Malawi Judiciary

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONSTITUTIONAL REFERRAL CASE NO.9 OF 2015

BETWEEN:

ENELESSI SIMON

-and–

TRIPHONIA RAPHAEL

-and-

ESNART FRANK

- VERSUS –

-

THE ATTORNEY GENERAL

CORAM: THE HON. CHIEF JUSTICE A. K. C. NYIRENDA, SC
Alfred Majamanda, Counsel for the Applicant
Kaphale, Attorney General, Counsel for the Respondent
Mthunzi (Mrs.), Law Clerk
Mwafulirwa (Mrs.), Principal Personal Secretary

RULING

The three applicants in this matter seek certification of their case for determination by the High Court, sitting as a Constitutional Court. It is the applicants' case that the issues which they seek determination of fall under section 9 of the Courts Act, which I will refer to on some occasions hereinafter as section 9. Ishould give a brief background of the matter to put the discussion in context.

Enelessi Simon, Triphonia Raphael and Esnart Frank, are women from different parts of Malawi who alleged to have been raped. They brought their complaints to relevant authorities and their respective cases were brought to magistrate courts in their respective areas of proximity. In all the cases the court either discharged the accused or acquitted them. In each case the basis of the discharge or acquittal was due to the courts' finding that there was no evidence to corroborate the complainants' evidence.

The cases were spread through the years in the near past. Enelessi Simon's case was in 2006 when she was only 14 years. Triphonia Raphael's case was in 2010when she was only 13 years old. Esnart Frank's case was in 2013 when she was 30 years old. The criminal cases against all the applicants were therefore long concluded. It is for this reason that the Attorney General is of the

viewthat the chapter on the cases was long closed as there must be an end to litigation.

The main issues which the applicants raise,on which they seek certification, relate to the constitutionalityof the requirement of corroboration in sexual offences. In the Notice of Intention to Sue, pursuant to section 4 of the Civil Procedure (Suits by or Against the Government or Public Officers) Act (Cap 6:01), the issues are summarised as follows:

> ***"The rationale for the Corroboration Rule requiring special evidentiary caution in sexual offences is based on the discriminatory, harmful and mistaken assumption that women make false allegations of sexual assault ....***
>
> ***The Corroboration Rule originates from English case law and is a relic of Malawi's Colonial past. However the United Kingdom and numerous other jurisdictions have since abolished the Rule on the basis of inconsistency with modern human rights standards and in recognition that the Rule lacks any rational basis ... Our clients will make application to the High Court of Malawi challenging the constitutionality of the common law Corroboration Rule.***

Our clients will claim that the Government has violated their fundamental rights under the Constitution and under international human rights law, as a result of the harms caused by the Corroboration Rule, which denies them access to justice. Our clients will seek a declaration that the Corroboration Rule is unconstitutional, as well as monetary compensation for the unlawful violation of their rights and freedoms."

What should be explained, following the above background, is that there are no proceedings by the applicants before any court at the moment apart from this application for certification.The application is therefore "stand alone" in that it is made without supporting proceedings before any court. The Notice of Intention to Sue Government referred to above is the stage at which the matter is.

It is for that reason that the stage at which the matter has been placed before me hasturned to be the real issue for consideration because of what we are used to in constitutional referrals which are invariably premised on ongoing proceedings before courts. The question is whether the applicants, and any applicant for that matter, can approach the Chief Justiceforcertificationof a matter as

constitutional pursuant to section 9,directly without first instituting proceedings before another court.

As will be apparent at this point, central to the discussion is Section 9 (2), and in passing section 9(3), of the Courts Actand the rules of procedure prescribed for that purpose. Section 9,in full, states:

> ***(1) Save as otherwise provided by this Act, or by any other Act for the time being in force, every proceeding in the High Court and all business arising thereout shall be heard and disposed of by or before a single Judge.***
>
> ***(2) Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.***
>
> ***(3) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection(2) shall be conclusive evidence of that fact."***

Section (3) has, since the hearing of this matter, been amended. What I quote above is what the section provided at the time of the application and therefore what is relevant for purposes of the application. As I observe latter it is more to section 9(2) that this matter is about.

The position by the Attorney General is that only an original court can move the Chief Justice for certification of a referral in addition to the President. That in the present matter the request is not coming from the President or from an original court. It is coming directly from individual litigants and in cases that were long disposed of through judgment.Thatthe application for certification is irregular for those reasons.

The Attorney General submits further that section 9(2) talks about a "proceeding." The Chief Justice, in section 9(3), is being asked to certify a proceeding. It is argued that in the instant case there is no 'proceeding' for the Chief Justice to certify.

Mr. Majamanda for the applicants does not agree with the Attorney General's position and submits that section 9(2) of the Courts Act permits for direct applications to the Chief Justice in the manner the applicants have done. There is here a very interesting discussion that we must engage in; an important one for that matter.

In the case of **Geofrey Doff Bottoman and PeterPetrosTembo v. The Republic**, Miscellaneous Criminal Application, Number 16 of 2013, Justice Kenyatta Nyirenda discusses the application of Section 9 of the Courts Act and the Rules established for that purpose. Reading Justice Nyirenda's decision, the analysis is much about whether it is necessary in all cases of a constitutional nature that a certificate by the Chief Justice be sought and obtained. His Lordship looks at the scheme of section 9 of the Courts Act read together with theCourts (High Court) (Procedure on the Interpretation or Application of the Constitution) Rules, later referred to as the Rules, and concludes that it is not in all instances that a certificate by the Chief Justice is necessary.

Let me put the various positions in this way, hopefully simple enough to the ordinary mind, in the nature of the subjectin question.

According to the **Bottoman and Tembo** case, it is permissible to empanel a constitutional sitting of the High Court without the certificate of the Chief Justice in some instances. The learned Judge in that case bases his reasoning partly, on a reading of Rule 2 which states:

> ***"These Rules shall apply to all proceedings on the interpretation or application of the Constitution which are certified by the Chief Justice in***

accordance with section 9(3) of the Act."

According to His Lordship the language of Rule 2 is unambiguous.That the scope of the application of the Rules is limited to proceedings which have been certified by the Chief Justice in accordance with section 9(3) of the Act. That by implication, the application of theRules does not extend to proceedings (a) on the interpretation or application of the Constitution which have not been certified by the Chief Justice in accordance with section 9(3) of the Act (b) on the interpretation or application of the Constitution which do not require certification and (c) on the interpretation or application of the Constitution where no application for certification has been made.

I must say there is quite some reasoning in the manner His Lordship discusses the scheme. I am sure that at an appropriate time it will be necessary to determine which instances do not require certification by the Chief Justice and who then determines when a certificate is required and when it shall not be required. Can the original court dispense with the certificate by the Chief Justice? Will the determinationof a matter as being constitutional follow the path suggested by Justice Mwaungulu in **Reserve Bank of Malawi v. Finance Bank of Malawiin Voluntary Liquidation Constitutional Cause Number 5 of 2010** which attempts to circumscribe instances that fall under section 9(2). Shall we not agree that

it is not easy to circumscribe the scope of section 9(2) in view of the phrase "...every proceeding..." as argued by Justice Nyirenda in the **Bottoman and Tembo**case when he says:

> ***"Where no application for referral has been made, I presume the argument is that the original court will lead the process of determining that a constitutional matter has arisen and presumably the High Court will be compelled, by that determination alone, to empanel as a constitutional court. If this process is outside the rules, as must be the argument, we would have to consider how the proceedings will be managed. Will it be the ruling of the original court that will raise the constitutional questionsfor determination? Shall the parties fall back on the Rules and frame the issues to be filed with the constitutional panel for determination.***
>
> ***There could be further observations to be made about the whole constitutional scheme. Section 9(2) relates to proceedings in the High Court. The exact words are "Every proceeding in the High Court and all business arising therefrom.... "***

The issues that are discussed by Justice Mwaungulu and Justice Nyirenda will remain cardinal and must, in the course of time be resolved in the scheme of constitutional referrals that we envisage as a jurisdiction. The real issue in the matter before me, going back to where I started, is to determine what is meant by the phrase "every proceeding in the High Court..."What does not come out clear from this phrase is whether the "proceeding" is that which is **already** in the High Court. In other words, does section 9(2) presuppose that there is a proceeding the High Court.

It is yet notfar-fetched to understand the phrase as referring to that which the Chief Justice will have certified, as the proceeding. In that sense there need not be a pre-existing matter in the High Court; in which case the proceeding will be that which the Chief Justice will certify.

Let us then look at it in this way.Ifthe understanding is that the proceeding must be that which is already before the High Court, then we might have problems with referralsin cases that arebefore subordinate courts which the Rules refer to. Technically section 9(2) will have excluded referrals in matters that are before the subordinate courts.

If the understanding is that there need not be an existing proceeding before the High Court and

that it is the certificate by the Chief Justice that places the matter before the constitutional panel of the High Court, then the provision would allow for referrals from all original courts. It would also allow for other referrals in situations where the Chief Justice might consider and determine that the matter appropriately falls within section 9 (2) of the Courts Act.

It is here that Counsel Majamanda seems to have a point. Rules 4, on commencement of proceedings, provides:

> ***"Any proceedings under these Rules shall be commenced by an originating motion in Form 2 of the Schedule, within fourteen days after certification by the Chief Justice pursuant to section 9(3) of the Act; but so however that:-***
>
> ***(a) in the case of a 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 a referral by any other court under rule 8, the proceedings shall be commenced by a notice of referral in Form 3 of the Schedule."***

The Rule starts with commencement of referrals generally which shall be in **Form 2**, but that in the case of a referral by the President it shall be by notice of referral and in the case of referral by other courts it shall be by notice of referral in **Form 3** in the Schedule to the Rules.

As a matter of fact, Part IV of the Rules might lend further support to the fact that what was envisaged was referrals in general, referrals by the President and then referrals by other courts. Part IV of the Rules is actually divided into these three areas.

There is muchthat could be discussed about Section 9 of the Courts Act and the Rules thereto. Perhaps this only admits to the wider challenges that are identified by both Justice Mwaungulu and Justice Nyirenda in the cases referred to, over and above the observations that have been raised by the Attorney General and Counsel Majamanda in the present application. We need to look at the entire scheme of constitutional referrals again and redraft both the enabling stature as well as the Rules. Both have served us for the period in use and have enabled us to unravel a wide ranging issues that we must take into consideration for the future.

As I state earlier, the Courts Act has since been amended by the Courts (Amendment) Act Number 26 of 2016. The amendment will have responded to some of the concerns raised by

Justice Mwaungulu and Justice Nyirenda and not so much about what has concerned us in this matter.

Having said all this and leaving ourselves with work uncompleted, I wish to reiterate what I said about referrals in **Court Reference No 2 of 2015, IN THE MATTER OF DR. BAKILI MULUZI AND THE ANTI-CORRUPTION BUREAUANDIN THE MATTER OF SECTION 101(2) OF THE CONSTITUTIONANDIN THE MATTER OF SECTION 42(2)(F) OF THE CONSTITUTIONANDIN THE MATTER OF THE COURTS (HIGH COURT) (PROCEDURE ON THE INTEPRETATION OR APPLICATION OF THE CONSTITUTION) RULES,** where I said:

> ***"It is unthinkable to have a matter before our courts that has no bearing, none whatsoever, on rights, responsibilities and obligations of the human being. Virtually every cause of action relates to the rights, obligations and responsibility of human beings in one way or another. In the course of every litigation before court, it is about the interpretation or application of individual or group rights. With a permissive constitution as ours, every time courts undertake such a responsibility they are, necessarily, interpreting or applying***

constitutional rights and obligations, from labour rights, through contractual rights, family obligations,and tortious responsibility to rights and responsibilities under the criminal law. Constitutional interpretation or application therefore runs across and is always before our courts in different ways, at different levels, but all the time."

The reason why I expressed these sentiments came out in a latter paragraph where I said:

".... we should be concerned with any attempt to make referrals an administrative arrangement. Court referrals could very easily become an unruly horse or a runaway train if not property regulated and judicially determined. It would be very easy for referrals to become a common practice and yet a lethal tool to stifling proceedings. ... it is not difficult to see how referrals could cripple proceedings if all the litigants had to do was to cry out "the Constitution", and by it alone gag the hands of the original court as well as the Chief Justice. Referrals should

therefore not be left to be as a matter of course.

It is for these paramount and overriding considerations that the Courts Act, together with the Rules, have laid down the procedure that must be followed as well as the requirements that must be accomplished in referrals."

My conviction therefore, as manifest in the views above, is that referrals must be regulated as we have done by Section 9 of the Courts Act and the Rules. Without a regulatory frame work, our judicial system could easily become inundated and overwhelmed with such proceedings.

It is acknowledged though that we need to look at both the Courts Act and the Rules again and clarify a number of issues that are still causing us technical difficulties.

Reverting specifically to the matter at hand,the position is that the genesis thereof is cases that were long concluded after full trial.There were no appeals made. From the Notice of Suit against Government, the applicants intend to challenge not only the constitutionality of the rule on corroborationbut further to seek compensation for the unlawful violation of

their rights and freedoms, as they put it.Allowing a referral in this context would not just be for the purpose of considering the constitutionality of the issues raised as regards the rule on corroboration, but it would alsoinevitably entail a review of the evidence in the cases in order to establish in what way and to what extent the rule was used to the detriment of the applicants.We can all see, and I hope we do, that that would be tantamount to indirectly allowing for a review or an appeal in the cases way out of time. That is not within my authority. I would therefore not allow this application.

Pronounced this 1st Day of March,2017, at Blantyre.

Andrew K. C. Nyirenda, SC
CHIEF JUSTICE