since that time, trial has not yet commenced. Equally, in respect of the 2nd Defendant, his statement was recorded on 7th March 2022. Defence Counsel argued that counting a period of 12 months from those dates, the latest that trial should have commenced was 7th March 2023.

102. The Court agrees that on an examination of the timeline of the proceedings in the instant case, it is clear that the prosecution has failed to commence trial on the charge of abuse of office as against both defendants, within the statutorily prescribed period of twelve months.

103. The Court acknowledges that under the CP & EC, the general policy of the law is as was stated by the House of Lords in the United Kingdom in the case of ***Regina vs J*** [2004] UKHL 42, namely that *"time does not run against iniquity."*

104. However, the decision of the House of Lords in that case is also illuminating in shedding more light on the general thinking of common law legislatures around the issue of prescribing prosecution time limits in respect of certain offences. The Court stated, at pragraphs 55 and 56 as follows:

"55. It is all the more significant that in certain cases Parliament has indeed provided that prosecutions can be brought only within a limited time after the offence was committed. Most obviously, section 127(1) of the Magistrates' Courts Act 1980 sets a six-month time-limit for laying an information or making a complaint in the magistrates' court, while in Scotland, under section 136(2) of the Criminal Procedure (Scotland) Act 1995, there is a similar time-limit for commencing summary prosecutions - but only of statutory offences. In addition, it has long been the practice for individual statutes to say that any prosecution must begin within a certain time after the conduct complained of. Section 62(1) of the Coal Mines Regulation Act 1887, discussed in Macknight v MacCulloch 1910 SC(J) 29, and section 27 of the Food and Drugs (Adulteration) Act 1928, discussed in Robertson v Page 1943 JC 32, are old examples, while section 2(3) of the Theatres Act 1968, prescribing that proceedings on indictment for presenting or directing an obscene performance cannot be commenced more than two years after the commission of the offence, is an example from a statute that is currently in force outside the realm of sexual offences.

56. It is not always easy to discern the policy behind the provisions limiting the time for bringing proceedings. For instance, the bar on summary proceedings after six months in the Magistrates' Courts Act 1980 cannot be based on any notion that the evidence then becomes stale since this would apply equally to the evidence in prosecutions on indictment, which are permitted. Similarly, evidence does not go stale more quickly for statutory than for common law offences and yet the six-month limit in the Criminal Procedure (Scotland) Act 1995 applies only to statutory offences. In any event, the court will take notice of any difficulties with the evidence when making sure that the

defendant can have a fair trial. It seems, therefore, that in these cases Parliament takes the rather broader view that, if the offences are worth prosecuting at all at summary level, they are only worth prosecuting if they come to light and can be dealt with soon after they are committed, in accordance with the prescribed time-limit. Similarly, in passing the Theatres Act 1968, Parliament must have taken the view that, if the prosecuting authorities could not decide within two years that the director of an obscene play was worth prosecuting on indictment, that should be an end of the matter. In enacting all these time-limits, Parliament has taken a conscious decision to depart from the general rule that proceedings can be taken at any time. Moreover, it has done so, having regard to the spectrum of offending to which the time-limit in question applies. Inevitably, in particular cases the time-limits may seem to work capriciously and to give immunity to someone who deserves to be prosecuted. Especially after so many years of enacting and re-enacting time-limits, Parliament must be taken to have been well aware of this risk, but to have decided none the less that the overall benefits of the limits outweigh their disadvantages. It follows that, even in "hard" cases, the policy of Parliament must be applied and effect given to the time-limits it has prescribed. If problems emerge, Parliament can, at any time, legislate to remedy them."

105. A few general observations may be made from the decision of the House of Lords in ***Regina vs J*** in the context of the Malawian position of the law.

(a) First is the observation of the House of Lords that the reasons behind these time-limits are not always clear, as they do not seem to be based on the staleness of evidence since if it were so, such concerns would be applicable to both serious and minor charges.

(b) What is apparent is that it appears that Parliament, in its wisdom, took the view that if minor offences attracting a prison term of not more than three years are to be prosecuted, then this should be done promptly after their commission. If, on such a charge, more than one year elapses from the point that a complaint is lodged, then the general position is that the case on that charge should not proceed.

(c) By establishing these time-limits, Parliament has consciously deviated from the general rule that allows criminal proceedings to be initiated at any time. Parliament has, in this regard, carefully considered the range of offences to which the time-limits apply and has consciously accepted the risk of capricious outcomes, where someone deserving prosecution may escape due to the time limit.

(d) The Court has surveyed the Constitution and formed the opinion that there is no constitutional principle upon which the Court can question Parliament's wisdom on this matter. It therefore follows that even when the time-limits prescribed under the CP & EC may seem to shield a suspect from prosecution in a matter where there seems to be clear evidence, the principle set by Parliament must be upheld, as Parliament must have weighed that the benefits of terminating the proceedings on such charges at such stage outweigh the disadvantages of the same.

(e) Thus, if at all the time-limits under the CP & EC may seem to some to create some societal problems, the remedy lies with Parliament which retains the power to amend the law to address any issues.

(f) The duty of this Court, however, is to do justice by vindicating the law.

106. In the circumstances of the present case, this Court recalls its recent Ruling in the case of ***Republic vs Chilima***, Criminal Case No. 10 of 2023, where the Court definitively ruled that a failure by the State

to commence trial within the period prescribed by section 302A(1) of the CP & EC is fatal to the charges concerned, in line with the express dictates of section 302A(4) of the same, unless the prosecution is able to prove the exceptions under subsection (2) & (3) of section 302A of the CP & EC. Those exceptions are, first, where the State may demonstrate that the defendant was at large, in which case the period prescribed by subsection (1) of section 302A within which to commence the trial starts running from the date on which the person is arrested for the offence. Second is where the cause of the failure or delay to complete the trial within the period prescribed by subsection (1) is not attributable to any conduct on the part of the prosecution.

107. The Court notes that the State made no attempt whatsoever to show that any of these two exceptions apply in the present case. It follows, therefore, that the charge of abuse of office, being one that falls within the ambit of section 302A of the CP & EC, is thus extinguished by operation of law in terms of section 302A(4) of the CP & EC.

108. Thus, on the charge of abuse of office contrary to section 95 of the Penal Code, the two defendants herein accordingly stand *"discharged"* by operation of the law, pursuant to section 302A(4) of the CP & EC, and this Court's role is merely to formally acknowledge and declare this preordained fact and legal reality under the law. The Court therefore so declares the discharge.

II. Fraud other than false pretences under section 319A of the CP & EC

109. Moving to the second challenge, the accused persons assert that the particulars of the fraud other than false pretences charge, contrary to section 319A of the CP & EC, cannot be substantiated and proved by the evidence that will be presented by the State, as evident from the disclosures that have been provided.

110. They argue that at the core of the State's accusation against them is that they provided false or misleading information to the International Monetary Fund (IMF), and that by reason of their conduct, the IMF cancelled the country's Extended Credit Facility (ECF), to the prejudice or detriment of the Malawi Government.

111. The accused persons argue that the proof of detriment is an essential element of the charges herein under section 319A of the Penal Code.

112. They argue that, as shown by various exhibits such as DK7, DK8, DK9, DK10 and DK11, the issue of a possible misreporting to the IMF by Malawi was first raised by the Managing Director of the IMF in May, 2021 when the ECF had already been terminated in September, 2020.

113. On this basis, they submit that the charges herein cannot possibly be proven.

114. The accused persons further argue that it is public knowledge that it is not true that the IMF canceled the ECF on the alleged basis, but that the Malawi Government unilaterally terminated the ECF for its own reasons. In this regard, since such publicly available information ostensibly contradicts the allegations contained in the charge sheet, the accused persons seek an early and immediate termination of the proceedings either by way of discharge or permanent stay of the criminal proceedings.

115. The Court wishes to state here that what the accused persons are asking the Court to do is basically to enter summary judgment against the State in a criminal proceeding. However, the Court observes that unlike the case under the Courts (High Court)(Civil Procedure) Rules, 2017 (CPR, 2017), which allow for a summary judgment procedure as a way of ending proceedings early (See Order 12 rule 23), the criminal procedure regime, as enshrined under the CP & EC, does not sanction

such a summary judgment mechanism at the trial stage or pre-trial stage until the stage for establishing a prima facie case. This is unlike in cases of appeals from subordinate courts to the High Court where it is explicitly provided, under section 351 of the CP & EC that:

> *"351. Summary dismissal of appeal*
> *(1) On receiving the petition under section 350, the High Court shall peruse the same and may, if it considers that the appeal is vexatious or frivolous or otherwise raises no sufficient ground which would enable the appeal to succeed, dismiss the appeal summarily.*
> *(2) Before dismissing an appeal under this section, the court shall call for the record of the case to satisfy itself that the petition indeed raises no sufficient grounds."*

116. Thus, if Parliament had intended for a summary judgment procedure to obtain at the pre-trial stage of criminal proceedings in the High Court, or during trial but before the case to answer stage, it would have clearly stated so in the like manner that it expressed itself in respect of the summary disposal of appeals under section 351 of the CP & EC.

117. Counsel Maele drew the Court's attention to paragraphs 3.4-3.8 of his Skeleton Arguments, where he outlined various case authorities that essentially state that the Court has inherent power to terminate proceedings where there is abuse of Court process.

118. The threshold for abuse of Court process so as to compel a Court to terminate criminal proceedings is a very high.

119. In the Kenyan case of ***Commissioner of Police & the Director of Criminal Investigation Department & another v. Kenya Commercial Bank Limited and 4 others*** [2013] eKLR, the Court asserted its role in addressing serious abuses of power by law

enforcement, stating that the Court has the responsibility to stop serious abuses of power when they come to its attention, in order to uphold justice and prevent harassment or persecution. The Court held that investigations or prosecutions that are oppressive or vexatious are contrary to public policy. It further pointed out that law enforcement officers conducting criminal investigations must adhere to legal standards and the decisions to investigate or prosecute must not be unreasonable, made in bad faith, have ulterior motives, or be used for personal vendettas or vilification. The Court asserted that the Court has the inherent authority to intervene in the investigation or prosecution process if it is being conducted improperly or if there is an abuse of power.

120. In another Kenyan decision, ***Republic v. Director of Criminal Investigations & 2 others; Resilient Investments Limited & 3 others*** (Judicial Review Application E037 of 2021) [2022] KEHC 43, the Court emphasised that the Judiciary must exercise restraint and should not stop or quash police investigations unless it is a matter of the *"rarest of rare cases."* The Court pointed out that a Court should not delve into the reliability of allegations unless they are obviously absurd or improbable to the point that no reasonable person could believe them. The Court stated that the power to quash investigations or a prosecution is significant as it effectively exonerates a suspect before trial, and thus must be exercised with extreme care and caution. It stated that this extraordinary power is not arbitrary and should not be applied based on whims or caprice of the judiciary. The Court held that judicial intervention is warranted only in cases where there is clear evidence of abuse of power or misuse of discretion.

121. In the case of ***The State (On Application of Xelite Strips Limited & Others) vs The Director General of Anti-Corruption Bureau***, Judicial Review Cause No. 01 of 2023, the Court stated, at paragraph 79, that where a Court has to intervene and terminate a law enforcement process or criminal proceeding, the applicant:

"would have to show that such conduct is so patently absurd that no reasonable person or body would be expected to engage in the same. They would have to show that the putative Defendant's conduct is highly exceptional and that it is demonstrative of abuse of power or abuse of discretion or bad faith."

122. These authorities show that it must be very rare indeed that a court should be invited, and accede to an invitation to terminate criminal proceedings at an early stage, before trial, and thus before the available evidence is tested through the process of examination during trial in Court, during which process such evidence may be subjected to challenge and/or vindication by the parties.

123. The Court is not satisfied, in view of the charges and the disclosures before the Court thus far, that the reasons provided by Counsel herein are sufficient to conclude that there has been patent abuse of Court process. The defence, in this Court's view, has failed to demonstrate that the conduct of the State is so patently absurd that no reasonable person or body would be expected to engage in the same, and that it shows clear abuse of power and of the Court process.

124. In the premises, it is the conclusion of this Court that until the case gets to the stage of the criminal procedure process where the law allows the accused person to raise such issues as are being raised at this stage, the accused persons must patiently wait for such a time whilst, in the meantime, availing themselves of the benefit of the fundamental constitutional principles of criminal justice which demand that an accused person is entitled to a fair public trial, including the right to confront and challenge the evidence against them.

125. While the Court is cognisant of the potential for the existence of information that may undermine the prosecution's case at an early stage of a criminal proceeding, it is not within the Court's mandate, at

this preliminary stage, short of the defence clearly establishing a clear case of abuse of court process, to assess the sufficiency of evidence that has yet to be formally adduced and subjected to the rigours of trial.

126. As earlier stated, there is no summary judgment process before the trial court in the criminal procedure process under the CP & EC. The import of defence Counsel's representations in the instant matter is to ask the Court to start carefully evaluating the evidence via-a-vis the elements of the offence. According to Counsel, when the Court does that, once it concludes that the untested evidence which is simply in the form of disclosures would not make out a certain element of the offence, then the Court should conclude that the whole trial process is abusive and the accused persons should be discharged. The Court does not agree.

127. The appropriate juncture at which an accused person may invoke the insufficiency of the prosecution's evidence with regard to any of the elements of any offence charged is at the close of the case for the prosecution, as dictated by section 254 of the CP & EC. It is at this point that the Court is empowered to determine whether the evidence is capable of supporting a conviction. Should the Court find the evidence wanting, an acquittal would necessarily follow without requiring the accused person to enter his or her defence. That is the well settled procedure under our criminal procedure law.

128. In the circumstances, the application for a discharge or a permanent stay of prosecution on the charge of fraud other than false pretences in respect of both accused persons is therefore premature and unwarranted at this stage.

CONCLUSION

129. In conclusion, it is ordered that in respect of the charge of abuse of office under section 95 of the Penal Code as against both accused

persons, it is hereby declared that both accused persons herein, namely Dr. Dalitso Kabambe and Mr. Henry Mathanga, stand discharged therefrom in accordance with section 302A(4) of the CP & EC.

130. The application to dismiss the charge of fraud other than false pretences under section 319A of the Penal Code in respect of both accused persons is, on the other hand, hereby dismissed.

131. The prosecution is at liberty to proceed with its case against the accused persons on the remaining charges.

132. The Court is mindful of the firm indication by the State of its intention to add additional persons as accused persons in the present matter. In this regard, the matter is adjourned to a date to be fixed by the Court. Depending on whether the intended accused persons are indeed committed to this Court for trial very soon as indicated, the matter is so adjourned for fresh plea and possible further directions, or, failing such committal as indicated, the matter will be fixed for commencement of trial.

133. It is so ordered.

Delivered in open Court at Lilongwe, this 19th day of April, 2024.

R.E. Kapindu, PhD

JUDGE