REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

MSCA CONSTITUTIONAL APPEAL CASE NO. 25 OF 2018

(Being Constitutional Case No. 1 of 2011)

BETWEEN

DR ELSON BAKILI MULUZI. .....APPELLANT

AND

ATTORNEY GENERAL ..... RESPONDENT

CORAM: THE HON. THE CHIEF JUSTICE A.K.C. NYIRENDA SC, JA

THE HON. JUSTICE E.B. TWEA

THE HON. JUSTICE R.R. MZIKAMANDA SC, JA

THE HON. JUSTICE A.C. CHIPETA

THE HON. JUSTICE L.P. CHIKOPA SC, JA

THE HON. JUSTICE F.E. KAPANDA SC, JA

THE HON. JUSTICE A.D. KAMANGA SC, JA

Mr. T. Chokotho of Counsel, Counsel for the Appellant

Dr. S. Kayuni, Mr. Maulidi and Frank Matola, Counsel for the Respondent

Ms C Masiyano, Court Clerk

Dates of Hearing: 29 July 2020

Date of Judgment: 17 May 2022

ANNOTATIONS

Cases cited

Malawi

The Attorney General v Hon. Friday Anderson Jumbe and another [2014] MLR 332

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The Constitution of the Republic of Malawi

Statutes and Rules

Corrupt Practices Act

Penal Code

Criminal Procedure and Evidence Code

Supreme Court of Appeal Act

Courts (High Court) (Civil Procedure) Rules, 2017

Supreme Court of Appeal Rules

JUDGMENT

Judgment delivered by The Honourable the Chief Justice A.K.C. Nyirenda , SC, JA

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I dismiss the appeal. I abide by the order for costs contained in the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC. I need not repeat the facts of the case which are fully set out in his judgment.

Judgment delivered by Justice E.B. Twea, SC, JA:

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also dismiss the appeal.. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC.

Judgment delivered by Justice R.R. Mzikamanda, SC, JA;

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also dismiss the appeal.

Judgment delivered by Justice A.C. Chipeta , SC, JA:

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also dismiss the appeal. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC.

Judgment delivered by Justice L.P. Chikopa SC,JA,

I have read in advance the judgment of My Lord Justice of Appeal F.E. Kapanda SC to be delivered in this matter. I agree with His Lordship's conclusion that the appeal herein be dismissed. I also agree with His Lordship as to costs. It does appear however that there might be slight differences in the reasoning leading to such conclusions. It is for that reason that I have decided to express the following sentiments.

For purposes only of clarity and context let me restate that by Originating Motion, the Appellant sought the High Court's determination on the constitutionality of section 32 (2) (b) and (c) of the Corrupt Practices Act[Cap 7:04 of the Laws of Malawi]. The Constitutional provisions against which the above statutory provision are to be examined are section 42 (2) (f) (iii) and section 44 (1) and (2). Accordingly, through the said Originating Motion the Appellant sought the following reliefs:

a. A declaration that section 32 (2) (b) and (c) of the Corrupt Practices Act reverses the onus of proof in respect of an essential element of the offence created;

b. A declaration that the said section 32 (2) (b) and (c) of the Corrupt Practices Act places a legal burden of proof on the accused;

c. A declaration that the said section 32 (2) (b) and (c) of the Corrupt Practices Act infringes the presumption of innocence and the right to remain silent;

d. A declaration that the said section 32 (2) (b) and (c) of the Corrupt Practices Act does not pass the limitation tests in Section 44 (1) and (2) of the Constitution; and

e. A declaration that the reverse onus created by the said section 32 (2) (b) and (c) of the Corrupt Practices Act should be read as imposing an evidential burden of proof on the accused;

The High Court, sitting as a Constitutional Court, on 21 February 2018 dismissed the motion. It held that section 32 (2) (b) and (c) of the Corrupt Practices Act was in tandem with the Republican Constitution and that it did not in any way fall afoul of sections 42 (2)(f)(iii) and 44 (1) and (2) of the Constitution. The Appellant has now appealed against the said judgment. He filed seven grounds of appeal. They have been listed in Justice of Appeal Kapanda SC's judgment.

And because this opinion is only a slight departure from that of His Lordship Kapanda SC's I will not belabour the issues. For it is obvious to me on the arguments and law before this and the Court below that at the heart of this appeal is the constitutionality of section 32 (2) (b) and (c) of the Corrupt Practices Act. Specifically, whether in relation to offences created thereunder the section reverses the burden of proof and infringes on an accused's rights to be presumed innocent and to silence as provided for in section 42(2)(a), (c) and (f)(iii) of the Constitution of the Republic of Malawi.

There might be various ways of determining the appeal. my best way forward is to first look at the context in which the burden of proof and the rights to silence and to be presumed innocent operate, second at what our law currently says about burden of proof, presumption of innocence and the right to silence. And thirdly at what the offences in section 32 (2) (b) and (c) of the Corrupt Practices Act are exactly all about and lastly whether on a true and correct understanding of the said section it is indeed unconstitutional for infringing constitutional provisions about the burden of proof, the presumption of innocence and the right to silence.

In that regard, it is of cardinal importance that mention be made of the following constitutional provisions.

First is section 9 thereof. It provides that:

'the Judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of the law'.[emphasis supplied]

Applied to the instant case the conclusion is obvious in my view. This appeal, like all others, must be determined on its own facts as found and the applicable law. The law must be understood in a wider context to include inter alia the common law, legislation, the Constitution and indeed case law.

The second are sections 20 [1] and 4 of the Constitution read together. The latter entitles all the peoples of Malawi to the equal protection of the Constitution and laws made under it [emphasis supplied].

The former reads:

'[1] 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.'

In my understanding the above clauses support the proposition that similarly situated persons, including where applicable accused persons, should be treated equally. None should be more advantaged or disadvantaged, as the case may be, than the other.

The third is section 44 of the Constitution. Particularly subsections [1] and [2]. They read;

[1] no restrictions or limitations maybe placed on the exercise of any rights and freedoms provided for in this Constitution other those prescribed by the law, which are reasonable, recognised by international human rights standards and are necessary in an open and democratic society;

[2] laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question and shall be of general application'.

On the face of it it appears that all rights and freedoms under our Constitution are limitable. Except that whatever limitations are imposed must meet the criteria set out in section 44[2] and [3] abovementioned. In **Maggie Kaunda v R** Criminal Appeal Number 8 0f 2001 High Court of Malawi, Mzuzu Registry[unreported] I, while sitting as a High Court opined that a limitation must meet/comply with the totality of the four criteria set out in section 44[1] before it can be considered a legal and effective limitation. It is a view I still subscribe to.

Lastly I consider section 45. The side note talks of derogation and public emergency. It is a long section. I will not therefore quote it in full. Suffice it to say that the essence thereof, especially in subsections 1 and 2 is that it allows derogation from the rights provided for in the Constitution in a state of emergency. Derogation is however not permissible with respect to:

[i] the right to life;

[ii] the prohibition of torture and cruel, inhuman or degrading treatment or punishment;

[iii] the prohibition of genocide;

[iv] the prohibition of slavery, the slave trade and slave like practices;

[v] the prohibition of imprisonment for failure to meet contractual obligation

[vi] the prohibition on retrospective criminalisation and the retrospective imposition of greater penalties for criminal acts;

[vii] the right to equality and recognition before the law;

[viii] the right to freedom of conscience, belief, thought and religion and to academic freedom; or

[ix] the right to habeas corpus.

I did ask myself some questions about the immediately above. For instance, is limitation as used in section 44 equal to derogation as used in section 45? Is, or should the fact that some rights are expressly exempted from derogation in section 45 while there is no such provision in section 44 be of any significance?

Whatever answer one chooses to give to the above questions I have no doubt firstly that limitations cannot be equal to derogations. Their use and in separate sections attest to that fact in my view. More than that Black's Law Dictionary 6th edition refers to a limitation as inter alia some restriction in duration, extent or scope. Applied to rights and freedoms I am of the view that a limitation should refer to a restriction in duration, extent and scope of right and freedoms.

A derogation on the other hand refers, according to very same **Black's Law Dictionary**, to a partial repeal or abolition of a law which limits its scope or impairs its utility and force. Applied to this case and in the Malawi context it would, in my view, refer to a partial repeal or abolition of rights and freedoms following the declaration of a state of emergency. By definition and in action a limitation and a derogation are not one and the same thing in my humble view.

Secondly it is worth noting that while derogation is allowable under section 45 of the Constitution it is expressly prohibited in relation to, inter alia, the right to equality before the law. It is not an accident in my humble view. It seeks to emphasise, in case there are some doubting Thomases about, the equality of all persons before the law. That the law provides protection to all and sundry without exception. That all similarly situated persons will be treated in equal fashion.

Coming back to the issues before us namely the burden of proof, the presumption of innocence and the right to silence it is fair to say that our law provides for them from various perspectives. That of the common law, statutory law, constitutional law and finally case law both local and international. And talking about burden of proof perhaps the most famous mention thereof is in the case of **Woolmington v DPP** [1935] AC 462 where Viscount Sankey, LC said at pages 481-2:

> 'but the prosecution must prove the guilt of the prisoner..... there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to satisfy the jury of his innocence. Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity exception.... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common Law of England and no attempt to whittle it down can be entertained.... '

Back home there have also been eloquent references to the burden of proof. One of my all-time favourites is in **Mogra v R** where Chipeta J [as he then was] said:

'under section 187[1] the Criminal Procedure and Evidence Code and from countless decided cases, including **Woolmington v DPP**[supra] as well as from learned authors of texts on criminal procedure and evidence, it is clearly cardinal that in general the legal burden to prove the guilt of the accused rests with and never leaves the prosecution throughout a case, and that the standard of proof to be attained does not get any lower than that of beyond reasonable doubt. Further under our Constitution section 42[2][f][iii] every accused person is presumed innocent and does not bear any duty in the least to prove such innocence.... An accused need do no more than raise, if he opts to fight the allegation against him, some reasonable doubt about his guilt. It is in fact not even obligatory for him to give any evidence in his defence. Thus even doubts solely arising from the prosecution evidence itself are sufficient to free him from the yoke of the charges even without him uttering a word let alone doubts arising from the defence evidence or testimony. It is clearly the law that reasonable doubts in a criminal case, whether arising from the prosecution evidence, or from the defence evidence or from both sides, must be resolved in favour of the accused.'

The big take away from the above cases is obviously the fact that the burden of proof in criminal cases lies on the State to prove its case beyond reasonable doubt. More importantly in my view is the fact that an accused is not obliged to say anything in their defence which is in tandem with section 42[2][f][iii] of our Constitution. That when an accused actually speaks in their defence it is not to prove their innocence. It is only to raise doubt as to their guilt seeing as the obligation is always on the State to prove their guilt beyond reasonable doubt.

There are also statutory provisions regarding the burden of proof. Section 187[1] of the Criminal Procedure and Evidence Code is an example. It provides:

'the burden of proving any particular fact lies on the person who wishes the court or jury, to believe its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person.

Provided that subject to any express provision to the contrary in any written law the burden of proving that a person who is accused of an offence is guilty of that offence lies upon the prosecution.'

Our Constitution delivers much the same message. Section 42 (2) (f) (iii) thereof is in the following terms:

> "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—
>
> (iii) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial..."

There is also what are called the Judges Rules. They are to the effect that an accused shall not be compelled to say anything about an accusation against them. But that where they decide to do so they should be warned that whatever they say might be used against them in a court of law.

Proceeding on the above it is a fact that our criminal law guarantees an accused the right to silence, the presumption of innocence and the fact that the burden of proof will always be with the State to prove its case beyond reasonable doubt. This guarantee is, in terms of sections 20[ ] and 4 of the Constitution, applicable to all accused persons without exception unless one successfully argues that such rights have been successfully/lawfully limited in terms of section 44[1] and [2] of the Constitution or similarly derogated from under section 45 above-mentioned. I would think however that because there is no mention of a state of emergency in this case the question of a derogation or derogations does not and cannot arise.

The Appellant's argument. As I understand it, is that section 32[2][b] and [c] is unconstitutional for infringing his right to be presumed innocent, his right to silence and transferring the burden on the State to prove him guilty of the offences created under section 32[2][b] and [c] to him. in his view, the said section obliges him on the pain of being found guilty to say something in his defence. It also does not presume him innocent hence its requirement that he says something in his defence and lastly that the effect of the above requirements is to oblige him to prove himself innocent once it is determined that he is either living a certain lifestyle or has in his custody a certain amount of assets.

The Respondent on the other hand and again as we understand their argument, seems to agree that section 32[2][b] and [c] have the effect of limiting the Appellant's right to be presumed innocent,

to silence and reversing the State's obligation to prove their allegations beyond doubt. It however cites section 44 (1) and 44 (2) of the Constitution and contends that the rights in section 42[2][f][iii] are capable of limitation. It further contends that the said rights have in the instant case been properly/lawfully limited and cannot therefore be unconstitutional as argued by the Appellant or at all.

Is section 32 (2) (b) and (c) of the Corrupt Practices Act unconstitutional for reversing the burden of proof, infringing on the rights to silence and to be presumed innocent? In asking the foregoing question I am proceeding on the basis that the section can be unconstitutional as conceived i.e. on the face of it or by way of placing unjustifiable limitations on constitutional rights.

The starting point should in my view be to restate what we have said above courtesy of section 9 of the Constitution namely that cases are decided on the basis of legally relevant facts and prescriptions of the law. In the instant case the questions then become what exactly does section 32 of the CPA exactly provide for? What does section 42 (2) (f) (iii) of the Constitution say? Does section 32(2)(b) and (c) on its true construction and understanding fall afoul of the Constitution specifically section 42[2][f][iii]?

Section 32 of the Corrupt Practices Act provides as follows:

"(1) The Director, the Deputy Director or any officer of the Bureau authorized in writing by the Director may investigate any public officer where there are reasonable grounds to believe that such public officer—

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments or other known sources of income;

(b) is in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments or other known sources of income; or

(c) is in receipt directly or indirectly of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under this Act.

(2) Any public officer who, after due investigation carried out under the provisions of subsection (1), is found to—

(a) maintain a standard of living above that which is commensurate with his present or past official emoluments or other known sources of income;

(b) be in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments or other known sources of income; or

(c) be in receipt directly or indirectly of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under this Act, shall, unless he gives a reasonable explanation, be charged with having or having had under his control or in his possession pecuniary resources or property reasonably suspected of having been corruptly acquired and, unless he gives a satisfactory explanation to the court as to how else he was able to maintain such a standard of living, or such pecuniary resources or property came under his control or his possession, or he came to enjoy the benefits of such services, he shall be guilty of an offence.

(3) In this section—

(a) "official emoluments" includes a pension, gratuity or other terminal benefits;

(b) "public officer" includes any person who has held office as a public officer on or after 6th July, 1964."

The marginal note to section 32 describes the offence thereunder as Possession of Unexplained Property. This, in so far as we understand the English language, should be differentiated from the mere possession of property no matter its quantity. The section is triggered by any one, two or all of the following three things. A public officer maintaining a standard of living beyond that which is commensurate with their present or past official emoluments or other known means of income, being in control or possession of pecuniary resources or property disproportionate to their present or past official emoluments or other known means of income and thirdly being in receipt of benefit of any services that raise the suspicion that it has been corruptly received or in circumstances which amount to an offence under the Corrupt Practices Act.

Whenever and however such suspicion arises the ACB, on the written authority of its Director[same as Director General?] may investigate such suspicion to determine whether an offence under section 32 might have committed. And if upon the investigations the ACB is

convinc' that their suspicions are well founded, they will bri g charges against the suspected public o' icer. the suspected officer will then be guilty as char d, of course after due process, unless h gives a satisfactory explanation to the court hearing t eir case about the innocence of their pos ession and/or control of property and their high standard of living.

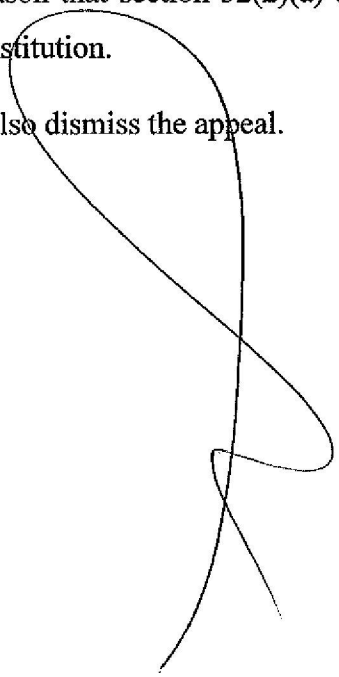
Looking at section 32 in the light of the discussion about presu ption of innocence, the right to silence a d the burden of proof the arguments proffered for and against its constitutionality the law and the applicable facts I am have no doubt that the said section is on a normal reading and understanding thereof not unconstitutional as alleged or at all. the section does not place any legal burden on the Appellant to prove his innocence. it does not compel him to say anything in his defence. It does not interfere with the presumption of innocenc . The references to satisfactory explanations notwithstanding it still remains the duty of the State/the prosecution to prove its case against the accused beyond reasonable doubt. The State therefore has, under both section 32 (2) (b) and ( ) the State has, inter alia, to establish beyond reasonable doubt that the accused is [a] 'in control or possession of pecuniary resources or property and [b] that the same are disproportionate to his past, present official emoluments or other known sources of income'. It must, as the case maybe, prove beyond doubt the suspect is indeed living a standard of life not commensurate with his earnings past or present or other known income. Meaning, as I understand the section and our criminal law, that if the State is incapable of providing such or that there is doubt whether such facts have been proven beyond doubt or not such doubt will be resolved in favour of the accused and an acquittal will follow.

True the section talks of an accused having to give a satisfactory explanation upon certain facts being proven. But the explanation is not in my opinion obligatory. It still is up to the accused whether to say something or exercise their right to silence. And where they say something it is not to prove their innocence. it is, at the most, to cast doubt on the State's case in the manner spoken of by Chipeta J.[as he then was] in **Mogra v R.** The accused will not be guilty because they did not give an explanation. They will be guilty because the court trial court having looked at the proven facts and law before it has come to the conclusion that the same prove beyond reasonable doubt that the accused was living a standard pf life beyond their known past or present income or whether they had under their control assets or property not commensurate to such income.

Accordingly, section 32 (2) (b) and (c) of the Corrupt Practices Act does not on the face of it create a reverse onus provision in respect of legal burden of proof. Neither does it oblige the accused to say something in their defence or infringe their right to be presumed innocent. the section is not on its face unconstitutional.

I should also say that in my humble opinion section 44[1] and [2] of the Constitution is not engaged in this case for the simple reason that section 32(2)(a) and (c) do not place any limitations on section 42[2][f][iii] of the Constitution.

I would in the circumstances also dismiss the appeal.



Kapanda S.C, JA:

INTRODUCTION

This is an appeal against the judgment of the Court below sitting as a constitutional panel delivered on 21 February 2018. The Appellant is answering corruption related charges before the High Court. By originating motion, the Appellant sought the High Court's determination of the constitutionality of section 32 (2) (c) of the Corrupt Practices Act. The Constitutional provisions against which the statutory provisions were examined were section 42 (2) (f) (iii) and section 44 (2) and (3). The Appellant through the Originating Motion sought the following declarations:

a. A declaration that section 32 (2) (b) and (c) of the Corrupt Practices Act reverses the onus of proof in respect of an essential element of the offence created;
b. A declaration that the said section 32 (2) (b) and (c) of the Corrupt Practices Act places a legal burden of proof on the accused;
c. A declaration that the said section 32 (2) (b) and (c) of the Corrupt Practices Act infringes the prescription of innocence and the right to remain silent;
d. A declaration that the said section 32 (2) (b) and (c) of the Corrupt Practices Act does not pass the limitation tests in Section 44 (2) and (3) of the Constitution;
e. A declaration that the reverse onus created by the said section 32 (2) (b) and (c) of the Corrupt Practices Act should be read as imposing an evidential burden of proof on the accused; and
f. A declaration that the reverse onus created by the said section 32 (2) (b) and (c) of the Corrupt Practices Act should be read as imposing an evidential burden of proof on the accused.

The High Court, sitting as a constitutional panel, dismissed the application holding that section 32 (2) (c) of the Corrupt Practices Act was in tandem with the Republican Constitution and that it did

not in any way fall afoul to section 42 (2) (f) (iii) and section 84 (2) and (3) of the Constitution. The Appellant now appeals against the whole of the said judgment.

FACTUAL BACKGROUND

In 2009 the Appellant was charged in the High Court with 15 counts of corruption, fraud and theft by public servant under the Corrupt Practices Act and the Penal Code. In the course of the trial, Appellant sought to challenge the constitutionality of section 32 (2) (b) and (c) of the Corrupt Practices Act. Kamwambe J., as he was then, presiding, determined that the challenge raised a constitutional question and directed the Appellant to seek certification from the Chief Justice that the matter be determined as such. Appellant sought and obtained certification to file Originating Summons to resolve the constitutional question.

After a full hearing, the High Court, sitting in a constitutional matter, dismissed applicant's suit, finding section 32 (2) (b) and (c) of the Corrupt Practices Act constitutional and declaring that it did not infringe the right to a fair trial or the right to remain silent under section 42 of the Constitution. The Court below also found that the provision did not require an accused to disprove an essential element of the offence created. The Court below also declared that the provision was a reasonable limitation of the presumption of innocence and that it imposed an evidential as contrasted with a legal burden on an accused to rebut the reverse burden of proof on balance of probabilities.

THE GROUNDS OF APPEAL

The Appellant filed notice and grounds of appeal. The following are the grounds of appeal:

1. The lower Court (sic) erred in law in holding that Counsel must desist from over relying on case law and statutes from other Commonwealth jurisdictions on the basis that the wording of those constitutions are similar to ours and that the test is not similarity but rather comparability when in fact similarity does make case law and statutes in question comparable;

2. The lower Court (sic) erred in law by holding that section 32 (2) (b) and (c) of the Corrupt Practices Act does not place a legal burden of proof on the accused and therefore violates the accused's right to be presumed innocent and the right to remain silent under section 42 (2) (f) (iii) of the Constitution;

3. The lower Court (sic) erred in law by holding that it was bound by the decision of the Supreme Court of Appeal in ***The Attorney General v Hon. Friday Anderson Jumbe and another*** [2014] MLR 332 when the matters in the case in question are different from matters in the present Court and by failing to distinguish the matter in question from the present one;

4. The lower Court (sic) erred in law by ignoring the applicant's oral submissions;

5. The lower Court (sic) erred in law by holding that the limitation in section 32 (2) (c) of the Corrupt Practices Act is reasonable in an open and democratic dispensation prevailing in the country especially in view of the Court's finding that the accused will have to make an informed decision of whether or not to exercise his right to remain silent;

6. The lower Court (sic) erred in law by failing to consider what constitutes actus reus for the offence in section 32 (2) (b) and (c) of the Corrupt Practices Act and whether the only logical conclusion from such actus reus is corrupt practices; and

7. The lower Court (sic) erred in law by failing to consider that section 32 (2) (c) of the Corrupt Practices Act lowers the standard of proof [to] that [of] a balance of probabilities and is therefore unreasonable, not recognized by International Human Rights standards and necessary in an open and democratic society and therefore unconstitutional.

ISSUES FOR D''TERMINATION

What are the issu s that arise and fall to be decided in the appeal under con ideration by this Court? As this Court understands it, the questions raised by the appeal are as follows:

Upon analysing the opposing arguments presented by the parties in their oral and written submissions, we find that the following issues fall for determination, namely;

(a) Whether proper procedure of referring a matter to a constitutional panel was followed?

(b) Whether section 32 (2) (b) and (c) of the Corrupt Practices Act reverses the onus of proof in respect of an essential element of the offence created thereby and places a legal or evidential burden of proof on an accused person?

(c) Depending on the answers to the second (2) question, the following question may or may not arise:

a. If it reverses the burden of proof, does section 32 (2) (b) and (c) impose limitations on the right to be presumed innocent?

b. If it does, is the limitational constitutional?

It is now necessary that this Court should look at the arguments that have been raised by the parties in response to these questions. We shall start with the Appellants' arguments then move on to deliberate those put forward by the Respondents.

THE PARTIES ARGUMENTS

The Appellant's

The Appellant starts by submitting that the constitutional questions for the Court's determination are as follows:

1. Whether or not section 32 (2) (b) and (c) of the Corrupt Practices Act reverses the onus of proof in respect of an essential element of the offence created thereby;

2. If it does, whether or not the said section places a legal or evidential burden of proof on an accused person;

3. If the section does impose legal burden of proof on an accused person, whether or not the same does not infringe the presumption of innocence and the right to silence under section 42 (2) (f) (iii) of the Constitution;

4. If the reverse onus clause created by section 32 (2) (b) and (c) of the Corrupt Practices Act infringes the constitutional presumption of innocence and the right to silence, whether or not the infringement passes the limitation criteria under section 44 (2) and (3) of the Constitution; and

5. Whether or not the reverse onus clause in section 32 ( ) (c) of the Corrupt Practices Act should be read down by the Court so as impose an evidential and not a legal burden of proof on an accused person.

Counsel for Appellant then submitted that the court below erred in law in disregarding foreign case law altogether. He argues that the main point they wish to emphasize as Appellant, is the decision of the Supreme Court of Appeal in ***The Attorney General v Hon. Friday Anderson Jumbe and another***, (supra) which deals with the issue of reverse onus which the Court below mainly relied upon. It was Counsel's argument that the Court below did not distinguish the facts of the case in the case of ***The Attorney General v Hon. Friday Anderson Jumbe and another*** and the present case. He contends that it is correct that the test that the Court should have regard to when interpreting the Constitution is comparability. Under section 11 (1) of the Constitution it is provided that appropriate principles of interpretation of the Constitution shall be developed and employed by the Court to reflect the unique character and supreme status of the Constitution. Counsel however argues that an approach by the Court below to dismiss outright foreign case law that is based on similar provisions to our Constitution without distinguishing whether the cases in question are not comparable to local case law is a narrow and pedantic approach to the interpretation of the Constitution that shall rob us the opportunity to benefit from the wealth of jurisprudence emerging in other jurisdictions.

Furt r, Counsel argued that several judgments of both th High Court and Supreme Court of App d have expounded the principles to be followed when nterpreting the Constitution so that one can safely say that there has developed some consensu on the proper approach to be used whe interpreting the Constitution. Counsel cites and relies on the case of ***The State and Malawi Elec oral Commission Ex parte Ringtone Mzima.***[1] Counsel is of the firm belief that the case of ***Ring one Mzima*** represents a summation of the dominant vi w emerging in other jurisdictions.

Appellant's Counsel further notes that in the case of ***The Attorney General v Hon. Friday Anderson Jumbe and another*** the Supreme Court of Appeal observed that the court below had prefe red jurisprudence from some Commonwealth jurisdictions and rejected some jurisdictions that have constitutions that are not similar to ours. However, Counsel submitted that it is clear this case was not urging Counsel against citing foreign case law but rather urging the court below not to prefer foreign case law based on the similarity of provisions but that rather the court should consider the comparability of issues. It is submitted by Counsel that similar issues with similar constitutional and statutory provisions would raise comparability of the foreign case in question to our case law. He added that for instance, in the Court below, the Appellant relied on cases from the Republic of South Africa, among other jurisdictions. The right to be presumed innocent and to remain silent during trial in section 35 (3) of the Constitution of the Republic of South Africa is similar to the rights contained in our Constitution in section 44 (2) (f) (iii). He added that Section 42 (2) (f) (v) of our Constitution further accords the accused the right to adduce and challenge evidence and not to be a compellable witness against himself or herself. Counsel therefore contends that a close look at the Constitution of the Republic of Malawi and Republic of South Africa show the constitutional principles are similar. Thus, the application of the constitutional principles to comparable issues arising out of a reverse onus would also be the same.

Counsel further argued that the Courts have also considered the issues of reverse onus on the basis of the common law. He called in aid the case of ***State v Chogugudza*** [2] where the Court relied on the common law to determine the legal burden of proof. He submitted that the common law position on the right to be presumed innocent which necessarily places the burden of proof on the State is insightful to the interpretation of the Constitution. The Appellants note that the decision is

[1] MSCA Civil Appeal No MSCA Civil Appeal No 17 of 2004
[2] (1996) (1) ZLR 28

not binding but argued that it is informing and persuasive and our Constitution encourages the Court to have regard to it. Counsel then submitted that, in the circumstances, the Court below should not have discouraged him from citing foreign cases that are meant to help the Court arrive at a just decision. He added that the Court below sitting as a constitutional panel should therefore have had regard to foreign case law as encouraged by the Constitution and should not have outright disregarded the foreign case law. Counsel for Appellant therefore submits that the Court below erred in disregarding the foreign case law altogether.

Further, Counsel for Appellant submitted on legal burden of proof in section 32 (2) (b) and (c) of the Corrupt Practices Act. Counsel's main argument is that section 32 (2) (b) and (c) of the Corrupt Practices Act shifts the legal burden of proof to the accused. He drew this Court's attention to the Criminal Procedure and Evidence Code under section 187 provides for the legal position on the burden of proof. Counsel also referred us to Section 188 (2) of the Criminal Procedure and Evidence Code which defines the legal burden when it refers to acts, omissions (*actus reus*) or intentions (*mens rea*). He submitted that the provision clearly requires that the burden to prove acts or omissions constituting the offence must always rest on the prosecution in terms of section 187 of the Criminal Procedure and Evidence Code. Counsel further submitted that the marginal note for section 32 (2) (b) and (c) of the Corrupt Practices Act is misleading in that whereas the marginal note states that the offence is one of being found with unexplained property, a reading of section 32 (2) (c) of the said Corrupt Practices Act evidently shows that the presumption raises the offence of receiving pecuniary resources or property corruptly. Section 32 (2) (b) of the Corrupt Practices Act therefore attempts to prejudice or diminish the obligation to establish by evidence the *actus reus* of receiving pecuniary resources or property and the *mens rea* of receiving the aforementioned property or services corruptly.

It is also the contention of the Appellant that section 32 (b) and (c) of the Corrupt Practices Act attempts to coerce the courts to make a finding of guilt based on the circumstantial evidence of possession of property and a failure (or choice as is in this matter) to give explanation as to how the person came by the property or services in question. Counsel added that the position in section 32 (2) (a) and (b) of the Corrupt Practices Act can be distinguished from section 32 (2) (c) of the same Act. He submitted that whereas under section 32 (2) (a) and (b) of the Corrupt Practices Act the inference of corruption is drawn from maintaining a standard of living above that which is

commensurate with the public servant's emoluments or having had control or possession of pecuniary resources, property disproportionate to their present or past emoluments (and being wealthy is not an offence); section 32 (2) (c) of the Corrupt Practices Act requires the State to prove receipt, directly or indirectly of the benefit of services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under the Act. The Appellant's Counsel therefore contends that in terms of section 32 (2) (a) and (b) the Corrupt Practices Act, if the accused person opts to exercise his right to remain silent, the Court is supposed to find the accused guilty without the State proving any *actus reus* or *mens rea* so long as the accused remains silent or fails to a give a reasonable explanation. Therefore, in the further view of the Appellant, the court may convict an accused person despite there being reasonable doubt as to his guilt. However, in terms of section 32 (2) (c) of the Corrupt Practices Act, the actual receipt of services has to be proven. Furthermore, it is said by the Appellant that the State has to show that the services in question were given in circumstances that raise suspicion of corruption or in the circumstances that are an offence under the Act. In the Appellant's opinion this means that for the reverse onus to operate under section 32 (2) (c) of the Corrupt Practices Act, the specific acts in issue and intention that are called in question have to be proved. It is only then that the burden shifts to the accused to give a reasonable explanation. In this case, the court will only convict if there is reasonable doubt as to the accused person's guilt.

Counsel further submitted that the legal burden of proof must be understood in the light of the presumption of innocence. He said that the presumption of innocence is one of the rights provided for in section 42 (2) (f) (iii) of the Constitution and that the presumption of innocence has enjoyed long standing recognition at Common law[3]. Counsel also cited several cases in several jurisdictions on the importance of presumption of innocence in the criminal trial process[4].

It is well to observe that the above arguments notwithstanding, Counsel for the Appellant conceded that the presumption of innocence is a limitable right as section 44 (1) of the Constitution does not include the presumption of innocence as one of the rights that cannot be limited. However, Counsel for Appellant argued that for there to be a valid limitation to the presumption of innocence the limitation must comply with sections 44 (2) and 44 (3) of the Constitution. He went on to observe

[3] ***Woolmington v Director of Public Prosecution*** [1935] AC 462

[4] See the Canadian case of ***Regina v Oakes*** [1968] 1 SCR 103 and South African case of ***State v Mbatha*** [1996] ZACC 1.

that nevertheless, in almost every jurisdiction, there are statutory devices that provide an exception to the State's burden to prove an accused guilty beyond reasonable doubt. It is argued that the State does this either by imposing a presumption against the accused, which will hold until he gives proof to the contrary or by requiring him to lead evidence enough to raise or create some doubt about an issue if he is to escape a conviction. Statute may also require an accused to raise a defence, excuse or justification or exception if he is to escape conviction. Furthermore, the Statute may impose on an accused the duty to prove or disprove an element of the offence. Statute may do this by presuming a fact to exist against an accused or by stating that a fact will be presumed to exist unless the accused gives evidence to the contrary. Reference was then made to the case of ***Regina v Oakes*** (supra) where the court put it thus:

> "Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. Firstly, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidential burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact".

Counsel further cited foreign cases on the difference between legal burden and evidential burden[5]. It is noted that although, in the Court below Counsel prayed that the Court should declare that the reverse onus created should be declared as one imposing an evidential burden[6], in this appeal the Appellant has changed tune and relying on these foreign case laws now submits that section 32 (2) (c) of the Corrupt Practices Act is a reverse onus provision that imposes a legal burden of proof against an accused person and is therefore in violation of the right to be presumed innocent until proven guilty under section 32 (2) (c) of the Corrupt Practices Act unless the same is read down under section 11 (3) of the Constitution as creating an evidential burden of proof. The wording of the section in issue appears similar to that which exercised the minds of the Privy Council in ***Attorney General of Hong Kong v Lee Kwong Kut*** (supra). The case dealt with a statute which provides that where a person was found in possession of anything reasonably suspected of having

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[5] See ***Scaggel v Attorney General*** [1997] 4 L.R.C 98, at 10; ***State v Choguguza*** (supra); ***R v Oakes*** (supra); ***R v Whyte*** [1988] 2 SCR; and ***State Bhulwana*** CCT 12/95 at pages 200-201; ***Attorney General of Hong Kong v Lee Kwong Kut*** [1993] AC 951

[6] See the declaration sought against the Respondent in paragraphs (e) and (f)

been stolen, and he failed to give a satisfactory explanation of how he came to possess such thing, he shall be presumed to have stolen it. The Privy Council held that the provision created a legal burden of proof and was in violation of the accused's right to be presumed innocent until proven guilty. It is the further view of the Appellant that the case of ***Attorney General of Hong Kong v Hui Kin Hong*** dealt with section 10 of the Prevention of Bribery Act of Hong Kong which is in *pari materia* with section 32 (2) (b) and (c) of the Corrupt Practices Act. The court in the ***Hui Kin Hong*** case was of the view that the section violated the presumption of innocence and that it reversed the onus of proof by creating a legal burden of proof but proceeded to analyse it and hold that the section was nonetheless 'Bill of Rights' compliant because it was reasonable.

Further, Counsel argued that his analysis of the decision in the ***Hui Kin Hong*** s case seems to show that their Lordships read or watered down the legal burden of proof into an evidential one when they stated that all the prosecution needs to prove is a *prima facie* case that the accused was living a standard of living not to commensurate with his official emoluments by showing something more than trifling incommensurate or disproportion to which then the accused has a duty to offer a satisfactory explanation. Their Lordship's use of the word *prima facie* case to be established by the prosecution shows that they intended to read down the accused's burden of proof to an evidential one. Counsel for Appellant therefore argues that it is clear from the above authorities that section 32 (2) (b) and (c) of the Corrupt Practices Act places legal burden of proof on the accused and therefore violates the Accused's right to be presumed innocent and the right to remain silent under section 42 (2) (f) (iii) of the Constitution.

Counsel then turned to argue that the Court below erred in law by failing to distinguish between the decision in ***The Attorney General v Hon. Friday Anderson Jumbe and another*** (supra) and the present matter. In the impugned judgment of the Court below the panel stated:

> "The issues that this court has been called upon to determine are similar to the issues that the Malawi Supreme Court addressed and settled in ***The Attorney General v Hon. Friday Anderson Jumbe and another*** [2014] MLR 332. In the abovementioned (sic) case reference was made to the reversal of burden of proof in section 25 (B) (3) of the Corrupt Practices Act.
>
> Under the doctrine of precedent this judgment of the Supreme of Appeal is binding on the High Court and the applicants have not advanced any convincing reasons as to why

this court should depart from the principles expounded in ***The Attorney General v Hon. Friday Anderson Jumbe and another.***"

Counsel argued that section 25 (B) (3) of the Corrupt Practices Act is fundamentally different from section 32 (2) (b) and (c) of the Corrupt Practices Act. He submitted that in the latter section, the prosecution bears the burden of proving all the essential elements of the offence. Counsel added that that is why the Supreme Court in ***The Attorney General v Hon. Friday Anderson Jumbe and another*** correctly observed that it is possible to prove a case under the said subsections without raising or relying on the presumption contained in the reverse onus. The presumption would only arise in the defined circumstances. On the other hand, he continued to submit, under section 32 (2) (b) and (c) of the Corrupt Practices Act, the State only investigates and has to prove that one has wealth that is beyond their known past and present emoluments. Once that is proved without anything more, a presumption arises that such wealth was acquired corruptly or fraudulently. Further, the test as to whether one had had a lifestyle above their earnings or has had in control pecuniary resources above their earnings is a very subjective test which would make uncertain the alleged offence. Counsel further argued that it is absurd that such an inference would be made even without proof of individual acts of corruption being identified as is the case in section 32 (2)(c) of the Corrupt Practices Act. It is argued that the State would not have to show that you were in possession of property or that the pecuniary resources in question were received in circumstances that raise suspicion of corruption or that amount to corruption under the Act. Further, it is said that the State need not even show that you were in a decision making position in relation to any transaction, past, present or future. It is further contended that the State would not have to prove that you abused your office; there would no need to prove loss on the part of government or any private individual would have to be made; and there would be no need to prove that an arbitrary act had been committed. In sum, the Appellant submitted that nothing suggesting corruption at all would have to be proved under section 32(2)(b) of the Corrupt Practices Act apart from the possession of wealth which exceeds one's present and past emoluments which itself does not exclusively raise an inference of corruption.

Counsel for the Appellant contends that as a matter of fact, his study of the record of the court thus far in Criminal Case number 1 of 2009 shows that the State only considered the emoluments that the Appellant received as President. No consideration was given to his other businesses and

sources of income. It is further argued that the figures in question included loans from banks and other sources that the State admitted they knew were the Appellant's personal businesses and those of his wife. It is therefore submitted that it is clear that under section 32(2)(b) and (c) of the Corrupt Practices Act, a court would be in a position to convict a person even where there is reasonable doubt as a legal burden is placed on the accused. The Appellant then drew our attention to the case of ***Attorney General vs Friday Anderson Jumbe and another*** (supra), and argues that the Court did not directly discuss the difference between the legal and evidential burden of proof but the Court's finding that the State could prove the offence without relying on the reverse onus goes a long way to show that section 25(B)(3) of the Corrupt Practices Act raises an evidential burden on the accused. Counsel is therefore of the view that since the Court did not find fault with Section 25 (B)(3) of the Corrupt Practices Act then there is no fault with section 32(2)(b) and (c) of the same Act. It is therefore counsel's submission that if the court below had distinguished section 25(B)(3) from section 32(2)(b) and (c) of the Corrupt Practices Act, the court would have found that the provisions are couched in a different manner and the court below would have noted that whereas section 25 (B)(3) of the Corrupt Practices Act places an evidential burden on the accused, section 32(2)(c) of the Act places a legal burden on the accused and is unconstitutional as it violates the right to be presumed innocent and the right to remain silent and if an accused were to exercise their right to remain silent, a court would convict the accused even though there existed reasonable doubt as to his guilt.

Counsel for Appellant then turned to argue against the finding of the Court below that the limitation in Section 32(2)(c) of the Corrupt Practices Act is reasonable in an open and democratic dispensation prevailing in the Country especially in view of the fact that the accused will have to make an informed decision of whether or not to exercise his right to remain silent. Section 44 (2) and (3) of the Constitution provides for circumstances in which limitation of the presumption of innocence would be lawful. Counsel however argued that section 44 (2) and (3) of the Constitution contains words or phrases on which there has been little, if any, interpretation in Malawian jurisprudence. He submitted that the Court therefore ought to also be alive to the differences in the constitutional provisions of the various countries whose court decisions are cited as persuasive authority on the constitutionality of reverse onus provisions or limitations to the presumption of innocence in those countries. Counsel submitted that the situation in Malawi is very similar to that of South Africa and Canada. He added that on the other side of the fence of the jurisprudence are

the constitutional arrangements obtaining in Zimbabwe, Namibia, United States, Hong Kong, and in the United Kingdom and under the European Convention on Human Rights generally (the Strasbourg jurisprudence). Counsel cited the South African case of ***State v Mbatha*** (supra) on limitations of rights where on page 261 Langa J., stated that:

> "The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation – (a) shall be permissible only to the extent that it is (i) reasonable; (ii) justifiable in an open and democratic society based in an open and democratic society based on freedom and equality; and (b) shall not the essential content of the right in question, and shall... also be necessary."

Counsel then proceeded to quote several dicta obtained from different foreign case laws including a Canadian case of ***Regina v Oakes*** supra where Dickson J., cites the United States of America case of ***Leary vs United States***[7], where Justice Harlan articulated a more stringent test for validity in the following manner:

> "a criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence "unconstitutional" unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend".[8]

He submitted that from these foreign cases, it will be seen that the limitation to the right to be presumed innocent created by section 32(2)(b) and (c) of the Corrupt Practices Act is not necessary as the provision could be framed in such a way that the legal burden of proof must not shift to the accused. He added that there is no rational connection between the elements of the offence that the State has to prove and the intended conclusion. As such the risk of convicting a person where there exists reasonable doubt is high. Thus, he continued to submit, such a reverse onus as the one under this matter is not reasonable in an open and democratic society.

This Court's attention was drawn to the most recent England and Wales Court of Appeal case of ***Webster vs R*** [9] where the appellant was charged of corruptly giving a gift under Section 1 (2) of the Public Bodies Corrupt Practices Act 1889 by way of reward in connection with past business transactions or to induce future business transactions. Section 2 of the Prevention of Corrupt Act

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[7] 395 U.S. 6 (1969)
[8] Ibid. 36
[9] [2010] EWCA Crim 1819

1916 requir[illegible] the appellant to prove that the gift admittedly made [illegible]as not given corruptly as an inducement [illegible] reward. He appealed on the basis that the latter provis[illegible]n infringed his presumption of innocence under article 6 of the European Convention on Human r[illegible]ghts. The Court held that the reverse onus infringed article 6 of the European Convention on Huma[illegible] rights but that the European Convention [illegible]n Human rights does not place an absolute prohibition on reverse onus clauses and what is requ[illegible]red is a fair trial[10]. It found that the imposition of the presumption was reasonably necessary and proportionate to counter the then growing problem of corruption[11]. The Court then said in paragraph 25:

> "We have already observed that there is a considerable difference in effect between the imposition upon the Defendant of a burden to raise an explanation in the evidence which, if given, the prosecution must disprove to the criminal standard and a legal burden upon the Defendant to disprove a legal presumption of corrupt motive. The latter presumption always raises the possibility that the jury may convict the Defendant of making a corrupt gift contrary to the presumption of innocence, while considering that the defendant may be innocent of a corrupt motive".

Counsel for Appellant argued that aware of this danger and of its duty to 'read down' statutes to ensure compatibility with the European Convention on Human Rights, the Court read down the reverse onus clause by holding that it placed a burden upon the defendant to raise in the evidence an issue whether a gift was corruptly made and that the ultimate legal burden of proving to the criminal standard that the gift was corruptly made would rest upon the prosecution. Counsel then submitted on *actus reus* under section 32 (2) (b) and (c) of the Corrupt Practices Act. Appellant's counsel contended that the offences under section 32(2)(b) and (c) of the Corrupt Practices Act do not create an offence of being found of unexplained property as the marginal note suggests. He suggested that the reverse onus shows that the offence is having or having had under his control or in his possession pecuniary resources or property reasonably suspected of having been corruptly acquired. He added that according to the section, that is supposed to be the charge and that under this provision, the State does not have to prove any corruption or suspicion of corruption. He went on to submit that if the Court below had considered the *actus reus* of the offence, it could have

[10] see paragraph 15 and 16 of the judgment
[11] See paragraph 22 of judgment

not t that corruption is not the only logical conclusion t t one can draw from possession of we th. Counsel further put it to us that the case of ***The Atto ey General v Hon. Friday Anderson Jun be and another***, mainly turned on the issue of proportionality. Thus, applying the proportionality test from this case to the present matter, the conclusion will be that section 32 (2) (b) nd (c) of the Corrupt Practices Act cannot pass the proportionality test.

Las ly, Counsel for Appellant submitted that the offence of being found in possession of pecuniary resources or property reasonably suspected of having been corruptly acquired lowers the standard of proof to one on a balance of probabilities. He argued that the fact that corruption occurred is not certain and a conviction may be secured on this lowered standard of proof and that such a standard of proof is not reasonable in an open and democratic society. It opens up to the law being abused and an accused may be convicted even in the light of reasonable doubt. Appellant's Counsel therefore submitted that in view of the lowered standard of proof, section 32(2)(b) and (c) of the Corrupt Practices Act violates the right to be presumed innocent and the right to remain silent.

In sum, Counsel for Appellant urged this Court to find and conclude that section 32(2)(b) and (c) of the Corrupt Practices Corrupt Practices Act violates the right to be presumed innocent and to remain silent and that the decision of the Court below be reversed.

The Respondent's

The Respondent, the Attorney General in this appeal, began by submitting that except for the rights which are expressly identified as non-derogable, non-restrictable or non-limitable under section 44(1) of the Constitution, the rest of the rights in Chapter IV of the Constitution can be derogated from, limited or restricted. He submitted that the right to fair trial is one of those rights that is derogarable and can essentially be limited. Further, the Respondent argued that the Constitution in sections 44(2) and (3) of the Constitution sets out guidelines for the said restrictions or limitations to be effective. Section 44(2) of the said Constitution provides as follows:

> "Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards, and necessary in an open and democratic society."

Then, section 44(3) of the Constitution states that "Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application."

The Respondent argued that for the right to fair trial to be limited, the limitation must (i) be prescribed by law; (ii) be reasonable; (iii) be recognized by international human rights standards; (iv) be necessary in an open and democratic society; (v) not negate the essential content of the right or freedom in question; and (vi) be of general application. The Respondent further argues that in order to understand the purport of section 42(2) (f) (iii) of the Constitution, a generous and purposeful examination of the issues before this Court and those that were before the judges in foreign jurisdictions should inform the Court how best to resolve a case. The Respondent cites ***Attorney General v Friday Anderson Jumbe and another*** (supra) and contends that reverse onus provisions in corruption legislation should always be construed in line with the tenets of section 11(1) and 2 and 13(o) of the Constitution. He added that the unique character, public trust and good governance values mirrored in the constitutional framework, should inform legislation that touches on transparency and confidence in public functionaries as was case with the applicant.

The Respondent further argued that the right to be presumed innocent has no contrary right in section 42 of the Constitution or paragraph (f) thereof. Thus, in the words of Langa J "...the presumption of innocence is clearly of vital importance in the establishment and maintenance of an open and democratic society based on freedom and equity."[12] He went on to say that the right to be presumed innocent is the foundation of an acceptable criminal justice system; a justice system that would earn and command the trust and confidence of the society. As such, by providing for the right to a fair trial and right to be presumed innocent in section 42(2)(f)(iii) our Constitution is not conferring on the citizens a new right. It is only recognizing a right that has existed under common law, statute and indeed international instruments. He added that what the Constitution has done is to give this right the force and supremacy characterized by all constitutional provisions. Further, the Respondent submitted that the presumption of innocence is intrinsically connected to the burden of proof in criminal cases and the duty to prove an accused person guilty rests on the prosecution. However, this is subject to the defences and exceptions. Thus, the right to be presumed innocent can therefore be limited, and has been limited. In order to buttress this point,

[12] ***State v. Mbatha*** (1996) 2 LRC 208

the Respondent brought to the attention of this Court sections 187(1) and 188(1) and (2)(a) of the Criminal Procedure and Evidence Code .

The Respondent further submitted that the presumption of innocence can be limited as long as the justification for such limitation is clearly established. The criminal standard of proof does not require absolute certainty. Counsel cites ***Miller v. Minister of Pensions***[13], where Denning L.J. put it thus:

> "... the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."[14]

It was also the Respondent's argument that in its ordinary operation reverse burdens serve the same goals as the presumption of innocence. Both aim to achieve a fair balance between the general interest of the community and the personal rights of the individual[15]. Put another way, he continued, a balance is sought between the defendant's right not to be wrongly convicted and the community's broader interest in law enforcement. The presumption of innocence ordinarily places great weight on the defendant's rights. The reverse burden favours the prosecution, so the shift must be justified. In re-striking the balance, reasonable proportionality must be maintained. For this argued the Respondent called in aid the case of ***Janosevic v. Sweden*** [16]. This Court is concerned with the compatibility of a statutory reverse burden with the common law standard of proof and with the Malawi constitution. The potential incompatibility is clear: the reverse burden might require a defendant, presumed to be innocent, to prove it. However, while a reverse persuasive burden requires the defendant to prove his innocence on the balance of probabilities, a reverse evidential burden only requires him to raise a doubt. The prosecution will then assume the

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[13] [1947] 2 All E.R. 372
[14] Ibid. 373-374
[15] See ***Brown v. Stott*** 120031 1 A.C. 681, 704, per Lord Bingham, per Lord Hope p. 722
[16] (2004) 38 E.H.R.R. 473

persuasive burden of negating that matter, beyond reasonable doubt. This situation is very familiar in cases where self-defence arises as an issue.

This Court's attention was further drawn to the protection of persons (not applicable to those under investigation) as enshrined in international instruments as well as the Constitution of the Republic of Malawi. Likewise, we were referred to the provision that criminalizes a public officer who acquires unexplained property during his tenure of public office and is unable or unwilling to explain how he acquired it, in spite of being required by law to be transparent about his income, interests and liabilities. The Respondent argues that is a long-standing argument that different and higher standards are required and expected of those who work in the public sector. In England, the Bribery Act 1916 had been prompted by scandals involving contracts with the War Office. During a speech in the House of Lords, the Lord Chancellor said:

> "I feel satisfied that you will agree with me in thinking that, short of high treason, it is almost impossible to imagine an offence more grave than to corrupt one of these public servants and cause the neglect of his duty."

The said Bribery Act 1916, among other things, introduced the presumption of corruption, which shifted the burden of proof, so that it was for the defence to prove (on the balance of probabilities) that a payment was not corrupt. The reasons given in Parliament for the introduction of the presumption were that it was necessary to remedy an obvious defect in the law and that it would not cause any injustice to an accused, as it would be easy for him to discharge the burden of proof if he was innocent. The Respondent cited ***R v Carr-Briant***[17] in support of the argument that the introduction of the presumption of corruption was meant to remedy an obvious defect in the law. It is observed that later, the Redcliffe-Maud Committee explained at paragraph 76 that "public life requires a standard of its own and those entering public office for the first time must be made aware of this from the outset"[18]. The task of the Committee was to examine local government law and practice following widespread disquiet about the standards of conduct in local government. It concluded that, although standards of conduct were 'generally high', it was right to be concerned that corruption exists, bearing in mind that, 'unless corruption is stopped, it spreads'.

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[17] [1943]1 KB 607

[18] https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/redcliffemaud-report/18F53B3A9D47AE767C7AA2FE4B56F6CB. Accessed 19 November 2021

Furthermore, the Respondent submitted that the effect of the reverse burden is that, when the basic facts have been proved by the prosecution, to the criminal standard, it becomes necessary for the defendant to demonstrate, by argument or with evidence, that there are reasons why any adverse presumption should be disregarded or that there remains a doubt to be settled in his favour, so that the court should not infer of his guilt. The Respondent then went on to contend that the inference can be rebutted not only by admissible evidence of an innocent explanation, established on the balance of probabilities, but also by an evidence-based submission of the defendant that the prosecution case does not exclude a plausible explanation. The Respondent cited several foreign cases including ***X v United Kingdom***[19]; ***Salabiaku v France*** [20] and ***Attorney General of Hong Kong v Lee Kwong-Kut*** [21], where the Privy Council was asked to consider the compatibility of a reverse onus clause with article 11(1) of the Hong Kong Bill of Rights, which guarantees the right to be presumed innocent until proven guilty, giving judgment, considered ***Salabiaku v France*** and then said:

> "There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant 's guilt beyond reasonable doubt .... Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines ... If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v United States* (1969) 23 L Ed 2d 57, 82, 'it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend'."[22]

The Respondent also argued that a person suspected or accused of a criminal offence has also traditionally been accorded a right of silence, which means that there is no obligation to answer

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[19] App 5124/71, (1972) 42 Collection of Decisions 135
[20] (1988) 13 EHRR 379
[21] [1993] A.C. 951
[22] ***Salabiaku v France*** (1988) 13 EHRR 379 at 388

questions, either before or during the trial. He added that at common law, this right has been supplemented by a further rule that the fact-finders may not be invited to draw any adverse inference from the failure of a defendant to assist the police or to give evidence at trial. However, he continued to argue, in Malawi either section 188 and section 256 or section 314 of the Criminal Procedure and Evidence Code apply. Thus, if the defendant elects to give evidence there is a further consideration where the law requires an explanation from him if he is to avoid conviction based on an adverse inference or presumption. Further, the Respondent submitted that regarding whether a case to answer can be established in the absence of the presumption normally depends on whether the basic facts amount to a *prima facie* case. He added that proof of the basic facts is not, without more, proof that an offence has been committed, namely, that the questionable circumstances automatically indicate that the defendant corruptly acquired his property. However, he contended that it seems highly likely that a *prima facie* case would be held to exist. The Respondent added that under the 2010 amendment of the Corrupt Practices Act and section 32 in particular, the property attributed to the public officer is, in effect, deemed to represent corrupt inducements, advantage or rewards unless the contrary is demonstrated by him, on the balance of probabilities or the court is made to doubt that this is the correct thing to presume. Thus, in the further view of the Respondent, it follows that there should be a case to answer once the basic facts are proved because, in the event of the defence proffering no evidence or otherwise challenging the presumption, it would not have been rebutted. The Respondent thus submits that if the basic facts are proved beyond reasonable doubt in a presumption case and the defendant however elects not to give evidence on oath or affirmation or to challenge the prosecution case by any other means, a conviction would be inevitable. As it were, the presumption will not have been rebutted on the balance of probabilities or at all.

Furthermore, the Respondent contends that section 32(2) (c) of the Corrupt Practices Act imposes on the accused an evidential burden upon case to answer stage and not a legal burden. Namely, the accused is required to adduce evidence sufficient to raise an issue as to whether he is guilty of the offence of being found in possession of unexplained property or income (the presumed fact on investigations). He added that the accused is not required to demonstrate on a balance of probabilities that he is not guilty of possession of unexplained property or income in order to be acquitted of that offence, which would be the case if the accused were saddled with a legal burden. The Respondent claims a similar argument was made in the South African case of ***State v***

Bhulwana & others (supra). The accused were convicted of dealing in dagga by reason of the operation of the presumption in section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 1992, which provided that where it was proved that an accused had been found in possession of dagga exceeding 115g "it shall be presumed, until the contrary is proved, that the accused dealt in such dagga." The accused contended that this reverse onus provision violated their presumption of innocence and was unconstitutional. The State asked the court to read down the section by interpreting it as merely imposing an evidential burden rather than a legal burden of proof on the accused, in the event that the section is held to be unconstitutional. Megan J. delivering the judgment of the Constitutional Court of South Africa at paragraphs 199 and 200 said:

> "It cannot be accepted that the subsections impose an evidential, not a legal burden. Section 21(1)(a)(i) provides that, where an accused is found in possession of a quantity of dagga in excess of 115g it shall be presumed, 'until the contrary is proved', that the accused was guilty of dealing in dagga. The clear language of the text suggests that the presumption will stand unless proof to the contrary is produced. Presumptions phrased in such a way have consistently been held to give rise to a legal burden since the judgement of the Appellate Division in *Ex parte Minister of Justice: Re R v Jacobson and Levy*, 1931 AD 466. On several occasions the Appellate Division has held that provisions in the legislation antecedent to this Act which gave rise to the presumption of facts 'unless the contrary is proved' impose a legal burden upon accused persons: see *State v Guess* (4) SA 715(A) at 719, *State v Radloff* 1978 (4) £4 66(A) at 71. There is no significant difference between the formulation of the earlier presumption considered in these cases and section 21(1) (a) (i), although the formulation in the earlier legislation was 'unless' rather than 'until' the contrary is proved. In the court a quo in *Bhulwana's* case Marais J was of the view that s.21 (1) (a) (i) plainly gave rise to a legal burden (see 1995(1) SA 509(C) at 510, 1995 (5) BCLR 566(C) at 567. I agree that there can be no doubt that s.21(1) (a) (i) is a reverse onus provision which imposes a burden of proof on the accused. The effect of the provision is that, once the State has proved that the accused was found in possession of an amount of dagga in excess of 115g, the accused will, on a balance of probabilities, have to show that such possession did not constitute dealing as defined in the Act. Even if the accused raised a reasonable doubt as to whether he or she was dealing in the drug, but fails to show it on a balance of probabilities, he or she must nevertheless be convicted. The effect of imposing the legal

burden on the accused may therefore result in a conviction for dealing despite the existence of a reasonable doubt as to his or her guilt."

Counsel for the Respondent argues that, similarly, in ***R v Oakes*** (supra) a case also relied upon by the Appellant, the Supreme Court of Canada considered section 8 of the Narcotic Control Act which provided that if the crown was able to prove beyond a reasonable doubt that the accused had been in possession of a narcotic then the accused was to be given an opportunity of establishing that the was not in possession of the narcotic for the purpose of trafficking. The section in effect required the accused to establish on a balance of probabilities that he did not have possession of the narcotics for purpose of trafficking. Dickson C.J.C. in ***R v Oakes*** at pages 132-133 said:

> "In general one must, I think conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in section 11 (d) if an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was true."

Relying on the above cited authorities, the Respondents submitted that the right to a fair trial, which includes the right to be presumed innocent, is an established principle of our law which saddles the burden of proof squarely on the shoulders of the prosecution. As such, the entrenchment of this right in section 42(2) (1) of the Constitution must be interpreted in this context. He added that it requires that the prosecution bear the burden of proving all the elements of an offence the accused is charged with. It was the further contention of the Respondent that Section 32(2) (c) of the Corrupt Practices Act brings into play the legal burden of proof for the prosecution throughout the trial and an evidential burden of proof on the prosecution and the same shifts to the accused person upon being found with a case to answer.

The Respondent then argued that pursuant to the Republican Constitution any limitation of rights must be justifiable under section 44(2) and (3) of the Constitution. Again, the Respondent is relying on the following statement in the case of ***R v Oakes*** (supra), on interpretation of a section in the

Canadian Constitution which is similar to our said sections 44(2) and (3) of the Constitution, where the court in Canada put it thus:

> "A second contextual element of interpretation of section 1 is provided by the words "free and democratic society". Inclusion of these words as final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the charter was originally entrenched in the Constitution. Canadian Society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society..."

Further, Counsel argued and submitted that with the rampant corruption level in this country as was affirmed in ***The Attorney General v Hon. Friday Anderson Jumbe and another***, this Court should look at the objective of in particular section 32 (2) (c) of the said Corrupt Practices Act which is to guard against unjust enrichment of public fiduciaries holding positions such as the one on which the applicant was. It is further contended that the provision does not stop public functionaries from accumulating property or income. It only criminalizes possession of unexplained pecuniary resources or property that is after an investigation has been carried out and it is demonstrated that such accumulation is disproportionate to the present or past official emoluments or other known sources of income of such public fiduciaries.

Lastly, the Respondent submitted on whether limitations of section 32 (2) (c) are proportional. Counsel argued that the limitations are proportional. He added that the word Public office under the Corrupt Practices Act means any person who is a member of, or holds office in, or is employed in the services of, a public body, whether such membership, office or employment is permanent or temporary, whole or part-time, paid or unpaid, and includes the President, a Vice President, a Minister, and a member of Parliament. The Respondent continued to argue that under the Corrupt Practices Act, public officers exercise wide independent and discretionary powers in their own right, and at times only subject to law. Thus, when public officers fully entrusted with such a fiduciary duty, unjustly enriches themselves or are found in possession of pecuniary resources or property disproportionate to their income or known sources of income they must give satisfactory explanation for the same. It was submitted that this is the case as the public office is held on trust for the public interest. Thus, any unexplained resources or property is to the detriment of the public

interest Accordingly, there is an expectation from the public officer concerned to give an explanation thus the limitations provided therein cannot be said to be disproportionate.

In conclusion, the Respondent submitted that the plain meaning of section 32(2)(b) of the Corrupt Practices Act is that it is in line with the constitutional framework, a necessary tool for the fight against corruption. The Respondent prays that this appeal be dismissed in its entirety with costs.

THE LAW AND DISCUSSION (Analysis of the law and determination)

Whether the procedure of referring a matter to a constitutional panel was followed;

We must begin by pointing out the significance of the introduction of section 9 (2) and (3) of the Courts Act and the rules made thereunder known as the Court (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, and of course with the now applicable rules in Order 19 of the Courts, (High Court) (Civil Procedure) Rules. It is well to note that one of the reasons why section 9 (2) and (3) of the Courts Act and the rules were introduced was only for the constitutional panel to hear and deal with matters that relate to the interpretation and application of the Constitution. Thus, a constitutional panel's jurisdiction ought not to be invoked in matters which can properly be dealt with in the ordinary course of litigation. It is against this background that a procedure was laid down on how a matter relating to the interpretation or application of the Constitution ought to be certified. Otherwise, our current Constitution pervades all aspects of life so much so that any action taken by a party may easily be transformed into a constitutional issue by simply citing some provision of the Constitution however remote. We raise the above issue because, having looked at the record, there arises a question of what was the procedure of referring a constitutional matter to the constitutional panel before the coming into force of Order 19 of the Courts. (High Court) (Civil Procedure) Rules, 2017.

As the factual background above will show, the Appellant was answering several corruption charges before the High Court when he raised some issues for the trial court to determine in respect of section 32 (2) (b) and (c) of the Corrupt Practices Act in view of his constitutional rights. The trial court in its ruling agreed with the Appellant that the issues he raised were of a constitutional

ture and directed that he presents them before the Chief Justice for certification pending a determination by a panel of not less than three judges. The Appellant duly complied and as it was provided by rule 4 of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, brought an originating motion seeking the determination by the Court on the above highlighted constitutional questions. The Appellant sought from the Constitutional panel several declarations as mentioned above. Unfortunately, the record has no certification from the Chief Justice. It seems the referral was not made by the Court as provided by the then applicable rules. Similar to Part I of Order 19 of the Courts, (High Court) (Civil Procedure) Rules, 2017 there are three ways in which matters of this nature are referred to the Chief Justice. These are: first, the general commencement of the proceedings which was then by an originating motion (now through summons); secondly, the referral by the President; and thirdly the referral by other courts. The problem that arises in this case is that when the Appellant decided to raise the issues that he thought related to the application or interpretation of the Constitution, the trial had already commenced. As such, the only viable way of referring the matter to the Chief Justice ought to have been through the referral by the court. In other words, the Court was supposed to invoke rule 8(1) of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, which provided as follows:

"

(1) Where a referral to the Court in relation to any matter on the interpretation or application of the Constitution is necessary as determined by an original court, the Judge or Magistrate or Chairperson of the original court shall, within seven days from the date of the determination, submit the referral in Form 3 of the Schedule to the Chief Justice for certification under section 9(3) of the Act.

(2) Where the original court had made a referral under sub rule (1) the proceedings in the original court shall be stayed pending a decision of the Court. "

Rule 4 of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, provided as follows:

"Any proceeding under these Rules shall be commenced by an originating motion in Form 2 of the schedule, within fourteen (14) days after the certification by the Chief Justice pursuant to section 9 (3) of the Act; but so however that –

(a) in the case of referral by the President under section 89 (1) (h) of the Constitution, the proceedings shall be commenced by a notice of referral; and

(b) in the case of referral by any other court under rule 8, the proceedings shall be commenced by notice of referral in Form 3 of the Schedule."

Evidently, where a matter is referred by a court, the proceeding in that original court is stayed. On the other hand, constitutional matters commenced under rule 4 of the Courts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, there were all to be disposed by the Constitutional panel and no proceeding was to be stayed. The matter was meant to be dealt fully by the constitutional panel because the statement of case would essentially be on interpretation or application of the Constitution. However, we now have this matter whose original proceedings were stayed pending the determination of the Constitutional panel, when there was no referral by the trial judge. The matter was brought to the Chief Justice for certification using a wrong procedure and the Chief Justice proceeded to certify it.

It is this Court's view that there was an error on how this constitutional matter came to be, the proper procedure was not followed. However the Chief Justice having certified the matter as having been complied with section 9 (2) of the Courts Act, and the Constitutional panel having substantially heard and determined the originating motion, this Court cannot undo both of these parallel processes. Hence, we should reluctantly proceed and determine this appeal on its merits.

Principles governing Constitutional and Statutory Interpretation

Before we proceed further, it is well to observe that that determining the above issues that have arisen in this matter inevitably involves interpreting the relevant constitutional and statutory provisions. Accordingly, this Court finds it necessary to briefly outline the governing principles of constitutional and statutory interpretation.

Sections 10 and 11, 12, 13 and 14 of the Constitution enjoins courts to promote principles of the Constitution, advance the rule of law, human rights and fundamental freedoms in the Bill of Rights

(Chapter IV of the Constitution) and contribute to good governance. This approach ought to be the mandatory constitutional canon of statutory and constitutional interpretation. Further, this Court has a duty to adopt an interpretation that conforms to the above-named provisions of the Constitution.

Section 10 of the Constitution provides as follows as regards the application of our Constitution:

> "(1) In the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.
>
> (2) In the application and formulation of any Act of Parliament and in the application and development of the common law and customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution."

Respecting the interpretation of the Constitution, Section 11 of the said Constitution advises that

> "(1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.
>
> (2) In interpreting the provisions of this Constitution a court of law shall—
>
> (a) promote the values which underlie an open and democratic society;
>
> (b)take full account of the provisions of Chapter III and Chapter IV; and
>
> (c) where applicable, have regard to current norms of public international law and comparable foreign case law.
>
> (3) Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution.
>
> (4) Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid."

Section 12 of the Constitution provides for the fundamental principles of the Constitution. These are put in the following terms:

" (1) This Constitution is founded upon the following underlying principles—

(a) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;

(b) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;

(c) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice;

(d) the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect

(e) 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; and

(f) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law.

(2) Every individual shall have duties towards other individuals, his or her family and society, the State and other legally recognized communities and the international community and these duties shall include the duty to respect his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; and in recognition of these duties, individual rights and freedoms shall be exercised with due regard for the rights of others, collective security, morality and the common interest."

Section 13 of the Constitution provides for national policy. In particular, section 13 (o) of the Constitution specifically states that the State shall actively promote the welfare and development

of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving public trust and good governance by, inter alia, introducing measures which guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and visibility will strengthen confidence in public institutions.

More importantly, section 14 of the Constitution encourages the courts to have regard to the principles of national policy when interpreting or applying any provisions of the Constitution or any other law. The said section 14 of the Constitution provides as follows regarding the said application of the principles of national policy:

> "The principles of national policy contained in this Chapter shall be directory in nature but courts shall be entitled to have regard to them in interpreting and applying any of the provisions of this Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution."

As this Court understands it, constitutional provisions must be construed purposively and in a contextual manner and courts are simultaneously constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be unduly strained but should avoid excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene, which includes the political and constitutional history leading up to the enactment of a particular provision[23]. In the case of ***Nseula v Attorney-General and another***[24], this Court instructively observed that:

> "A Constitution is a special document which requires special rules for its interpretation. It calls for principles of interpretation suitable to its nature and character. The rules and presumptions which are applicable to the interpretation of other pieces of legislation are not necessarily applicable to the interpretation of a Constitution. In the leading case of the Privy Council on interpretation of constitutions in the Commonwealth, *Minister of Home Affairs and another v Fisher and another* [1980] AC 319, Lord Wilberforce in delivering the judgment of the court said this:

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[23] *See* ***Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others*** [2018] eKLR
[24] [1999] MLR 313 (MSC)

'This is no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal document giving rise, among other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this and with the recognition that rules of interpretation may apply to take as a point of departure for the process of interpretation a recognition of the character and origin of the institution and to be guided by the principle of giving full effect to those fundamental rights and freedoms with a statement of which the Constitution commences.'"

There is no doubt in this Court's mind that section 32 (b) and (c) of the Corrupt Practices Act must have been enacted pursuant to the fundamental principles of the Constitution and must be understood purposively because it is undeniably linked to the Constitution. The courts must therefore always seek to promote the purpose principles and objects of the Constitution. As courts we must prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional meanings and guarantees[25]. Further, in searching for the purpose, it is legitimate for this Court to seek to identify the mischief sought to be remedied. Thus, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. As it were, we must understand the provision within the context of the grid, if any, of related provisions of the Constitution as a whole, including its underlying values. Thus, although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context[26]. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous. This Court further observes that the social and historical background of a legislation is important in seeking to identify the mischief sought to be remedied was appreciated in the Kenyan case of ***Commissioner of Income Tax v Menon***[27], where it was held that one of the canons of statutory construction that a court may look into is the historical setting of an Act. This is done so as to ascertain the problem with which the Act in question has been designed to deal.

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[25] ibid.

[26] See ***Blantyre Water Board and others v Malawi Housing Corporation***, [2007] MLR 48 (SCA).

[27] [1985] KLR 104; [1976 1985] EA 67

Therefore, in construing the constitutionality of the impugned provision of section 32 (2) (b) and (c) of the Corrupt Practices Act, we are obliged not only to avoid an interpretation that clashes with the constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms and also an interpretation that permits development of the law and contributes to good governance. It is thus clear that it is the duty of a court when construing statutes to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes with it, for any law that is inconsistent with the provisions of the Constitution is, to the extent of such inconsistency invalid. More importantly, no one provision of the Constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument[28].

Whether section 32 (2) (b) and (c) of the Corrupt Practices Act reverses the onus of proof in respect of an essential element of the offence created thereby and places a legal or evidential burden of proof on an accused person?

The starting point in determining this issue is section 42 (2) (f) (iii) of the Constitution. The said section 42 (2) (f) (iii) of the Constitution is in the following terms:

> "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—
>
> (iii) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial..."

This section is understood to mean that the legal burden of proof of commission of an offence rests on the state throughout trial or criminal proceedings. The accused is presumed to be innocent at all times and that he is not obliged to say anything on being charged with the commission of an offence.

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[28] See ***Nseula v Attorney-General and another*** (supra)

Next is section 32 of the Corrupt Practices Act respecting what possession of unexplained property entails. The said section provides as follows:

"(1) The Director, the Deputy Director or any officer of the Bureau authorized in writing by the Director may investigate any public officer where there are reasonable grounds to believe that such public officer—

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments or other known sources of income;

(b) is in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments or other known sources of income; or

(c) is in receipt directly or indirectly of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under this Act.

(2) Any public officer who, after due investigation carried out under the provisions of subsection (1), is found to—

(a) maintain a standard of living above that which is commensurate with his present or past official emoluments or other known sources of income;

(b) be in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments or other known sources of income; or

(c) be in receipt directly or indirectly of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under this Act, shall, unless he gives a reasonable explanation, be charged with having or having had under his control or in his possession pecuniary resources or property reasonably suspected of having been corruptly acquired and, unless he gives a satisfactory explanation to the court as to how else he was able to maintain such a standard of living, or such pecuniary resources or property came under his control or his possession, or he came to enjoy the benefits of such services, he shall be guilty of an offence.

(3) In this section—

(a) "official emoluments" includes a pension, gratuity or other terminal benefits;

(b) "public officer" includes any person who has held office as a public officer on or after 6th July, 1964."

The Court below held that the above section 32 (b) and (c) does not place a legal burden of proof on the Appellant whereas the Appellant insists it does and he argues that in accordance with section 188 (2) of the Criminal Procedure and Evidence Code the legal burden of proof always rests with the prosecution. As it were, the appeal before us turns on whether section 32 (b) and (c) of the Corrupt Practices Act creates a legal or evidential burden on a defendant. Thus, a crucial distinction has to be made between what is called the 'legal' burden sometimes called the 'persuasive' burden, of proof and the 'evidential' burden. We acknowledge both parties' correct submission on the distinction between legal burden and evidential burden. As it were, a defendant who bears a legal burden will lose if he fails to persuade the fact-finder of the matter in question on the balance of probabilities. Further, as this Court understands it, an evidential burden in relation to a matter is a burden of adducing sufficient evidence to raise an issue regarding the existence of the matter. The burden of disproof will then fall on the prosecution in accordance with the normal rule. The significance of the distinction in this context is that evidential burdens are regarded as compatible with the presumption of innocence. Unlike a legal burdens, an evidential burden does not require the accused to assume the risk of being convicted because he fails to prove some matter relating to his innocence.

In the United Kingdom, the courts have built on this distinction discussed above and have held that if they find a legal burden imposed by a reverse onus provision to be incompatible with article 6(2) of the European Convention on Human Rights, they can use the interpretative power under section 3 of the Human Rights Act to read down the legal burden to an evidential burden. The use of section 3 is the preferred solution to any issue of incompatibility of legislation with the Convention. A declaration of incompatibility under section 4 of the Human Rights Act has been said to be the last resort and to be avoided if it is at all possible to interpret the legislation in a way that is Convention-compliant[29]. One other point that needs to be made at this stage is that the problem encompasses both presumptions and affirmative defences. It makes no difference whether

[29] See ***Ghaidan v Godin-Mendoza*** [2004] 3 W.L.R. 113

e statute provides that x is to be presumed against the efendant unless he proves the contrary, whether the statute states that it is a defence to pro x. Both types of provision require the efendant to prove a matter going to his innocence of th offence charged.

It is the opinion of this Court that when a challenge is made as to the compatibility of a reverse onus provision, the present law requires a three-stage process of decision-making by the Court. These are:

First, is the interpretation of the statute: at this stage the Court is examining whether the provision in question, interpreted in accordance with the ordinary principles of construction, place a burden on the criminal defendant? If the answer is in the affirmative, the Court has to find out whether the burden is a legal or an evidential burden? If it be found that it is an evidential no further inquiry or analysis need be made about compatibility with section 42 (2) (f) (iii) of the Constitution. However, if it is a legal burden, the court must move to stage 2 to assess the question of compatibility.

Second is the justification of the reverse onus stage: at this stage the Court examines whether the provision, the subject matter of the inquiry, or the section in question serves a legitimate aim and whether it is proportionate to that aim? If the answer is in the affirmative, the provision is an acceptable qualification to the presumption of innocence The defendant will then bear the burden of proof on the matter in question, although to a lowe standard of proof than the prosecution (namely the balance of probabilities). If the answer is in the negative, the court must then move to stage 3.

Final and third stage is reading down the provision: at this stage if the reverse legal burden cannot be justified can the Court "read down" the burden to an evidential one, using section 11 (3) of the Constitution? If the Court can, it should do so. If it cannot then the Court should make a declaration of incompatibility of the provision under section 5 of the Constitution.

Interpretation of the statute (Section 32 (2) (b) and (c) of the Corrupt Practices Act)

As this Court understands it, the interpretation of a statute is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as

a whole and the circum stances attendant upon its coming into existence[30]. It is a this interpretation of the statute stage that his case was dismissed in the Court below. The Court be low, at paragraphs 8.8 through to 8.9, held as follows:

> "The unanimous judgment of this Court is that Section 32 (2) (c) of the Corrupt Practices Act injures no provision of our sacred law. The provision in question does not place a legal burden on the Applicant in this matter. All it is asking the Applicant to do is to give a satisfactory explanation as to how he acquired the properties listed in the charge sheet. The standard is on a balance of probabilities.
>
> In our reasoned judgment, the Applicant in this matter, once a *prima facie* case has been established, must give a reply otherwise he risks the possibility of being convicted by the trial court if he remains silent. This in our view creates an evidential burden and not a legal burden on the Applicant. The standard once again is on a scale of probabilities."

This Court agrees with the finding of the court below that the section does not place any legal burden on the Appellant. In this Court's judgment, the section does not take away the duty of the State or the burden of the prosecution to prove its case against an accused beyond reasonable doubt. In any event, under both section 32 (2) (b) and (c) the State has to respectively establish *prima facie* that the accused is 'in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments or other known sources of income;' or 'in receipt directly or indirectly of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under the Corrupt Practices Act'. Put differently, upon examining both parties' submissions on reverse onus provisions, while generally correct, it is nonetheless apparent that there is some measure of misunderstanding of what reverse onus provisions really are and in what circumstances they can be identified especially in respect of legal burden of proof. As this Court understands the law, not every provision that expects an accused to do something to rebut a fact can be said to be a reverse onus provision and thereby creating a legal burden. In some instances, the statutory provision merely provides a defence for an accused to avoid a conviction. In such cases, the law still imposes on the prosecution the burden to prove their case beyond reasonable doubt but simultaneously

[30] See *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2018] eKLR.

presents the accused the means by which to raise a doubt on the established facts to avoid a conviction. As it were. what always seems important is a close examination of the provision in question and asking whether in its purview it clearly creates a presumption of the existence of certain facts within prevailing states of affairs, or merely provides a possible defence to an accused to avoid a conviction. As will be demonstrated, this Court believes that section 32 (2) (b) and (c) of the Corrupt Practices Act does not create a reverse onus provision in respect of legal burden of proof but merely affords an accused a possible defence against conviction after the prosecution establishes the existence of certain facts and circumstances which without a defence being mounted, would still be required to scale the burden of proof beyond reasonable doubt if a conviction is to be secured. Put differently, there is need to isolate the actual offence created by section 32 (2) (b) and (c) of the Corrupt Practices Act and determine what is required of the State in order to establish a *prima facie* case against an accused before he is called upon to mount a defence; and whether the accused is in the circumstances required to disprove an essential presumed element of the offence created. Thereafter, there is the further need to determine whether the provision presumes the accused to be guilty outright if he elects to remain silent without requiring the evidence to be provided by the State, in order to ascertain whether the evidence crosses the threshold of guilt beyond reasonable doubt, before a conviction is entered.

In the case of ***R v Hunt***[31] , Lord Griffiths stressed the importance of three factors in deciding whether Parliament had intended to place an onus on the accused. The first was the object of the legislation: what was the mischief at which the Act was aimed? The second was practical considerations affecting the burden of proof, such as the relative ease or difficulty of proof: how difficult would it be for the prosecution to prove the matter in question and how easy would it be for the accused to do so? A court may be more likely to classify a provision as a statutory defence if it would not be difficult for the defendant to discharge the burden of proving it. The third was the seriousness of the offence. This offered a check on any expansive tendencies of the first two factors towards reversing the onus. According to Lord Griffiths, it helps to resolve any ambiguity in favour of the defendant where the issue of interpretation is one of real difficulty.

[31] [1987] A.C. 352

DETERMINATION

Now, looking at section 32 (2) (b) and (c) of the Corrupt Practices Act, the first point to note is that the offence created by these provisions stems from the investigation envisaged in section 32 (1) (a) through (c), by which the Anti-Corruption Bureau is authorized and empowered to investigate any public officer suspected, on reasonable grounds, to exhibit the circumstances outlined thereunder. Where the investigation by the Anti-Corruption Bureau leads to a conclusion that a public officer under investigation does disclose the circumstances envisaged in section 32 (1) (a) through (c) of the Corrupt Practices Act, such public officer may then be charged with the offence of "having or having had under his control or in his possession pecuniary resources or property reasonably suspected of having been corruptly acquired" under section 32 (2) (c) of the said Corrupt Practices Act.

As this Court sees it, the first part of section 32 (2) (b) and (c) of the said Corrupt Practices Act creates an offence that is complete in itself without any need for an accused person to prove his innocence. And, in line with the ***Woolmington*** principles, the burden of proving that offence remains throughout on the prosecution. Similarly, the standard of proof required from the State is proof beyond reasonable doubt. In this Court's view, what this means is that where the prosecution provides sufficient evidence to establish *a prima facie* case that an accused has or has had under his control or in his possession pecuniary resources or property reasonably suspected of having been corruptly acquired, a court will call upon an accused to enter a defense. In the circumstances, he may elect to exercise his right to remain silent under section 42 of the Constitution or give evidence in his defense. Should an accused elect to remain silent, the Court still has to evaluate the available evidence and weigh whether the totality of the evidence available satisfies and exceeds the threshold of reasonable doubt to justify a conviction.

The second part of section 32 (2) (c) of the said Corrupt Practices Act then merely allows an accused person to provide evidence that circumstances exist by which he was able to "maintain such a standard of living, or how such pecuniary resources or property came under his control or his possession, or how he came to enjoy the benefits of such services," and nothing more. The reason this Court thinks the mischief at which the section was aimed at was on the ease of proof and peculiar knowledge that the criminal defendant has. By way of an example, similarly, a defendant who has a licence to drive or to sell intoxicating liquor can easily produce it if required.

It is easier for him to do this than for the prosecution to prove the negative proposition that he did not have a licence. In such a case the prosecution would have to adduce evidence such as registers of licence-holders, or perhaps evidence that the defendant failed to produce a licence on demand. The former may entail trouble and expense, the latter may result in conflicts of testimony or disputes whether non-possession is a reasonable inference from non-production. It should be noted though that the defendant does not have peculiar knowledge of his possession of a licence; that knowledge is available to the prosecution from evidence such as registers, but it is just more burdensome and costly to locate it. On the other hand, the defendant does have peculiar knowledge of his state of mind at the time of a criminal act; he has privileged access to his intention, knowledge or belief. The question that arises though is: does it follow from his peculiar knowledge that it is easier for him to prove absence of a criminal intention than for the prosecution to prove its presence. A dictum of Clarke L.J. in the Divisional Court in ***Sheldrake v DPP***[32] is instructive in answering this question. He put it thus:

> "... there are very many aspects of the criminal law in which the state of mind of the accused is of crucial importance but where the burden of proving it is on the prosecution[33]".

The significance of the defendant's peculiar knowledge of certain facts is not therefore that it supports the imposition of a legal burden on the defendant to prove those facts. Peculiar knowledge can at best support the imposition of an evidential burden to raise the issue of those facts, in circumstances where the prosecution would not otherwise know in what form a defence based on those facts might arise. It is for this reason that the defence bears the burden of raising the issue of common law defences such as self-defence or duress. It would not be reasonable to expect the prosecution to negative such justifications and excuses without being made aware of the facts relied on to support them, and in most of these cases it is only the defendant who knows those facts. This Court finds that the same proposition can be made about section 32 (2) (b) and (c) of the Corrupt Practices Act. The presence of the words '<u>unless he gives a satisfactory explanation to the court as to how else he was able to maintain such a standard of living, or such pecuniary resources or property came under his control or his possession, or he came to enjoy the benefits of such services, he shall be guilty of an offence</u>' does not entail the defendant bears the legal burden

[32] [2003] 2 Cr. App. R. 206
[33] Ibid. 222

of proof to those facts. What the second part of section 32 (2) (c) of the Corrupt Practices Act does is to provide a possible defence to the accused. On being made aware of such possible defence the prosecution can then negative such a defence. Either way, the accused person is not called upon to disprove an essential element of the offence created. That burden remains on the prosecution throughout. Looked at from this perspective, it can be concluded that section 32 (2) (c) of the Corrupt Practices Act does not reverse the legal burden of proof or shift such burden onto the accused.

As pointed out earlier, if at this point of interpreting a section it is found that the impugned provision does not place any legal burden on accused person and concludes that the section rather places an evidential burden there is no need for further inquiry or analysis about the provision's compatibility with section 42 (2) (f) (iii) of the Constitution. As stated above, evidential burdens are regarded as compatible with the presumption of innocence[34]. Of course, the Court may proceed to discuss justification and proportionality of the evidential burden in order to justify the same in respect of section 44 of the Constitution. In addition, in the context of this case citing and relying on ***The Attorney General v Hon. Friday Anderson Jumbe and another***, this Court agrees with the Court below that:

> "It is not out of proportion to require them to explain where they flout set safeguards and standards and thereby cause to the public and/or confer benefits of themselves or others to the detriment of public interest'.

The Supreme Court of Appeal in ***The Attorney General v Hon. Friday Anderson Jumbe and another***, further stated that:

> "It is an open secret that, in this Country, since the advent of multiparty political system, corruption has reached epidemic proportions. Sadly, the public sector has not been spared. It is a fair comment to say that the public sector is deeply involved in corrupt practices. The Corrupt Practice Act was passed with a view to curb the malpractice. The preamble expressly states that it is an Act "to make comprehensive provision for the prevention of corruption". Clearly the provision of the Penal Code became insufficient to address corruption. It is incumbent on the courts therefore, to assess the sufficiency of the objective

[34] See ***R. v DPP Ex p. Kebeline*** [2000] 1 Cr. App. R. 275 at 324 (Lord Hope); ***R v Lambert*** [2002] 2 A.C. 545

of the restriction or limitation of a right to justify overriding the Constitution. When sufficiency is established then the court must examine the proportionality of the limitation." (Emphasis supplied by this Court)

On the other hand, as to the Appellant's argument that the Court below erred in law by holding that it was bound by the decision of the Supreme Court of Appeal in ***The Attorney General v Hon. Friday Anderson Jumbe and another***, is misconceived. The Appellant failed to distinguish the matter in question in ***The Attorney General v Hon. Friday Anderson Jumbe and another*** from the case under consideration in the present one before us. This Court finds that the matters in the case of ***The Attorney General v Hon. Friday Anderson Jumbe and another*** are different from the matters in the present case. The Court below did not suggest that it found section 32 (2) (b) and (c) of the Corrupt Practices Act constitutional because it was bound by ***The Attorney General v Hon. Friday Anderson Jumbe and another***. Rather, it found that section 32 (2) (b) and (c) of the Corrupt Practices Act was justifiable limitation of the Appellant's right to be presumed innocent and that the limitation fell within the ambit of restrictions anticipated in ***The Attorney General v Hon. Friday Anderson Jumbe and another.*** This Court also finds that section 32 (2) (b) and (c) of the Corrupt Practices Act was justifiable limitation of the Appellant's right to be presumed innocent and that the limitation fell within the ambit of restrictions anticipated in ***The Attorney General v Hon. Friday Anderson Jumbe and another*** and accordingly uphold the decision of the court below.

As regards the first ground of appeal, where the Appellant challenges the High Court's *dicta* following and applying ***The Attorney General v Hon. Friday Anderson Jumbe and another***, this Court would like to advise Counsel that he must desist from overly relying on case law and statutes from other Commonwealth jurisdictions on the basis that the wording of those constitutions is similar to Malawi's. It is this Court's considered view that this ground of appeal is merely academic as the Appellant's case does not turn on its determination since it lends no weight whatsoever to the Appellant's case. The pronouncement on it by the court below was no more than *obiter dicta* emphasizing the importance of relying on locally generated jurisprudence rather than relying on foreign precedents especially in cases covered by local statutes and local authorities.

In sum, we therefore uphold the decision of the court below and dismiss this appeal in its entirety.

ORDER

Appeal disallowed with each party to bear own costs. Judgment of the court below to stand.

Judgment delivered by Justice A.D. Kamanga SC, JA,

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also disallow the appeal in the manner put in the judgment of this Court as set out above.

Pronounced and delivered in Open Court at the Supreme Court of Appeal, sitting in Blantyre this 17th day of May 2022

Signed: .....

HONOURABLE THE CHIEF JUSTICE A.K.C. NYIRENDA, SC

Signed: .....

HONOURABLE JUSTICE E.B TWEA, SC, JA

Signed: .....

HONOURABLE JUSTICE R.R. MZIKAMANDA, SC, JA

Signed: .....

HONOURABLE JUSTICE A.C. CHIPETA, SC, JA

Signed: .....

HONOURABLE JUSTICE L.P. CHIKOPA, SC, JA

Signed: .....

HONOURABLE JUSTICE F.E. KAPANDA, SC, JA

Signed: .....

HONOURABLE JUSTICE A.D. KAMANGA, SC, JA