IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

REVIEW CASE NO. 21 OF 2017

UNDER SECTION 42(2)(F)(viii) OF THE CONSTITUTION OF THE REPUBLIC OF MALAWI

AND

UNDER SECTION 25 AND 60 OF THE COURTS ACT

AND

UNDER SECTION 360 AND 361 OF THE CRIMINAL PROCEDURE AND EVIDENCE CODE

THE REPUBLIC

AND

CHILDREN IN DETENTION AT BVUMBWE AND KACHERE PRISONS

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Mr Maele, of Counsel for the Children in Detention

Mrs Mithi, Official Interpreter

Mrs Msimuko, Court Reporter

ORDER ON REVIEW

Kalembera J

This matter concerns children who for various reasons are in detention at Bvumbwe and Kachere Priosons. Others are on remand and others are serving sentences of varying durations. Being dissatisfied with orders detaining them at Bvumbwe and Kachere prisons, have moved the court to review the propriety of the orders detaining them at Bvumbwe and Kachere Prisons.

The children have filed the following grounds for review:

1. Propriety of the orders detaining the children at Bvumbwe and Kachere Prisons before a finding against them.
2. Propriety of the orders committing the children at Bvumbwe and Kachere Prisons before after a finding of liability.
3. Propriety of 2nd and 3rd Grade Magistrate Courts assuming jurisdiction over cases of children in conflict with the law.
4. Propriety of orders remanding children under section 250 and 265 of the Criminal Procedure & Evidence Code.
5. Propriety of using Warrants of Commitment under section 329 of the Criminal Procedure and Evidence Code in cases involving children.

This being a review of criminal proceedings from the lower court, it must be dealt with just like an appeal, that is, in coming up with a decision, I must look at and analyze all the evidence before the lower court. This however is a unique case in the sense that it concerns a number of children who found themselves in conflict with the law. Others were found liable for commission of offences and sent to either of these prisons, others are just on remand awaiting trial for different offences. And the State through its affidavit sworn by Collin Brian Chitsime, Principal State Advocate, is in total agreement with the arguments advanced on behalf of the said children. Thus, I will only emphasize the position of the law.

The best interests of the child must at all times be upheld and protected. Section 42 (2) (g) as follows:

"s. 42 (2) Every person arrested for, or accused of, the alleged commission of an offence shall in addition to the rights which he or she has as a detained person, have the right –

(g) in addition, if that person is a person under the age of eighteen years, to treatment consistent with the special needs of children, which shall include the right –

(i) not to be sentenced to life imprisonment without possibility of release;

(ii) to be imprisoned only as a last resort and for the shortest period of time consistent with justice and protection of the public;

(iii) to be separated from adults when imprisoned, unless it is to be considered to be in his or her best interest not to do so, and to maintain contact with his or her family through correspondence and visits;

(iv) to be treated in a manner consistent with the promotion of his or her sense of dignity and worth, which reinforces respect for the rights and freedoms of others;

(v) to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role;

(vi) to be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards; and

(h)……."

Thus, the best interests of the child, and more so of those children in conflict with the law, must be upheld and protected at all times.

The Child Care, Protection and Justice Act (the Act) was enacted as an Act to consolidate the law relating to children by making provision for child care and protection and for child justice; and for matters of social development of the child and for connected matters. In that regard the said Act upholds the best interests of the child at all times. Where a child has been arrested on the ground that he has committed an offence, section 95 of the Act provides as follows:

"s.95 –(1) No child shall be detained before a finding against him/her unless the Director of Public Prosecutions, in writing or upon hearing, satisfies the inquiry magistrate or court that –

(a) The prosecutor wishes to charge him with a serious offence in respect of which there is sufficient evidence to prosecute;

(b) It is necessary in the interests of such child to remove him from undesirable circumstance; or

(c) The prosecutor has reason to believe that the release of such child would defeat the ends of justice.

Only in those exceptional circumstances should a child be detained before a finding of responsibility for commission of an offence. Where a decision has been made to detain a child before a finding against him, then as stipulated under section 96 (1) of the Act, he shall be detained in a safety home. In exceptional circumstances, and on application to the inquiry magistrate by the prosecutor, the child might be detained in a reformatory centre. As per the Schedule to the Prisons Act (Cap 9:02) of the Laws of Malawi, Bvumbwe and Kachere are prisons. It is very clear that a child awaiting trial, or a child against whom no finding has been made, shall not be detained in a prison. Even where a finding of responsibility has been made against a child, such child shall not be detained in prison. Section 140 of the Act clearly states as follows:

"No child shall be imprisoned for any offence."

A safety home is defined under section 2 as meaning '*a place or part thereof for purposes of reception, education, counseling and safety of children before conclusion of trial or in circumstances requiring placement of a child for care and protection;*' whereas a reformatory centre, under the same section 2, means '*a home or institution or part thereof established for the purposes of –(a) reception, education and vocational training, and (b) counseling of children in accordance with this Act.*' Thus, a safety home and a reformatory centre are not prisons. If the law required that children be remanded or imprisoned in a prison it would have specifically provided as such. It is therefore improper and illegal to detain or remand a child in a prison or to imprison a child for any offence.

As regards the constitution of the Child Justice Court, section 133 of the Act provides as follows:

"s.133 –(1) A child justice court shall be presided over by a professional magistrate or a magistrate of the first grade.

(2) The Chief Justice having been satisfied as to the competence of the presiding officer, may designate a court of magistrates of any grade to be a child justice court and shall publish a notice of the designation in the Gazette.

(3)……"

Thus, any magistrate of a grade lower than that of a professional magistrate, that is, lower than Senior Resident Magistrate, and lower than that of a First Grade Magistrate cannot preside over a child justice court, unless so designated through a notice published in the Gazette, by the Chief Justice. It therefore follows, and it's the finding of this court that Second and Third Grade Magistrates cannot preside over a child justice court unless so designated by the Chief Justice through a notice published in the Gazette. Thus, where the said Second and Third Grade Magistrates purportedly presided over child justice courts, and purportedly made orders, those orders are a nullity and ought to be set aside.

Furthermore, on the propriety of the orders remanding the children under sections 250 and 267 of the Criminal Procedure and Evidence Code; and propriety of using warrants of commitment under section 329 of the CP&EC, one must take into consideration the provisions of sections 134; 96 and 146 of the Child Care, Protection and Justice Act. As has already been found herein, where a decision has been made to detain a child before a finding him, he shall be detained in a safety home. Thus use of sections 250 and 267 of the CP&EC are inappropriate. Similarly, children should not be committed prison under warrants of commitment under section 329 of the CP&EC, or be committed to prison at all. This is so because a child can never be convicted for any offence; and warrants under section 329 of the CP&EC use the words "convicted" and "sentence".

Under section 86 of the Child Care, Protection and Justice Act, the words "finding of guilty", "conviction" and "sentence" shall not be used in respect of any child in proceedings in a child justice court or any other court, but in pronouncing the conviction against the child, the court shall record that the child is found to be responsible for the offence charged and, instead of sentencing the child, the court shall proceed to make an order upon such finding in accordance with this Act. The court under section 146(1)(h) of the Child Care, Protection and Justice Act can

make a reformatory order in that regard. The 7th Schedule provides a template of such an order.

Having made the observations herein, and considering that the State agrees with the position taken on behalf of the children herein, I hereby grant the children's prayer and find as follows:

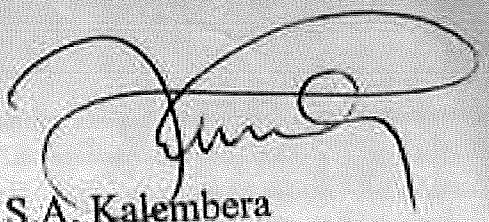
a. It is indeed improper to detain children at Bvumbwe and Kachere Prisons before a finding against them as these two institutions are not safety homes .
b. It is indeed improper to detain children at Bvumbwe and Kachere Prisons after a finding of liability against them as these two institutions are not reformatory centres.
c. Second and Third Grade Magistrates have no jurisdiction over child justice courts unless so designated by the Chief Justice through a notice published in the Gazette.
d. It is improper to use remand warrants under section 250 and 265 of the Criminal Procedure and Evidence Code.
e. It is improper to use warrants of commitment under section 329 of the Criminal Procedure and Evidence Code in cases involving children.

Consequently, I order and direct as follows:

a. All the children that are detained at Kachere and Bvumbwe Prisons pending trial, and courts have not yet made any finding of liability against them, should be transferred to safety homes within 30 days after service of this order.
b. All the children that are at Kachere and Bvumbwe Prisons and a finding of liability has been made against them, should within 30 days after service of this order, be transferred to reformatory centres.
c. All Magistrates of grades lower than the First Grade Magistrate must not preside over child justice courts unless so designated by the Chief Justice through a notice published in the Gazette.
d. All orders made by Second and Third Grade Magistrates against children herein, without being so designated by the Chief Justice through a notice published in the Gazette, are null and void and are hereby set aside. All

children affected by this order must be retried before a properly constituted child justice court within 30 days after service of this order.

PRONOUNCED this 5th day of June 2018, at the Principal Registry, Criminal Division, Blantyre.



S.A. Kalembera

JUDGE