

A VICTORY FOR THE RIGHT TO FAIR AND SUBSTANTIAL JUSTICE:

RECENT CASES FROM THE MALAWI HIGH COURT

*"FREEDOM FROM ARBITRARY ARREST
AND DETENTION IS A HUMAN RIGHT"*



*Universal Declaration of Human Rights, Article 9
International Covenant of Civil and Political Rights, Article 9
African Charter on Human and Peoples' Rights, Article 6*



INTRODUCTION

"It cannot be disputed that an unlawful interference with a person's right to personal freedom amounts to a violation of their right to liberty and can be an affront to their dignity."¹

All persons are entitled to fundamental rights and freedoms, including the right not to be discriminated against, harassed, or abused, and are fully entitled to fair treatment, due process of the law, and to be free from arbitrary arrest and detention.

The fundamental human rights of all persons are protected in regional and international instruments, which Malawi has signed and ratified, including: the African Charter on Human and Peoples' Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR).

The principle of universality of rights underlies the application of all fundamental human rights. Article 1 of the Universal Declaration of Human Rights (UDHR) provides that "all human beings are born free and equal in dignity. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Similarly, Article 4 of the African Charter on Human and Peoples' Rights provides that "human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." Article 5 continues

¹ *Republic v Pempho Banda and others* Review Case No. 58 of 2016, [2016] MWHC 589 (8 September 2016) [4.37].

that “every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation, and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, states that: “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” The State is obliged to protect and respect the rights of all people, regardless of their means of livelihood. The rights to life, dignity, security of person, privacy, freedom from torture and arbitrary arrest and detention, fair trial, non-discrimination, freedom of expression, freedom of association and peaceful assembly, must be applied equally to everyone.

The High Court of Malawi has recently been critical of the way in which police and lower courts have applied certain offences and emphasised the obligation of the State to protect and uphold the rights of all persons.

In September 2016, in the case of *Republic v Pempho Banda and Others*, the High Court of Malawi held that the offence of living on the earnings of prostitution did not prevent sex workers themselves from living on their earnings.² The Court held that section 146 of the Penal Code prevents *another individual* from living on the earnings of their prostitution, and was designed to protect sex workers from exploitation by third parties.

In Malawi, many sex workers face discrimination, intimidation and harassment by the police simply for being sex workers. This occurs despite the fact that it is not illegal to be a sex worker in Malawi. Over the years, sex workers have often been arrested under offences that are overly broad and are incorrectly and arbitrarily applied by the authorities. In particular, some of the offences which have been erroneously used to unlawfully arrest and convict sex workers include the offence of being a rogue and vagabond and the offence of living on the earnings of prostitution.

In January 2017, the High Court of Malawi in *Mayeso Gwanda v The State* declared one of the rogue and vagabond offences unconstitutional, and therefore arrests made under this offence are unlawful.³

² Review Case No. 58 of 2016, [2016] MWHC 589 (8 September 2016).

³ Constitutional Cause No.5 of 2015, [2017] MWHC 23 (10 January 2017).

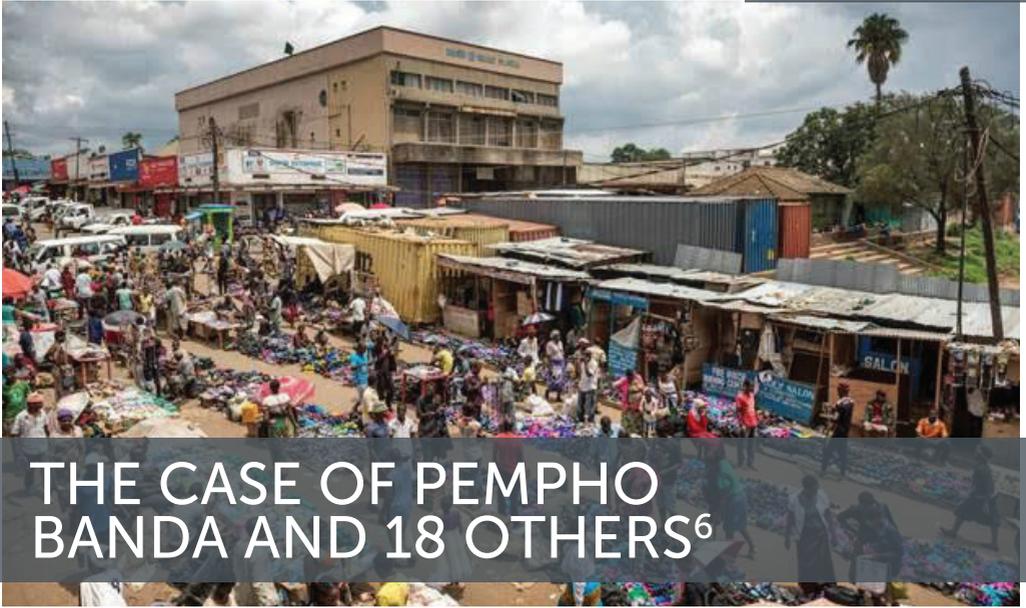
Also in January 2017, the High Court of Malawi in *EL (Female) v Republic* set aside EL's conviction and sentence for the offence of being likely to spread a disease dangerous to life. The Court emphasised the fair trial rights of the accused and the importance of the courts being very careful when dealing with offences that are overly broad.⁴

These cases complement an earlier judgment by the Malawi High Court on the rights of sex workers and women living with HIV, in *State v Mwanza Police and Others*.⁵

These cases emphasise that all persons including poor, vulnerable and marginalised individuals such as sex workers and women living with HIV, are fully entitled to fair treatment, due process of the law and to be free from victimisation and abuse.

⁴ Criminal Case No. 36 of 2016 (19 January 2017).

⁵ *State v Mwanza Police, Mwanza District Hospital, Ministries of Justice, Internal Affairs, Health, Attorney-General and Ex parte: HB, JM (o.b.o 9 others)* Miscellaneous Cause No. 10 of 2011, Kamanga J (oral judgment 20 May 2015).



THE CASE OF PEMPHO BANDA AND 18 OTHERS⁶

“It has long been settled law that the arrest and detention of a person are a drastic infringement of his basic rights, in particular the rights to freedom and human dignity, and that, in the absence of due and proper legal authorisation, such arrest and detention are unlawful.”⁷

Case Background

The *Pempho Banda* case concerned 19 women who were arrested and charged with the offence of living on the earnings of prostitution, contrary to section 146 of the Penal Code. The women did not have legal representation and pleaded guilty. They were convicted by a Fourth Grade Magistrate in Dedza and fined MK7000 each.

The women challenged this decision in the High Court on the basis that:

1. The police and the magistrate misinterpreted the offence of ‘living on the earnings of prostitution’ under section 146 of the Penal Code, and therefore the magistrate had no jurisdiction to hear a case relating to the offence of living on the earnings of prostitution;
2. Their fair trial rights were violated because the charges and evidence were not adequately explained to them and the Magistrate’s Court failed to comply with the mandatory provisions in section 215 of the Criminal Procedure and Evidence Code; and

⁶ *Republic v Pempho Banda and others* (Review Order) (Review Case No. 58 of 2016) [2016] MWHC 589 (8 September 2016).

⁷ *Republic v Pempho Banda and others* [4.36], per Ntaba J. See also *Theobald v Minister of Safety and Security and Others* 2011 (1) SACR 379 (GSJ), at 389F.

3. Their fair trial rights were violated because the Magistrate’s Court incorrectly tried all 19 women together and recorded a unanimous plea of guilty, in violation of section 127 of the Criminal Procedure and Evidence Code.

The High Court found in the women’s favour on all counts – finding that there had been a violation of the women’s fair trial rights, and an ‘unlawful interference’ with their ‘right to personal freedom’.⁸ The following are key points from the High Court’s decision.

Sex Work in Malawi

The High Court acknowledged that although sex work continues to be a sensitive subject in Malawi, the Penal Code does not criminalise the act of buying and selling sex. It is not a crime to be a sex worker in Malawi – but certain activities around sex work are criminalised. For example, it is an offence to recruit someone to become a sex worker (procurement) or to keep a place that is used for sex work (brothel). It is also a crime to force someone to become a sex worker or to keep someone in a brothel without their consent.

The High Court further expressed concern that police officials continue to target sex workers by incorrectly applying offences in the Penal Code to arbitrarily arrest and detain sex workers and that these provisions are open to constitutional review.

The Correct Interpretation of Section 146

“Courts in interpreting (living on the earnings) have maintained that the mischief that it was curbing was protecting prostitutes from those who exploit them.”⁹

To determine the true meaning of the offence, the Court first examined its wording and history. In examining the historical context of this offence in both Malawi and the United Kingdom, it showed that the purpose of the offence was to prevent the exploitation of women in the sex trade.

The Court concluded that section 146 does not prevent sex workers themselves from living on the earnings of prostitution. Section 146 should be read narrowly as criminalising the behaviour of third parties (such as brothel owners or pimps) who control sex workers and have an economic stake in their exploitation.¹⁰ This offence therefore does not prevent sex workers from earning money through sex work or from using the money to support their dependants.

⁸ *Republic v Pempho Banda and others* (Review Order) (Review Case No. 58 of 2016) [2016] MWHC 589 (8 September 2016) [4.37].

⁹ *Republic v Pempho Banda and others* [4.33].

¹⁰ *Republic v Pempho Banda and others* [2.13] citing *Shaw v DPP* [1962] AC 269-71, 263-4; *R v Downey* [1992] 2 S.C.R 10.

The Right to Liberty

“Unlawful interference with a person’s right to personal freedom amounts to a violation of their right to liberty and can be an affront to their dignity.”¹¹

All people have the right to liberty, as highlighted in section 18 of the Malawi Constitution. A person may only be deprived of their liberty when this is done in accordance with the law. It is unlawful to arrest or detain a person unless they are reasonably suspected of having committed an offence.

The High Court held that the way section 146 has been applied to sex workers, especially during police raids, has resulted in their unlawful and arbitrary arrest and detention. This is a violation of their right to liberty and their right to be treated with dignity.

Freedom from Discrimination

“The manner in which the 19 women were arrested and tried (...) was based on a biased and discriminatory reasoning by the police as well as a clear lack of evidence to support such (a) charge but was done merely to embarrass, label and harass the 19 women.”¹²

Under section 20 of the Malawi Constitution, no one may be discriminated against on grounds of race, sex, language, religion, opinion, nationality, social origin, disability, property, birth, occupation or other status. This means that police are not allowed to arrest persons on the basis of their economic status or profession. The Court highlighted the discriminatory way that the ‘living on the earnings’ offence had been applied to women in Malawi.

The Right to a Fair Trial

“This court is mindful of the Constitutional tenets of a right to a fair trial as espoused in section 42. Consequently, the court recognises that in meting out justice, it should do so by taking into account fairness and equity in all aspects.”¹³

A fundamental right in any criminal matter is the right to a fair trial, which is guaranteed by section 42 of the Malawi Constitution. This means that the process should be fair and

¹¹ *Republic v Pempho Banda and others* [4.37].

¹² *Republic v Pempho Banda and others* [4.37].

¹³ *Republic v Pempho Banda and others* [4.7].

certain, with due care given to upholding the rights of the accused.¹⁴ Without this right, the rule of law and public faith in the justice system collapses.

Obligations of Police and Magistrates under the Malawi Criminal Procedure and Evidence Code

Obligations of Police

The Criminal Procedure and Evidence Code sets out the procedures to be followed when a person is arrested. Police are obliged to follow the provisions in the Code.

Several conditions must be met when a police officer effects an arrest:

- The police must have sufficient and supporting evidence of a crime in order to arrest an accused. To effect an arrest under section 146, the police must have evidence such as bank statements or reliable and corroborated eye-witness testimony that a third party is living on the earnings of a sex worker and controlling her.
- The police must inform a person of the reason for their arrest, at the time they are arrested, or ‘as soon as practicable’ after.¹⁵
- The police may only use reasonable force to arrest the accused.¹⁶
- The police must caution the accused on their right to remain silent.¹⁷
- The police must inform the accused that they have the right to speak to a lawyer or paralegal in private.
- Once charged, an accused must be brought before a judge within 48 hours of their arrest.¹⁸

The Court explained that it is established law that police must provide each accused, and the Court, with a **charge sheet** which clearly explains:

- The counts and charges for the alleged crimes;
- The essential elements for each of the offences charged; and
- The particulars of the offence for each element. This includes reasonable information about the date, time and place of the alleged crime, and other relevant information, to enable the accused to understand the nature of the charge.¹⁹

The charge sheet must be in plain, non-technical language, which the accused can understand.

¹⁴ *Republic v Pempho Banda and others* [4.7].

¹⁵ Malawi Criminal Procedure and Evidence Code s 20A(1).

¹⁶ Malawi Criminal Procedure and Evidence Code s 20(4).

¹⁷ Malawi Criminal Procedure and Evidence Code s 20A(6).

¹⁸ See Malawi Constitution s 42; Malawi Criminal Procedure and Evidence Code s 32 (applies where an arrest is made without a warrant); Malawi Criminal Procedure and Evidence Code s 35 (applies where an arrest is made without a warrant).

¹⁹ Malawi Criminal Procedure and Evidence Code s 128(a)(i)-(vi).

Obligations of the Court

The Criminal Procedure and Evidence Code also creates obligations for magistrates. Upon being brought before a magistrate, a number of conditions must be met.

Requirements for recording pleas:

- The Court has a duty to explain every element of the offence to each accused individually, per the charge sheet. A reply for each count should be recorded separately.²⁰ This is especially important where there are multiple accused in the same matter. The Court should not record a collective or unanimous plea.²¹
- The Court has a duty to ensure that each and every accused understands the charges against them, with sufficient particularity, and in language that they understand.²²
- The accused may then be asked to plead guilty or not guilty. This involves asking the accused whether they admit to or deny the truth of the charge.²³

Every person has the right to be considered innocent until proven guilty.²⁴ Therefore every person has the right to enter a plea of not guilty. For a plea of guilty to be recorded, the Court must be satisfied that the accused understands the consequences of pleading guilty. This means that the accused must understand that they will not have the opportunity to explain themselves or have their matter heard in Court.

The Court should record a plea of not guilty, and the matter should proceed to trial if:

1. The Court is not satisfied that the accused understands the consequences of pleading guilty;
2. The accused does not plead; or
3. The plea does not pass the 'equivocal test'. This means that the Court cannot accept an equivocal plea of guilty.²⁵ Where an accused is not unequivocally certain that they wish to admit to the crime, a plea of not guilty must be recorded and the matter must proceed to trial.²⁶

If all relevant safeguards are complied with and a plea of guilty is recorded, then the accused's admission "shall be recorded as nearly as possible in the words used by him and he may be convicted and sentenced thereon".²⁷

²⁰ *Republic v Pempho Banda and others* 12 [4.9].

²¹ *Republic v Pempho Banda and others* 12 [4.12].

²² Malawi Constitution s 42.

²³ Malawi Criminal Procedure and Evidence Code s 251.

²⁴ Malawi Constitution s 42.

²⁵ *Republic v Benito* (1978-80) 9 MLR 211, 213 cited in *Republic v Pempho Banda and others* [4.10].

²⁶ As above.

²⁷ Malawi Criminal Procedure and Evidence Code s 251(2).

Requirements for joinder of cases

Every person has the right to be tried separately for the crimes for which they are charged. Section 127 of the Criminal Procedure and Evidence Code outlines that charges may only be joined where they 'are founded on the same facts or form, or are part of, a series of offences of the same or similar character'.²⁸

*"Two offences (...) do not form a series merely because evidence relating to one offence is uncovered during the investigation into the other."*²⁹

If a number of crimes are uncovered during a police raid or investigation, then the police must still charge each accused separately on the basis of the facts relevant to each individual accused. Offences which are committed at different times and different places are not considered part of a series without evidence that they show a similar form or character, or a factual link.³⁰ If the only factual link is that the police uncovered these crimes during the same raid, then the charges should not be joined.³¹

Incorrect joinder will allow a Court on appeal to set aside any convictions on the basis that there has been a failure of justice.³²

Conclusion

This case emphasised that all persons including poor, vulnerable and marginalised individuals such as sex workers are fully entitled to fair treatment, due process of the law and protection of their dignity. Judicial officers and police must at all times ensure that all unrepresented individuals' rights are protected throughout the criminal justice system regardless of their social status and class.

The High Court has clarified the scope of a crime which is regularly used as a basis to harass, label, embarrass, arbitrarily arrest and wrongfully convict female sex workers on the basis of their occupation. The High Court emphasised that section 146 has regularly been misused by law enforcement officials in Malawi.³³

The Court also emphasised that it is not illegal to be a sex worker in Malawi. The State has reviewed the Penal Code many times and has chosen not to criminalise it. Therefore sex workers may not be arrested under section 146 of the Malawi Penal Code simply for living on the earnings of their own sex work.

²⁸ Malawi Criminal Procedure and Evidence Code s 127.

²⁹ *Republic v Pempho Banda and others* [4.17].

³⁰ *Republic v Pempho Banda and others* [4.18].

³¹ *Republic v Pempho Banda and others* [4.18].

³² *Republic v Pempho Banda and others* [4.18].

³³ *Republic v Pempho Banda and others* [4.17].



THE CASE OF MAYESO GWANDA³⁴

Case Background

Mayeso Gwanda, a street vendor, was arrested by Malawi police on 20 March 2015 at 4am. At the time, he was on his way to sell plastic bags in Limbe. He was arrested and told that he would have to explain his case at the police station. He was kept in custody at the police station until 23 March 2015 when he was taken to the Blantyre Magistrates Court and charged under section 184(1)(c) of the Penal Code with being a rogue and vagabond. Two days later he was released on bail pending trial. Subsequently, the trial was stayed pending the determination of a Constitutional Petition. The constitutional case was heard before a panel of three judges (Mtambo J, Kalembere J and Ntaba J) and judgment was handed down on 10 January 2017.

Section 184(1)(c) of the Penal Code provides that:

“Every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, shall be deemed a rogue and vagabond, and shall be guilty of a misdemeanour and shall be liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for eighteen months.”

³⁴ *Mayeso Gwanda v The State*, Constitutional Case No. 5 of 2015, [2017] MWHC 23 (Mtambo J, Kalembere J, Ntaba J)(10 January 2017).

The Malawi High Court has frequently ruled that section 184(1)(c) has been applied too broadly by police and magistrates and emphasised that the section was not aimed at criminalising the poor. The courts have said that all the elements of the offence must be proved, including evidence that the accused was loitering for a specific illegal purpose and intention in the mind of the accused that his purpose was illegal or improper. Despite these pronouncements by numerous courts, no court was specifically asked to declare the offence unconstitutional.

The Issues to be Determined in the Gwanda Case

1. Whether section 184(1)(c) of the Penal Code in itself and in its general application violated the applicant’s constitutional rights, and
2. Whether the violation of these rights were reasonable, recognised by international human rights standards, and necessary in an open and democratic society.

The History of the Offence

The Court traced the roots of the offence to the English Vagrancy Act of 1824. The same offence exists in many former British colonies, including Mauritius, Nigeria, Gambia, Zambia, Uganda, Botswana, Tanzania, and Seychelles. The offence has been repealed in Kenya. The Court noted that “most of the colonies and protectorates have new constitutional orders and thus it is argued that these vagrancy laws are now dated.”³⁵

“Obviously, it could never be a crime for one to be merely dishonest or unscrupulous or a wandering person without a fixed place of abode and no more. This is so because for a criminal offence to be present, one must commit an unlawful act (actus reus) and have a guilty mind (mens rea).”³⁶

The Offence Violates Constitutional Rights

The Court held that offence violated the applicant’s rights to **dignity, freedom from inhuman and degrading treatment, freedom from discrimination** and **equal protection of the law**. Mtambo J went further to find that the offence also violated the **right to freedom and security of person** and the **right to freedom of movement**.

More specifically, the arrest for behaviour that was not criminal amounted to **inhuman and degrading treatment**, as did the fact that Gwanda had been incarcerated for three days and nights in police cells that were congested. This arbitrary arrest and detention amounted to a violation of his **right to freedom and security of person**. The offence further infringed on the **right to freedom from discrimination** as it is disproportionately applied to those who are poor.

³⁵ *Mayeso Gwanda v The State*, per Mtambo J, page 6.

³⁶ *Mayeso Gwanda v The State*, per Mtambo J, page 4.

The Court held that the limitation of these rights were unreasonable and the broad wording of the offence produced disproportionate results on marginalised groups in society.

The Court found that the fact that the courts have tried to interpret the offence narrowly did not save it from unconstitutionality and it continued to be applied in an arbitrary manner. The Court accordingly declared the offence unconstitutional.

The Right to Dignity

Kalembera J emphasised that the offence violated the right to dignity:

“What evidence was there that the Applicant intended to commit an offence? ... there was no investigation, there was no evidence that the Applicant intended to commit an offence or an illegality... His dignity was violated. He was presumed guilty until proven otherwise. All because he possibly appeared to be of no means. He was not treated as a human being. And where a person’s dignity is violated or compromised, it likely creates a chain reaction, that is, several of the individual’s human rights end up being violated.”³⁷

The Right to a Fair Trial

Ntaba J considered the extent to which the offence violated the right to a fair trial. She noted that the offence is vague in that it does not sufficiently explain what the prohibited conduct is and gives police officers too much discretion to determine the ambit of prohibited conduct. This violates the **principle of legality**, which affects both the right to a fair trial and the rule of law. The offence also violates one of the fundamental tenets of criminal procedure and the right to a fair trial – the right to be presumed innocent until proven guilty.

The Offence is Overly Broad

The Court held that section 184(1)(c) of the Penal Code is overly broad resulting in too much discretion left in the hands of the police.³⁸

“Clarity and certainty in criminal matters are imperative and that is why courts guard jealously the principles that no one should be punished under a law unless it is sufficiently clear and certain to enable him to

³⁷ *Mayeso Gwanda v The State*, per Kalembera J, page 8, 9

³⁸ *Mayeso Gwanda v The State*, per Mtambo J, page 24.

know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly ascertainably punishable by law when the act was done."³⁹

Crime Prevention

The Court noted that the police can still arrest criminals under other offences "but in a more investigative and/or targeted manner with respect to clear offences".⁴⁰

*"Let me state that the rule of law which is the tenet of the Malawian Constitutional law and indeed Malawian constitutional democracy, should always be upheld and should not be compromised merely in the name of public safety or preventive policing."*⁴¹

Ntaba J explained that section 184(1)(c) is not the most appropriate crime prevention measure:

*"Crime prevention can arguably be achieved by more precise and constitutionally valid provisions; including other provisions in the Penal Code; developing alternatives to arrest; ensuring arrests that are more targeted and intelligence-based; reducing vulnerability; addressing structural issues; preventing and reducing exploitation; and adopting strategies to expand educational, economic and social opportunities... arrest itself is not automatically the most appropriate response and police can, for example, caution and warn a person as a first response, whereafter an arrest for a substantive offence could be appropriate where there is a sufficient basis for such arrest."*⁴²

Conclusion

The result of this judgment is that arrests under section 184(1)(c) of the Penal Code are unconstitutional. The Court has further recommended the review of other provisions which have similar negative effects and are arbitrarily applied due to their ambiguous wording.

³⁹ *Mayeso Gwanda v The State*, per Ntaba J [4.19].

⁴⁰ *Mayeso Gwanda v The State*, per Mtambo J, page 6.

⁴¹ *Mayeso Gwanda v The State*, per Ntaba J [4.40].

⁴² *Mayeso Gwanda v The State*, per Ntaba J [4.60-4.61].



THE CASE OF EL v REPUBLIC⁴³

Case Background

The EL case concerned a woman living with HIV and on antiretroviral treatment (ART) who was convicted of a crime under section 192 of the Penal Code for breastfeeding another person's child. The child did not contract HIV and the evidence indicated that the breastfeeding was accidental and unintended.

Section 192 of the Penal Code creates an offence for any unlawful, negligent or reckless act which is likely to spread a disease dangerous to life. The accused, EL, did not have legal representation at her trial. The Magistrate's Court recorded a guilty plea and sentenced her to nine months' imprisonment with hard labour.

EL appealed her conviction and sentence in the High Court. She appealed on the following grounds:

- A guilty plea was incorrectly entered against her by the Magistrate's Court.
- Section 192 requires that the act the person is accused of doing must be "likely" to spread a disease dangerous to life, in this case HIV. The prosecution had shown no evidence that a single exposure of a child to the breastmilk of a woman with HIV who is on ART is "likely" to spread HIV. EL presented expert evidence that showed, to the contrary, that the risk of transmitting HIV in these circumstances was "infinitesimally small". In addition, Malawi's healthcare guidelines promote breastfeeding by women with HIV who are on ART.

⁴³ *EL v Republic* (Criminal Case No. 36 of 2016) High Court of Malawi, Zomba District Registry, 19 January 2017, Ntaba J.

- The prosecution did not prove that she had intentionally or negligently breastfed the child.
- The facts did not show that she “knew” breastfeeding was likely to transmit HIV.
- Section 192 of the Penal Code is in any case vague and overbroad and therefore unconstitutional, violating her human rights, including her right to a fair trial.
- Her sentence was in any case excessive and failed to take into account mitigating factors, including the best interest of her children.

The prosecution agreed that EL’s conviction and sentence should be set aside. The prosecution showed how the charge sheet was defective and therefore EL’s plea should not have been recorded as guilty as the charge sheet did not disclose the elements of the offence.

The High Court set aside EL’s conviction and sentence. In its judgment, the Court made some important findings, which are detailed below.

The High Court judgment cautions courts and the police to ensure that people living with HIV must have their human rights protected in the criminal justice system.

“Fundamentally, in this human rights era, the law should remember to uphold the accused person’s rights to privacy, dignity and due process.”⁴⁴

Anonymity Order

People living with HIV continue to face stigma and discrimination in all areas of life. The case raised sensitive issues affecting the dignity and privacy of the appellant and the children concerned.

To ensure that all the parties were protected from further non-consensual exposure of their HIV and health status and to protect them from stigmatising public attention, the High Court ordered that the names and personal information of EL, the complainant and the children concerned be anonymised:

- The registrar was instructed to ensure all court documents given for public access referred only to the parties by their initials.
- Journalists were instructed not to make public any information that could lead to the parties being identified.
- The hearings were held in camera.

⁴⁴ *EL v Republic* [4.20].

Fair Trial Rights

The High Court judgment illustrates how prejudice against people living with HIV can negatively impact their fair trial rights. In finding that the trial court procedure was irregular, the High Court noted that the proceedings and the court's reasoning indicated "blatant bias" against EL.⁴⁵

The High Court overturned EL's conviction because it said that the charge sheet was ambiguous and lacked clarity.⁴⁶ EL's plea was qualified because her admission to the facts read to her at the trial were inconsistent with the caution statement and did not establish the elements of the offence under section 192 of the Penal Code.⁴⁷ It was clear in the Court's findings that EL did not intend to breastfeed the child and moreover could not have intended to transmit HIV to the child.⁴⁸

Protecting Dignity and Privacy when Gathering and Admitting Evidence

The Court raised concern that EL's rights to dignity and privacy under sections 19 and 21 of the Constitution had been violated when information about EL's health and HIV status and her ART had been obtained by police and admitted into evidence by the trial court.⁴⁹ It warned that courts must be especially "concerned and careful" with the admission into evidence of private information on peoples' health status, due to the threat this imposes on peoples' rights to privacy and to dignity. Such evidence's admission may, in addition, not be compliant with the Criminal Procedure and Evidence Code.⁵⁰

The Correct Approach to Criminal Offences for HIV Transmission and Exposure

The High Court judgment deals with the difficult issue of the application of the criminal law to cases of HIV exposure, non-disclosure and transmission. The judgment provides important guidance on the limits of the application of criminal law in these cases in the context of human rights.

The Importance of Scientific Evidence

In its reasoning, the Court illustrated the importance of judicial decisions being grounded in scientific evidence.

In the context of section 192 of the Penal Code, for example, the prosecution would have to prove, amongst others, that the accused's act was objectively "likely" to spread a

⁴⁵ *EL v Republic* [5.1].

⁴⁶ *EL v Republic* [4.12].

⁴⁷ *EL v Republic* [4.13].

⁴⁸ *EL v Republic* [4.15].

⁴⁹ *EL v Republic* [4.14].

⁵⁰ As above.

disease dangerous to life to succeed with a conviction.⁵¹ The Court recognised that the prosecution had not raised any evidence to prove that breastfeeding by a woman on ART is likely to transmit HIV.⁵²

To the contrary, the Court found that the chances of a mother who is on ART transmitting HIV to an infant through breastfeeding are very low.⁵³ This was based on expert, medical evidence raised by EL and in reference to Malawi’s HIV and AIDS Policy⁵⁴ and guidelines dealing with HIV services and maternal healthcare,⁵⁵ as well as World Health Organisation’s “Guidelines: Updates on HIV and Infant Feeding.”⁵⁶

Limiting the Overly Broad Application of Criminal Law

The Court considered the views of the Joint United Nations Programme on HIV/AIDS (UNAIDS) and expert evidence presented by EL. It noted that the overly broad use of criminal law in cases of HIV exposure, non-disclosure and transmission raises serious human rights concerns.⁵⁷

The Court considered the argument that criminal law and public health legislation should not create HIV-specific offences because general criminal offences, such as assault, could be applicable in rare cases of intentional and malicious transmission of HIV. The Court stated that:

“criminal law should not be applied to cases where there is no significant risk of transmission or where the person did not know that he/she was HIV [positive], did not understand how HIV is transmitted, did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences. Legal systems should ensure their ... application of general criminal laws to HIV transmission is consistent with their international human rights obligations.”⁵⁸

⁵¹ *EL v Republic* [2.11].

⁵² *EL v Republic* [4.13].

⁵³ *EL v Republic* [4.15].

⁵⁴ Republic of Malawi (2013) National HIV and AIDS Policy, available at: http://www.dnha.gov.mw/documents/National%20HIV%20and%20AIDS%20Policy_2012-2017.pdf.

⁵⁵ See for example: Ministry of Health, Malawi (2011) Clinical Management of HIV in Children and Adults, Available at: http://www.dnha.gov.mw/documents/National%20HIV%20and%20AIDS%20Policy_2012-2017.pdf.

⁵⁶ (2016). Available at: http://www.who.int/nutrition/publications/hivaid/guideline_hiv_infantfeeding_2016/en/.

⁵⁷ *EL v Republic* [4.16].

⁵⁸ *EL v Republic* [4.17].

The Court however stressed that the negligent infection of any disease through breastfeeding “should not be put in the same category or class of intentional infection”:

“The law must be sensitive to various issues including the lack of knowledge on how HIV is transmitted. Most importantly, the circumstances of the accused must also play a role. Unquestionably, the law ... should still ensure the traditional standard of proof applies and should be established by prosecutors.”⁵⁹

Sentencing Women Offenders

The High Court judgment provides useful guidance on sentencing principles for women with children. In reasoning that the sentence imposed on the appellant was excessive, the Court said that:

“the Appellant also had a small breastfeeding child The court should have remembered that Malawian courts have always upheld the best interests of the child.⁶⁰ ... [I]ncarcerating a woman with her child should always be the last resort for any court especially where the offence is a misdemeanour.”⁶¹

The High Court stated that Malawian courts should take into account the guidelines set by the 2010 United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (otherwise known as the “Bangkok Rules”).⁶²

Conclusion

The *EL* case emphasises that prosecutors, police and courts must respect the rights of persons living with HIV to privacy, dignity and to a fair trial.

The judgment exposes how **HIV-specific** criminal laws may threaten human rights protections.

The application of **generic** criminal offences to cases of HIV transmission, exposure and non-disclosure must never violate the privacy, dignity and fair trial rights of accused persons. Courts must take into account the circumstances of the accused, their knowledge, their vulnerabilities, and whether there is in fact a “significant risk of HIV transmission”. Courts must ensure that criminal prosecutions are based on credible scientific evidence and objective facts and not grounded in bias.

⁵⁹ *EL v Republic* [4.20].

⁶⁰ *EL v Republic* [4.24].

⁶¹ *EL v Republic* [4.26].

⁶² Available at: https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf, *EL v Republic* [4.26].



STATE v MWANZA POLICE AND OTHERS⁶³

Case Summary

On 10 March 2011, eleven women from Mwanza, Malawi filed an application in the Blantyre High Court challenging their subjection to mandatory HIV tests, the admission of the HIV test results as evidence in criminal cases against them, and the public disclosure of their HIV status in open court.

The applicants were arbitrarily arrested in Mwanza on two separate occasions in September and November 2009 during sweeping exercises conducted by the police. On both occasions, a number of women were detained overnight at the Mwanza Police Station. The women were then taken to the Mwanza District Hospital. At the hospital, the women were subjected to blood tests without their informed consent. The medical officers noted the women's names and test results on pieces of paper and handed these over to the police. Thereafter, the women were taken to the Magistrate's Court where some were charged with spreading disease in contravention of section 192 of the Penal Code. In the courtroom, the particulars of the offence were read out loud including the fact that the women were HIV positive. This was the first time some of the women became aware of their HIV status.

⁶³ *State v Mwanza Police, Mwanza District Hospital, Ministries of Justice, Internal Affairs, Health, Attorney-General and Ex parte: HB, JM (o.b.o 9 others)* Miscellaneous Cause No. 10 of 2011, Kamanga J (oral judgment 20 May 2015).

The applicants argued that subjecting them to mandatory HIV tests was unreasonable and arbitrary. They further submitted that the mandatory HIV tests violated their constitutional rights, including:

- Their right to privacy and liberty of a person [section 21];
- Their right to non-discrimination [section 20];
- Their right to freedom from cruel, inhuman and degrading treatment [section 19(3)]; and
- Their right to dignity of the person [section 19(1)].

In challenging the admission of the illegally-obtained HIV test results in each applicant's criminal case, the applicants argued that this violated their constitutional right to a fair trial. Finally, the applicants argued that the public disclosure of their HIV status in court violated their constitutional rights to privacy and dignity.

Justice Dorothy nyaKaunda Kamanga handed down judgment on 20 May 2015. Reading her judgment in court, Justice nyaKaunda Kamanga said that forced HIV testing amounted to a violation of the applicants' constitutional rights, including their right to privacy; their right to non-discrimination; their right to freedom from cruel, inhuman and degrading treatment; and their right to dignity. Justice Kamanga went a step further and requested a copy of the criminal court records in order to review the sentence the magistrate imposed on the applicants.



**SOUTHERN = AFRICA
LITIGATION = CENTRE**

