IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

JUDICIAL REVIEW CAUSE NO. 18 OF 2015

BETWEEN

THE STATE

VS

THE CHIEF RESIDENT MAGISTRATE (LILONGWE).....1ST RESPONDENT

HONOURABLE JUSTICE DR. CHIFUNDO KACHALE.....2ND RESPONDENT

EX PARTE: FRIDAY JUMBE.....1ST APPLICANT

PHILLIP BWANALI.....2ND RESPONDENT

VINCENT ZUMU MPALUKO.....3RD RESPONDENT

CORAM: HON. JUSTICE PROF. R.E. KAPINDU

: B. Phiri, Counsel for the Applicant

: A. Nkhwazi, Official Interpreter

ORDER

Kapindu, J

1.1 This is the Court's decision on an ex-parte application brought by the Applicants for an Order of leave to apply for judicial review brought in terms of Order 53 r.3(2) of the Rules of the Supreme Court (RSC).

1.2 The Applicants are accused persons facing various criminal charges in **Criminal Case Number 100 of 2006 (originally Criminal Case No. 14 of 2004) at the Chief Resident Magistrate Court in Lilongwe**.

1.3 The Applicants are represented by Counsel Burnet Phiri of Messrs Lexon & Lords in Lilongwe. The Application documents, inclusive of Form 86A under

the Rules of the Supreme Court (RSC), the grounds upon which the various reliefs are sought, the affidavit in support verifying the facts in the grounds, and the Skeletal Arguments are, cumulatively, significantly extensive in length. I will attempt to do justice in summarizing the essence of the issues raised.

1.4 The 2nd Respondent, the Honourable Justice Dr. Chifundo Kachale (hereinafter referred to as the 2nd Respondent) was, before his appointment as a Judge of the High Court of Malawi in 2011, working as Chief Resident Magistrate in Lilongwe. Whilst holding that position, the 2nd Respondent was seized of and presided over the instant criminal proceedings. Now, after the 2nd Respondent's appointment as a High Court Judge, Criminal Case Number 100 of 2006 being a matter domiciled at the Chief Resident Magistrate's Court (Centre) (in Lilongwe) over which the 1st Respondent has superintendence, the 1st Respondent has taken a decision to let the 2nd Respondent continue handling the matter.

1.5 The Applicants state that they are aggrieved by the 1st Respondent's decision herein, and also the 2nd Respondent's continued handling of the above-mentioned criminal cause. They allege that it would appear that the 2nd Respondent, a sitting High Court Judge, has a personal interest in the matter because he does not want let go of the matter so that the same may be handled by a sitting Magistrate. They state that their suspicion arises from the fact that there are several professional Magistrates at the Chief Resident Magistrate Court in Lilongwe who could ably handle the matter.

1.6 The Applicants seek to fortify their concerns by arguing that prior to the 2nd Respondent (then as Principal Resident Magistrate) being seized of the matter, a number of other Magistrates, including His Worship N'riva (as he then was), His Worship Kishindo (as he then was), and Her Worship De Gabriele (as she then was) handled the matter. They argue that when each

one of these Magistrates (as they then were) shifted location from the Chief Resident Magistrate Court in Lilongwe, the matter was transferred to another Magistrate sitting at that Court. They submit that this is how, after Her Worship De Gabriele (as she was then) had left, the matter came to the 2nd Respondent. They are therefore of the view that since the 2nd Respondent is now a High Court Judge, they see no reason why the matter should not be competently transferred to a professional Magistrate currently sitting at the Chief Resident Magistrate Court in Lilongwe.

1.7 It is in this respect that they fault the decision of the 1st Respondent to transfer the matter herein to the 2nd Respondent so that he can continue handling the same. The 1st Respondent, according to the Applicants, invoked the provisions of Section 5A of the Courts Act in transferring the matter to the 2nd Respondent. Section 5A of the Courts Act provides that: "Every Judge shall, in addition to such other powers as may be conferred upon him, have all the powers conferred on any subordinate court by any written law." In this regard, although the 2nd Respondent is a Judge of the High Court, he has all the powers of a subordinate Court, such as the Court of the Chief Resident Magistrate, and he can therefore competently exercise the powers of a Chief Resident Magistrate. As I understand the facts, the 2nd Respondent is, in terms of Section 5A of the Courts Act, exercising the powers of a Chief Resident Magistrate in the criminal proceedings that are the subject of the present judicial review proceedings.

1.8 The Applicants submit that the 1st Respondent's decision to let the 2nd Respondent continue to handle the instant criminal proceedings, by invoking the provisions of Section 5A of the Courts Act, is unreasonable in the *Wednesbury's* sense.

1.9 Secondly the Applicants argue that when one reads the decision of the 2nd Respondent made in 2008 finding the Applicants with a case to answer in

respect of the charges that they are facing in the instant criminal proceedings, one cannot help but be left with the impression that he already made a decision to convict them at a stage where he was only supposed to find whether or not a case had sufficiently been made out for the Applicants (as accused persons) to be called upon to make their defence. They argue that the 2nd Respondent made pre-emptive conclusions, conclusions that preempt the explanations the defence could have provided to the issues raised, and that such conclusions render the presumption of innocence a sham. They therefore argue that they cannot have a fair trial before the 2nd Respondent for this reason.

1.10 Thirdly, the Applicants argue that the 2nd Respondent is married to the Director of Public Prosecutions (DPP). They state that this is a very close relationship, and that in addition, although the DPP is not personally involved in prosecuting the matter, she has made utterances that show that she has a direct interest in the outcome thereof. In this vein, they argue that they cannot have the feeling of being tried before an impartial Court if the matter continues to be tried before the 2nd Respondent.

1.11 Judicial review of administrative action lies in four categories of cases: (a) where there is want or excess of jurisdiction by the decision maker; (b) where there is an error of law on the face of the record; (c) where there has been failure to comply with the rules of natural justice; and (d) where the decision-maker has acted unreasonably in the sense expressed in what is commonly referred to as the *Wednesbury* principle. According to this principle, decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision. See generally the case of **Felix Mchawi v Minister of Education,**

Science and Technology, Miscellaneous Civil Cause No. 82 of 1997; and also the case of **The State v Director of Public Prosecutions & Another, Ex-parte Dr. Cassim Chilumpha**, Civil Cause No. 315 of 2005; [2005] MWHC 16.

1.12 In the instant case, the applicant claims that the conduct of the Respondents is unreasonable in the *Wednesbury's* sense. At this stage, I do not have to make a finding whether the Applicants have proved reasonableness or not. All I have to decide is whether the issue raised would be fit for further investigation at full trial. However, for the reasons I provide below, I will not go to that assessment either. The rules require that even if a case falls into one of the categories where judicial review would lie, the court is not bound to grant leave. The jurisdiction to make any of the various orders available in judicial review proceedings is discretionary. What order or orders the court will make depends upon the circumstances of the particular case. See RSC, "Supreme Court Practice, 1999" *Practice Note* 53/14/32.

1.13 More specifically, according to the rules, one of the considerations in this regard is that courts will not normally grant judicial review where there is another avenue of remedy available. It has been held that it is a cardinal principle that, save in the most exceptional circumstances, the jurisdiction to grant judicial review will not be exercised where other remedies are available and have not been used. See **R. v. Epping and Harlow General Commissioners, ex p. Goldstraw** [1983] 3 All E.R. 257, 262, per **Sir John Donaldson M.R**.). This principle was affirmed in the case of **The State vs The Electoral Commission, Ex-Parte Bakili Muluzi & Another**, Constitutional Civil Cause No. 2 of 2009. The principle is also expressed in **The State v Director of Public Prosecutions & Another, Ex-parte Dr. Cassim Chilumpha** (above); and **The State v Traditional Authority**

Kampingo Sibande, Ex- Parte Machael Phiri, Miscellaneous Civil Cause No. 15 of 2014 (HC, MZ), among others.

1.14 The question is whether in this case, the Applicants have or do not have an alternative remedy. They argue that they do not. They have cited various provisions from the Criminal Procedure and Evidence Code (Cap 8;01 of the Laws of Malawi) (CP & EC) in order to demonstrate that whilst these may appear to show the existence of an alternative remedy, such provisions would not engender an effective remedy for the Applicants. They have cited Sections 353(2), 360, 362(1) and 363 of the CP & EC. Essentially they argue that whilst these provisions provide a review procedure by the High Court in respect of criminal proceedings in subordinate Courts, Section 363(2) states that no party to such review proceedings has any right to be heard whether personally or through Counsel before the High Court when the High Court is exercising its powers of review. In this regard, they contend that with no guarantee for legal representation, their fair trial rights would not be guaranteed under the CP & EC review procedure. They therefore submit that the only meaningful remedy for them is through these judicial review proceedings.

1.15 I need to mention that Section 363(2) concludes by stating that "nothing in this subsection shall be deemed to affect Section 362(2)." In turn, Section 362(2) provides that "No order made in exercise of the powers conferred in this section shall be made to the prejudice of an accused unless he has first had an opportunity of being heard either personally or by a legal practitioner in his own defence."

1.16 Pausing there I would like to cite another procedure for the review of criminal proceedings. This procedure is provided for in Sections 25 and 26 of the Courts Act. The provisions are in the following terms:

> 25 The High Court shall exercise powers of review in respect of criminal proceedings and matters in subordinate courts in accordance with the law for the time being in force relating to criminal procedure.
>
> 26 (1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.
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> (2) Upon the High Court calling for any record under subsection (1), the matter or proceeding in question shall be stayed in the subordinate court pending the further order of the High Court.

1.17 Section 28 of the Courts Act then provides that:

> No party shall have any right to be heard, either personally or by a legal practitioner, before the High Court when exercising its powers of review or supervision under sections 25 and 26.

1.18 These provisions make it clear that any party to any criminal proceedings before a subordinate Court has the right to make an application to the High

Court in order to trigger the exercise by the High Court of its supervisory and review jurisdiction over criminal processes before the Magistrate (subordinate) courts. Again the provisions, in particular Section 26 of the Courts Act, make it clear that the High Court's supervisory and review jurisdiction herein may be exercised at any stage of the proceedings in the subordinate court, whether such proceedings be civil or criminal.

1.19 Whilst both procedures under the CP & EC and under the Courts Act suggest that no party has a right to be heard during the review procedure, either personally or through Counsel, they both categorically state that such a right exists if the Court is minded to make a decision that would be to the prejudice of the party concerned.

1.20 I need to point out that the right to legal representation, on which basis the applicants rest their argument in urging that the review procedure under the CP & EC would be unfair, is a constitutional right. Section 42(2)(v) of the Constitution provides that:

> 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 to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights.

1.21 Further, it is provided under Section 44(4) that:

> Wherever it is stated in this Constitution that a person has the right to the services of a legal practitioner or

medical practitioner of his or her own choice, that right shall be without limitation…

1.22 The emphasis made in Section 44(4) on the right to legal representation shows that according to Malawi's constitutional design, this is a core fair trial right that should not be lightly interfered with.

1.23 These courts have long emphasized, in what is now a long line of jurisprudence, that when interpreting the Constitution a generous and purposive approach, rather than a narrow and pedantic approach, should be adopted. See **Fred Nseula v Attorney General & Another**, MSCA Civil Appeal No. 32 of 1997; **Attorney General v Dr. Mapopa Chipeta**, MSCA Civil Appeal No. 33 of 1994; **The State v President of Malawi & Others, Ex-parte Malawi Law Society**, [2007] MWHC 7; **The State v Minister of Finance & Another, Ex Parte Bazuka Mhango & Others**, Miscellaneous Civil Cause No. 163 of 2008, among many others. With regard to the right to legal representation, such a generous approach entails that whenever a person faces criminal charges, procedures should not be designed that expressly prevent him or her from being legally represented at any stage of such proceedings.

1.24 The provisions under the CP & EC and the Courts Act that state that no party shall have any right to be heard, either personally or by a legal practitioner, before the High Court when exercising its powers of review or supervision should be given a proper, purposive and contextual interpretation. Those provisions are designed to further rather than to thwart fair trial. Those proceedings are generally intended to take account of the general prevailing socioeconomic circumstances of the people of Malawi, and to ensure that rights of individuals are protected rather than prejudiced.

1.25 Put simply, in requiring that no person has a right to make representations in person or through Counsel, the idea is to ensure that matters are reviewed with effectiveness, efficiency and due expedition. Where the results of such review are in favour of an accused person, then a decision to that effect should be quickly made. Such a decision, according to this statutory design, is made without wasting time by requiring that the accused person should be produced before the Court and that he or she should come with his or her Counsel to make representations before such a decision is taken. Were the right to be represented by Counsel expressed to apply to this situation, it would essentially have meant that no review matter would proceed in the absence of legal representation, or the accused making personal representations. In our legal system, and considering domestic circumstances in Malawi, that approach would clog and overwhelm the criminal justice review system with many unheard review matters; and this would in turn delay the dispensation of criminal justice.

1.26 However, I do not believe that the provisions on criminal case review can be expressed in a way that suggests that where a party is represented by Counsel, the Court can intentionally or knowingly prevent Counsel from representing the accused person or the party concerned during the review proceedings, on account of the language in Section 363 of the CP & EC or Section 28 of the Courts Act. This interpretation is buttressed by Section 10(2) of the Constitution that requires that in the application of an Act of Parliament, these courts must have due regard to the principles and provisions of the Constitution. In this regard, regard should be had to the absolutist terms in which the right to legal representation is expressed under the Constitution.

1.27 The law then requires that if the decision to be taken by the Court may in anyway be to the disadvantage of the accused person, in other words to his/her prejudice; the right of the accused person to make representations

personally or through Counsel becomes imperative, and Section 44(4) of the Constitution obviously applies with full force. Perhaps one may argue that even in cases where the decision taken is favourable to the accused person, legal representation ought to be stated as a right because the accused person could have made an argument leading to an even better result were he or she to be represented by Counsel. The answer lies in Section 362(4) of the CP & EC which provides that:

> The exercise of the High Court of its powers of review under this section in relation to any proceedings shall not operate as a bar to any appeal which may lie against the finding made, or the sentence imposed, in such proceedings:
>
> Provided, however, that such review shall operate as a bar to such appeal if the proceedings by way of review took place in open court and the accused had an opportunity of being heard either personally or by a legal practitioner.

1.28 This subsection essentially shows that an appeal from the subordinate Court to the High Court should, in principle, only lie where the decision that was taken by the High Court on review was not to the prejudice of the accused person. This is so because, if the decision taken on review was to the prejudice of the accused person, the High Court could not have proceeded to do so without according the accused person an opportunity to be heard either by herself (or himself) or through Counsel. This scenario therefore covers the concern that I expressed above, i.e the argument that the accused person could have made an argument leading to an even better result were he or she to be represented by Counsel. The accused person would, in that case, have another bite to challenge the subordinate Court's decision by way of appeal, duly represented by Counsel.

1.29 So here is the conclusion of the whole matter: I cannot grant leave to apply for judicial review because the applicants have an alternative remedial avenue. They can seek review of the matter before a Judge of the High Court under the CP & EC, under the Courts Act, or under both pieces of legislation. I therefore direct that if the Applicants are still minded to have the decision in the Court below reviewed, they should adopt that procedure first. I am mindful that the High Court sitting here at Zomba, as indeed the High Court sitting anywhere else in the Malawi, has jurisdiction and would be competent to conduct such review should the Applicants elect to adopt the above-said review procedure. I opine however that this matter can conveniently be dealt with at the High Court Lilongwe District Registry which, in terms of proper judicial administration, has general oversight over the Chief Resident Magistrate's Court at Lilongwe. I therefore order, for reasons of good and orderly judicial administration, that any such application for review, should the Applicants be minded to pursue the same, should not come to this Registry unless there be demonstrated compelling reasons why they may not be dealt with by another Judge at the Lilongwe Registry.

1.30 I dismiss the application for leave to apply for judicial review. I make no order as to costs.

Made in Chambers this 30th Day of April 2015

RE Kapindu

JUDGE