



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NUMBER 869 OF 2017**

BETWEEN:

THE STATE

AND

THE OFFICER INCHARGE LINGADZI POLICE STATION-----1ST DEFENDANT

THE ATTORNEY GENERAL-----2ND DEFENDANT

EX PARTE: BEATRICE MATEYU-----APPLICANT

CORAM: THE HONOURABLE JUSTICE M.C.C. MKANDAWIRE

Mrs Soko, Ms Dossi and Salleh Mtambo,

Counsel for the Applicant

Chisiza, Counsel for the Defendants

Kumwenda, Court Interpreter

ORDER

1. On the 16th of November 2017, the Applicant filed and made an ex-parte application for leave to apply for Judicial Review. The application was supported by a sworn statement made by Beatrice Mateyu the Applicant as well as skeleton

arguments. On 6th December 2017, the Applicant was granted leave to apply for Judicial Review.

2. The Applicant's claim was that she is seeking Judicial Review of-

a) the decision of the first defendant to order an arrest of the Applicant during the demonstration against Gender Based Violence on the 14th of November 2017.

b) Section 137(3) of the Penal Code Cap 7:01 of the Laws of Malawi for being unconstitutional.

3. The Applicant sought the following reliefs-

3.1 A declaration that the decision of the 1st Defendant to order and execute the arrest of the applicant during the demonstration against Gender Based Violence on the 14th of September 2017 is unconstitutional and therefore of no legal consequence for the following reasons:-

a) It violates rights of human dignity and personal freedoms in contravention of section 19 of the constitution.

b) It amounts to unfair discrimination and therefore contravenes section 20 of the constitution, and

c) It amounts to discrimination against women in contravention of section 24 of the constitution: and ,

d) It violates the rights of freedom of expression and freedom of assembly in contravention of section 35 and 38 of the constitution, and,

e) It violates rights to fair trial in contravention to section 42(1) of the constitution.

3.2 A declaration that the decision of the 1st Defendant to order an arrest of the Applicant during the demonstration of Gender Based Violence on the 14th of September 2017 is arbitrary and unreasonable as no public functionary properly guided by the facts of this case and the law applicable thereto would make such a decision.

3.3 An order quashing the decision of the 1st Defendant to effect an arrest of the Applicant.

3.4 An award for damages for the wrongful arrest and detention of the Applicant.

- 3.5 A declaration that section 137(3) of the Penal Code is unconstitutional or in the alternative it be clarified by the court.
4. The defendants filed a defence as well as a sworn statement in support of their defence. The sworn statement was made by Neverson Chisiza Senior State Advocate in the Ministry of Justice and Constitutional Affairs.
5. The defendant contends that the matter herein is not amenable to Judicial Review in that the entire matter is premised on the constitutionality of section 137(3) of the Penal Code.
6. The defendant further contends that the Attorney General is not the right party to the proceedings herein.
7. In the alternative and without prejudice to the statement of defence, the Defendant referred to ground 1 of the Applicant's grounds for Judicial Review and admitted the contents therein. The Defendant however denied the contents of ground 2 and puts the Applicant to strict proof.
8. The defendant contends that it did not arbitrarily arrest/detain the Applicant. The defendant was only carrying out its constitutional and statutory mandate pursuant to section 137 of the Penal Code and had accorded the Applicant all rights she is entitled to as an accused person and any allegations to the contrary are strongly denied and must be strictly proved.
9. The defendant further contends that section 137 of the Penal Code still remains the law of this land and has not been invalidated by any court in Malawi. Further that the actions of the Applicant that led to the arrest remain offensive to section 137 of the Penal Code.
10. The Defendant therefore contended that the Applicant's action is not amenable to Judicial Review. That the Applicant is not entitled to the reliefs sought in these proceedings. Finally, that there was no violation of the Applicant's rights. The Defendant therefore prays that the matter herein be dismissed with costs.
11. On the 24th of January 2019, the Defendant filed a sworn statement by Simeon Kamisa who is the Criminal Investigations Officer at Lingadzi Police Station. The officer said that during the solidarity march, the Applicant carried and displayed a placard that read ***"Kubadwa ndi nyini sitchimo."*** The police found those words

vulgar, offensive and obscene as a result of which the Applicant was subsequently detained.

12. The officer said that his research concluded that the correct offence in the circumstances was that of insulting the modesty of a woman contrary to section 137(3) of the Penal Code. He proceeded to charge the Applicant with the said offence and proceeded to grant the Applicant bail.

13. Not being sure of the offence, he sought opinion from the National Police Headquarters at Area 30. He was advised that the preferred charge was not the correct one and that he would be advised of the correct charge.

14. Whilst waiting for the said charge, they received a court order restraining them from proceeding with any criminal proceedings in the matter. The matter has thus been pended awaiting the outcome of this Judicial Review.

15. The Applicant filed three statements in support of her case. These are statements by Beatrice Mateyu the Applicant, Pristilla Kankhulungo and Zinenani Majawa. The Applicant also filed skeleton arguments in support of this application.

16. I have looked at the sworn statements filed by the Applicant's side. They all raise pertinent questions on the constitutionality of section 137(3) of the Penal Code. The statements also refer to the unprocedural conduct by the Defendant when effecting the arrest of the Applicant. They also raise the unreasonableness of the Defendant's conduct.

17. The 1st Defendant through the sworn statement of Mr Kamisa says that section 137(3) of the Penal Code that was used as a holding charge for the Applicant was not the correct section and that the said charge will be amended. That the stay order from the court was served on them before any action to amend was done.

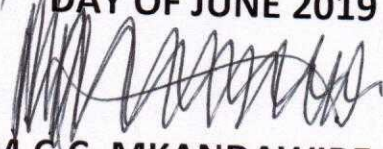
18. I have looked at the facts of this case. I have also looked at the submissions that have been made by both sides to the matter. I am now more satisfied than before that this is a proper matter that should be referred to the Chief Justice to certify the proceeding as a constitutional matter. At first, I had thought that this is a matter which would easily have been disposed off through Judicial Review. However, taking into account that the central axis of this case is section 137(3) of the Penal Code which section is being challenged to be unconstitutional, it would be to the best interest of the parties and the public if this matter was certified as a

constitutional matter. Much as I do have unlimited jurisdiction to deal with this matter but decisions of a constitutional panel offer a wider diversity and greatly enrich our jurisprudence.

19. I therefore order that pursuant to Order 19 rule 7(1) of the Courts (High Court) (Civil Procedure) Rules 2017, this matter should be referred to the Chief Justice for certification under rule 2. The outcome of the decision from the High Court sitting on a constitutional matter shall inform the Applicant on the next course of action to take.

20. I further order that each party should meet its own expenses.

DELIVERED THIS 21st DAY OF JUNE 2019 AT LILONGWE


M.C.C. MKANDAWIRE

JUDGE