IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONSTITUTIONAL CASE NO. 12 OF 2007

BETWEEN:

EVANCE MOYO ....APPLICANT

AND

THE ATTORNEY GENERAL .....RESPONDENT

CORAM: THE HON. JUSTICE H.S.B. POTANI
THE HON. JUSTICE DR. M. MTAMBO
THE HON. JUSTICE S. A. KALEMBERA
Mr. M. Mambulasa, of Counsel for the Applicant
Mr. S. Kayuni, Senior State Advocate, of Counsel for the Respondent
Mr. U. Kam'mayani, of Counsel for *Amicus Curiae* (Malawi Human Rights Commission)
Mr. J. Gulumba, of Counsel for *Amicus Curiae* (Eye of the Child)
Mrs. V. Jumbe, of Counsel for *Amicus Curiae* (Centre for Human Rights, Education, Advice and Assistance)
Mrs. Chimtande, Official Interpreter
Mrs. Mangisoni, Recording Officer

JUDGMENT

The applicant, Evance Moyo, commenced this action by Originating Summons dated 30th day of May 2007 seeking the Court's determination and declaration on the following questions:

1. Whether or not by remanding the applicant at Chichiri prison from 10th August, 1997 to December 2002 and imprisoning him during the pleasure of the President from December 2002 to date under the same circumstances, the State has not violated section 42 (2) (g) (iii) of the Republican Constitution as read with section 4 of the Children and Young Persons Act

(Cap 26:03) of the Laws of Malawi and disrespected or violated Article 37 (c) of the Convention on the Rights of the Child 1989 and Article 10 (2) (b) of the International Covenant on Civil and Political Rights.

2. Whether or not by imprisoning the applicant for a period of 11 years, 5 months and 16 days the State has not violated section 42 (2) (g) (ii) of the Republican Constitution as read with section 11 (4) of the Children and Young Persons Act and disrespected or violated Article 37 (b) of the Convention on the Rights of a Child.

3. Whether or not the applicant has not been severely prejudiced as he has not benefitted from the application of Constitutional provisions, Children and Young Persons Act and the Penal Code (Cap 7:01) of the Laws of Malawi.

4. A declaration that section 26 (2) of the Penal Code and Section 11 (1) of the Children and Young Persons Act are unconstitutional.

5. Consequent upon the High Court interpreting / finding in favour of the applicant on any or all of the questions above, an order that the Court exercises its powers under its inherent jurisdiction to order the immediate release of the applicant as the only effective remedy for the violation of his rights and the prejudice he has thereby suffered. Alternatively, that the Court makes a declaration that the applicant's case must as of necessity and urgency be immediately considered by the Board of Visitors with a view to recommending to the President that he be discharged on Presidential Licence if the Board itself cannot order his discharge.

6. The applicant also seeks compensation from the respondent for the violation of his Constitutional Rights and the substantial prejudice that he has thereby suffered as a result of failure by the State to secure proper provision of his education and training and to review his development to determine a date for his release.

7. Such further or other relief as the Court may determine.

8. An order that the respondent pays costs of this action.

The application is supported by an affidavit sworn by the applicant as well as skeletal arguments. There are also skeletal arguments / submissions or presentations from *Amicus Curiae* which in one respect or the other support the

applicant's action. There are also skeletal arguments in opposition to the applicant's application.

The brief facts of this matter are such that the applicant was arrested on 1st August, 1997 in Chiradzulu District on suspicion of having committed the offence of murder. He was 16 years old. The applicant had earlier on, on 31st July 1997 gone out with his friends to a drinking party at about 20:00 hours. At the party a fight broke out between the applicant and one Moses Chibwana (deceased). Other friends on either side joined the fight. It was later discovered that the deceased had been stabbed and he died a few minutes later. The next morning the applicant and his parents went to report the matter to Chiradzulu Police and the applicant and his friends were later arrested. His friends were later released after a few days.

On 10th August, 1997 the applicant was remanded at Chichiri Maximum Prison in Blantyre after committal from Chiradzulu Magistrate Court. He was remanded in the adult section up to December 2002 when he turned 20 years old and when he went for trial. The High Court found the offence of murder proved contrary to section 209 of the Penal Code, (Cap 7:01) of the Laws of Malawi. At that time the offence of murder attracted mandatory death sentence. However, the applicant being a juvenile at the time of commission of the offence and in compliance with section 11 (1) of the Children and Young Persons Act and section 26 (2) of the Penal Code, the trial judge ordered that the applicant be detained at Chilwa Approved School during the pleasure of the President.

The main issues for determination are therefore whether the applicant's rights were violated when he was incarcerated with adults when he was a juvenile; whether section 11 (1) of the Children and Young Persons Act and section 26 (2) of the Penal Code are unconstitutional; whether the applicant should be immediately released or his case be urgently considered by the Board of Visitors; and whether the applicant should be compensated.

We are grateful to counsel for their elaborate, detailed and well researched submissions. Unfortunately, it has not been possible to refer to each and every submission made by counsel.

It is paramount at this stage to refer to the law(s) in issue. The Constitution of the Republic of Malawi is the supreme law of the land, that is, Malawi. It provides under section 4 that the Constitution shall bind all executive, legislature and judicial organs of the State and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it. All laws enacted in this

Country therefore derive their authority from this Constitution. According to section 5 of the said Constitution any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency be invalid. Furthermore, section 11 of the Constitution provides as follows:

> *"(1) Appropriate principles of this Constitution shall be developed and employed by the Courts to reflect the unique character and supreme status of this Constitution.*
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> *(2) In interpreting the provisions of this Constitution the Court shall –*
>
> *a) promote the values which underlie an open and democratic society;*
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> *b) take full account of the provisions of Chapter III and Chapter IV; and*
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> *c) where applicable, have regard to current norms of public international law and comparable foreign case law*
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> *(3) Where a Court of law declares an act of executive or a law to be invalid, the Court may apply such interpretation of that act or law as is consistent with this Constitution."*

Chapter IV of our Constitution enshrines fundamental human rights and freedoms and binds the Executive, Legislature and the Judiciary and all organs of the Government and its agencies are required to respect and uphold them.

It is not in dispute that when the applicant was arrested in 1997 he was 16 years. The State has further conceded that the applicant should have been in the Juvenile section of the Chichiri prison during remand and also after trial and not the adult section unless it was in the best interest not to do so. Section 42 (2) (g) (iii) of the Constitution stipulates as follows:

> *Section 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 child, to treatment consistent with the special needs of children, which shall include the right –*
>
> *(iii) to be separated from adults when imprisoned unless it is 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."*

Furthermore, section 31 of the Children and Young Persons Act provides thus:

> *"Whenever any person apparently under the age of eighteen years* has been *arrested and is not released on bail under section 30 the officer – in – charge of the police station of which such person is brought shall, notwithstanding*

anything to the contrary contained in any written law, cause such person to be detained in a place of detention until he can be brought before a court unless the officer certifies

a) that it is impracticable to do so;

b) that he is of so unruly or depraved a character that he cannot be safely so detained; or

c) that by reason of his state of health or of his mental or bodily condition it is inadvisable so to detain him, and the certificate shall be produced to the Court before which the person is brought."

In the matter at hand the applicant was 16 years when he was arrested and incarcerated. He was therefore a juvenile and ought to have been treated with due regard to his welfare and steps should have been taken to remove him from undesirable surroundings, and for securing that proper provision is made for his education and training (refer S. 4 of the Children and Young Persons Act). The applicant in blatant disregard of his welfare and his special needs as a juvenile, he was remanded at Chichiri Maximum prison in Blantyre and he was incarcerated in the adult section of the prison. This only came to light during his trial. The primary consideration in dealing with a juvenile whether in criminal matters, or adoption or custody proceedings is what is in the best interest of that child or juvenile. This is the trend followed internationally as provided in various international instruments to which Malawi is a party. The Convection on the Rights of the Child to which Malawi is a party in its Article 3 provides as follows:

"In all actions covering children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Malawi having acceded to the CRC on 2nd January, 1991 the said Convention is binding on Malawi and all public or private institutions in this country. As already alluded to herein, the Court as provided for in section 11 (2) (c) of the Constitution in interpreting the provisions of the Constitution, should have regard where applicable, to current norms of public international law and comparable foreign case law. Otherwise the provisions of our Constitution and statutes should be the first port of call. Section 211 of our Constitution as amended by Act No. 13 of 2001 stipulates as follows:

"(1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by or under an Act of Parliament.

(2) Binding international agreements entered into before the commencement of this Constitution ***shall continue to bind the Republic unless otherwise provided by an Act of Parliament.*** *(emphasis provided)*

(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic."

In dealing with the incarceration of the applicant consideration should have been had to the welfare or best interests of the juvenile. The CRC refers to the best interests of the child principle whereas the Children and Young Persons Act refers to the welfare of the child. Whether one talks about the best interests of the child or the welfare of the child they mean the same thing. (see MSCA Adoption Appeal No. 28 of 2009: **In the Matter of Chifundo James**). And further on the applicability of the international agreements or convention the case of **S. Kalanda –v- Limbe Leaf Tobacco Ltd,** Civil Cause No. 542 of 1995 is enlighting when Mwaungulu, J stated thus on p.8

> *"The second view is that binding international agreement before 1994 became part of our law by operation of the Constitution. The uncertainty in section 211 before the amendment is cured by the amendment. Section 211 (1) as amended expressly states that international agreements entered after commencement of the Constitution shall form part of our law by domestic legislation. If it meant prior international agreements required domestic legislation, the Constitution would in section 211 (1) have added qualifications to the effect that all international agreements before 1994 would, like the ones after, need domestic legislation. The Constitution restricts the requirement to legislation after commencement of the Constitution. On the face of it the Constitution excludes prior international agreements in section 211 (1). In my judgment, the Constitution in section 211 (2), stresses the non – requirement of domestic legislation for international agreements prior to the commencement of the Constitution. Moreover, if it was meant that domestication by legislation apply to international agreements prior to 1994, the Constitution would expressly have said so in section 211 (2) having omitted it in section 211 (1). This interpretation bases on the construction of section 211 before and after the amendment. It is not based on an external premise.*

The CRC is therefore applicable and binding on Malawi. However, the provisions of section 42 (2) (g) of our Constitution and the Children and Young Persons Act are not in conflict but rather they complement each other. Our Constitution in section 42 (2) (g) (iii) as earlier alluded to prohibits incarceration of juveniles / children with adults and section 4 of the Children and Young Persons Act complements the Constitution by requiring that the welfare of the child be upheld at all times. We therefore find that the incarceration of the applicant with adults before and after his trial is a blatant violation of his fundamental human rights and freedom under our Constitution and is contrary to the Convention on the Rights of the Child and other international Convention on child rights as well as the provisions of the Children and Young Persons Act.

It has further been submitted by Counsel for the applicant and Counsel for the *Amicus Curiae* that sections 26 (2) of the Penal Code and 11 (1) of the Children and Young Persons Act be declared unconstitutional. Section 26 (2) of the Penal Code provides as follows:

> *"Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of 18 years, but in lien thereof the court shall sentence him to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody."*

And section 11 (1) of the Children and Young Persons Act states that the sentence of death shall not be pronounced on or recorded against a person under the age of 18 but in lien therefore the Court shall sentence him to be held or detained at the pleasure of the President. It is therefore being contended and strongly in our view that these provisions are unconstitutional and that holding or detaining a child at the pleasure of the President is unconstitutional as it usurps the judicial function of the Judge or Magistrate and bestows the same in the President, thus in the Executive branch of government which is further against the doctrine of separation of powers and the independence of the Judiciary. Malawi having been a colony of Britain adopted the British judicial system. This provision is therefore similar to the one applicable in the United Kingdom. Powers of Criminal Courts (Sentencing) Act 2000 of the United Kingdom provides in section 90 –

> *"Where a person convicted of murder or any other offence the sentence for which is fixed by law as life imprisonment appears to the Court to have been aged under 18 at the time the offence was committed, the Court shall (notwithstanding anything in this or any other Act) sentence him to be detained during her Majesty's pleasure."*

We have already observed herein that children / juveniles are a vulnerable group and have special needs and have to be treated in a special way. When a juvenile is being detained at the pleasure of the President it is the responsibility of the Manager or Officer in – charge of the detention centre where the juvenile is being detained to constantly review the conduct of the juvenile and make reports to the Board of Visitors which in turn has to make reports and recommendations to the President as the case may be. The juvenile so detained must have access to education and all other amenities that will help him develop into a productive citizen. The detention of the juvenile must therefore at all times be premised on the welfare of this child and any incarceration of the child must be for the shortest time possible and as a last resort (Ref. section 42 (2) (g) (ii). Furthermore, when the child is so detained at the pleasure of the President it presupposes that there will be constant reviews of the juvenile's conduct and in our case it is the

responsibility of the manager or officer in charge of the place of detention and the Board of Visitors. The aim is always that the child or juvenile should only be recommended for release if he has shown remorse and if he has been adequately rehabilitated to the extent that he is no longer a danger to the society. Being so held at the pleasure of the President should not therefore be construed as life imprisonment. In **R (on the application of Venables) – vs – Secretary of the State for the Home Department,** [1998] AC 407, Lord Hope stated as follows:

> *"...the sentence of detention during Her Majesty's pleasure is a separate and distinct sentence from that of life imprisonment. It recognizes the special characteristics of the young offender, and especially of the child offender. This is built into the sentence a measure of leniency in view of the age of the offender at the time of the offence. The measure of that leniency is that, in his case, in the working out of the sentence, punishment and welfare are both equally relevant. he is to be detained without limit of time, but expressly on terms which do not deprive him of his liberty for the rest of his days.*
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> .....
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> *this means that the child's proper and development while in custody, as well as the requirements of punishment, must be kept under review throughout the sentence. A policy which ignores at any stage the child's development and progress while in custody as a factor to his eventual release date is an unlawful policy..."*

In the matter at hand, it is the system which seems to be failing. Someone somewhere has ignored their duty as provided by the statutes. When a Court has passed judgment and sentence in respect of adult offenders the Court ceases to be interested in the execution of the sentence. In respect of juveniles who have committed grave offences and are found guilty the law has provided that such offenders be held at the pleasure of the President so that they undergo a programme of review. They are treated in a special way and cannot therefore be sentenced to a determinable period have being held at the pleasure of the President. They can then be released at any stage depending on the recommendation which goes to the President. To be detained at the President's pleasure cannot therefore be equated to a mandatory life sentence. Where the system is operating effectively, we cannot have the unfortunate situation which we have in this case. It can rather be equated to indeterminate sentence which cannot be held to be unconstitutional. We are therefore of the view that section 26 (2) of the Penal Code and section 11 (1) of the Children and Young Persons Act are not unconstitutional.

We however note that it would be ideal to prescribe minimum terms / periods of detention for those ordered or sentenced to be held at the pleasure of the President

as a guide to the President and this responsibility should be with the trial judge. In the United Kingdom since 30th November, 2000 this is the approach adopted.

As to the issue of compensation, it is our view that the applicant was incarcerated following due process and that it was not arbitrary. His incarceration with adults was indeed a violation of his rights but we do not feel that it warrants the monetary compensation. The best compensation the applicant can be given considering the period of more than 10 years he has been incarcerated is to order his release.

All in all, the incarceration of the applicant with adults violated his rights, he has been prejudiced as he has not benefitted from provisions of Children and Young Persons Act and the Constitution. We also do not think that the provisions of section 26 (2) of Penal Code and section 11 (1) of the Children and Young Persons Act are unconstitutional.

We therefore order that considering the circumstances of the applicant and that he has been detained for so long without any review it would be improper to further refer the matter to the Board of Visitors and then the President as that would be to further delay and would be tantamount to delaying the obvious. We therefore order the immediate release of the applicant from custody unless being held for other lawful reasons.

The costs of this application are for the applicant.

PRONOUNCED in open Court this 26th day of August, 2009.

H.S.B Potani
JUDGE

Dr. M. Mtambo

S.A. Kalembera
JUDGE