



**IN THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
MZUZU REGISTRY: CRIMINAL DIVISION  
MISCELLANEOUS APPLICATION NO. 116 of 2016**

*(Being unspecified civil cause number of 2016 before the First Grade Magistrate Court  
at Chintheche)*

In The Matter of Section 26 of The Courts Act (Cap. 3:02)

-and-

In The Matter of The Review of The Decisions of The First Grade Magistrate Court at  
Chintheche Made in April 2016

-Between-

Olika Nkhoma and 13 Others.....Applicants

-And-

Child Protection Team.....Respondent

---

***DeGabriele, J***

**ORDER ON REVIEW PURSUANT TO SECTION 26 OF THE COURTS ACT**

---

**1. INTRODUCTION**

1.1. This matter was commenced in this Court by an expedited originating summons dated 25 November 2016. The Applicants are Stanly Chimota, Olika Nkhoma, Etina Kamanga, Mercy Chirwa, Brenda Phiri, Lute Chimoto, Tamalia Nkhwazi, Rose Banda, Josephine Nkhoma, Chikozga Banda, Ephron Phiri, Raymond Phiri and Donald Phiri. The Applicants sought the following reliefs from the Court;

1. *A declaration that the orders of the Magistrate ordering the suspension of both female and male students for reasons of pregnancy from Uhoho Primary School, requiring the payment of the fine or the remitting into custody of the Applicants or the application of the penal rules of the club or society are illegal, irrational and inconsistent with the rights of the Applicants under the constitution;*
  2. *An order reversing all the decisions of the First Grade Magistrate;*
  3. *An order of restitution of any money paid as a fine by the Applicants;*
  4. *An order for the payment of compensation for the violation of the Applicants' constitutional and common law rights.*
  5. *An Order that the Applicants are entitled to costs occasioned by this application;*
  6. *Any other order and/or declaration that the Court may deem appropriate to make;*
  7. *Any other relief that the Court may deem appropriate to grant.*
- 1.2. At the first hearing, Legal Aid applied for an adjournment so they could prepare their defence, and also add the Attorney General as a party to the proceedings. On hearing the applications and submissions made by counsel, it was clear that the matter required the High Court to exercise its supervisory and revisionary jurisdiction.
- 1.3. The matter has therefore been considered under section 26 of the Courts Act, which grants the High Court general supervisory and revisionary jurisdiction over all subordinate Court's powers. The supervisory or revisionary power can be exercised by the High Court either of its own motion or at the instance of any party or person interested at any stage in any matter or proceedings whether civil or criminal as long as it appears desirable in the interest of justice. Once the High Court has called for the record of the lower court for purposes of review or supervision any proceedings subsisting in the lower court pertaining to that matter shall be stayed pending the further order of the High Court. The High Court may give such directions as to the further conduct of the same as justice may require.

1.4. In this case, the matter was already concluded and there is no subsisting proceedings. This Court will therefore review that whole matter for purposes of providing guidance and supervision to the lower court.

## **2. The Application**

2.1. The Applicants are female primary school students, their parents, young men accused of impregnating the female students, and parents of the students or young men or boys accused of having impregnated the female students. The incident occurred at Uhoho Primary School at Chenyentha Village, Traditional Authority (T/A) Malanda Chambu Chifipa. The Applicants allege that the CPC prohibits school age pregnancy and requires any member who impregnates a school going child; or any member whose school going child falls pregnant or impregnates another to pay a fine of MK10, 000.00. In April 2016, it was discovered that about 20 female at Uhoho School were pregnant. The school authority, after consulting members of the community which the school serves, agreed to refer the matter to the First Grade Magistrate Court (FGM) at Chintheche for resolution. All the female students who were pregnant and the young men or boys suspected to have impregnated them were summoned to the lower court. The reasons for summons were only known at the lower court.

2.2. This application is made against the Child Protection Committee Team (CPC), instituted under the by law made under Traditional Authority Malanda, which by law operates within the community. The CPC instituted the proceedings and the FGM ordered that those among them who were pregnant or had caused pregnancy should pay a fine of MK10, 000.00 or be remitted into custody of the Chintheche Police where they would remain until that amount was paid. The order of the FGM was accordingly enforced and those who paid the fine were set free but those who did not pay the fine were placed in the custody of the police and were only released after the amounts were paid. The hearing process of the matter and the enforcement of the payment of the fine was done by the FGM with the aid of the staff from the court. The results of the enforcement was that

- a. *Olika Nkhoma (18) was pregnant and was consequently placed in custody in which she stayed for a day until her release after the payment of the fine.*
- b. *Etina Kamanga, (18) was arrested in the morning for being pregnant and released in the evening upon payment of the fine.*
- c. *Mercy Chirwa (19) who was in standard 7 at Uhoho was detained for a whole day for being pregnant and only released around 5 p.m. after payment of the fine.*
- d. *Jessie Chirwa (18) was arrested around 7 in the morning pursuant to the Order of the Magistrate and was released around 5 p.m. in the evening after the fine had been paid.*
- e. *Brenda Phiri, (19) and in standard 7 was arrested pursuant to the said orders also around 5 in the morning and was released in the evening after the fine was paid.*
- f. *Lute Chimoto, a parent was arrested because her son, who was missing had been accused of impregnating a student, and stayed in custody until the fine was paid.*
- g. *Rose Banda, a parent, was placed in custody because her son had impregnated someone and her daughter had been impregnated by somebody and she was in custody for the whole day until she paid K20, 000.00*
- h. *Tamalia Nkhwazi who was not available during the lower court proceedings paid the fine later to avoid incarceration for being found pregnant*
- i. *Josephine Nkhoma (19) and who is dumb was not arrested even though she was found pregnant as her fine was paid.*
- j. *Chikozga Banda who was in a relationship with the aforementioned Etina Nkhoma spent two days in the Chintheche Police cell for being found to have impregnated Etina.*
- k. *All other Applicants were in custody for a day pursuant to the Magistrate's order and were only released when the fine was paid*

2.3. This Court called for the record of the matter from the lower court. The FGM first provided this Court with the information that there was no matter registered with the lower court as there was no case registration number and no court summons were issued, except invitations to a meeting sent by the lower court

on behalf of the CPC. The matter was being handled by the CPC under the by-law developed by the community and the lower court had no jurisdiction over the same. The officers of the lower court facilitated the discussion and provided the venue, and the Chintheche Police provided security.

2.4. The FGM later swore an affidavit in which he stated that he received a verbal request from the Primary Education Advisor in collaboration with CPC to use the court premises for a community meeting to resolve an issue which erupted at Uhoho Primary school within the area, where 16 girls were found to be pregnant at the same time. The matter had generated huge interest in the community and the court premises would be a neutral venue. The Chintheche Police provided security on that day. He further stated that he as the chairperson of the Court User Committee (CUC) facilitated the meeting by writing invitation letters to all the concerned parties and the court seal was used to authenticate the letters. The FGM was asked to chair the proceedings as chairperson of the CUC because the chairperson of the CPC was away. The FGM facilitated the proceeding and those found liable were asked to pay a fine ranging from MK2000.00 to MK10, 000.00 based on the by-law of the area. A court Marshall was tasked to receive the money and he used the court seal to authenticate the payments but surrendered the money to the Committee afterwards. He further stated that there was no arrests or detaining of any person except for one boy who was responsible for making a girl under 15 pregnant and police detained him for further investigations. He stated that the decisions were owned by, and were a full responsibility of the CPC.

## **2. Issues for Determination**

2.1. The Applicants have raised about five specific issues that they seek the Court to examine and determine. As stated above, this review has occurred after the matter was already concluded. As such, these further determinations by the Court are aimed at ensuring that the lower courts has sufficient direction in dealing with similar issues.

## **3. *Whether the decision of the First Grade Magistrate at Chintheche to make an order in the lower court proceedings requiring the female Applicants or their***

***parents to pay a fine of K10,000.00 for being found pregnant and further requiring the male Applicants or their parents to pay a fine of K10,000.00 for impregnating the female Applicants, is in accordance with the jurisdiction of the said Magistrate under the Courts Act or any other law or is in accord with the Applicants constitutional right to a fair trial or other constitutional rights;***

3.1. As far as this Court can establish, this matter was never registered in the lower court either under criminal jurisdiction conferred on the lower court by ***section 13 of the Criminal Procedure and Evidence Code***, nor under the civil jurisdiction conferred on the lower court under ***section 39 of the Courts Act***. There is no case number in the manner which other matters are registered and determined, and there was no record of proceeding. However, the evidence shows that a case or a matter or a dispute was processed and dealt with by the lower court because court stationery, court premises and court staff were all used in a process that led to imposition of fines and detaining those who failed to pay the fine at the Police Station.

3.2. The summons exhibited and marked as **SC1** attached to the affidavit of the Applicants are couched as follows;

*"In the Magistrate Court At Chintheche*

*Child Protection Team v*

*Stanley Chimota*

*Blendah Phiri*

*Chimota Kamanga*

*Jenala Banda*

**SUMMONS**

*You are summoned to appear before Chintheche Court on 25 April 2016*

*(Signed by Court Clerk and the Chintheche Magistrate Court seal is impressed on it)"*

To any person looking at the above, it was clear that there was a matter concerning the CPC and the named individuals, and that the matter had to be dealt with at the Chintheche Magistrate Court. The court seal of the lower court and the signature of the court clerk or marshal leads to the conclusion that this was not a mere invitation to come to a venue for a meeting, but a court summons to go to the named court to answer a charge or an allegation.

3.3. The evidence shows that some of the people who could not pay the imposed fine were placed into custody. While there is no order to so place them in custody, there is evidence of the Police being requested to release persons from police custody after a fine of MK10,000 was paid. The document exhibited and marked as **SC2** and **SC3** shows this and they are formulated as follows;

*“To  
The O/C  
Chintheche Police  
Sir,  
Would you please release Olika Nkhoma due to the payment of MK10, 000 the parent has paid.  
(Signed by Court Clerk and the Chintheche Magistrate Court seal is impressed on it”*

While there is no order to so place them in custody, the document above clearly shows that the Officer in Charge at Chintheche Police is being requested to release persons from police custody after a fine of MK10,000 was paid.

3.4. The FGM has stated that the process before him was not judicial in nature but was under the responsibility of the CPC, who were enforcing the by law made by T/A Malanda. As stated above, and for all intents and purposes, the action of the FGM and the resultant process shows that it was a legal process carried out by the lower court, but outside the criminal or civil jurisdiction conferred to him by the laws of Malawi. Any specific jurisdiction or powers that any magistrate court exercises emanate from the laws of Malawi, specifically from the Constitution of the Republic of Malawi which is the Supreme law, Acts of Parliament on various subjects and any rules, regulations or by laws made under Acts of Parliament. The law as contained in the Acts of Parliament is made or created by the legislative arm of the Malawi Government. In many of these Acts of Parliament, there is a power given to the Minister responsible to create by-laws or a specific subject matter which are binding and can be enforced by the courts. The Minister therefore makes the by-laws with authority of the Act of parliament in a delegated capacity. For example, the Local Government Act under section 103 allows the Assemblies, and states that

*“The Assembly may make by-laws for the good rule and By-laws government of the whole ‘or any part of the local government of area or, as the case may be for the prevention and suppression of nuisances therein and for any other purpose”.*

Under the Local Government Act, infractions against the by-laws lead to a liability punishable by a fine not exceeding the sum of MK2,000, and in the case of a continuing offence a further fine not exceeding MK200 for each day during which the offence continues after conviction thereof or to a term of imprisonment not exceeding six months or both such fine and imprisonment. As these by laws are within a statute, the magistrate court would have jurisdiction to enforce the same, in a properly constituted court of law.

3.5. The creation of by laws by various communities has gained momentum. The by-laws aim to enforce a community code of ethics or good practices, and to reduce pressure on the formal law enforcement institutions. It is envisaged that the use of such by laws minimises the referral of minor offences to the otherwise overwhelmed justice system. The by-laws are meant to encourage dialogue and increase the ability of the community to deal with their issues using their own resources, with minimum interruptions and delays. On 22 July 2016, at a workshop to disseminate gender related law, the then Minister of Gender, Children, Disability and Social Welfare stated that her ministry was engaging with chiefs to ensure the gender related laws were implemented through the Chiefs’ by laws. She further stated that her ministry was working on standardising and mapping out the by-laws to ensure that the by-laws are aligned to the laws<sup>1</sup>. Indeed, many NGOs, and international institutions support such a move in a bid to making laws more accessible and to ensure implementation with minimum challenges.

3.6. In themselves by laws created by Chiefs and communities are not harmful and they can indeed be used to advance the rights of the vulnerable in the society. However, the enforcement of such by laws can lead to the infringement of rights, removing responsibility, or increasing health risks on different populations. For example, there are by laws intended to reduce early

---

<sup>1</sup>Nyasa Times report of July 22, 2016 filed by Gladys Kamakanda of Malawi News Agency (MANA)



pregnancies and early marriages. If a school age girl is pregnant, she as well as the guardians have to pay a fine, as well as the man or boy who made her pregnant. In a bid to avoid the payment of fine, the girl or the parent may resort to procuring illegal abortion hence risking the life of the girl. Another example is the by law that states that every woman must give birth in hospital, which is good and desirable. However, where such a woman gives birth in the community for any reasons, she has to pay a fine at community level, as well as at the health facility for her to access post-natal care as well as under five clinic services for the new born baby. If such a mother cannot pay any of these fines, she will not access any services for herself or the under-five clinic, leading to high risk for her and her child. It is therefore imperative that any by law made by any Chief together with his or her community must not infringe on the fundamental rights and freedoms of community members under the laws of Malawi. Any such by law that contravenes the laws of Malawi are illegal and cannot be enforced.

3.7. The by-law being referred to by the FGM in this matter is not the same as a by law made under a Statute by the Minister responsible. The by law was made by Chiefs together with the community and children living in the area of T/A Malanda Chambu Chifipa with an aim of protecting children from all forms of dangers and abuse, such as alcoholism, smoking, drug abuse, child labour, prostitution and sexual abuse. The by law is said to have been formulated with specific reference to the laws of Malawi, such as the Malawi Constitution, Labour Relations Act, Child Care, Protection and Justice Act, and the general by-laws of Nkhatabay District Council governing Nkhatabay District. The by-law is effective from 29 June 2013 and it was authorised or passed by the District Commissioner of Nkhatabay District and the FGM at Chintcheche Magistrate Court. The by-law put in place a tribunal that hears complaints and make findings of guilty but with no power to enter a conviction or pass a sentence of imprisonment. The fines imposed by the tribunal range from the lowest being MK1, 500 to the highest being MK50, 000. The money raised from the funds is solely for the use of the tribunal in its child protection activities. The membership of the tribunals includes Health workers, Religious organisations, Teachers,

Community Child Protection Workers, Community Policing Forums, Youth Networks, and District Commissioner, Magistrate, Police Officer In-Charge.

- 3.8. It is the finding of this Court that the FGM was a central founding member or drafter of the by-law, a member of the team that passed or authorised the by law, and a member of the tribunal. This scenario led to extreme conflict of interest for the FGM. By chairing the process, the FGM was a judge in his own cause. He should have recused himself and let the deputy chairperson of the tribunal proceed. In that scenario, if the matters needed to be referred to the magistrate court, he was likely to be the person to preside over the same in a court of law. As matters stand, and as stated above, for all intents and purposes the FGM was carrying out a judicial function but under the by law. It is the view of this Court that the involvement of magistrates in the decision making process of the tribunals or processes under any by law in any locality must be very minimal, to avoid abuse of power and conflict when the same issues come to court to be determined under the magistrate's legal jurisdiction and power.
- 3.9. It is the finding of this Court that the FGM at Chintheche acted outside his jurisdiction by using the magistrates court, its resources and staff to hear unregistered proceedings, and impose fines upon the Applicants. The fines that were collected were not accounted for. For all intents and purposes, whether or not the General Receipts were issued, the said fines collected on behalf of and by the magistrate court and should have been accounted for. It is a further finding of this Court that the FGM abused his power and overreached his authority because he used the magistrate court staff, resources and facilities to hear these complaints and made the whole look like it was the magistrate court that had made the decision. The attempt by the FGM to distance himself from culpability as shown in his affidavit does not satisfy this Court. A magistrate in such rural community must maintain neutrality in the way he performs his functions and in the way he relates to the community. The laws of Malawi do not confer any jurisdiction to any magistrate to preside over dispute and complaints in a tribunal set under by laws made by Chiefs.
- 3.10. It is a well known fact that almost all Chiefs have their own premises where they carry out different processes and hearings. The tribunal as set in the by-

law is an independent structure and its workings and functions should not be mixed with the works and function of the magistrate court and should have had this issue by the CPC heard at their own location, and using their own system of collecting fines. The Court further finds that the fines imposed in the by-law made by the Chiefs are much higher than the fines that Assemblies can impose under the Local Government by laws. Such high fines by the by laws of the Chiefs do unnecessarily place a heavy burden for the people in the community, and can lead to many injustices. In this particular case, the fines had to be paid by those who did not commit the offence and if they failed, they had to be imprisoned. It is a further finding of this Court that the approach of the by law and its tribunal was harsh and against the laws of Malawi in that it punished those who did not commit the offence.

3.11. Having perused the by-law as passed by and managed by the CPC and the tribunal, there is no provision therein that penalises the fact of getting pregnant. The by-law is clear that it is dealing with the protection of children from all forms of danger and abuses such as alcoholism, smoking, drug abuse, child labour and prostitution and sexual abuse. The by-law specifically states that any person who procure abortion will be liable to a fine and any parent that allows their child to enter into early marriage will be liable to a fine. The fact of getting pregnant and impregnating a girl is not specifically covered or penalised. It is the finding of this Court that the CPC and the FGM acted outside the by-law itself by imposing fines on the various Applicants. For this reason the Applicants can have recourse to remedies for the breach of their rights against the CPC, and the FGM in his personal capacity.

**4. *Whether the decision of the First Grade Magistrate at Chintheche to make an order during the said lower court proceedings remitting each Applicant who had not paid the aforementioned fine into the custody of the Chintheche police and requiring the Applicant to remain in such custody until the fine was paid is consistent with common law notions of fairness, legality and rationality and with the right to liberty or other constitutional rights***

4.1. Section 9 of the Constitution of the Republic of Malawi states that

*“The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with it in an independent and impartial manner with regard only to questions of fact and the prescriptions of law”.*

This means that the judiciary in all its levels must exercise its powers and perform its duties with impartiality in accordance to the laws of Malawi, and within specific jurisdictional limits imposed by the law. Every judicial officer is bound by the Constitution and laws of Malawi to perform their duties with fairness, legality and rationality. Failure to do so would lead to breach of the laws, would mean incompetence in performing the legally stated functions, and would mean abuse of power; which should lead to bringing the whole judiciary into disrepute.

4.2. As stated above, the FGM acted out of his jurisdiction and he had no power to remit into custody any of the Applicants who defaulted in paying fines. In so doing he acted against the Laws of Malawi, as well as the set rules of the tribunal under the by-law. In Chapter 9 on the by law, and under the heading Powers of the Tribunal, the tribunal provides that

*“Upon the finding of guilt, the tribunal shall have powers to order the offender to pay fine or order the offender to perform unpaid community work in accordance with the provisions of these by-laws, but the tribunal shall have no powers to order a sentence of imprisonment”.*

Clearly the act of sending individuals in custody to force the payment of a fine is not allowed under the by-law. The recourse is to order a fine or order community work. It is the finding of this Court that the actions of the FGM as he chaired the tribunal and the actions of the CPC were not consistent with the notions of fairness, legality and rationality and with the right to liberty or other constitutional rights.

**5. *Whether the decision of the said Magistrate made in the lower court proceedings ordering that the parent of every Applicant accused of being pregnant or causing pregnancy who had been fined but had absconded, to be remitted into the custody of the said police until the absconding Applicant***

***gave himself or herself up or until the fine was otherwise paid is in accord with the common law notions of rationality, legality and is consistent with the right to liberty and other constitutional provisions;***

5.1. Ordinarily, law works on the basis of punishing the one who has offended or broken the law. The law only departs from this when another person bound by a bond on behalf of the offender is held accountable if the offender has failed to fulfil conditions set by the court, see ***section 106 and section 124 of the Criminal Procedure and Evidence Code.***

5.2. There is no provision in the Constitution of Malawi, in any legislation of parliament or any recognized written law that prohibits or criminalises getting pregnant or making a girl pregnant. The action of the FGM to act under the by-laws and impose a fine through a court of law was against this jurisdiction and powers. Magistrates, no matter how highly they are regarded in a community or locality they live and work, cannot act outside the set laws of Malawi. It was held in the case of ***Mpinganjira v Lemani and another [2000-2001] MLR 295***, that magistrates cannot act or make orders in the absence of any statutory power and/or jurisdiction conferred on magistrates. It is the view of this Court that if magistrates do make orders outside of their power or jurisdiction, such orders are illegal and an abuse of power. By conferring statutory power and jurisdiction, the law aims at removing anarchy and chaos that would ensue if every magistrate saw need to act and make orders that are *ultra vires*.

5.3. The by-law enforced by the CPC penalises parents specifically on two aspects; for allowing a child to get married, and for stopping children from attending school. The rest of the penalties are for the children to bear individually, or to any person in general who fails to act in a way that promotes the rights of the children. The Court notes that on any penalties to do with the children specifically, there is no penalty for getting pregnant or making a girl pregnant. It is therefore wrong to penalise the various Applicants for falling pregnant, making a girl pregnant or as parents failing to pay a fine for their child who has failed to answer the summons or failed to pay a fine imposed on them. The CPC and the FGM acted both against its own rules and against the laws of Malawi and must

be condemned in the strongest terms. The fines that were wrongly collected ought to be paid back.

**6. *Whether the decision of the Magistrate which prohibited or impeded the Applicants who were in custody from sitting for and writing MANEB examinations is in accordance with the Applicants section 25 right to education and other constitutional provisions?***

6.1. While the Constitution of the Republic of Malawi protects the right to education as a fundamental right in section 25, it also provides for the promotion of education and the eradication of illiteracy in Malawi in various other section, and incorporates the right to education as part and parcel of the right to development. Education is very important and under section 13 (f) of the Constitution of the Republic of Malawi it is provided that the State shall promote the welfare and development of the people of Malawi by adoption and implementation of policies and legislation aimed at achieving, among other things, education.

6.2. The by law passed by T/A Malanda, enforced by the CPC and the tribunal also are in support of keeping children in school by removing any external negative influence that could interfere or stop the children from continuing and attaining education. To this end, any measures or penalties passed by the tribunal under the by-law must at all times respect the right to education and the fact that the by law was ensuring that children attain that education.

6.3. The Applicants herein state that those who were in custody were precluded from sitting for their Malawi Examination Board examinations. This Court notes that there is no evidence in the affidavit pertaining to the sitting for examinations in terms of dates and examination time tables. Be that as it may, and as stated above, the CPC and the FGM acted against their own by law, which aim to promote education, and they must be held fully accountable for such acts.

**7. *Whether the Respondent or any private club or society or unincorporated association has the right under the present constitutional dispensation to make penal rules which apply to its members and/or members of the community in which the club or association is situated or operates?***

7.1. The by-law under T/A Malanda Chambu Chifipa was made through a consultative process that included children and the community at large. There are 45 chiefs in T/A Malanda Chambu Chifipa and 45 Community Based Child Committee in the area. The applicant herein come from GVH Chenyentha, who is under the said TA Malanda Chambu Chifipa. As stated above, the aim of the by-laws is noble in that children are meant to be protected from all forms of dangers and abuse, including alcoholism, smoking, drug abuse, child labour and prostitution and sexual abuse.

7.2. The definition of a child in the by-law, which was fully accepted by the community, is that

*“A child is a person below the age of 18 years but has not married, or he or she is above 18 years and still schooling either at Primary School or Secondary School”.*

This definition has obviously been qualified to meet the needs of the community. A look at the ages of the girls concerned is that they were all above 18 years. In essence this means that legally they are adults and part of the community in which the by-law operates and by virtue of being in that community they subscribed to the by law. It is the finding of this Court that the by-law was well accepted by the community in which the Applicants came from. There are no issues herein that are raised showing that the by-law was oppressive. The issue before this Court is that the magistrate acted wrongly and against the law in using the court process to advance a community based process which has its basis in a by law made by the Chief.

7.3. Traditional Authority Malanda and or the CPC is not a club or an association and as such they are not held under the rules of associations. As stated above, the by-law save a noble cause but it is their implementation that was wrong. Furthermore, the FGM herein did not even do what the by-law is stating. The only issue this Court is concerned about is that the monetary penalties are very high and can cause undue hardship on the community members. Under current laws, a magistrate can only make a penal sanction under the law. Any by-laws made by communities must engage the use of sanctions akin to what traditional leaders are allowed to pass within their localities.

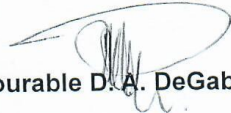
## **8. Conclusion**

- 8.1. Looking at the above, this Court concludes that the FGM had no jurisdiction and no authority to use the lower court premises as a venue for carrying out the activities or proceedings of the CPC. From the evidence, this was not a proper CUC meeting but a process to find and apportion blame and liability on the issue of the 16 or 20 girls who became pregnant. The FGM was not presiding over the process as a chairperson of the CUC, but as a tribunal on behalf of the CPC. The FGM had no authority to use the lower court stationary and court seal and the lower court staff to carry out a this process. The FGM usurped his powers and acted *ultra vires* in ordering people to pay fines and then ordering the police to hold such persons in custody for failing to pay the fine through a court process, on an issue that arose from the by law of T/A Malanda.
- 8.2. By enforcing the by-law through the court process, the FGM had overstepped the role of the judiciary enshrined under section 9 of the Malawi Constitution. He did not comply with the provisions of section 12 (b) and (f) of the Constitution that he exercise power as a magistrate under lawful authority and observe and uphold the rule of law by being involved in the making of the by-law, and adopting them and sitting as judge in their implementation, the FGM failed to observe impartiality and independence as provided for in Section 42 (2) (f) (i) and Section 103(1) of the Constitution. He failed to uphold human rights and freedoms enshrined in the Bill of Rights.
- 8.3. The by-laws were not a subsidiary legislation in both the actual and legal sense. The penal aspects of the same were questionable. In many areas where by laws are made, the penalties include payment of chicken, goats, some community work or monetary penalties which are very minimal. The Applicants' rights under the Constitution as regards the right to liberty, the right to freedom and security of the person, the right to education and other rights were violated during the legal proceedings taken against them. The decisions and orders of the FGM were illegal, irrational and unconstitutional.
- 8.4. The FGM was wrong in allowing the use of a court seal to authenticate a process that is outside the court functions. The FGM claims that he was asked a chairperson on the CUC to preside over the process, but that does not change



the position of the law; that as an FGM, he did not have the jurisdiction to preside over this case on the basis of the secular and unsanctioned by law made by himself and others within the community of Chintheche. He had overstepped his powers by unjustly inflicting punishment on parents and guardians of the youths involved with pregnancies, which penalties were not even provided for in the by law itself. To this end, the Applicants herein have a right to claim against the CPC Team, and the FGM in his personal capacity.

**Made in Chambers at Mzuzu Registry this 14th day of March 2019**



**Honourable D. A. DeGabriele**

**J U D G E**