

# WOMEN'S ECONOMIC RIGHTS: REMOVING BARRIERS TO WOMEN'S ACCESS TO JUSTICE IN MALAWI

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## Introduction

The Malawi Constitution provides that any law that discriminates against women on the basis of gender shall be invalid.<sup>2</sup> This is right closely relates to other rights including the right to freely engage in economic activity; the right to development; and the right to fair and safe labour practices without discrimination.<sup>3</sup> “Economic rights” in this paper refers to the right to earn a dignified living through decent work whether in the public or private sector, operate successful businesses and serve in elected positions to run public affairs.

World Bank reports have highlighted some adverse findings in relation to women's economic rights in Malawi. For example, the lack of legislation on paternity leave, no provision on access of nursing mothers to break times to nurse their babies, no mandate for flexible work times and schedules for nursing mothers, no prohibition against enquiring into a woman's marital status during job interviews.<sup>4</sup> In addition, there is no specific tax credits applicable to women, there is no universal provision of free child care, education and support, and although primary education is free it is not compulsory.<sup>5</sup> In 2015, the World Bank reported that Malawi has the lowest income levels in the world.<sup>6</sup> Depressed incomes are a hindrance to accessing health and wellness. By protecting women in employment and business their good health and that of their families would be guaranteed. In addition, customs that promote women's inferior status and hinder their access to economic development such as polygamy, wife inheritance, and property grabbing continue to exist.<sup>7</sup>

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- 2 Section 24 of the Constitution of Malawi, 1994, provides that:
  - “(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status ...
  - (2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as:
    - (a) sexual abuse, harassment and violence;
    - (b) discrimination in work, business and public affairs; and
    - (c) deprivation of property, including property obtained by inheritance.”
- 3 Constitution of Malawi, sections 29, 30 and 31 respectively.
- 4 World Bank Group *Women, Business and the Law: Removing Restriction to Enhance Gender Equality* (2014) 121.
- 5 *Id.*
- 6 World Bank “WB Update Says 10 Countries Move Up in Income Bracket” *Press Release* (1 July 2015) available at <http://www.worldbank.org/en/news/press-release/2015/07/01/new-world-bank-update-shows-bangladesh-kenya-myanmar-and-tajikistan-as-middle-income-while-south-sudan-falls-back-to-low-income> (last accessed: 15 October 2016).
- 7 See Malawi Human Rights Commission *Cultural Practices and Human Rights: A Study into Cultural Practices and Their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi*, 2006.

The Gender Equality Act (GEA) was enacted in 2013 to “promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society, to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment, to provide for public awareness on promotion of gender equality, and to provide for connected matters.”<sup>8</sup>

The courts have the power under the Constitution to interpret, protect and promote people’s rights in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.<sup>9</sup> To a large extent, the success or failure of the objectives of the GEA will depend on the Malawi Human Rights Commission<sup>10</sup> and the courts. In assessing the courts’ enforcement of the GEA, the following questions should be considered:

1. How have the courts interpreted equality of men and women in integration, influence, empowerment, dignity and opportunities?
2. How have the courts ensured that they provide redress for sex discrimination, harmful practices and sexual harassment?
3. How have the courts provided awareness on the promotion of gender equality?

It should however be noted that the role of courts in interpreting, protecting and enforcing rights and freedoms under the law cannot be separated from political will. The role of political leaders in formulating policy is critical in determining the efficiency and effectiveness of courts. For example, the decision of former President of Malawi Dr. Joyce Banda to appoint five female High Court judges brought the number of female High Court judges to seven.<sup>11</sup> This was a good example to other public service appointing authorities to remove the gender gap in decision-making positions. This is the kind of transformation at the highest level of policy formulation that impacts positively on the rights of women. In a country dominated by customary laws and values it is extremely important that more female judges be appointed to the higher benches to counter the negative cultural practices that filter into decision-making processes.<sup>12</sup>

The GEA requires that public offices must be occupied with no less than 40 percent women and the High Court can be approached to issue a compliance order where a recruiting authority does not comply with this provision during appointment.<sup>13</sup> However, in the Malawi judiciary itself women constitute only 28 percent of judges on the bench.<sup>14</sup> As the adjudicating authority of the GEA, it is imperative that the appointing authority bridges this gap to validate the spirit of the Constitution and the GEA.

8 Act No. 3 of 2013, section 23.

9 Constitution of Malawi, 1994, section 9.

10 GEA, sections 8 to 10.

11 Prior to these appointments, the High Court had two female judges while the Malawi Supreme Court of Appeal had two female justices.

12 For example, the High Court in *Demba v Demba* Civil Appeal No 161 of 2006 (unreported) accepted that customary law allowed a man to divorce his wife if she did not comply with her household duties. See DM Chirwa *Human Rights under the Malawian Constitution* (2011) 231.

13 GEA, sections 11 and 12. “...an appointing or recruiting authority in the public service shall appoint no less than forty percent (40%) and no more than sixty percent (60%) of either sex in any department in the public service.”

14 As at December 2016 there were 36 judges in the Supreme Court of Appeal and High Court. Of these only 10 were women (1 in the Supreme Court of Appeal, and 9 in the High Court).

It is also important for the judiciary to put in place deliberate mechanisms that will ensure gender equality. Rather than being an overreach of the court's mandate, judicial activism to right the wrongs against traditionally disadvantaged groups is necessary and commendable. It is no good hiding behind archaic excuses that the 'law has no eyes'. If the legislature thought the law cannot see, it would not have made provisions for affirmative action.

## Redress for Sex Discrimination, Harmful Practices and Sexual Harassment

In taking stock of the courts' contribution towards implementation of the GEA, we should consider the extent to which women access the courts. This should include an analysis of the barriers faced by women in accessing justice. Such an assessment can then contribute towards reform in the judiciary and increased access to the courts by women to assert their economic rights. In this respect, the Chief Justice is tasked to make rules and prescribe fees for those approaching the courts under the GEA.<sup>15</sup> This is a further opportunity to ensure increased access to justice for women.

Even when courts provide quick redress for women, few women currently approach the courts. For example, Court Number 3 in the Commercial Court, a division of the High Court registered 40 cases in 2013. Of these, four cases involved female litigants suing or being sued in their personal capacity. Only one case is still pending conclusion. The reason for this pending case is that the lawyers on both sides have not moved the court to prosecute the case since the last document was filed on 20 October 2014. 36 cases were filed in 2014. Of these none involved a woman suing or being sued in her personal capacity. In 2015, 68 cases were registered. Out of these cases six involved women suing or being sued in their personal capacity and they were all concluded. In 2016, as at 30 August, 74 cases were registered out of which six involved women suing or being sued in their personal capacity. One is concluded, and five are pending court appearance within the months of October, November and December 2016. There is no matter pending judgment and of the sixteen cases involving female litigants except for the one in 2013 only five registered in 2016 are awaiting court appearance within three months. Thus, from a registered 218 cases in a period of close to four years, sixteen involved women demanding or defending their economic rights in business, representing seven percent. Of the sixteen, ten cases have been concluded representing a 62 percent completion rate. Of the sixteen cases, seven involved women suing and the other nine were of women being sued.

## The Industrial Relations Court and Women's Access to Justice

Courts like the Industrial Relations Court (IRC) have made tremendous inroads to help women access justice through its deliberate policies of simple and straightforward procedures, minimum registration fees, speedy disposal of cases, and an ethos of "women first". Furthermore, the Industrial Relations Court has been able to improve court access to many disadvantaged persons, including women, by considering cases from a human rights perspective and maintaining the

<sup>15</sup> GEA, section 22.

supremacy of substance/facts over technicality. A case should not fail because of a technicality, it is the substance of the matter which is critical. Judges ought to prioritise facts and not make decisions in a vacuum when issues of human dignity are at stake.

However, whilst the IRC has issued progressive judgments on women's economic rights prior to the passing of the GEA, the new Act has not automatically resulted in an increase in the number of women seeking access to justice through the IRC. The table below illustrates how women litigants encountered the Industrial Relations Court in the period between 2012 and 2015. Notably, over the four-year period, the total number of women engaging with the court varied very little and averaged at 8.6 percent of the total number of cases registered.<sup>16</sup> Of significance is the increase in registered cases and in female applicants in the Principal Registry in 2014 and 2015 compared to 2012 and 2013.

*Case statistics in the Industrial Relations Court, 2012 to 2015*

Registry	Year	Total cases registered	Female applicants	Female respondents	Total female litigants
Principal	2012	576	65	13	78
Lilongwe	2012	627	9	9	18
Mzuzu	2012	110	11	5	16
Principal	2013	639	50	20	70
Lilongwe	2013	571	6	13	19
Mzuzu	2013	115	19	2	21
Principal	2014	580	88	11	99
Lilongwe	2014	613	3	7	10
Mzuzu	2014	112	7	3	10
Principal	2015	764	81	25	106
Lilongwe	2015	700	4	11	15
Mzuzu	2015	146	15	4	19
<b>TOTAL</b>		<b>5553</b>	<b>358</b>	<b>123</b>	<b>481</b>

Research at the IRC shows that the Court has consistently applied the law to give effect to the objectives of the Constitution on the question of non-discrimination and equal access to economic resources. The following cases are examples of situations where the Industrial Relations Court of Malawi provided redress in complaints of discrimination and sexual harassment.

<sup>16</sup> In 2012, the total number of cases registered in all registries were 1313, with female litigants comprising 8.5 percent. In 2013, the total number of cases registered were 1325, with female litigants comprising 8.3 percent. In 2014, the total number of cases registered were 1305, with female litigants comprising 9.1 percent. In 2015, the total number of cases registered were 1610, with female litigants comprising 8.6 percent.

## HIV discrimination

In *Banda v Lekha*<sup>17</sup> the applicant alleged that she was dismissed from her employment after testing HIV-positive. She was not ill. The Industrial Relations Court held that the reason for the dismissal was discriminatory. Section 20 of the Malawi Constitution prohibits discrimination. The Court noted that although HIV was not included in the prohibited grounds of discrimination listed in the Constitution, given Malawi's international obligations and its commitments under its National AIDS Policy, HIV should be seen as a prohibited ground of discrimination. In this respect, the Court followed the reasoning of the South African Constitutional Court in *Hoffmann v South African Airways*.<sup>18</sup>

## Reproductive health

In *Chinkondenji v Malawi Stock Exchange Ltd*<sup>19</sup> the applicant alleged that in the course of her employment she fell ill and had to undergo a gynecological procedure. Upon her return from sick leave she was demoted, although her salary and benefits remained the same. The Court ordered her reinstatement in her previous position and further restrained the employer from psychologically harassing the applicant.

## Pregnancy

In *Jumbo v Banja La Mtsogolo*<sup>20</sup> the applicant alleged that her employer admonished her for falling pregnant 'at the wrong time' and dismissed her. The Court ordered her reinstatement.

## Maternity leave

In *Chisowa v Ibrahim Cash 'n Carry*<sup>21</sup> the applicant was dismissed immediately after returning from maternity leave. The Court held that a woman is entitled to return to work after maternity leave. She was awarded compensation.

## Sexual harassment

Prior to the enactment of the GEA, there was no definition of sexual harassment. As the cases cited below illustrate, the Industrial Relations Court applied definitions used in CEDAW<sup>22</sup> and other jurisdictions.

The International Labour Organisation (ILO) has defined sexual harassment broadly to include instances when the "victim has reasonable grounds to believe that her objection would disadvantage her in connection with her employment including recruitment or promotion," or "when it creates a hostile working environment."<sup>23</sup> Acts of sexual harassment would include "insults, remarks, jokes,

17 [2008] MLLR 338 (IRC).

18 [2000] 21 ILJ 2357 (CC); 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC).

19 [2008] MLLR 379 (IRC).

20 [2008] MLLR 409 (IRC).

21 [2008] MLLR 385 (IRC).

22 CEDAW General Recommendation No. 12 of 1989.

23 International Labour Organisation *Labour Legislation Guidelines* (2001) Chapter VII, Sexual Harassment.

insinuations and inappropriate comments on a person's dress, physique, age, family situations", and a "condescending or paternalistic attitude undermining dignity, unwelcome invitations or requests that are implicit or explicit whether or not accompanied by threats, lascivious looks or other gestures associated with sexuality, unnecessary physical contact such as touching, caresses, pinching or assault."<sup>24</sup>

The applicant in *Kamkosi v Office of the Ombudsman*<sup>25</sup> alleged that her employer pestered her with small notes inviting her to join him for dinner and demanding her to work in the evenings. Her response to these advances were non-committal and the Ombudsman ordered that she be removed from his office to a dilapidated office. The Court had to consider whether the employer's conduct was fair and whether it amounted to a constructive dismissal. The Court found that a case of sexual harassment had been established.

In *Nazombe v Malawi Electoral Commission*<sup>26</sup> after a misunderstanding at a lakeshore resort with her boss, the applicant was demoted from her position. The Court found that the demotion was unfair and ordered her reinstatement.

In *Ntaba v Continental Discount House Ltd*<sup>27</sup> the applicant alleged that her dismissal was unfair because she had declined to accompany her boss to a lakeshore resort for a weekend. The Court found that this did not amount to sexual harassment but that in dismissing her the employer did not follow rules of procedure. The respondent was ordered to pay compensation in an amount equivalent to three months' salary. The Court's reason for rejecting the applicant's assertion of sexual harassment was that the incident was isolated and that subsequent to that incident the applicant had committed acts of misconduct.

It is important that cases of sexual harassment are not be condoned. Increasingly courts in other jurisdictions have recognised that, depending on the circumstances, a single incident of sexual harassment is sufficient. This is an important development as the failure to recognise sexual harassment would institutionalise hostile working environments. Many women will be reluctant to approach the courts because they have already lost their jobs and would not want to risk their complaint being dismissed by the courts.

In *Phiri v Smallholder Coffee Farmers Trust*<sup>28</sup> the applicant alleged that during an office party a fellow employee attempted to rape her. Management took a view that the woman had committed an act of misconduct by publicising the incident and her contract was not renewed. The Court found that the employer created a hostile working environment and ordered compensation. The Court found that the employer was in breach of its legal obligation to protect female employees and that the failure of an employer to take an allegation of sexual harassment seriously was a breach of the implied contractual term relating to mutual trust and confidence.

The definition of sexual harassment in the GEA, section 6 is a potential setback in fighting gender-

24 International Labour Organisation *Equality in Employment and Occupation – General Surveys by the Committee of Experts on the Application of Conventions and Recommendations* (1988) para. 45.

25 [2008] MLLR 418 (IRC).

26 [2008] MLLR 460 (IRC).

27 [2008] MLLR 472 (IRC).

28 [2008] MLLR 482 (IRC).

based violence and it is incumbent on the courts to ensure that it does not limit women's access to justice in cases of sexual harassment. It says: "a person commits an act of sexual harassment if he or she engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature **in circumstances in which a reasonable person**, having regard to all circumstances, would have anticipated that the other person would be offended, humiliated or intimidated".<sup>29</sup> It is imperative that the reasonable person standard is assessed in the light of the principle of gender equality and the rights to dignity and equal protection enshrined in the Constitution. The reasonable person standard does after all refer to a person who is fair-minded and law-abiding. Following a reasonable person standard that ignores constitutional values and follows attitudes informed by outdated cultural, religious and traditional norms and beliefs will not promote justice.

### Sex discrimination

In *Hlongo v Pegas Panel Beaters*<sup>30</sup> the employer did not provide a changing room for the applicant who was a female employee working in a workshop. When she complained about the issue she was dismissed. The Industrial Relations Court found that the dismissal was unfair as the employer could not justify the reason for the dismissal.

### Marital status/associative discrimination

In *Jana v Attorney General*<sup>31</sup> the applicant brought an action against the Government of Malawi claiming discrimination. She alleged that she was mistreated and not promoted on the basis of the fact that her sister was married to a prominent cabinet minister who had since fallen out of favour with the ruling party and was in the opposition. The Industrial Relations Court found that a case of discrimination on the basis of gender and marital status had been made out. The Court's ruling depended on associative discrimination where the ground for the discrimination was not based on the female employee's personal characteristics but on her extended family association.

Similarly in *Kaunda v Tukombo Girls Secondary*<sup>32</sup> the applicant and her husband both worked for the respondent. The applicant's husband resigned from his employment with the respondent. The respondent in turn terminated the applicant's employment on account of her husband's resignation explaining that her contract was linked to that of her husband. The Court found that the reason for termination amounted to discrimination based on her marital status and ordered the respondent to pay compensation. In this matter the discrimination was not based on the woman's personal characteristic but on her association with her husband.

In *Mwanamanga v Malamulo Mission Hospital*<sup>33</sup> the applicant's letter of termination read as follows: "the administration in its recent meeting of the 18th January 2000 voted to terminate your services with one month notice on the grounds of marrying a polygamist." The Court faulted the employer and ordered compensation to be paid to the applicant. The Court held that the reason for

29 Emphasis added.

30 Case No. 563/2007 (IRC) (unreported).

31 [2008] MLLR 391 (IRC).

32 [2008] MLLR 446 (IRC).

33 [2008] MLLR 457 (IRC).

termination amounted to an interference with the applicant's right to marry a person of her choice and denied the applicant the right to economic activity through employment.

As seen by the cases above, the IRC has been developing jurisprudence which protects the rights of women. The Court has found that women can enter into contracts in their personal capacity to advance their economic empowerment and that women can marry, establish a family and still earn a living through gainful employment. The IRC endorses the participation of women with HIV in economic development through employment. It also found that procreation is a natural process and that women must not be discriminated against on this basis. The IRC promotes a conducive working environment for women so that they can freely enjoy their economic rights and freedoms by punishing institutions and employers that practice, encourage or condone hostile working environments including cases of sexual harassment.

## Awareness on Promotion of Gender Equality

Publicising cases from the IRC and the Commercial Court is a way to raise awareness of the different forms of discrimination faced by women. It is important to inform women who may face work discrimination about the case law outlined above. Knowing which court to go to, what to tell the court and what remedy to expect are essential information if women are actually going to be able to access justice.

Publicising the case law cited above will demonstrate to employers what not to do and how they will be held responsible for any of the prohibited acts. For example, a recent media article reported on an interview of a female train driver who had experienced difficulties carrying out her work when there was derailment in remote areas that have no sanitation facilities.<sup>34</sup> It is necessary for the employer, in this case Central East Africa Railway (CEAR), to seriously consider making arrangements that would reverse the situation by creating or developing conditions that would make the work environment for its female drivers safe, secure, hygienic and conducive to preservation of human dignity.

In addition, such cases provide an opportunity for courts to learn from each other<sup>35</sup> and provide examples on best practices as well as areas that need improvement, such as remedies and admission of evidence.

The examples cited of women accessing the IRC and Commercial Courts illustrate that courts need more support to assist it to broaden access to justice and ensure that more cases can be adjudicated upon.

The Malawi Human Rights Commission should also work alongside the courts because it has the mandate to enforce the provisions of the GEA. As cases are adjudicated, judgments delivered and holdings publicised, awareness is raised.

<sup>34</sup> The female driver was featured in one of the weekend papers in Malawi.

<sup>35</sup> The IRC and Commercial Court are highly specialised courts and their officers gain experience through targeted, on the job training.



## Conclusion

Most of the barriers to women's access to economic rights and justice can be removed through political will, transformation of people's mindsets and attitudes, institutional reforms and inclusiveness. The courts have an important role to play in ensuring that the vision of gender equality enshrined in the Constitution is achieved in practice. The Constitution provides that gender equality shall be achieved through "full participation of women in all spheres of Malawian society on the basis of equal opportunities with men; the implementation of the principles of non-discrimination and such other measures as may be required; and the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property."<sup>36</sup>

Malawi is tasked with implementing the 2030 Agenda for Sustainable Development. Goal 16 of the Sustainable Development Goals aims to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". Critical to achieving sustainable development is the recognition of the economic rights of women and their equal participation in formal and informal economies. The role of the courts in enforcing the GEA and in upholding the economic rights of women is an important part of achieving sustainable development. It requires that courts develop specific measures to address the economic, social and cultural barriers faced by women in accessing the courts and it further requires the courts to appreciate the barriers faced by women in the workplace when determining cases.

Many of the Industrial Relations Court cases discussed in this paper speaks to the targets under Goals 16 of the Sustainable Development Goals. For example, target 16.1 focuses on the reduction of all forms of violence. Sexual violence and sexual harassment within the workplace can be reduced if courts send a clear message that there will be no impunity for violence against women in any sphere of society. Target 16.3 of Goal 16 focuses on the promotion of rule of law and ensuring equal access to justice for all. As illustrated in this paper much work remains to ensure increased access to the courts for women. In this respect, it is important that indicators on access to justice are disaggregated and that discrepancies in access between men and women are analysed and addressed through concrete measures. Target 16.10 seeks to ensure public access to information and protection of fundamental freedoms in accordance with national legislation and international agreements. The Gender Equality Act is one example of national legislation that should be actively enforced to protect fundamental freedoms and address pervasive forms of discrimination. In addition, public information on the courts system and other complaints mechanisms available to assert one's rights are a critical component of access to information. Here the courts too have an important role to play.

36 Constitution of Malawi, 1994, section 13(a); see also section 14 "The principles of national policy contained in this Chapter shall be directory in nature but courts shall be entitled to have regard to them in interpreting and applying any of the provisions of this Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution."