



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CONSTITUTIONAL REFERRAL NUMBER 2 OF 2021

BETWEEN:

JAM WILLEM AKSTER

CLAIMANT

AND

THE ATTORNEY GENERAL

DEFENDANT

CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA

HONOURABLE JUSTICE VIKOCHI CHIMA

HONOURABLE JUSTICE MANDALA MAMBULASA

MR. MAELE, OF COUNSEL FOR THE CLAIMANT

MR. VICTOR JERE, OF COUNSEL FOR THE DEFENDANT

MS. CHIKONDI CHIJOZI, OF COUNSEL FOR THE AMICUS CURIAE

MR. FELIX KAMCHIPUTU COURT CLERK

ORDER

BACKGROUND:

[1] The Claimant herein, Jam Willem Akster, was charged with several counts in the Chief Resident Magistrate Court sitting at Blantyre. During the hearing of the criminal proceedings, the court below noted that the issues raised concerned the interpretation and application of the provisions of the Republican Constitution. Thereafter, as demanded by section 9(3) of the Courts

Act¹, the lower court referred the matter to the Chief Justice for certification. The Chief Justice duly certified the proceedings as constitutional pursuant to a Certificate dated 18th May 2021. The issues for consideration before this court are: whether section 153 (a) of the Penal Code² is constitutional; whether section 154 of the Penal Code is constitutional and whether section 156 of the Penal Code is constitutional.

[2] On 30th July 2021, we invited the parties to a scheduling conference pursuant to Order 19, rule 7 (3) of the Courts (High Court) (Civil Procedure) Rules, 2017, to be referred herein as Civil Procedure Rules. During the scheduling conference, we also had an opportunity to hear the application of the Registered Trustees of the Centre for Human Rights, Education, Advice and Assistance (CHREAA) to be admitted as *amicus curiae*. Upon hearing the application, we duly admitted CHREAA as *amicus curiae*. We further proceeded to give directions as to the further conduct of the matter as evidenced by the Order for Directions on Scheduling Conference dated 4th August 2021.

[3] The said Order for Directions on Scheduling Conference in paragraph 6 provided for time frames within which the parties were to file and serve their skeleton arguments and list of authorities. The Claimant was supposed to file and serve skeleton arguments by 20th September 2021, the defendant by 10th September 2021 and *Amicus curiae* by 30th September 2021.

[4] By Certificate of Non-Compliance filed by the Defendant dated 2nd September 2021, it was brought to our attention that the Claimant did not comply with the Order for Directions on Scheduling Conference as he did not serve and file skeleton arguments and list of authorities by 20th August 2021. Pursuant to that non-compliance by the Claimant, the Defendant prayed to this court to dismiss the present matter.

[5] Since the Defendant prayed to this court for dismissal of the matter following non-compliance of the Order for Directions on Scheduling Conference on the part of the Claimant, we reasoned that it would be unfair and unjust to grant the prayer without hearing the Claimant herein. We therefore ordered that the prayer be dealt with during an *inter-partes* hearing that was set for 12th October 2021.

[6] On 22nd September 2021, the Claimant filed a Notice of Preliminary Objection on the suitability of Counsel Victor Jere to represent the Attorney General on the ground that there is no evidence that he was appointed to act for the Attorney General. This preliminary objection was set down for hearing on 12th October 2021. This means that we had to deal with two applications on this appointed date.

ISSUES FOR DETERMINATION

[7] As explained above, the two applications before us were, first, the application by the Defendant to dismiss/strike off the present matter for non-compliance and secondly, the preliminary objection by the Claimant on the suitability of counsel Victor Jere to represent the Attorney General.

¹ Cap.3:02 of the Laws of Malawi

² Cap. 7:01 of the Laws of Malawi

[8] On the appointed date of 12th October 2021, the court decided to first deal with the preliminary objection on the suitability of counsel Victor Jere to represent the Attorney General. We arrived at this decision after realizing that our decision on this preliminary objection may affect the other application.

CLAIMANT'S SUBMISSION

[9] The preliminary objection by the Claimant is supported by a sworn statement and skeleton arguments which counsel duly adopted in their entirety. In his sworn statement, counsel Maele depones that his perusal of the court file on 23rd September 2021 showed that there was no Notice of Appointment filed by Counsel Victor Jere from the Attorney General nor was he as counsel for the Claimant served with such a Notice from counsel Victor Jere.

[10] Counsel Maele depones that the position of the Attorney General is a Constitutional one and there are clear provisions relating to how the Attorney General can appoint a person to act on his behalf. Counsel Maele further submitted that civil procedure has laid down procedures on what counsel should do to notify the court and the other parties in the case that they are acting for a party in the case. Counsel depones that in this matter, there is no evidence that counsel Victor Jere was appointed to act for the Attorney General let alone a Notice of Appointment. Counsel Maele therefore submitted that counsel Victor Jere was therefore not competent to file any process in this case.

[11] Counsel Maele therefore prayed to this court to throw out the application for Non-Compliance as it was filed by a person who has not shown the court any authority to act on behalf of the Attorney General.

[12] During the hearing of the objection, counsel Maele told the court that he was served with a letter from the Attorney General dated 8th October 2021 appointing counsel Victor Jere to act on his behalf. Counsel Maele submitted that this letter from the Attorney General vindicates them as counsel Victor Jere prior to the letter did not have any authority known to the law representing the Attorney General. Counsel Maele cited the case of **Blessings Kaferawanthu, Edwin Mcfare and Harrison Davie V The Republic**³, where Professor Kapindu J nullified the proceedings after it was discovered that the legal practitioner in that matter was not admitted to practice law as required. Counsel prayed to this court to take the same root and nullify whatever counsel Victor Jere has done prior to 8th October 2021 including the application for Non-Compliance.

DEFENDANT'S SUBMISSION

[13] Counsel Jere commenced his submission by offering the background to the whole matter from the criminal proceedings in the lower court in Criminal Case Number 146 of 2020. He submitted that he was prosecuting the matter in the lower court with consent⁴ from the Director of Public Prosecutions (DPP). Counsel Jere stated that he believes that there was an error occasioned in this matter where the Attorney General was indicated as a party to these proceedings. In his submission,

³ Criminal Appeal No. 13 of 2015

⁴ Signed Consent from the DPP is dated 31st July 2020 appointing counsel Victor Makhubulo Jere public prosecutor in Criminal Case NO. 146 of 2020.

counsel stated that the Attorney General is not a party to the present proceedings. Citing Order 19 rule 8 of the Civil Procedure Rules, counsel submitted that in constitutional matters, service is mandatory on the Attorney General whether or not the Attorney General is a party to the proceedings. Counsel submitted that in his understanding, the parties to the present proceedings ought to be the State, the Claimant and the *Amicus Curiae* as admitted.

[14] Counsel submitted that his audience therefore in the present proceedings emanates from the fact that he is representing the State as a public prosecutor in the lower court. He believes that there is an error that neither party picked until the present application. He submitted that from the letter attached from the Attorney General, it is clear that all along he had the requisite consent to even represent the Attorney General in these present proceedings. He stated that his filing of the letter from the Attorney General appointing him as a representative of the Attorney General was merely to provide evidence of his appointment as demanded by counsel Maele and to formalize the appointment.

[15] On the case⁵ cited by counsel Maele, counsel Jere submitted that there is no relevance of that case to the present proceedings. He submitted that there is no fraud being perpetrated in the present matter as he has consent from the DPP to prosecute the matter in the lower court and that by virtue of that consent, he submitted that he has a right to be heard in the present proceedings.

[16] Counsel submitted that the Claimant is only trying to delay the prosecution of the criminal proceedings in the lower court. He submitted that during the Scheduling Conference, the court gave directions which the Claimant did not comply with. He stated that during the Scheduling Conference, counsel for the Claimant, without any valid reasons, did not attend the same.

[17] In reply, counsel Maele submitted that the authority to act on behalf of the Attorney General dated 8th October 2021 has no retrospective application. Counsel submitted that the application for Non-Compliance was filed on behalf of the Attorney General. Counsel therefore submitted that court process filed before that authority should be disregarded by this court.

SUBMISSION BY *AMICUS CURIAE*

The *Amicus Curiae* submitted that the position is that the parties in the lower court are the parties in the constitutional matter. Citing the case of **Mayeso Gwanda V The State**⁶, the *Amicus Curiae* submitted that the Attorney General is supposed to be served whether or not is a party to the proceedings. In essence, the *Amicus Curiae* observes that there is no issue in counsel Victor Jere representing the State as a party.

THE LAW AND DISPOSAL OF THE MATTER

[18] We are of the considered view that in resolving the issues, we must first deal with the issue of parties in constitutional matters. We have noted that referral from the Chief Resident Magistrate to the Chief Justice indicated the Attorney General as the defendant⁷. However, the Certificate

⁵ Blessings Kaferawanthu, Edwin Mcfare & Harrison Davie V The Republic (supra)

⁶ Constitutional Case No. 5 of 2015

⁷ Referral dated 12th April 2021

from the Chief Justice indicated the parties as The Republic and Wim Akster. We pause here to state that we noted that the name of the Claimant is not as it appears in his passport, a copy of which we have on file. For purposes of consistency and also to ensure that there is no confusion, we ordered during the Scheduling Conference, that moving forward, the Claimant's name in all documents filed with this court, should be as it appears in his passport, which is, Jam Willem Akster.

[19] The Claimant adopted the parties as indicated in the referral by indicating the Attorney General as the defendant. This is the error that counsel Victor Jere alluded to in his submission. The thinking of the lower court and the Claimant is that once proceedings are certified as constitutional, the Attorney General immediately becomes the defendant. We beg to differ with that proposition. The Attorney General does not automatically become a defendant in constitutional matters unless he or she is sued directly as a party. The parties as captured in the original court are the parties in the constitutional matter. We are of the view that the position is what the Certificate from the Chief Justice captures. Hence, the parties in the present matter are Jam Willem Akstar V The Republic (State).

[20] We are fortified in our position by what the Civil Procedure Rules provide. Order 19 rule 8 provides as follows:

“Every process under this Part shall be served on the Attorney General whether or not the Attorney General is a party to the proceeding.”

Our understanding and interpretation of this rule is that there are circumstances where the Attorney General is not or may not be a party to the proceedings. The reason why the Rules demand service on the Attorney General is in recognizance of the constitutional role played by the Attorney General in constitutional matters. It is up to the Attorney General after service has been effected on him or her to join the proceedings or not. Unfortunately, it seems to us that the Claimant herein disregarded this rule by not serving on the Attorney General. There is no evidence on file that the Attorney General was served with the court process herein as for him to exercise his discretion whether to join the present proceedings or not.

[21] In **Khoviwa V The Republic**⁸, the Supreme Court of Appeal had this to say:

“It must be reiterated here that these courts have on a number of occasions emphasized the importance of following appropriate procedure for declaring any law or provision of a statute unconstitutional. It is imperative that the Attorney General be put on notice regarding the constitutionality of a law or statutory provision that is the subject of the proceedings that are likely to end in that law or provision being declared unconstitutional. Further still, the views of the Attorney General must be sought before any such declaration is made, as was the process in Kafantayeni and

⁸ MSCA Criminal Appeal No. 12 of 2017 (Unreported)

Others V Attorney General. This procedure was recently affirmed by this court in *Professor Arthur Peter Mutharika and the Electoral Commission V Dr. Saulos Klaus Chilima and Dr. Lazarus Chakwera* MSCA Constitutional Appeal Number 1 of 2020. In the present case, the Attorney General was not put on notice that an important issue on the constitutionality of the death penalty was coming up for consideration. Nor were the views of the Attorney General sought before the declaration on the unconstitutionality of the death penalty...”

It is clear to us that what the Supreme Court of Appeal stated above is in line with Order 19 rule 8 of the Civil Procedure Rules. The Attorney General being a Law Officer⁹ responsible for the rule of law and constitutionalism, is to be put on notice where the constitutionality of a provision in a Statute is being litigated in a court of law. We are of the view, as observed above, that once the Attorney General is put on notice, he or she may exercise his or her discretion whether to join the proceedings or not.

[22] In *Professor Arthur Peter Mutharika and the Electoral Commission V Dr. Saulos Klaus Chilima and Dr. Lazarus Chakwera*¹⁰, the Supreme Court of Appeal had the following to say on the role of the Attorney General:

“...we also note that Order 19 rule 8 of the Courts (High Court) (Civil Procedure) Rules provides that every process relating to matters under the Constitution shall be served on the Attorney General, whether or not the Attorney General is a party to the proceedings. The Attorney General thus becomes a party to the proceedings and is expected to assist the court in resolving the issues before the court.”

[23] The Supreme Court of Appeal went further to state the role of the Attorney General as follows:

“... We hold that although the Attorney General was properly appointed to represent the second appellant, in terms of section 20 of the Electoral Commission Act, at the commencement of the proceedings in the court below, when the matter became a constitutional referral the Attorney General, as a Law Officer number one and custodian of the Constitution, should have stepped back and ceased to represent the second appellant. The Attorney General, having withdrawn from representing the second appellant, should have taken up the role of assisting the Court below to resolve the three constitutional issues on matters of law which had been referred to the Court....It is obvious to us, as it should have been to the Court below, that the Attorney General must have been aware that he could and should have continued participating in the proceedings only in his capacity of Attorney General and Law

⁹ See Section 50 of the General Interpretation Act, Cap. 1:01 of the Laws of Malawi

¹⁰ MSCA Constitutional Appeal Number 1 of 2020

Officer to guide the court below on matters of law in resolving the three constitutional issues, as opposed to representing or taking sides with the second appellant.”

[24] As the Supreme Court of Appeal has observed above, once the Attorney General decides to join the proceedings, he has to assume a neutral role. His or her role is strictly to assist the court to resolve the constitutional issues before it. The Attorney General is not supposed to take sides as Law Officer of the court. It is therefore in keeping with this proposition that it becomes problematic to indicate the Attorney General as a defendant in these matters. The parties to the case still remain as such. Hence, we hold that it was wrong in the present matter to indicate the Attorney General as the defendant. As a result, we hold that the cited case of **Blessings Kaferawanthu, Edwin Mcfare and Harrison Davie V The Republic**¹¹ is not relevant in the present matter as it was premised on the wrong interpretation that counsel Victor Jere was representing the Attorney General.

[25] Now having held that the parties are Jam Willem Akstar V The Republic (State), it is obvious to us that the legal practitioners who represented them in the lower court are the ones to represent them in the constitutional matter unless the parties exercise their right to change legal practitioners. The State/Republic in that matter was represented by Counsel Victor Jere as a public prosecutor following his appointment by the DPP. We are of the considered view that counsel Victor Jere is representing the State (DPP) herein. When the matter commenced in this court, counsel Victor Jere was appearing on behalf of the State. We are of the view that the interests of the State/DPP in the present matter will be well served by the appearance of counsel Victor Jere as some of the issues to be resolved by this court hinge on the criminal issues in the lower court.

[26] We are of the view that the distinction between the Attorney General as provided in section 98 of the Republican Constitution and the DPP as provided in section 99 should be respected despite the fact that these two constitutional offices fall under the Ministry of Justice and Constitutional Affairs. When it comes to criminal prosecution, the DPP is responsible and the Attorney General is the Government principal legal adviser whose duties as already stated include fostering rule of law and constitutionalism.

[27] Though the Attorney General was not served as observed above, it is clear to us that he is aware of the present proceedings through the communication from the DPP. It seems to us that the Attorney General is desirous that his views be heard in the present matter. We are of the view that is the reason that he has issued consent to Counsel Victor Jere pursuant to section 98 (2) (b) of the Republican Constitution to represent him. However, we are of the considered view that this arrangement is not legally tenable at law as there is a conflict of interest. Counsel Victor Jere is supposed to advance the interests of the State as public prosecutor and not the Attorney General who is supposed to play a neutral role. We are mindful of the fact that in certain instances, the interests of the DPP as a party to constitutional proceedings may differ from interests of the Attorney General as custodian of the Republican Constitution. In those circumstances, it is

¹¹ supra

advisable and prudent for the Attorney General to make appearance or appoint someone to act on his behalf to assist the court in resolving the constitutional issues before it.

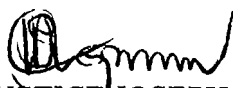
CONCLUSION

[28] Based on the foregoing, it is our finding that counsel Victor Jere was and is competent to represent the DPP in the present matter as a party in the lower court. Further, we are of the considered view that counsel Victor Jere cannot represent both the DPP and the Attorney General to avoid conflict of interest. In these circumstances, we order that the Attorney General be represented by either counsel Aristotle Mahonga from Attorney General's Chambers as communicated by the Attorney General to counsel Victor Jere through his letter dated 8th October 2021 or any other legal practitioner from Attorney General's Chambers he may appoint.

[29] We are therefore of the view that the applicant for Non-Compliance filed by counsel Victor Jere is in order as he was competent to represent the DPP in this matter.

[30] This is the unanimous decision of the court.


MADE IN OPEN COURT THIS 16TH DAY OF NOVEMBER 2021 AT BLANTYRE PRINCIPAL REGISTRY.



HONOURABLE JUSTICE JOSEPH CHIGONA



HONOURABLE JUSTICE VIKOCHI CHIMA



HONOURABLE JUSTICE MANDALA MAMBULASA