



COURT DIARY: CONSTITUTIONAL CHALLENGE TO CRIMINALISATION OF CONSENSUAL AND NON-EXPLOITATIVE ADOLESCENT SEXUAL RELATIONSHIPS – AJ (A MINOR) -vs- THE STATE

Background of the Case

The case of **AJ (a minor) -vs- The State** is a case where a young adolescent boy aged 15 is challenging the constitutionality of the offence of Defilement (section 138(1) of the Penal Code) where it applies to consensual and non-exploitative sexual relationships between adolescent children.

The Chief Justice certified the case as a constitutional matter and referred it on 6 October 2021 to the Constitutional Court for hearing. A panel of three judges, Justices Zione Ntuba, Jack N’riva, and Mandala Mambulasa, was constituted to sit and determine the proceedings. The case was consolidated with *Ex-Parte Stanford Siliro Shaba on behalf of TS (a minor)*. The Applicant is represented by Chikondi Chijozi from the Southern Africa Litigation Centre (SALC) and Ruth Kaima from the Center for Human Rights, Education, Advice and Assistance.

After inviting all local and internal interested parties, the Court admitted five organisations and individuals to join the proceedings as *amici curiae*, including the United Nations Special Rapporteur on the Right to Health, Centre for Applied Legal studies from South Africa and Dr Godfrey Kangaude, a Malawian legal researcher and scholar on SRHR.

Summary of court proceedings

Constitutional Court Hearing

- On 14 February 2022, the Court received two applications from the Attorney General (AG) Chambers through electronic mail. The first application sought permission to file and serve their skeleton arguments out of time, arguing that the Applicant had filed

theirs beyond the initially ordered Court date of 15 January 2022. The second application sought an interlocutory order to set aside the Court's ruling on 11 February 2022, admitting the five *amicus curiae*. The AG Chambers' advocates argued that the foreign organisations and individuals admitted as *amicus curiae* did not have sufficient interest in the matter, warranting them to join as parties to the suit as the case affected the people of Malawi only. The advocates further argued that the order of admitting *amici curiae* was irregular as the Court had not allowed the Attorney General's office to present their views on the applications. They argued that under Order 19 Rule 8 of the Courts (High Court) (Civil Procedure) Rules 2017, the Attorney General's Office was supposed to be served with the application for admitting *amici curiae*. Still, as that process was never done, the whole procedure of accepting *amici curiae* should be considered invalid.

- On 15 February, the Court addressed the applications from the Attorney General (AG) Chambers and dismissed them. The Court ruled that the AG Chambers had had ample time (more than three weeks) to file and serve their skeletal arguments from the date the Applicants had filed and served theirs on them. The Court stated that the Applicants had a due reason for filing their documents beyond the stipulated time because the initially ordered filing day fell on a public holiday. In addition, the Court ruled that the Applicant had not caused any inordinate delay as they had filed immediately after the excluded days had elapsed. The Court then directed that the matter should proceed to a full hearing as initially planned and that instead, the AG Chambers would be allowed to make their representations on points of law and not facts. The Court ordered that the AG Chambers file their written submissions with the Court 7 days from the hearing date.
- The Court also rejected the second application because, firstly, the advocates of the Attorney General had misunderstood the difference between the phrases "parties to a suit or action" and "*amicus curiae*." The Court pointed out the difference between the two, citing various case authorities such as *Allen vs Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229* and *Service Commission vs Speaker of National Assembly & Another Petition No. 518 of 2013*. These cases all emphasised that *amici curiae* are not parties to a suit or action but simply friends of the Court. Their roles are to assist the Court impartially by expounding the law based on their skills, research, and expertise. The Court also observed that, whereas the Court may order a party to a suit or action to pay the costs of the action, an *amicus curia* may not be called to do so. Consequently, their standards in litigation cannot be the same, essentially rendering them different.
- Secondly, the Court found that, although there had indeed been a failure to comply with Order 19, rule 8 of the Civil Procedure Rules by the *amici curiae*, this did not render their admission irregular to be set aside. The Court cited Order 2 rule 2 of the Rules, which states that notwithstanding Order 2 rule 1, an irregularity in a proceeding, a document, a step taken, or an order made in a proceeding shall not nullify that proceeding, action, or order. The Court then declined to set aside the Order admitting *amici curiae*.

Supreme Court of Appeal Proceedings

- On 16 February, the AG Chambers filed an application with the Malawi Supreme Court of Appeal requesting that the Supreme Court make an order to stay the proceedings in the Constitutional Court whilst an appeal against the issue of irregularly admitting *amici curiae* was being determined.
- On 17 February, the Supreme Court of Appeal granted the application. Therefore, the proceedings seeking a stay in the Constitutional Court had to be heard and determined first in the Supreme Court before the Constitutional Court could interpret and resolve the constitutional issues initially brought before it. At the hearing on 1 March 2022, only advocates of the Attorney General's Chambers presented the arguments they had filed on 16 February 2022. The Supreme Court adjourned the matter to 29 March 2022 for both parties to argue their cases respectively. The Court saw it fit to give the AG Chambers a chance to reflect on the Applicant's skeletal arguments filed in response to their application.
- On 29 March 2022, the AG Chambers was the first to present its response against the Applicant's skeletal arguments in opposition to the stay of proceedings. Advocates of the AG Chambers commenced by arguing that the skeletal arguments that the Applicants had filed were not, in essence, addressing their application to the Supreme Court for a stay of proceedings. The advocates stated that the Applicant had touched on the issue of admission of *amicus curiae*, something that the advocates had not considered or brought up in their application to appeal. They contended that the only problem they had brought before the Supreme Court of Appeal was an application for a 30-day extension to draft and file their skeletal arguments in response to the Applicant's skeletal arguments before the Constitutional Court.
- Once given an audience to respond to the AG Chambers, the Applicant argued for the dismissal of the appeal as the AG Chambers advocates had not sought leave from the lower Court to commence such appeal proceedings. Secondly, the Applicant contended that until 29 March 2022, none of the Defendants had filed any notice of appeal or grounds of appeal. There was, therefore, essentially no appeal before the Supreme Court. The Applicant argued that the Constitutional Court had already granted the remedies sought by the AG Chambers. The Court had given them an extra seven days from 15 February to file their written skeletal arguments.
- The 30-day extension the AG Chambers asked for from the Supreme Court had already lapsed, counting from when the Constitutional Court had ordered that the AG file the requisite documents. The Applicant implored the Supreme Court to find that the AG chambers were abusing the court process and using tactics to delay the course of justice in the Constitutional Court.

- The Applicant also contended that the AG Chambers had expressly stated in their appeal documents that the Supreme Court should set aside the lower Court's order admitting *amici curiae*. Therefore, the Applicant was astonished that the advocates stood before the Supreme Court and denied propositions addressing the same from the Applicant in their skeletal arguments. The Applicant concluded that the Supreme Court should dismiss the application and order the resumption of proceedings in the Constitutional Court.

Outcome

The Supreme Court reserved its judgment indefinitely.