

THE ROLE OF THE JUDICIARY IN SAFEGUARDING AND ENSURING ACCESS TO CRIMINAL JUSTICE DURING THE PRETRIAL STAGE: THE CASE OF MALAWI¹

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Introduction

Malawi's democratic Constitution contains provisions that protect various rights of criminal suspects pertaining to arrest, detention and fair trial³ as well as the interdependent rights to dignity,⁴ personal liberty⁵ and access to justice⁶ that are intended to fundamentally transform the administration of criminal justice. These progressive provisions are critical in protecting the rights of the accused and guiding the nation to shift away from the harsh and brutal style of law and order that prevailed during the one party era.⁷

In the last two decades of democratic governance, various initiatives have been implemented aimed at the revamping of the criminal justice system to increase access to justice for detained and accused persons. Some of the focus areas have been to ensure that remand prisoners and poor people have greater access to the criminal justice system at the pretrial stage.⁸ This enormous task has yielded many promising results, although fragmented and insufficient. A 2011 audit of pretrial detainees "revealed a number of systemic procedural and structural problems in the criminal justice system" that contribute to the situation of prolonged detention without being brought before a court law to be charged or tried.⁹ Considering the universal acceptability of the constitutional principle of presumption of innocence,¹⁰ the overuse of pretrial detention is perturbing as it results in the violation of the human rights of suspects and undermines the rule of law. The criminal justice system still needs to work on reducing delays in criminal cases at the pretrial phase as there is risk of injustice to both the accused and the victim if inordinate delays are experienced.

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- 2 Judge of the High Court of Malawi; LL.B (Hons.) (University of Malawi), M.A. (Rutgers University), LL.M (University of Cape Town).
- 3 Constitution of Malawi, 1994, section 42.
- 4 Constitution of Malawi, 1994, section 19.
- 5 Constitution of Malawi, 1994, section 18.
- 6 Constitution of Malawi, 1994, section 41.
- 7 *Chomela and Another v Republic* [1995] 1 MLR 93, 95; DM Chirwa Human Rights under the Malawian Constitution (2011) 415.
- 8 C Msiska, V Mhango and J Redpath *Pre-trial Detention Custody Time Limits, Ensuring Compliance in Malawi* (2013); University of the Western Cape, Community Law Centre (CLC), the Centre for Human Rights and Rehabilitation (CHRR), the Centre for Human Rights Education, Advice and Assistance (CHREAA), the Paralegal Advisory Service Institute (PASI), the Catholic Commission for Justice and Peace (CCJP), and Open Society Initiative for Southern Africa (OSISA) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration* (2011).
- 9 C Msiska et al. *Pre-trial Detention Custody Time Limits, Ensuring Compliance in Malawi* (2013) 4.
- 10 Constitution of Malawi, 1994, section 42(2)(f)(iii).

This paper examines legislation and case law in order to understand the critical role of the Malawi judiciary in safeguarding and ensuring access to criminal justice during the pretrial stage by ensuring that arrested persons are charged promptly and not subjected to prolonged periods of detention. The limitations of time factored into the legal regime for the protection of accused persons, such as the 48 hours rule and pretrial custody time limits, constitute a process for attaining optimum levels of efficiency.¹¹ It is contended that the time limits should not only guide the practice but should also be used as a tool by which the criminal justice system could be measured as they help to assess the effectiveness of the law and practices and its impact on the human rights of those in Malawi. The measurements incorporated in the criminal procedure enable a better understanding of whether the criminal justice system is achieving its objective of improving access to justice at the pretrial stage. Where there are challenges, appropriate interventions can be implemented that would lead to an improvement in problematic practices and a better performance of the criminal justice system.

The paper will begin by highlighting what “access to justice” means and its relationship to human rights. This will be followed by a discussion of the judicial enforcement of the rights of the accused through an examination of the interpretation of the 48 hours rule and pretrial custody time limits as mechanisms for reducing delays in the dispensation of justice during the pretrial process. The paper will conclude by discussing the need to uphold the accused’s constitutional right to be released unless the interests of justice dictate otherwise.

Access to Justice: Meaning of the Concept and its Relationship to Human Rights

One of the targets under Goal 16 of the Sustainable Development Goals is to “promote the rule of law at the national and international levels and ensure access to justice for all”.¹² Access to justice can be defined as “the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards”.¹³ The existence of various modes through which people access justice is also supported by the findings of a study on women and the administration of justice in Malawi.¹⁴ Accordingly, access to justice is more than improving a person’s access to judicial recourse but entails the availability of accessible, affordable, timely and effective means of redress or remedies.¹⁵

The right to access to justice is recognised in section 41 of the Constitution and is widely acknowledged under the international human rights framework. Some of the core instruments on the issue are the Universal Declaration of Human Rights,¹⁶ the International Covenant on

11 Constitution of Malawi, 1994, section 42(2)(b); see also Statute Law (Miscellaneous Provisions) Act 27 of 1967, sections 16(6) (a)(i) and (ii); Criminal Procedure and Evidence Code (CPEC) Cap. 8:01 of the Laws of Malawi, section 35.

12 United Nations *Sustainable Development Goals* available at <http://www.un.org/sustainabledevelopment/peace-justice/> (last accessed: 25 Sept 2016).

13 United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner’s Guide to Human Rights-Based Approach to Access to Justice* (Bangkok: UNDP, 2005).

14 Women and Law in Southern Africa Research Trust *In Search of Justice: Women and the Administration of Justice in Malawi* (2000) 108.

15 FE Kanyongolo *Malawi Justice Sector and Rule of Law* (2006) 20.

16 Universal Declaration of Human Rights (1948) articles 6, 8, 10.

Civil and Political Rights,¹⁷ and the African Charter on Human and People's Rights.¹⁸ These conventions link access to justice and human rights protection by legally recognising all persons and providing that everyone has access to the courts where they can seek an effective remedy against violations of fundamental rights.¹⁹ The recourse to this fundamental right and important State obligation should be expeditious and have a reliable time frame for disposal of matters for it to be effective and efficient.

The Malawi Growth and Development Strategy II²⁰ includes improving access to justice as one of the central themes for democratic governance. To facilitate the implementation of the national development policy the Democratic Governance Sector Strategy²¹ has identified its second key result area as the strengthened rule of law, improved access to justice, public safety and security. The judiciary is a key institution that plays a major role in implementing the reforms under the abovementioned strategy. Indeed the success of Malawi's democratic governance "depends on the capacity of the Judiciary to enforce constitutional limits on the executive".²² Consequently, the judiciary articulates its mission as "to provide independent and impartial justice and judicial services that are efficient and that earn the respect, trust and confidence of society".²³ These policy documents emphasise that ensuring citizens' access to justice is a crucial fundamental right and an important State obligation.

Legislative Mechanisms to Reduce Delays at the Pretrial Stage

The judiciary has the supreme responsibility to safeguard and protect the various rights that accrue to persons arrested or detained for allegedly committing a criminal offence. Some of the main procedures that take place at the pretrial stage are the commencement of criminal proceedings, applications for release or bail pending trial and framing of charges.²⁴ Sections 42(2)(a), (b), (c), (d) and (e) of the Constitution guarantee an accused person various pretrial rights that must be respected and observed before trial begins. Notably section 42(2)(b) of the Constitution has elevated to a constitutional right remedies for detained persons that are contained in sections 16(6)(a)(i) and (ii) of the Statute Law (Miscellaneous Provisions) Act and section 35 of the Criminal Procedure and Evidence Code (CPEC).²⁵

Delays in bringing cases to trial has been identified as one of the impediments to the efficient administration of justice which governance sector reforms must address.²⁶ The compliance with time limits at the pretrial stage is critical because delay in commencing criminal proceedings

17 International Covenant on Civil and Political Rights (1976) articles 2, 14, 16.

18 African Charter on Human and People's Rights (1986) articles 5, 7, 26.

19 NS Okogbule "Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects" (2005) 3 *SUR* 95, 97.

20 Government of Malawi, *Malawi Growth and Development Strategy II* 2011-2016 (2012) 65.

21 Government of Malawi, *Building Accountable and Transparent Institutions – Democratic Governance Sector Strategy* 2013-2017 (2012) 13.

22 J Liabunya "Judicial Accountability in Democratic Malawi: A Critical Assessment" (2012) 6(2) *Malawi LJ* 203, 205.

23 Available at <http://www.sdn.org.mw/judiciary/information.htm> (last accessed: 6 December 2016).

24 D Newman *Criminal Procedure and Evidence in Malawi* (1982).

25 *In re Muluzi* [1993] 16(2) MLR 642.

26 FE Kanyongolo *Malawi Justice Sector and Rule of Law* (2006) 115; NS Okogbule "Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects" (2005) 3 *SUR* 95, 99; S Baradaran "The Presumption of Innocence and pretrial detention in Malawi" (2010) 4 *Malawi LJ* 126 to 127.

amounts to conduct on the part of the prosecution which is “oppressive, unfair and unjust”.²⁷ This section will examine the legislative mechanisms for reducing delays at the pretrial stage of the criminal process and illustrate through case law how the judiciary protects the presumption of innocence and promotes access to justice for detained persons.

The 48 Hours Rule

The right to be released from detention if the detention is first, unlawful,²⁸ secondly if the State has failed to charge an arrested person within the period of 48 hours after arrest;²⁹ and thirdly in exercise of the right to bail³⁰ buttresses the general principle that every person charged with a criminal offence is presumed innocent until proved guilty.³¹ One of the pretrial rights which pertains to the timely implementation of pretrial activities is the right of an accused to be brought before a court of law within a reasonable time and not more than 48 hours after his arrest, so that he can be charged or be informed of the reason of his detention.³² The right is for the State to treat the citizen as the section requires in the time specified otherwise the citizen is to be brought under judicial surveillance. The 48 hours limitation of time, also known as the ‘48 hour rule’,³³ ensures prompt judicial control and check on executive actions affecting citizen’s rights. The 48 hours rule imposes a duty on the State and entrenches citizens’ right to be brought before a court of law within the prescribed time.³⁴ The 48 hours rule affords the citizen a prompt opportunity to assert and test the reasonableness of the State’s deprivation of pretrial rights. The High Court in *State and Others ex p Dr Chilumpha*³⁵ found that the decision by the respondents to keep the applicant for more than 48 hours before taking him to court to be unreasonable in the *Wednesbury* sense and the applicant could have sought the remedy of *habeas corpus*.

Challenges to the right

The pervasive delays in bringing detained persons before courts has made enforcement of pretrial rights “one of the most litigated rights in Malawi”.³⁶ The case statistics at the High Court Principal Registry show that a total of 1,104 motions for bail or release from custody were registered during a seven year period between January 2010 and June 2016.³⁷ The resultant annual average of 157 applications is an indicator of the volume of suspects of serious criminal offences on pretrial detention who have challenged their right to liberty in court. The data also provides some idea of the extent to which pretrial detention for serious offences is being used in the jurisdiction.

27 *Chinkhadze and Another v Anti-Corruption Bureau* MSCA Criminal Appeal No. 1 of 2003, [2004] MLR 39, 43.

28 Constitution of Malawi, 1994, section 42(1)(f).

29 Constitution of Malawi, 1994, section 42(2)(b).

30 Constitution of Malawi, 1994, section 42(2)(e).

31 Constitution of Malawi, 1994, section 42(2)(f)(iii); D Newman *Criminal Procedure and Evidence in Malawi* (1982) 46; DM Chirwa *Human Rights Under the Malawian Constitution* (2011) 429.

32 Constitution of Malawi, 1994, section 42(2)(b); Criminal Procedure and Evidence Code, Cap. 8:01 of the Laws of Malawi, section 35(2).

33 *State and Others ex p Dr. Chilumpha* [2006] MLR 406.

34 *In the Matter of Khasu* [2002–2003] MLR 73.

35 [2006] MLR 406.

36 DM Chirwa *Human Rights under the Malawian Constitution* (2011) 429.

37 High Court of Malawi: Principal Registry, Criminal Registry data June 2016.

In the cases where prolonged detention has been challenged, the High Court has found the State in violation of the citizen's right to be brought to a court of law within 48 hours and has invoked the constitutional provision as well as exercised its discretion to respect the presumption of innocence and terminate the continuous violation.³⁸ The judicial pronouncements reveal that courts have tried to take citizens' rights seriously with a general guideline direction that:

“where the prospect of trial are as good as or better when the citizen is released on bail than when he is remanded in custody, justice and good public policy demand that the option upholding the citizen's right to liberty and presumption of innocence should be preferred.”³⁹

In *Chomela and Another v Republic*⁴⁰ the applicants had been in detention for about two months without being charged before a court of law. The High Court was of the view that every arrested and detained person must be brought before an independent and impartial court within 48 hours without exception and held that this provision is “in the Constitution primarily as a safeguard against wanton and arbitrary arrests and detentions; the rough and bitter experience of the past in this country which was an inescapable reality.”⁴¹ To avert the apprehension created by the State's uncertainty of when trial would commence the Court made an order that the State bring the applicants before a court of law on or before 22 September 1995, failing which the applicants were to be released on bail on the conditions that the Court had already fixed.

In *the Matter of Khasu*⁴² the applicants who were arrested and kept in custody for 14 days on allegations of murder filed an application at the High Court contending that the State had violated section 42(2) (b) of the Constitution and sought to be released on bail. The Court observed that there seemed to be “a laxity undesirable for this application and the right violated.”⁴³ The Court opined that:

“State organs cannot, however, avoid constitutional duties and responsibilities under the section because of administrative or financial difficulties. The weight a democratic constitution attaches to the citizen's rights should, in my judgment, be matched with prioritising and desire to attain efficiency levels that uphold and promote rights. Any other approach results in violation of rights.”⁴⁴

Although the 48 hours rule sounds ideal, it is a time bound standard by which the efficiency in arresting, charging and bringing suspects before court in the criminal justice system should be measured. Methodical implementation requires that magistrates regularly call for apprehension reports from police stations, in accordance with section 36 of the CPEC, in order to verify whether the State is complying with the provision and follow up on the status of detained persons who have not been brought to court to be charged and take plea.

38 See *Chomela v Republic* [1995] 1 MLR 93; *In the Matter of Khasu* [2002–2003] MLR 73; *Tembo v Republic* (1) [1995] 2 MLR 408.

39 *In the Matter of Khasu* [2002–2003] MLR 73, 77.

40 [1995] 1 MLR 93.

41 *Id* 95. DM Chirwa *Human Rights under the Malawian Constitution* (2011) 424.

42 [2002–2003] MLR 73.

43 *Id* 75.

44 *Id* 78.

Pretrial custody time limits

After the expiry of the 48 hours post-arrest of an accused, computation of pretrial custody time limits begin. Pretrial custody time limits are provided for under Part IVA of the CPEC and are intended to expand on and better reflect the provisions of section 42 of the Constitution. The maximum period that an accused can be held in custody pending trial will depend on the “jurisdiction of the court trying the accused” and “the seriousness of the offence.”⁴⁵ In a subordinate court an accused person can be held in custody pending commencement of his trial for a maximum period of 30 days.⁴⁶ For offences that fall within the jurisdiction of the High Court, an accused can be detained in custody pending committal for trial in the High Court for a maximum period of 30 days.⁴⁷ For those criminal matters that have been committed to the High Court the pretrial custody limit is ordinarily 60 days and a 90 days custody limit in serious cases such as homicide matters.⁴⁸ Section 161H of the CPEC allows for one additional 30 day extension, accordingly, the maximum pretrial custody time limit for homicide matters is 120 days.⁴⁹ At the expiry of a custody time limit a court may grant bail on its own motion;⁵⁰ on application by or on behalf of the accused or on information from the prosecution.⁵¹ An extension of the time limit can be granted where the prosecution can show good and sufficient cause. The cases of *Bamusi and Others v Republic*⁵² and *Taipi v Republic*⁵³ have held that expiry of pretrial custody time limits does not lead to an automatic release.

Detention before trial after the custody time periods are exceeded should lead a court to form the view that further detention without commencement of trial violates the presumption of innocence,⁵⁴ is unreasonable and a judicial officer should seriously consider exercising discretionary powers to release persons who have been in prison longer than necessary. Long periods of pretrial detention breach the statutory provision and cause disquietude because the practice negatively impacts on the enjoyment of human rights to liberty and dignity, as detained persons risk “losing contact with family and friends, job loss and future unemployment, or loss of livelihood, damaged careers, communicable diseases and exposure to violence and corruption.”⁵⁵ The malpractice also contributes to overcrowding in our prisons which violates the human dignity of prisoners.⁵⁶

45 University of the Western Cape, Community Law Centre (CLC), the Centre for Human Rights and Rehabilitation (CHRR), the Centre for Human Rights Education, Advice and Assistance (CHREAA), the Paralegal Advisory Service Institute (PASI), the Catholic Commission for Justice and Peace (CCJP), and Open Society Initiative for Southern Africa (OSISA) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration* (2011) 38-39.

46 CPEC, Cap. 8:01 of the Laws of Malawi, section 161D.

47 CPEC, Cap. 8:01 of the Laws of Malawi, section 161E.

48 CPEC, Cap. 8:01 of the Laws of Malawi, sections 161F and G.

49 See *Kandiado v Republic*, HC/PR Bail Cause No. 2 of 2016 (29 March 2016) (unreported); *Chensewu v Republic*, HC/PR Bail Cause No. 11 of 2016 (29 March 2016) (unreported).

50 CPEC, Cap. 8:01 of the Laws of Malawi, section 161I; *Gadabwali v State* MSCA Miscellaneous Criminal Appeal No. 2 of 2013 (3 May 2013) (unreported).

51 CPEC, Cap. 8:01 of the Laws of Malawi, section 161I.

52 HC/PR Bail Application No. 8 of 2013 (22 March 2013) 3.

53 MSCA Criminal Appeal No. 9 of 2014 (18 May 2015) (unreported).

54 S Baradaran “The Presumption of Innocence and pretrial detention in Malawi” (2010) 4 *Malawi LJ* 124.

55 Open Society Foundations (OSF) *Strengthening Pretrial Justice: A Guide to the Effective Use of Indicators* (2015) 13 available at <https://www.opensocietyfoundations.org/publications/strengthening-pretrial-justice-guide-effective-use-indicators-0> (last accessed: 26 September 2016).

56 *Masangano v Attorney General* [2009] MLR 171.

Pretrial custody time limits establish a uniform approach to guide and assist prosecutors and judicial officers in their pretrial detention decision-making by setting a reasonable time for incarceration. The time limits maintain the notion that time lapsed is a critical factor to be taken in consideration when a court exercises its discretion on whether or not to grant bail. The Bail (Guidelines) Act and case law support the view that “bail is not something that has to be granted regardless of period”.⁵⁷ However, the enactment in 2010 of the pretrial custody time limits overrides decisions that demanded for lengthy pretrial detention, such as *Tayub v Republic*⁵⁸ where it was held that “to release a murder suspect within two or even twelve months on bail, will be against public policy”.⁵⁹

In terms of implementation, police stations and prisons who are practically in the best position to measure custody time length have been shown to lack the procedures and tools of tracking custody time periods and ensuring adherence.⁶⁰ In practice the pretrial custody time limits have not been easy for State organs to implement over the years and study findings prove that some detainees have experienced excessive detention indicating the breach of the statutory provision.⁶¹ Prison statistics for February 2016 reveal that out of a total of 11,187 prisoners, 2,603 were on pretrial detention and 546 of the remandees had been detained for more than 90 days.⁶² It is imperative that stakeholders in the criminal justice system prioritise matters of pretrial detainees when enforcing pretrial custody time limits, considering bail and setting down matters for trial.

The case of *Taipei v Republic*

Enforcement of pretrial custody time limits have been the subject of a direct decision by the Supreme Court of Appeal (SCA) in the case of *Taipei v Republic*.⁶³ The brief facts in the abovementioned case were that the appellant, Mabvuto Taipei, was arrested on 15 September 2007, about a year from the time of the occurrence of an alleged murder and was remanded into custody at Mulanje Prison. On 11 November 2007 he escaped from lawful custody and it took almost seven years before he was re-arrested on 13 January 2014. The appellant’s initial application before the High Court for pretrial bail was rejected on 23 June 2014 and his appeal to a single judge of the SCA was also dismissed. A three member panel of the SCA bench was then called upon to:

“determine whether it is legally correct for any Court of Law to exercise discretion when considering bail in cases where the applicable pre-trial custody time limit has been exceeded, or whether in such cases the Court has no choice at all but to grant bail as a matter of course and in any event.”⁶⁴

57 *Tayub v Republic* HC/LL DR Criminal Cause No. 49 of 1997 (unreported) (4 July 1997) 10.

58 *Id.*

59 *Id.*

60 C Msiska, V Mhango and J Redpath *Pre-trial Detention Custody Time Limits, Ensuring Compliance in Malawi* (2013) 4.

61 University of the Western Cape, Community Law Centre (CLC), the Centre for Human Rights and Rehabilitation (CHRR), the Centre for Human Rights Education, Advice and Assistance (CHREAA), the Paralegal Advisory Service Institute (PASI), the Catholic Commission for Justice and Peace (CCJP), and Open Society Initiative for Southern Africa (OSISA) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration* (2011) 67; S Baradaran “The Presumption of Innocence and pretrial detention in Malawi” (2010) 4 *Malawi LJ* 126, 129 to 130.

62 LD Mtengano “The State of Overcrowding in Malawi Prisons: Challenges and Strategies for Reducing Prison Population” (2016) *Report of the Criminal Justice System Stakeholders Workshop* 24.

63 *Taipei v Republic* MSCA Criminal Appeal No. 9 of 2014 (18 May 2015) (unreported).

64 *Id.* 6.

The SCA held that sections 161 G and I of the CPEC “being mere creatures of a Statute, cannot pretend to be as powerful as, or even to be superior to, the provisions of Section 42(2)(e) of the Constitution”.⁶⁵ That the general guideline under section 42(2)(e) of the Constitution cannot be confined to a limited period of time by setting boundaries within which the constitutional provision should operate. The SCA stated that it was:

“...convinced that in setting pre-trial custody time limits sections 161 G and I of the CP & EC were not meant to dislodge, or to otherwise overtake, the constitution on its basic requirements for considerations of bail. Rather, we believe they were meant to aid the Constitution by empowering the Courts to, even on their own motion, step in and consider bail when they see the time limits not respected. We accordingly reject the argument of the appellant to the effect that these provisions have since set up a new regime of viewing pre-trial bail in all cases where pre-trial custody time limits have been exceeded. While we are aware that in most cases where the State has held a crime suspect for a longer period of time than the prescribed pre-trial custody time limit Courts will almost inevitably conclude that it is contrary to the interests of justice to prolong such incarceration, this to us does not necessarily mean that in every such case Courts cannot choose whatever they consider to be the most just way of determining a bail application that comes before them.”⁶⁶

The SCA has settled the issue of enforcement of pretrial custody time limits by holding that the discretion section 42(2)(e) of the Constitution confers to the courts to exercise in relation to all persons that have been arrested for or accused of crime continues after the expiry of the pretrial custody time limits that have been set by the CPEC. The SCA having found the appellant to be an “undoubted flight risk” proceeded to dismiss the appeal. However, the Court knowing that swiftness is of essence in management of criminal matters and noting that there was “no visible sign that the State is at all minded to prosecute the appellant for murder it is holding him in custody for” was of the opinion that the appellant could not be kept in “endless detention without hope of a trial”.⁶⁷ On 18 May 2015 the SCA ordered the Director of Public Prosecutions to commence prosecuting the appellant within 30 days of the order failing which the appellant was to be released on bail. The State having failed to comply with the conditional order, the appellant was released on bail on 24 June 2015.

The Right to be Released and the Concept of Interests of Justice

The case of *Taipi v Republic*⁶⁸ emphasises the importance of exercising discretionary powers when applying section 42(2)(e) of the Constitution, which provides an accused person a constitutional right “to be released from detention with or without bail, unless the interests of justice require otherwise”. The expression “interests of justice” is a fluid concept which the case of *Kasambara v Republic*⁶⁹ has interpreted as referring “to those considerations that are aimed at achieving fair and equitable decision making in the administration of justice”.⁷⁰ The Court in *Tembo and Others*

65 *Id* 7.

66 *Id* 7-8.

67 *Id* 10.

68 *Id*.

69 MSCA Criminal Appeal No. 13B of 2015 (20 November 2015) (unreported).

70 *Id* 10.

*v Republic (1)*⁷¹ held that:

“It is in the interests of justice that those accused of committing a crime should be brought to book and that it is also in the interests of justice that those not guilty of crime should be exculpated of the allegations against them.”⁷²

The cases of *Phiri and Another v Republic*,⁷³ *Zgambo v Republic*,⁷⁴ *Mvahe v Republic*,⁷⁵ and *Lunguzi v Republic*⁷⁶ in interpreting this right have held that section 42(2)(e) of the Constitution has not given an absolute right to bail and courts retain a discretion on whether to grant or refuse admission to bail. The key principles developed by the courts in considering applications to be released from detention have been codified under section 3 of the Bail (Guidelines) Act.⁷⁷ Paragraph 4(a) of part II of the Schedule under Bail (Guidelines) Act, *Selemani v Republic*,⁷⁸ and *Tembo and Others v Republic (1)*⁷⁹ put the primary consideration in determining where the interests of justice lie as whether the accused person is likely to appear at the appointed time to stand trial. The public interest in bringing offenders to justice and a citizen’s right to a quick and speedy trial, are some of the factors courts regard in balancing the interests of justice when deciding whether to release the citizen unconditionally or on bail. In some matters the choice may not be easy to make. In *Phiri v Republic*⁸⁰ the Supreme Court of Appeal found that the High Court did not appear to have balanced the personal interests of a murder suspect and the interests of justice as required by section 9 of part II of the Bail (Guidelines) Act and proceeded to order the release of the appellant on bail with conditions.

The burden lies on the State to justify on a balance of probabilities why bail should not be granted.⁸¹ To discharge this burden the State must prove that interests of justice requires that bail should not be granted by proving to court circumstances working against bail.⁸² In enforcing this right an accused person can be released on bail even where pretrial custody time limits have not expired.⁸³ In *Banda v State*⁸⁴ the High Court granted bail to a murder suspect who had been on remand for less than a month as the Court was not satisfied by the arguments of the State that the release of the applicant from his detention would cause a sense of shock and public outrage in a community where several other homicide suspects in famous cases had been released from detention on bail and there had been no public outrage. While released, the accused failed to attend commencement of his trial on 22 July 2015 which led to revocation of his conditions of bail and issuance of a warrant of arrest.

71 [1995] 2 MLR 408.

72 *Id* 410.

73 [2000–2001] MLR 369, 370–371.

74 [1999] MLR 405.

75 MSCA Criminal Appeal No. 25 of 2005 (unreported).

76 [1995] 1 MLR 135.

77 Act 8 of 2000, Cap. 8:05 of the Laws of Malawi.

78 [1993] 16(2) MLR 793, 795.

79 [1995] 2 MLR 408.

80 MSCA Criminal Appeal No. 16 of 2015 (unreported) (18 November 2015) 5.

81 *Kamwangala v Republic* MSCA Miscellaneous Criminal Appeal No. 6 of 2013 (unreported).

82 *Id* 13.

83 Section 161J of the CPEC.

84 HC/PR Bail Application No. 81 of 2014 (unreported) (21 August 2014).

Where bail is denied the applicant can re-apply for the relief where there is proof of a change in the circumstances of the accused or he can appeal. In *Republic v Yiannakis*⁸⁵ the fact that more than six months had passed since the arrest of the accused without a prospect of a reasonably speedy trial was considered to be a changed circumstances that merited admitting the accused to bail.

Conclusion

This paper has shown that the Constitution of Malawi and the CPEC provide for time limits aimed at increasing access to justice for the accused by fostering speedy processes at the pretrial stage. The implementation of the 48 hours rule and pretrial custody time limits can contribute to upholding the principle of presumption of innocence and thereby avoid pretrial detention unless the interests of justice dictate otherwise.⁸⁶ However, the case law and prisoner statistics reveal violations of the law in that some accused are experiencing pretrial detention of excessively long duration. Detention places accused persons in a vulnerable position and long periods of incarceration exceeding the legally permissible period without trial are contrary to the interests of justice and breach human rights. The challenges in upholding the time limits call for the need to devise and implement strategies that would improve the implementation of custody time limits which may entail developing and promulgating appropriate rules of criminal procedure. However, proactive approaches taken by stakeholders in the criminal justice system to curtail prolonged pretrial detention and control the remand prisoner population by regularly conducting camp courts, where considerations for pretrial release or setting down matters for plea and directions hearing can be made, are a welcome development as they contribute towards the protection and promotion of pretrial rights of poor and marginalised detainees.⁸⁷

85 [1995] 2 MLR 497.

86 Constitution of Malawi, 1994, section 42(2)(e); Open Society Foundations (OSF) *Strengthening Pretrial Justice: A Guide to the Effective Use of Indicators* (2015) 20; S Baradaran "The Presumption of Innocence and pretrial detention in Malawi" (2010) 4 Malawi LJ 126, 133.

87 See for example Court User Committee *Performance Standards for the Criminal Justice System and Guidelines for Visiting Prisons and Police Stations* (2013) 6 to 7.