



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION**

CRIMINAL REVIEW CASE NO. 14 OF 2017

**(Being Criminal Case No. 476 of 2017 before the First Grade Magistrate Court, sitting
at Blantyre)**

JAMES CHINTHENGA AND 12 OTHERS APPLICANTS

AND

THE STATE..... RESPONDENT

CORAM: HON. JUSTICE E. CHANZA

Ms. Chijozi, Counsel for the Applicants

Ms. Masiku, Counsel for the Respondent

Ms. F. Ngoma, Court Clerk

A. Introduction

1. This is a ruling on an application for referral to the Chief Justice for certification of the matter as a constitutional matter which has been made by the Applicants under **Sections 9(2) and (3) of the Courts Act**.

2. The Applicants were arrested at various places within the City of Blantyre on 11th April 2017 following a sweeping exercise by the police, and were charged with the offence of being idle and disorderly contrary to **Section 180(b) of the Penal Code**. The particulars of charge as proffered against them were that the Applicants on the 11th April 2017 within the City of Blantyre in public places wandered to gather alms. They were all convicted on their own plea of guilty, and were accordingly sentenced to one week imprisonment with hard labour, but the operation of the sentence was suspended for a period of two years on condition that during this period the convicts should not commit similar offences. The lower court further ordered that the judgment in the matter should be served on the Ministry responsible for social welfare to act upon it so that it can find an alternative means of earning a living for the convicts.

3. **Section 180(b) of the Penal Code** provides that every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children so to do; shall be deemed idle and disorderly persons, and shall be liable for the first offence to a fine of K1,000 and to imprisonment for three months; and for a subsequent offence to a fine of K3,000 and to imprisonment for six months.

4. The various statements made in the lower court by the convicts in mitigation of their sentence are illuminating of the circumstances which the applicants alleged to have made them engage in the action of wandering in the public places of the City of Blantyre to gather alms. In summary the Applicants who are people with various forms of disability stated that it was due to their various forms of disabilities which made it virtually impossible for them to earn a living in any other way other than through gathering alms in the public places of the City of Blantyre.
5. Throughout the proceedings in the lower court, the Applicants had no legal representation. However, after their conviction and sentencing in the lower court, the Applicants through their counsel filed in the High Court an application for review of the proceedings of the lower court. It is in this context that the Applicants have made the current application.

B. Issue for Determination

6. The legal issue for determination by this Court is whether the matter as raised by the Applicants expressly and substantively relates to or concerns the interpretation or application of the constitution to qualify for referral to the Chief Justice for certification as a constitutional matter

C. Parties Arguments

7. The Applicants aver that they are seeking to challenge the constitutionality of **Section 180(b) of the Penal Code** to the extent that it criminalises the applicants for begging for their survival, and those of their dependants without any exception as to the type of begging. The Applicants contend that **Section 180(b) of the Penal Code**

is unconstitutional to the extent that it broadly criminalises individuals found wandering or gathering alms in public spaces, inclusive of those engaged in non-aggressive means of begging like the Applicants herein, thereby violating their constitutional rights to dignity, freedom from torture, cruel and degrading punishment, equality and non-discrimination as enshrined in **Sections 19(2) and (3); 20; and 24(2)(f) (iii) of the Constitution.**

8. The Applicants submit that the inherent issue with the overarching offence of begging under **Section 180(b) of the Penal Code** is that it creates arbitrary assumptions enabling the criminalisation of acts that are for many a last resort to secure a means of living, and in effect criminalising poverty.
9. The Applicants are therefore calling upon this Court to consider referring this matter to the Chief Justice for certification of the matter as a constitutional matter so that the High Court can determine the question “whether **Section 180(b) of the Penal Code** in its current form violates **Section 18, Section 19 (1) to (3), Section 19(6); Section 20(1); Section 29; Section 35 and Section 42(2)(f) (iii) of the Constitution** and therefore unconstitutional”.
10. The Respondent opposes this application on the basis that there is no constitutional question being raised by the Applicants herein. The Respondent argues that **Section 180(b) of the Penal Code** does not in any way target people with disabilities. It is their argument that **Section 180(b) of the Penal Code** applies to any person engaged in the activities stipulated in that provision.
11. The Respondent also submits that the matter having been concluded in the lower court; the Applicants having not appealed against the decision of the lower court; and the Applicants having served the sentence that was imposed on them by the lower

court, there is no recognised proceeding in the “original court” and that therefore the matter cannot be referred to the “*Constitutional Court*”. The Respondent therefore prays that the application for referral be dismissed. I proceeded with this matter on the understanding that that the use of the phrase “*Constitutional Court*” by the Respondent was in effect a reference to the three-judge panel of the High Court as envisaged under **Section 9(2) of the Courts Act**.

D. Law and Determination of the Issue

12. In terms of **Section 9(1) of the Courts Act**, proceedings in the High Court are ordinarily heard by a single judge. However, if a proceeding that is in the High Court and all business arising therefrom expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, such proceeding or business is required be heard and disposed of by or before not less than three judges. In this respect, it is required that the Chief Justice must certify that such a proceeding or business is one which comes within the ambit of **Section 9(2) of the Courts Act**. Once certified by the Chief Justice in terms of **Section 9(2) of the Courts Act**, the certification becomes a conclusive evidence of that fact.
13. I am mindful that at this point of the proceedings this Court is not dealing with the merits of the substantive issue that the Applicants seek to challenge, but rather the procedural issue of whether the proceedings that are before this Court qualify for certification by the Chief Justice as a matter that should be heard by a panel of three judges in accordance with **Section 9(2) of the Courts Act**.
14. The elements that need to be satisfied for this court to refer the matter to the Chief Justice for certification are as follows:

14.1. Firstly, that there is a proceeding before the High Court and:

14.2. Secondly, that out of the proceeding which is before the High Court there has arisen an issue or business that expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution.

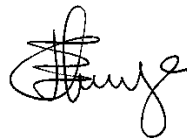
15. On the first element, the Respondent argues that there is no proceeding before the High Court from which it can be said that an issue that expressly or substantially relates to or concerns the interpretation or application of the provisions of the Constitution has arisen. The Respondent's reasoning is that the matter having been concluded in the lower court; the Applicants having not appealed against the decision of the lower court; and the Applicants having served the sentence that was imposed on them by the lower court; there is no recognised proceeding in the "original court" and that therefore the matter cannot be referred to a panel of three judges. The case of *Enelesi Simoni and Others V Attorney General* Constitutional Referral No. 9 of 2015 has been cited in support of this proposition.

16. It is not in dispute that the Applicants herein applied for a review of the lower court proceedings by the High Court pursuant to **Sections 25 and 26 of the Courts Act**, and that it is out of this review process that the Applicants have raised the issue of the constitutionality of the provision under which they were convicted by the lower court. This factor is the one which distinguishes the present application from the *Simoni's case* cited by the Respondent. Unlike in the present application, the Applicants in the *Simoni's case* sought to commence fresh proceedings against the Attorney General based on some proceedings which had already been concluded in a subordinate court and there was no proceeding before the High Court. The

application for certification in that case was never an issue arising from either an appeal or review proceedings, or indeed any proceeding which was before the High Court. It was a standalone cause of action. The applicants in the *Simoni's case* were in fact at a commencement stage of proceedings against the Attorney General, and had just issued a Notice of intention to sue pursuant to **Section 4 of the Civil Procedure (Suits by or Against the Government or Public Officers) Act (Cap 6:01)**. This suit from a procedural point was delinked from the proceedings that took place and had been concluded in the subordinate court. It was at this stage that they sought certification under **Section 9(3) of the Courts Act**. The current application is therefore not on four walls with the *Simoni's case* cited by the Respondent.

17. This Court further observes that the requirement on the first element as highlighted earlier in the ruling is not that there must be a proceeding in the “original court”. The requirement is that of the presence of a “proceeding in the High Court”. This Court is of the view that the use of the word “proceeding” by the framers of this provision was deliberate and encompassing of any type of proceeding that may be before the High Court. As the High Court has both original and appellate jurisdiction, the use of the word “proceeding” therefore refers to any proceeding which is before the High Court whether the court is exercising its original or appellate jurisdiction; or indeed performing its supervisory functions under **Sections 25 and 26 of the Courts Act**.
18. I find the argument by the Respondent that there is no proceeding before the “original court” to be without merit. It is therefore the finding of this Court that there is a proceeding before this Court as envisaged by **Section 9(2) of the Courts Act** in the form of an application for review, from which the application for certification by the Chief Justice is emanating from.

19. On the second element of whether the issue that has arisen out of the review proceedings expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution; this Court is inclined to answer this question in the affirmative. It is the view of this Court that the nature of issue raised by the Applicants is in effect challenging the consistence of the impugned provision with the Constitution. It is therefore the view of this Court that the second element has also been satisfied.
20. It is therefore the view of this Court that the matter raised by the Applicants during the review process is an appropriate one for referral to the Chief Justice for certification as a constitutional matter; and that this application must succeed. I accordingly refer this matter to the Chief Justice for certification under **Section 9(3) of the Courts Act.**
21. On the issue of costs for this application as prayed for by the Applicants, I have carefully considered all the circumstances surrounding this application as were before me, and specifically what prompted the Applicants' to pray for the costs for the application herein, and I am of the view that each party must bear its own costs for this application. I accordingly so order.



Delivered in Chambers this 15th day of November 2024

E CHANZA

JUDGE