



IN THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY: CRIMINAL DIVISION
Criminal Case No. 7 of 2020

The Republic

-v-

Thomson Frank Mpinganjira

Coram:

Honourable Lady Justice D.A. DeGabriele

Mr. R. Matemba	Director General for ACB, for the State
Mr. Nkhono, SC	Counsel for the Accused
Mr. Maele	Counsel for the Accused
Mr Chokotho	Counsel for the accused
Mr. Amosi	Court Clerk
Mrs Msimuko	Court Reporter

DeGabriele, J

JUDGEMENT

Introduction

1. The accused person, Thomson Frank Mpinganjira has been charged with six (6) counts of offence under the Corrupt Practices Act. The charges arose from events surrounding the trial of the case of **Dr. Saulos Klaus Chilima and Dr. Lazarus McCarthy Chakwera -v- Professor Arthur Peter Mutharika and Electoral Commission Constitutional Reference Number 1 of 2019 (unreported)**, which was heard by a panel of five (5) High Court Judges.
2. The background in brief is that the presidential result from the Tripartite General Election held on 19 May 2019 was challenged. The Petitioners alleged gross irregularities in the conduct of the presidential election by the Electoral

Commission. The matter was subsequently certified as a constitutional case because the challenge had raised questions involving the interpretation of the Constitution. The electoral challenge was upheld, and the presidential result was nullified. The Court ordered that a fresh presidential election be conducted.

3. During the conduct of the trial, it was exposed that the accused person had sought to influence the outcome of the Elections Case. It is alleged that he had offered substantial sums of money to the five (5) presiding Judges to decide the case in favour of the then incumbent president Professor Peter Arthur Mutharika. He was arrested and charged with six (6) counts of offence under the Corrupt Practices Act.

a. The first count is ***Offering an advantage to a public officer, contrary to section 24 (2) of the Corrupt Practices Act***. The particulars of this count are that the accused person, between 1st October, 2019, and 30th. November 2019, within the City of Blantyre, offered an advantage, namely, an unspecified amount of money, to Justice Michael Atanzio Tembo, for the benefit of the said Justice Michael Atanzio Tembo and Justices Healey Potani, Ivy Kamanga, Dingiswayo Madise and Professor Redson Kapindu, all public officers and members of the Constitutional Court panel sitting on the Constitutional Reference Case Number 1 of 2019, as an inducement for the five judges to decide the Constitutional Reference Case Number 1 of 2019, in favour of the respondents in the said case, who were Arthur Peter Mutharika and the Malawi Electoral Commission.

b. In the alternative to first count, the second count is ***Attempting to induce a public officer to perform functions corruptly, contrary to section 25A (2) of the Corrupt Practices Act***. The particulars of the offence are that the accused person, Thomson Mpinganjira, between 1st October, 2019, and 30th November, 2019, within the City of Blantyre, attempted to induce Justice Michael Atanzio Tembo, a public officer and member of the Constitutional Court panel sitting on the Constitutional Reference Case Number 1 of 2019, to exercise or perform his functions corruptly, in relation to the said Constitutional Reference Case, namely, to accept an unspecified amount of money for himself and

for Justices Healey Potani, Ivy Kamanga, Dingiswayo Madise and Professor. Redson Kapindu, in order for the five judges to decide the said Constitutional Reference Case in favour of the former President Professor Arthur Peter Mutharika and the Malawi Electoral Commission in the said Constitutional Reference case.

- c. In the alternative to the second count, the third count is ***Attempting to induce a public officer to abuse his public office, contrary to section 25B (2) of the Corrupt Practices Act***. The particulars of the offence are that the accused person, Thomson Mpinganjira, between 1st October, 2019, and 30th November, 2019, within the City of Blantyre, attempted to induce Justice Michael Atanzio Tembo, a public officer and member of the Constitutional Court panel sitting on the Constitutional Reference Case Number 1 of 2019, to abuse his public office or position as a member of the said Constitutional Court panel, by offering him an unspecified amount of money, for the advantage of the former President Professor Arthur Peter Mutharika and the Malawi Electoral Commission in the said Constitutional Reference Case.
- d. The fourth count is ***Offering an advantage to a public officer, contrary to section 24 (2) of the Corrupt Practices Act***. The particulars of the offence are that the accused person, Thomson Mpinganjira, between 1st October, 2019, and 30th November, 2019, within the City of Lilongwe, offered an advantage, namely, an unspecified amount of money, to Justice Healey Potani, for the benefit of the said Justice Healey Potani and Justices Michael Tembo, Ivy Kamanga, Dingiswayo Madise and Professor. Redson Kapindu, all public officers and members of the Constitutional Court panel sitting on the Constitutional Reference Case Number 1 of 2019, as an inducement for the five judges to decide the Constitutional Reference Case Number 1 of 2019, in favour of the former President Professor Arthur Peter Mutharika and the Malawi Electoral Commission in the said Constitutional Reference case.
- e. In the alternative to the fourth count, the fifth count is ***Attempting to induce a public officer to perform functions corruptly, contrary to section 25A (2) of the Corrupt Practices Act***. The particulars of the

offence are that the accused person, Thomson Mpinganjira between 1st October, 2019, and 30th November, 2019, within the City of Lilongwe, attempted to induce Justice Healey Potani, a public officer and member of the Constitutional Court panel sitting on the Constitutional Reference Case Number 1 of 2019, to exercise or perform his functions corruptly, in relation to the said Constitutional Reference Case, namely, to accept an unspecified amount of money for himself and for Justices Michael Atanzio Tembo, Ivy Kamanga, Dingiswayo Madise and Professor. Redson Kapindu, in order for the five judges to decide the said Constitutional Reference Case in favour of the former President Professor Arthur Peter Mutharika and the Malawi Electoral Commission in the said Constitutional Reference case.

f. In the alternative to the fifth count, the sixth count is ***Attempting to induce a public officer to abuse his public office, contrary to section 25B (2) of the Corrupt Practices Act***. The particulars of the offence are that the accused person, Thomson Mpinganjira between 1st October, 2019, and 30th November, 2019, within the City of Lilongwe, attempted to induce Justice Healey Potani, a public officer and member of the Constitutional Court panel sitting on the Constitutional Reference Case Number 1 of 2019, to abuse his public office or position as a member of the said Constitutional Court panel, by offering him an unspecified amount of money, for the advantage of the former President Professor Arthur Peter Mutharika and the Malawi Electoral Commission in the said Constitutional Reference Case.

4. The accused person denied all the six counts of offence, and a plea of not guilty was entered in respect to each one of the counts. Before trial begun, the accused person made an application under section 252A of the Criminal Procedure and Evidence Code (CP&EC) to enter into a plea-bargaining process. The Court allowed the plea bargain process. At the end of the process, the Defence and the State had made their position known and the plea-bargaining process had been concluded. However, the accused person had sought more time to make his own consultations before accepting or rejecting the State's offer. The Court denied the application to extend the plea-bargaining

period because the consultations were not necessary as the bargain was between the accused person and the State, not any other third parties.

The Prosecution's evidence

5. The prosecution paraded 6 witnesses.

- a. The first witness (PW1) was Justice Michael Atanzio Tembo. He told the court that he is a Judge of the High Court in the General Civil Division. He went further to tell the court that he sat on the Constitutional Reference Case number 1 of 2019 together with Justices Kapindu, Madise, Kamanga, and Potani. He testified that the petitioners in the said case were Dr. Saulos Klaus Chilima and Dr. Lazarus Chakwera and that the Respondents were Arthur Peter Mutharika of Democratic Progressive Party and the Electoral Commission. Justice Tembo told the court that the issue which was before the Constitutional Court was the election of Arthur Peter Mutharika as President of Malawi. The Petitioners were arguing that Arthur Peter Mutharika was not duly elected as the president due to irregularities during the 2019 presidential elections. Justice Tembo told the court that he personally knows the accused person as a person he goes to the same Church with, and the church is the Seventh Day Adventist Church. He told the court that the accused person contacted him four times on 9th of October 2019, 10th October 2019, 13th October 2019, and the final time on 30th October 2019.
- b. Justice Tembo told the court that the accused person sent a message at around 6 o'clock in the morning on 9th October, 2019, asking for Justice Potani's number. At this moment, the accused person did not disclose to the witness why he wanted Justice Potani's number. The witness said he later shared this issue with Justice Kapindu. The witness told the court that he informed Justice Potani that the accused person was looking for his number, and that the witness told Justice Potani about this information in the presence of Justice Madise and Justice Kapindu at Ufulu Gardens in Lilongwe. Justice Potani advised the witness that he

should give the accused person his contact number, and the witness did as advised.

- c. The witness went on to tell the court that on 10th October 2019, at lunch Justice Potani that he had bad news because he had received a call from the accused person. Justice Potani stated that the accused person told him that he was running a Project of Lawyers and Judges, which project included Justice Chikopa, but that the project did not concern the FDH Bank. Justice Potani Further narrated that the accused person was told to contact him (Justice Potani) as Chair of the Panel of Judges that were hearing the Constitutional Reference Case and tell him that he had a parcel to give to him. The accused person also stated that he was ready to bring the parcel containing cash from Blantyre to Lilongwe where the Judges were sitting. The witness told the court that Judge Potani told the accused person not to bring the parcel but instead give it to him in person in Blantyre. The witness further informed that on 13th of October 2019, the accused person texted him on *WhatsApp* and informed him that he had managed to get in touch with Justice Potani, and that the accused person was happy to have gotten in touch with Justice Potani.
- d. The witness further told the court that on 24th of October 2019, between 12:00 noon and 1:00pm, the accused person called him on *WhatsApp*, but he did not pick the call as he was not comfortable to answer the call. Instead, the witness texted the accused person that he was busy and that the accused person suggested that they should talk after 5:00 pm to which the witness agreed. The witness told the court that the accused person called him in the evening on his cell phone number 0888 844 765 and told him that Justice Potani was not available. The accused person also stated that time was running out for him. The accused person further complained that Justice Potani just sent a text when he called saying acknowledging his call, but Justice Potani did not return the call. The accused person then asked the witness to help him talk to Justice Potani. When the witness asked the accused person what is it that he wanted Justice Potani for, the accused person said to the witness that he thought he knew everything, to which the witness said he did not know anything.

- e. . The accused person explained that he had told Justice Potani that he was running a project of Judges and Lawyers and that he was advised to talk to Justice Potani as there was parcel to be given to Justice Potani. The accused person further stated that he is a lender, that he lends money to different people including DPP officials and that people he lends money to are supposed to pay back and that as a lender, he finds out the purpose for which people have borrowed money from him. The witness informed the court that he told the accused person that he needed to know why he wanted Justice Potani because he was not the one who gave him Justice Potani's number. That the accused person told the witness that he had been given a parcel and that when he had opened it there was cash inside, he then said that he had been told to give it to Justice Potani. That the witness asked the accused person if Justice Potani knew that someone sending the parcel through the accused person, whereupon the accused person replied that what he had told Justice Potani was that he had given a parcel to pass on to Justice Potani and that he had checked inside the parcel and the parcel contained cash.
- f. The witness told the court that the accused person further told him that the money was meant to be given to Justice Potani and later the money would be shared to among the five Judges. That the accused person stated that they were concerned as to whether the money was reaching the Judges "*zikumafika*" (actual words used by the accused person). That the mission of the accused person was to find out whether "*ndalama zikumafika*" the accused person stated that he wanted to verify because he had questions on the conduct of Counsel Mbeta who had also taken money for lawyers representing Arthur Peter Mutharika, but that the lawyers denied having received the money from Counsel Mbeta, money sent by the accused person. The accused person further told the witness that counsel Mbeta was also receiving money for the Judges and lawyers.
- g. The witness told the court that the accused person told him that his cousin Brown Mpinganjira advised him to ask the witness whether they

were receiving the money, as the witness was his fellow church member, Upon hearing this, the witness told the accused person that they were being scammed of the money, since the witness as a Judge hearing the election case had never received any money from anyone and had never discussed with anyone about the money concerning the issue he had raised. That the accused person later asked the witness to help him in the project by getting the parcel of money and give it to Justice Potani, but that the witness refused. The witness further told the court that the accused person told him that the money that had been sent to the Judges who were presiding over the election case was in excess of K100,000,000.00 (one hundred million kwacha). That everyone, including the principal, knew the issue of the money. Here the witness told the court that according to his conversation with the accused person, the "Principal" was Arthur Peter Mutharika who was the first Respondent in the **Constitutional Reference case number 1 of 2019**. The witness told the court that the accused person further said that some people had put the fear of the devil in the DPP officials and that DPP officials thought that the petitioners in the election case were giving money to the Judges, and that the DPP officials even said "*Mukapanda kupeleka muzalira*"

- h. The witness further told the court that on 13th of October 2019, the accused person told him that he had gone to the bottom of the matter and that he confronted the person who was collecting money from him and later giving to Justice Chikopa. The person insisted that the money was coming to the Judges through Justice Potani. The accused person further added that Brown Mpinganjira told him (the accused person) that Justice Potani drove Justice Chikopa to Brown Mpinganjira's residence. When asked by the witness whether he saw Justice Chikopa receiving any money, the accused person indicated to the witness that he did not see Justice Chikopa receiving money. That the accused person further added that Justice Chikopa told Brown Mpinganjira that no amount of money could affect the decision of the Judges in the **Constitutional Reference case number 1 of 2019**, the witness told the court that he got the sense that Brown Mpinganjira was the one taking money from

accused person to give to Justice Chikopa. The witness later told the court that he recorded the calls that the accused person made to him and that he submitted the recordings as well as print-out of his *WhatsApp* messages with the accused person to the ACB as part of his evidence. The witness concluded his testimony by emphasizing that according to him, the accused person wanted to offer him and the Judges a parcel containing money to induce or influence them to decide the election constitutional Reference case number 1 of 2019.

- i. In cross examination, the witness was asked to verify a number of issues in the transcript, and the evidence he had given under oath, which he did. He told the court that he has been a judge since 2013, and he knew the accused from 2010 when he started congregation at Sunnyside Seventh day Church. He told the court that he sat in the sabbath together with the accused and they visited each other's homes as church members. He stated that he made the recordings on 24th October 2019 on the phone app automatically and 30th October 2019, on loudspeaker recording on his iPad as he wanted to share with colleagues what transpired and, if matters came to a head, report the issues to authorities. The accused person contacted him on 4 occasions. The matter was reported to the Chief Justice who later reported to ACB. The panel of judges decided to report the matter after hearing the case because of the sensitivity of the case and its national interest. The witness was apprehensive at that time because there was so much being reported in social media.
- j. The witness stated that he did not solicit information but just listened and asked questions for clarity. The witness was aware that Justice Chikopa was cleared, but not the clearance of the accused person. The accused person had stated that the money was in excess of MK100 million. The accused person had informed the witness that he had advised the people not to pay, but they did not heed his advice. The accused person wanted to send the parcel to Justice Potani, and he did not want to fail like the others. The accused person said the die was cast and it fell on him to approach the judges through the chair of the panel.

6. The second prosecution witness (PW2) was Justice Healey Potani.
 - a. He told the court that he was Chairing a panel of Judges in the **Constitutional Reference case number 1 of 2019**, which involved Dr. Chilima and Dr. Chakwera as Petitioners, and Arthur Peter Mutharika and the Malawi Electoral Commission as Respondents. He narrated to the court that on the 9th of October 2019, Justice Tembo told him that the accused person wanted his number, and that was said at Ufulu Garden in the presence of two other Judges, Justice Madise and Kapindu. PW2 told the court that he told Justice Tembo to give the accused person his number and that Justice Tembo should as well give him the number of the accused person so that when he calls he should recognize the number. PW2 further said that at around 9:00 pm on 9th October, 2019, the accused person called him. He said that the accused person explained to him that he was running a project of Judges and Lawyers and wanted to talk to him as the chairperson of the panel of Judges hearing the **Constitutional Reference case number 1 of 2019**. PW2 told the court that he was apprehensive after hearing that the accused person wanted to talk to him as the chairperson of the panel because he was handling a very sensitive case at that time.
 - b. PW2 further stated that the accused person told him that he wanted to find out from him if he had received parcels sent to him by accused person through Justice Chikopa, and also that he wanted to be advised on how he should deliver another parcel that he had in his possession, and that he was ready to fly to Lilongwe from Blantyre to hand over the parcel. PW2 told the court that he told the accused person not to travel to Lilongwe but that he would meet him in Blantyre. He further said that the accused person kept calling him, but he did not pick any of his calls. The witness told the court that he never met the accused person and that he never received the parcel from him. The witness later tendered printouts of screenshots of cell phone and *WhatsApp* calls that the accused person made on 9th October 2019, as part of the evidence.
 - c. In cross examination, he told the court that he joined the judiciary in 1989 as a resident magistrate and had served as a Chief Resident Magistrate,

a Deputy Registrar and Registrar. He was appointed a judge of the High Court in 2003. He was appointed Judge-In-Charge in the year 2014, and his duties included looking over the welfare of judges, supervising judges and case management. He was not surprised the accused wanted to call him because he believed the accused wanted to follow-up on a case. The conversation with the accused person on 9 October lasted about 5 minutes. PW2 did repeat and confirm most of the points he raised in examination in chief. He told the court that witness statements do not contain all the information. He also said there was no discussion of money between him and the accused. He also said that the Constitutional Reference Case was heard by a number of judges and the level of bias was minimal. In re-examination, he just confirmed the information he had given.

7. The third witness (PW3) was Justice Dingiswayo Madise.

- a. PW3 told the court that he is High court Judge in Blantyre. He told the court that Justice Tembo told Justice Potani that the accused person was looking for his number and that Justice Potani told Justice Tembo to give the accused person his number. PW3 was present when this was said, together with Justice Kapindu was also present. Later Justice Potani informed them that the accused person was trying to get in touch with him to give him a parcel as chair of the panel for the benefit of all the five Judges who were sitting on the Constitutional reference Case Number 1 of 2019.
- b. PW3 further explained that Justice Potani said that they needed to report the matter to Chief Justice who should in turn report to Director of the Anti-Corruption Bureau. He said that they briefed the Chief Justice on what had transpired between the accused person, Justice Potani and Tembo. PW3 told the court that the Chief Justice was equally concerned and promised to report the matter to the Anti-corruption Bureau. He also told the court that the money or the parcel was never delivered to Justice Potani or Justice Tembo. He concluded by stating that he found the conduct of the accused person offensive because one does not offer bribes to Judges.

- c. In cross examination, Counsel for the accused person stated first that the evidence of PW3 was hearsay. The Court proceeded to direct that he could be cross examined on the issues that he witnessed. The witnesses stated that he was not part of the conversation between the accused person and Justice Potani, nor the accused and Justice Tembo. He was aware that the matter was not reported because there was fear of losing focus on the case at hand. He also stated that as far as he knew, the parcel was never received, and no judge received any money
8. The fourth prosecution witness (PW4) was Justice Redson Edward Kapindu.
 - a. He told the court that he is Judge of the High court, a visiting Professor at the University of Johannesburg and a part time lecturer at Chancellor College, the University of Malawi. He further told the court he was appointed as Judge of the High Court in July 2013. PW4 told the court that he was one of the Judges that presided over the **Constitutional reference Case Number 1 of 2019** in 2019. He told the court that Justice Michael Atanzio Tembo told him that he had received a message from the accused person. The accused person was requesting for a cell phone number for Justice Potani. PW4 and Justice Tembo were wondering as to why the accused person wanted the number of Justice Potani. Justice Potani allowed for his number to be shared with the accused person. PW4 and Justice Madise were present when this was said.
 - b. The following day at lunch time, Justice Potani told them (all 5 Judges) that he got a call from the accused person who said that he was running a project. The witness explained to the court that Justice Potani told them that the accused person had said that he had approached him as the chair of the panel of Judges who were handling the election case. That the accused person told Justice Potani that he was running a project of Lawyers and Judges and that he had a parcel that he wanted to deliver to Justice Potani.
 - c. When asked what Justice Tembo told him, the witness said that Justice Tembo told him that the accused person explained to him that he wanted

to deliver a parcel to Justice Potani, and that later the accused person later asked Justice Tembo to deliver the parcel to Justice Potani, a request which Justice Tembo refused. The witness also told the court that Justice Tembo showed him the text message between him and the accused person. PW4 also listened to the audio recordings that Justice Tembo had recorded of his conversation with the accused person, and he recognize the voices in the recordings as those of Justice Tembo and accused person. The witness indicated to the court that he never interacted with or spoken with the accused person, but he was certain that the two people that were conversing in the audio recordings were Justice Tembo and the accused person.

- d. The witness emphasized that the other person in the audio recordings was the accused person because Justice Tembo was definite on that, and that he could also relate the voice to the accused person because he had listened to him speaking on numerous occasions. The witness further told the court that he could vouch to the truthfulness of the conversation between Justice Tembo and the accused person because he had listened to the two audio recordings between Justice Tembo and the accused person. PW4 told the court that they all agreed that the matter should be reported to the Anti-Corruption Bureau. That they resolved to involve the chief Justice, who should report the matter to the Anti-Corruption Bureau. PW4 concluded his testimony by telling the court that he did not have doubts that the offer of the parcel to the chairperson of the panel was something that was meant to influence the elections case that they were handling at that time.
- e. In cross examination, Counsel for the accused person stated that the testimony was hearsay. Again, the Court directed that PW4 be cross examined on the issues he had direct knowledge on. PW4 stated that he never interacted with the accused person, but as a high-profile person he had heard him speak on radio and television. He only listened to the conversation that was recorded. He said it was not wrong to ask for a judge's number, but he would only share such a number after verifying with the judge concerned. He said the conversation among the judges

was about an attempt to bribe with a parcel. He acknowledged that bribery cases ought to be reported within 48 hours unless there is probable cause not to do so. The probable cause in this matter was to ensure no distractions until the corruption case evidence was heard.

9. The fifth witness (PW5) was Justice Ivy Chatha Kamanga

- a. PW5 told the court that she is currently Justice of Appeal, but she was High Court Judge during the period the issue at hand had happened. PW5 told the court that she was one of the Judges that handled the **Constitutional Reference Case no 1 of 2019**, and the parties in the case were Arthur Peter Mutharika, Dr. Lazarus Chakwera, Dr. Saulosi Chilima and the Malawi Electoral Commission. She said the members of the panel had agreed that they would brief each other in case of anything happening regarding the case. PW5 told the court that in October 2019, during lunch time, Justice Potani told them that he had shocking news, but he did not know how to tell the Judges. Justice Potani told them that the accused person wanted to find out whether he had received a parcel to pass on to panel of Judges who were handling the **Constitutional Reference Case Number 1 of 2019**.
- b. PW5 stated that Justice Potani showed them *WhatsApp* messages where the accused person said that they should meet at Justice Potani's House, as his house. With respect to Justice Tembo PW5 said that Justice Tembo confirmed to have given Justice Potani's number to the accused person. PW5 had she had the opportunity to listen to the audio recordings that was recorded by Justice Tembo and that she managed to recognize the voice of Justice Tembo and the accused person. PW5 recognized the voice of the accused person in the recordings because she has listened interviews that the accused person has had on various television stations and fora or meetings that she has also attended, such as at Nkopola Lodge in Mangochi where the accused person was speaking. PW5 told the court that the substance of conversation was that the accused person as a member of the team behind the project, wanted to find out if Justice Potani had received money that he had been sending to them. She further told the court that the accused person

analysed every Judge on his or her potentiality to be corrupt but that the accused person excluded her from the list of Judges that could be influenced. PW5 told the court that she can vouch for the truthfulness of the conversation between Justice Tembo and the accused person because she listened to the recorded conversation that Justice Tembo had with the accused person. PW5 concluded by telling the court that she can confirm and state that what was discussed between the accused person and Justice Tembo is true because of the recorded conversations that she had listened to.

- c. In cross examination, PW5 stated that she confirmed the truthfulness of the conversations because she listened to it herself. PW5 stated that reporting later than 48 hours to ACB did not rob the ACB of their opportunity to investigate the matter. PW5 said that it was not feasible to report within that time because of the sensitive case. The panel also thought of the high likelihood of mob justice bearing the national interest on the matter and needed to protect the accused person as well.

10. The sixth prosecution witness (PW6) was Dan Mponda.

- a. He told the court that he is the Director of the Investigations at the ACB and he had attained the current position through promotions after joining the ACB in 2021 as an investigation officer. He told the court that he knows the accused person as Thomson Mpinganjira. That he interacted with the accused person during the investigation of an allegation that the ACB was conducting. The said allegation was based on the letter that the Chief Justice wrote to the Director General of the ACB that the Managing Director of the FDH Bank, who is the accused person, contacted the five Judges through Justice Potani and Justice Tembo, asking if they had received the money that he was sending them. He tendered that letter from the Chief Justice as part of his evidence.
- b. PW6 told the court that the team of investigators from the ACB comprised of Pacharo Nyirongo, Vilera Liwonde, Florence Phiri and himself. As part of their investigations, they conducted interviews, collected documents, audio recordings and other pieces of evidence.

The team interviewed Justice Michael Tembo, Justice Kapindu, Justice Kamanga, Justice Madise and Justice Potani. Justice Tembo was the one who gave them the audio recordings. The interviews were recorded *verbatim* and that there is no influence whatsoever by the ACB. PW6 told the court that the recordings were soft copies transmitted from Justice Tembo's phone to their computer. After analysing all the materials, they had gathered, their investigations established that the accused person indeed offered an unspecified amount of money to Justice Potani and Justice Tembo in order for them to decide the case they were presiding over in favour of the Democratic Progressive Party and the Malawi Electoral Commission.

- c. PW6 told the court that on 22nd January, 2020, the ACB invited the accused person to the ACB offices in Blantyre to hear his side of the story. PW6 read the record of interview that they had recorded from the accused person and tendered the record of interview as part of his evidence. The witness also told the court that record a caution statement from the accused person where he adopted his record of interview as part of his caution statement. The witness also tendered the caution statement as part of his evidence. PW5 concluded by stating that their investigations established that the accused person offered an unspecified amount of money to the panel of Judges that were presiding over the election case in order for them to decide that case in favour of the Democratic Progressive Party and the Malawi Electoral Commission.
- d. In cross examination, PW6 stated that he joined the ACB in the year 2001. He has a Bachelor of Education degree, trained locally and abroad as an investigator, holds a Masters' Degree in strategic planning. He said the Chief justice lodged the complaint through a letter dated 2 December 2019, which his office received on 10th January 2020. PW6 stated that the Act encourages early reporting so that evidence should not be lost and witnesses have the issues fresh in their minds. There was no evidence that the judges were given money to decide in favour of the respondents. PW6 also stated that in matters of corruption, offers and actions are not done directly. The accused was interviewed as a witness

and later was arrested and interviewed under caution. He said that if there had been early reporting, they might have found the parcel. There was an investigation on Justice Chikopa but he was cleared. The bank accounts of the accused person and Justice Chikopa were checked and there was no reflection of MK100 million. In re-examination, he stated that delays affect the quality of investigations but there was no such negative effect in this case. When the accused was being interviewed, his lawyer Counsel Nkhono asked for a brief consultation and after the interview resumed, the accused simply responded 'no comment' to all questions put to him. The parcel was mentioned by the accused person and not the judge. PW6 also stated that any person can report corruption.

11. At the close of the prosecution's case, the Court assessed the evidence to find whether or not the prosecution has preferred sufficient evidence to warrant the accused person to enter his defence, as required under section 313 of the CP&EC. The Court found that the evidence of the prosecution raised a *prima facie* case against the accused person sufficient to put him on defence. The Court is informed the accused person that the call to enter a defence is not mandatory in view of section 42(2)(f)(iii) of the Constitution of the Republic of Malawi, as the accused person has a right to choose to defend himself or to exercise their right to remain silent. However, whichever choice he makes, this Court will be able to proceed to judgement based on the evidence before it. The accused person opted to enter his defence.

The Defence's case

12. Before so entering his defence, the accused person made an application that this Court should recuse itself on allegations of impropriety. He alleged that this Court, through Justice Kalembere and a person named Tim Zambezi was either demanding to receive, or intended to receive, or promised to receive the sum of '200' for purposes of this Court deciding in favour of the accused person. The Court made a ruling that it would not recuse itself. The accused person appealed against the ruling of this Court and sought to have the proceedings before this Court be stayed. The supreme Court denied making an order of stay of proceedings and ordered that this Court should continue to hear the matter.

13. The accused person intended to call 4 witnesses. However, only 2 witnesses testified. The accused person also made an application before this Court to have the witnesses protected. The Court granted an anonymity order and allowed the witnesses for the accused person to give evidence *in camera* due to their own perceived threats to their lives. Regardless of the anonymity order, and the guarantee for protection, the other two witnesses, who came to Blantyre from Lilongwe to testify, did not testify before this Court.

14. The first defence witness (DW1) was the accused person himself, Thomson Frank Mpinganjira.

a. He told the court that he resides in Nyambadwe on Plot number NY 628, in Blantyre and that he comes from Dzungu Village, Traditional Authority Bvumbwe in Thyolo District. DW1 holds a Bachelors' Degree in Accountancy and is a Fellow of the Chartered Institute of Accountants and has been a Fellow since 1992. He told the court that he is a businessperson, having retired from employment as the Group Chief Executive Officer of FDH Holdings, a position he held from the year 2007. DW1 was the Managing Director of FDH Holdings Group from 2002 to 2007. He told the court that he founded the company in the year 2000, that the process of establishing the company started in the year 1999 but that the company started its operations in the year 2002. DW1 holds shares of the FDH Financial Holdings Group, through his company called Continental Development Limited.

b. DW1 told the court that he does not hold any position in the *Mulhakho wa Lhomwe* Cultural grouping and he is not a member of any political party in Malawi. He told the court that he did not have any preference as regards who would win the ***Constitutional Reference Case Number 1 of 2019***. He indicated that he knows Arthur Peter Mutharika who belongs to Democratic Progressive Party (DPP). DW1 told the court that he supports all political parties that go to him for assistance and that he funds all political parties, the same way he funds other projects in the country. DW1 told the court that he has never had any ambition to take a leadership position in any of the political parties, and that he is aware that social media thinks he is interested in a position in DPP, he told the

court that he has addressed this issue in media briefings and conferences.

- c. DW1 told the court that he has assisted political parties such as PP, United Transformation Party (UTM) and MCP. That he has personally dealt with leaders of the political parties mentioned, and that these leaders are Dr. Joyce Banda, Dr. Lazarus Chakwera, Dr. Saulos Chilima and Professor Arthur Peter Mutharika. DW1 stated that he is not interested in politics because he has a business that requires his focus and attention, and that can be affected by his involvement on politics. He told the court that as a businessman, he works with any leadership in government and that it is suicidal to join politics because political parties come in and out of power.
- d. DW1 further told the court that the late Paramount Chief Ngolongoliwa once approached him, on 13th March 2018, where the Chief asked the witness if he could be the running mate for DPP, but that he told him that he was not interested because he is a businessperson. DW1 further told the court that on 24th September, 2019, Prince Kapondamgaga who is the current officer in-charge of the State Residencies approached the witness and asked him if he could be running mate to Dr. Lazarus Chakwera for MCP in respect of the 2020 elections, and he declined as well. With respect to prosecution witness number one, DW1 told the court that it is correct that he knows Justice Tembo, that he knew him in 2010, that they are together in the English class number 2 at their church, and that the class has 12 members, that they also attend the same Sabbath school where they discuss things. DW1 told the court that they also visit each other as members of class 2 and that he has been to Justice Tembo's house and Justice Tembo has also visited his house twice; the first time was when they visited his house as a class and the second time was when they visited to condole him for the death of his wife.
- e. DW1 told the court that he remembers Justice Tembo saying that he did not consider him as a friend, and he was surprised to hear that because if someone can discuss personal matters then they ought to be friends.

An example of a personal matter that Justice Tembo discussed with the witness was the allegation that he (Justice Tembo) had embezzled MK20 Million in 2014. DW1 told the court that Justice Tembo said in court that DW1 asked for a cell phone number for Justice Potani from him is true and correct. DW1 told the court that he called Justice Tembo to ask for Justice Potani's number because he knew Justice Tembo personally and that he spoke with Justice Potani in the evening after getting the number from Justice Tembo.

- f. DW1 told the court that he recalls the evidence concerning the audio recordings that he had with Justice Tembo. He told the court that he did not know that Justice Tembo was recording the conversation that they were having, and he was made aware of the recordings on the day he was advised to go to ACB in Blantyre. He recalls that the recordings were played in his presence, and he recognized the people speaking in the audio recordings. The witness told the court that he could not dispute the authenticity of the recordings played in court, and indeed agreed that he had a conversation with Justice Tembo and therefore he has no problems with the recordings. The witness, however, told the court that he was surprised that Justice Tembo decided to record him instead of telling him that what he was doing was wrong because of the status of their relationship. With respect to the transcript tendered in court, DW1 confirmed that *speaker one* is Justice Tembo and *speaker two* is himself. He further told the court indeed he had a discussion with Justice Tembo about a parcel to be passed on to Justice Potani, but he wasn't certain how much money was in the parcel, but the money was more than MK100 million.
- g. DW1 told the court that he did not meet Justice Potani but only had a phone conversation with him. That the phone conversation with Justice Potani was very brief and lasted for not more than 5 minutes. DW1 also told the court that he mentioned the parcel in his conversation with Justice Potani, but that he did not tell Justice Potani what was in the parcel and the purpose of the parcel. However, DW1 told the court that in fact there was no parcel at all but that the reason he mentioned the

parcel was that he thought that Justice Potani would grant him an audience if he mentioned the issue of the parcel. DW1 wanted to meet Justice Potani because of the conversation he heard that Justice Potani was receiving parcels. The witness, however, admitted in court that all he had was hearsay evidence that Justice Chikopa was passing on money to Justice Potani. With respect to receipt of money (or bribes) by Judges, the witness told the court that he heard that some Judges receive bribes and other do not. With respect to donations made to political parties and politicians, the witness told the court that he made a number of donations to Dr. Lazarus Chakwera. That he donated the sum of MK20 million on 14th of February 2019, and that Bridget is the one who took the money to President Dr. Lazarus Chakwera. The witness said that the request come from Chivunde. The witness further told the court that Mr Kapondamgaga made a request of MK10 million. That further on 17th February 2019, MK25 million was delivered at the MCP Headquarters. The witness told the court that a total of MK98 million was delivered to Dr. Lazarus Chakwera. The money was both loans and donations.

- h. In relation to Dr. Saulos Chilima, the witness told the court that on 31st August 2018, he gave a loan of MK50 million to Dr. Saulos Chilima, and that he repaid all except a balance of MK3 million. That the payment that was made in June 2019, was a donation and not a loan. On 3rd January 2020, he gave out another loan of MK30 million to Dr. Chilima, and on 23rd March 2020, the witness gave out another loan of MK10 million. DW1 further told the court that on 25th of October 2020, he provided a loan of MK350 Million to Dr. Chilima for the purchase of Nissan Vehicles for campaign purposes. However, the witness indicated to the court that it was the FDH Bank that provided the loan to Dr. Saulos Chilima.
- i. With respect to Dr. Joyce Banda, he told the court that he made a number of donations to Dr. Joyce Banda amounting to MK40 million. DW1 also told the court that he made a number of donations to the DPP. He also indicated that the DPP borrowed money from him through his TFM Trust amounting to MK945 Million and remains unpaid. With

respect to donations that he made to different politicians and political parties; the witness admitted that Arthur Peter Mutharika was the leader of the DPP. The witness further told the court that the MK100 million related to the DPP and not the other political parties (i.e., UTM, MCP and PP)

- j. In cross examination, he told the court that the DPP through Brown Mpinganjira was giving money to Justice Chikopa who then gave money to Justice Potani. Brown Mpinganjira got the money from DPP but DW1 did not know the reason for giving money to Justice Potani. The source of the accusation that judges were receiving bribes was Brown Mpinganjira. DW1 insisted that there was no parcel, and he mentioned the parcel to secure an audience with justice Potani. DW1 conceded that he had no evidence in court as regards whether money was requested by, and received by Dr. Lazarus Chakwera in the court of law as he dealt with third parties. For Dr Chakwera, Dr Chilima and Dr Banda DW1 gave his money to them, while for DPP he borrowed as TFM Trust and paid the money to DPP. He did not charge interest but just passed on what he got from as TFM. DW1 stated that it was not illegal for an institution that is not registered to lend money to actually lend money. He also said that there was no evidence of how money was requested on behalf of Dr. Chakwera and he conceded that the evidence he gave would be hearsay.
- k. DW1 conceded that the issue of donations had nothing to do with the case. He also said that the discussion on MK100 million, the allegation that judges and the lawyers' received bribes were all based on what he heard from DPP. DW1 acknowledged that he worked with the party in power and at that time it was the DPP that was in power. DW1 said he had more positions under DPP, and that DPP is associated with Mlakhwa Alomwe, to which Paramount Chief Ngolongoliwa was patron when he asked him to be a running mate. DW1 also confirmed the information in the transcript, he stated that he retired from active work, and it was related to this case. In re-examination, DW1 basically repeated most of what he said in examination in chief.

15. The second defence witness was “Emily Phiri”, not her real name.

- a. The witness told the court that she works at the FDH Bank and that she is related to the accused person, a niece. In summary the witness told the court that she had, on different occasions, delivered money to Dr. Chilima and Dr. Lazarus Chakwera. With respect to Dr. Chilima, the witness told the court that she had in total delivered MK40 million to Dr. Chilima, (MK30 million delivered at his house in area 10 in Lilongwe on 3rd January 2020 and MK10 million collected on 18th June 2020 by Mphatso, Dr. Chilima's driver. DW2 stated that the money come from her client, Thomson Mpinganjira. DW2 further told the court that Dr. Chilima paid back the MK40 million as it was a loan. She told the court that it was the Credit Facility Department Team of the Bank that had asked her to go and collect the money from Dr. Chilima, and that she indeed collected the MK40 million.
- b. With respect to Dr. Chakwera, DW2 told the court that on 14th February 2019, she met Dr. Chakwera at Ufulu Gardens and delivered MK20 million. She had received the money from her client, the accused person. She also met Dr. Chakwera in his office at MCP Headquarters in Lilongwe in August, 2019 and delivered MK5 million. On 29th March, 2020, she delivered MK31 million cash to Chris Chaima Banda for paying of MCP monitors, that she got the instructions to deliver the money from her client, the accused person.
- c. In cross examination, DW1 conceded that that her testimony of telling the court that the transactions between the accused person and Dr. Chilima and also the transactions between the accused person and Dr. Chakwera, had nothing to do with the case in this court. She was aware that the accused person was being accused of bribery, but she was giving evidence to show that the accused person as a banker took no sides on the political front. She stated that she does transaction on behalf of her client, the accused as she is a personal banker. She deals with CEOs, Ministers and other high-profile people. She said the process was not meant to avoid money laundering charges. The money she delivered could be loans or donations. She also stated that she had no

evidence of personal dealings in terms of handing over money to Dr Chakwera.

The Law

16. It is a well settled position that the prosecution bears the burden of proof in a criminal case. Section 187(1) of the Criminal Procedure and Evidence Code (CP&EC) provides that the burden of proving that a person who is accused of that offence is guilty of that offence lies upon the prosecution. In **Namonde v Republic, [1993] 16(2) MLR 657 (HC)** Chatsika, J said:

"It should be remembered that subject to an exception at common law in cases of insanity and to various statutory provisions, the prosecution bears the burden of proof on every issue in a criminal case. Lord Sankey said in Woolmington v Director of Public Prosecution [1935] AC 462: 'Throughout the web of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'."

17. In **Republic v Jack Bandawe [2010] MLR 288 (HC)** the burden and standard of proof in criminal trials was dealt with when the High Court quoted with approval the dictum by the Chipeta, J (as then he was) in **Fallid Mogra v Republic Crim Appeal No. 55 of 2005 (unreported)** as follows:

"Under section 187(1) of the Criminal Procedure and Evidence Code and from countless decided cases, including Woolmington v DPP . . . as well as from learned Arthurs of texts on Criminal Procedure and Evidence, it is clearly cardinal that in general the legal burden to prove the guilt of the accused rests with and never leaves the prosecution throughout a case, and that the standard of proof to be attained does not get lower than that of beyond reasonable doubt. Further, under our Constitution section 42(2)(f)(iii) every person accused of a crime is presumed innocent and does not bear any duty in the least to prove such innocence . . . [A]n accused need do no more than raise, if he opts to fight the allegation against him, some reasonable doubt about his guilt. It is in fact not even obligatory for him to give any evidence in defence. Thus even doubts solely arising from prosecution evidence itself are sufficient to free him

from the yoke of the charges, even without him uttering a word, let alone doubts arising from defence testimony . . . It is clearly the law that reasonable doubts in a criminal case, whether arising from the prosecution evidence, or from the defence, or from both sides, must be resolved in favour of the accused."

18. The standard of proof in criminal cases is proof beyond reasonable doubt. What proof beyond reasonable doubt means was explained in ***Banda v Republic (1968-70) 5 ALR (Mal.) 9*** where the High Court quoted with approval the dictum by the celebrated Lord Denning in ***Miller v Minister of Pensions [1947] 2 All ER 373***, that,

"The degree is well-settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave a remote possibility in his favor which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

19. In ***Joseph Ndubuisi Nwangwu v Republic [2008] MLR 102 (HC)***, the court held that the standard of proof in criminal cases is what is also translated in section 169(1) of the CP&EC: Section 169(1) provides as follows:

"(1) A fact is said to be proved when, after considering the matters before it, the court or jury, as the case may be, either believes it to exist or to have existed or considers its existence at the relevant time so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists or existed."

20. Section 183(1) of CP& EC provides that:

"(1) Subject to this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecution or the accused, and the admission of any such fact under this section shall be conclusive evidence in those proceedings of the fact admitted."

21. As stated under this provision, any admitted fact presented in oral evidence becomes part of the evidence before the court of law. In this case, the accused person told the court that he has no problems with the evidence in the audios and the transcripts to the audios and he confirmed that he was involved in those conversation. To that end the evidence of the audios and transcripts is fully admitted as part of the evidence before this Court without any doubt.

22. Section 212 of CP& EC provides that there are no required number of witnesses to prove a case except where it is provided by the law. It provides:

"Subject to this Code and any other law for the time being in force, no particular number of witnesses shall in any case be required for the proof of any fact."

This means that the parties are free to call witnesses and this they did, and the witnesses gave evidence in accordance with the law. If a witness fails to give evidence due to their own choice, this Court cannot compel that witness unless the party who is calling such a witness asks the court to subpoena the witnesses.

23. Section 232 of CP& EC provides that:

"(1) When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

(2) Evidence of a statement made at the time when, or shortly before, or shortly after an offence is alleged to have been committed and directly relating to a fact relevant in the case is admissible if it was made by a person who is a witness and if such statement is used for showing its consistency with his evidence."

24. The accused person argues that the evidence of Justices Kapindu, Kamanga, and Madise was hearsay evidence. According to the law, these witnesses can testify as to the issues they observed that are relevant to the case at hand. Their evidence as far as it is relevant is admissible. Their evidence does corroborate the evidence of the main witnesses who were Justice Tembo and Justice Potani and it also shows consistency to the rest of the evidence. This

particular provision applies to the evidence of the State and well as the evidence of the accused person..

25. In **Tambala v Republic [1998] MLR 391 (HC)**, the High Court dealt with corroboration with approval the dictum by Bolt J, who lucidly explained the legal expression "corroboration" in **Banda v Republic (1966–68) ALR (Mal) 336** as follows:

"As the subject of corroboration appears to be one which perplexes and confuses many magistrates (courts), it may be helpful to restate the position. As a matter of law, corroboration is not required except in cases of perjury or treason, and a court may convict on the evidence of a single witness; it stands to reason, however, that a case will normally be stronger if there are two or more witnesses who testify to the same state of affairs. Nevertheless, although as a matter of law corroboration is not required, there are certain types of case in which, as a matter of practice, it is incumbent upon a trial court to consider whether any corroborative evidence exists. I refer now to sexual cases and to cases in which the evidence against the prisoner depends entirely, or substantially, on the word of an accomplice – a person who himself participated in some way in the alleged crime. In these two instances it is considered not so much to be a matter of law but rather a combination of caution, prudence and common sense."

26. In corrupt practices offences, the action is between the 'corruptor' (the person corrupting the other) and the 'corruptee' (the person being corrupted), and in many cases there are no direct witnesses. In such cases the court can convict based on the evidence of the person who has reported, but it does not hurt if there is other evidence corroborating the evidence of the person who has reported. To that extent, all the evidence before this Court becomes relevant whether it has been tendered by the State or the accused person. In **Kagwa v Republic [1991] 14 MLR 138 (SCA)**, the court held that corroboration is nothing more than some additional evidence from a source which is independent of the evidence of the witness whose evidence requires corroboration. In **R v Kaluwa 1964-66 ALR Mal. 356** the court stated that circumstantial evidence may amount to corroboration when this evidence is proved by witnesses other than the one requiring evidence.

27. Where there is no direct evidence, the prosecution can prove a case beyond reasonable doubt through circumstantial evidence. the case of **R v. Taylor (1928) 21 Cr. App. R 20** Hewart, C.J had this to say:

"Circumstantial evidence is very often the best evidence. It is evidence of circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. "

In **Director of Public Prosecutions v Kilbourne [1973] AC 729**, the Lord Simon said circumstantial evidence *'works by cumulatively, in geometric progression, eliminating other possibilities'*. There must, in the words of Pollock, CB., in **Exall (1866) 4 F & F 922**:

"...be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit."

28. In **Jailosi v Republic (1966-68) ALR (Mal) 494**, the court held that for a conviction based on circumstantial evidence to be safe each link in the chain of evidence must be unassailable and the cumulative effect must be inconsistent with any rational conclusion other than guilt. In **Viyaviya v Republic [2002-2003] MLR 423(SCA)**, the court said:

"We must point out that the law regarding circumstantial evidence in our criminal jurisdiction is now well settled as evidenced by numerous case Authorities resting with the decision of this Court in the case of Reuben Stenala Namame and another v The Republic MSCA Criminal Appeal No. 7 of 1994. Shortly stated, that law is as follows: where the evidence is circumstantial the accepted and logical approach is by way of elimination that is by negating all possible hypothesis of innocence. In order to justify from circumstantial evidence, an inference of guilt the facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. A court of law can only convict an accused person if one inference and one inference only, is possible. Where several inferences are open, some consistent with innocence and others consistent with guilt, it is not open to a court, in the absence of any other

evidence, to choose the inferences consistent with guilt and to reject inferences consistent with innocence...."

29. The general law on "attempts" under the Corrupt Practices Act are provided under section 35. Section 35 provides:

"Any person who attempts to commit, or who aids, abets or counsels, or conspires with, any person to commit an offence under this Part shall be guilty of committing that offence."

Under the Corrupt Practices Act, those attempts are equated as having committed the offence and are punishable under Part IV, with a term of 12 years imprisonment. In **Chilunga v Republic (1968-70) ALR Mal. 338**, the court held that in relation of attempt to offence, an act must be proved to be a step towards commission of the offence and not mere preparation. The court said:

"It is common ground that not all acts which are towards the commission of the crime to be regarded as attempts. Some acts may be too far removed from the commission of the crime to be regarded as attempts to commit the crime, but just where the distinction is to be drawn between preliminary acts of preparation and acts which are near enough related to the crime to amount to attempts to commit it is often a difficult question to determine."

30. In **Republic v Saini 7 MLR 303**, the court held that to constitute an attempt in connection with full offence, an attempt must be immediately and not remotely connected and amount to more than mere preparation for full offence. The facts of the case were that the accused went to his house and picked some pieces of wire. He was asked by his wife what he wanted to do with the wire, and he replied that he wanted to hang himself. The matter was reported to police and the accused was charged with attempted suicide. In quashing the conviction entered by the lower court, the High Court, the court said:

"For an act to be considered an attempt, the act done must be immediately and not merely remotely connected with the commission of the offence. In other words it must be something more than mere preparation for the commission of the offence. In the instant case, even by a stretch of human imagination, what the accused did could not be said to be an act which was immediately connected to the commission of the offence. This was only a preparation for

the offence and was only remotely connected with it. I find, therefore, that the conviction was bad in law."

31. In this case, the State was rights to charge counts of offence for attempt, but it was done in the alternative. In this case, the Court has to look at the evidence to determine whether the attempts he is charged with had gone beyond the action of preparing to commit the offence. In ***Chimwalila v R (1964-66) ALR Mal. 275***, the court held that an accused may be convicted of an attempt even where the circumstances of the attempt made it impossible to succeed in committing the full offence. The court stated as follows:

"Moreover, a person may be convicted of the attempt even if he could not have committed the full offence: see R v Ring. This, of course, would cover the case of the bars on the window frustrating the removal of the radio, whether or not that could be regarded as a full offence or not"

32. Section 400 of the Penal Code deals with an attempt as follows:

"(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by the reason of the circumstances not known to the offender it is impossible to commit the offence."

33. In the ***Republic v Nankhope, Confirmation case Number 318 of 2000(unreported)*** the court discussed an attempt under section 400 of the Penal Code as follows:

"First, section 400 requires the defendant must intend to commit a crime. That intention must be immediate and contemporaneous to some act. The Court of Appeal has held in R v Khan and others, 91 Cr. App. R. 29 that the intent required is the one required for the full offence. This excludes intents constituting merely preparatory acts. The evidence must point to an intention

to commit the crime for which the defendant's act are an attempt of. Secondly, the defendant must put his intention into execution. There must be evidence that the defendant at the time of the offence wants to execute his intentions. This he must show by some overt act. The overt act must be such that points to the actus reus of the offence. It is not any act. Just as the intent must be the one for the full offence, the overt act must be such that it points to an act that constitutes the crime. Acts that are merely preparatory do not meet this test. It must be an act that points to the act that in itself and the circumstances points to an act which constitutes the crime. The offender need not complete the act to be convicted of an attempt. For if he does complete the act, he is guilty of the complete offence. It is always a question of fact whether the act points to an act constituting the actus reus of offence."

34. At this point, the Court will outline the sections under which the counts of offence were drafted. There are 6 counts of offence, but they emanate from three provisions under the Corrupt Practices Act. Section 24(2) of the Corrupt Practices Act provides as follows:

"Any person who by himself, or by or in conjunction with any other person, corruptly gives, promises or offers any advantage to any public officer, whether for the benefit of that public officer or of any other public officer, as an inducement or reward for doing or forbearing to do anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned shall be guilty of an offence."

The accused person is being charged with the offence of corruptly offering an advantage to public officers as an inducement for the public officers not to perform their duties effectively. Section 25A (2) of the Corrupt Practices Act provides as follows:

"Any person who uses his influence on, or induces or persuades, a public officer concerned with any matter or transaction falling within or connected with that public officer's jurisdiction, powers, duties or functions to exercise or perform his powers, duties or functions corruptly, or otherwise to act corruptly, in relation to such matter or transaction shall be guilty of an offence."

35. The accused person is being charged in the alternative for inducing public officers to perform their duties corruptly. Section 25B(2) of the Corrupt Practices Act provides as follows:

“Any person who uses his influence on, or induces or persuades, a public officer to use, misuse or abuse his public office, or his position, status or authority as a public officer, for such person’s advantage or for the advantage of another person or to obtain, directly or indirectly, for such person or for another person any advantage, wealth, property, profit or business interest shall be guilty of an offence.”

The accused person is being charged in the alternative with influencing and inducing a public officer to misuse or abuse their position for the advantage of the accused person or another person, in this case to decide in favour of the Respondent.

The word ‘advantage’ is defined under section 3 of The Corrupt Practices Act as

“advantage” means any benefit, service, enjoyment or gratification, whether direct or indirect, and includes a payment, whether in cash or in kind, or any rebate, deduction, concession or loan, and any condition or circumstance that puts one person or class of persons in a favourable position over another”

Section 3 of the defines public officer:

“public officer” means any person who is a member of, or holds office in, or is employed in the service of, a public body, whether such membership, office or employment is permanent or temporary, whole or part-time, paid or unpaid, and includes the President, a Vice-President, a Minister and a member of Parliament.”

The analysis of the law, facts and evidence

36. The State which is mandated by the law has accused and charged the accused person with attempting to corruptly offer an advantage to public officers. The State argues that the totality of the evidence before this Court discloses and proves that fact. The accused person denies to ever having corruptly offered

an advantage to Justice Potani and Justice Tembo in particular, or the other members of the panel of judges hearing the **Constitutional reference Case Number 1 of 2019**. The accused person states that all he was doing was to go to the Justice Potani and verify the reports he heard in the social media that the judges on the **Constitutional reference Case Number 1 of 2019** panel were receiving bribes. This Court has to determine whether the evidence before it shows that the offence was committed and was so committed beyond reasonable doubt by the accused person.

37. It is not in dispute that Justice Potani (as he was then) and Justice Tembo and the other Judges were public officers. They confirmed in their evidence that they worked as justices of the High Court at the time of the alleged commission of the present offence(s). The question to be determined is whether the accused corruptly offered an advantage to Justice Potani and Justice Tembo, who are public officers on their own behalf and on behalf of the other Judges, to decide the case in favour of the Respondents. It is not in dispute that the accused mentioned a parcel to be given to Justice Potani. Justice Potani told the court that the accused wanted to fly to Lilongwe from Blantyre to give him the parcel, but he declined. Justice Tembo said that the accused told him that he failed to meet Justice Potani, the accused Justice Tembo to take the parcel to Justice Potani but he declined.
38. The defence argues extensively that the parcel did not exist, and it was mentioned in order to gain access to Justice Potani and to confirm what he was hearing about the judges presiding over the constitutional matter were getting bribes. It is true that no one saw the parcel from the available witnesses. Therefore, the State relies on circumstantial evidence on the existence of the parcel. In the case of *R v. Taylor (1928) 21 Cr. App. R 20* Hewart, C.J stated that circumstantial evidence is very often the best evidence. It is evidence of circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial". In *Viyaviya v Republic (supra)* the court held that in order to justify from circumstantial evidence, an inference of guilt the facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

39. The evidence that the accused mentioned about the project he was running with lawyers and judges that involved giving cash to the lawyers in the elections case was never disputed. It was also not disputed that the accused told Justice Tembo that the parcel in question contained cash. Justice Potani stated that the accused had asked him if they got money with the other judges sitting in the elections case when he suggested to bring to him the parcel and Justice Ternbo said that the accused told him that Democratic Progressive Party (DPP) which had Arthur Peter Mutharika in the case decided to give out money because they had information that the other camp was giving money to the judges sitting in the elections case. From the available evidence, the circumstances clearly point to the parcel being existence and that it contained unspecified amount of money and offered to the judges sitting in the elections case for their advantage in order to get favour although the defence wanted to paint a different picture.
40. In the final submissions the accused person has asked the Court to focus on the "trustworthy" evidence as shown in the audios and the transcripts thereto. The accused person argues that this evidence shows that he was just on a factfinding mission and not committing a crime. In summary Transcript one is about the accused person stating the background of why he desperately needed the parcel to reach Justice Potani, and why he desperately wanted Justice Tembo, whom he calls the 'fallback' person to take the parcel to Justice Potani. The accused person voluntarily states that the DPP believed that others sent money to the panel of Judges for a favourable conclusion of the case in those others' favour. Further, the accused person only mentions the 'parcel' to justice Potani, after the Judge had said that he had not received any parcels. The accused person already had audience, why did he need to mention the parcel, and why would he want to bring it to Lilongwe. Looking at the evidence in totality, as presented by the trustworthy transcripts, it is clear that the parcel existed, it had money to in the excess of MK100 million and the money was meant to be shared amongst the members of the panel of Judges hearing the **Constitutional Reference Case Number 1 of 2019**. The issue of DPP being involved, the issue of lawyers for the DPP being involved, the MK100 million and the issue of sharing the money were all introduced into the conversation by the accused person, and not by Justice Tembo.

41. The explanation by the accused person that he mentioned the parcel so he could gain audience with Justice Potani is not supported by the evidence. First, the accused person received the cell phone number of Justice Potani without mentioning the parcel. Second after mentioning the parcel and offering to bring it to Lilongwe and being told by Justice Potani to meet in Blantyre, the accused person failed to secure that meeting after calling Justice Potani daily. Hence the mention of the parcel to Justice Potani had no effect to secure the Blantyre meeting. Thirdly, the accused person mentions the parcel to Justice Tembo and the contents of the same, in the hope of getting Justice Tembo to take the parcel to Justice Potani, and to ensure that the parcel was received before Justice Potani returned to Lilongwe for continued hearing of the **Constitutional Reference Case Number 1 of 2019**. This Court concludes that looking at the Audios and Transcript One, in totality, and together with the other evidence before this Court, the accused person corruptly offered an advantage to Justice Potani and Justice Tembo, whom he called the fallback person, of an unspecified sum of money in excess of MK100 million, which was contained in a parcel. The parcel did exist.
42. The accused person also attempted to have this Court believe that he was on a fact-finding mission, and indeed *Transcript Two* he was now updating Justice Tembo on what he found. One has to remember that in *Transcript one*, the accused person was afraid that Justice Potani, who had refused to meet him or contact him, had reported the accused person to the ACB. Looking at the whole matter as it relates to corruption and attempting to offer an advantage, coupled with the fear of being reported, this Court concludes that the accused person instigated this final call to Justice Tembo to cover his base in case of eventualities. First, the accused person stated that he went to verify with the person who told him of the bribes, which is Brown Mpinganjira, and then he saw Justice Potani dropping Justice Chikopa at Brown Mpinganjira's house and was informed that these two judges received the bribes from DPP through Brown Mpinganjira. This information was meant to disarm Justice Tembo and present the accused person as a trustworthy person. Second, the accused person tells Justice Tembo that it was known that justice Tembo did not receive bribes. However, one wonders why the accused person contacted

Justice Tembo and wanted him to take the parcel of bribe money as a fallback person in the first place. Third, the accused person told Justice Tembo that he was informed by Justice Chikopa that it was impossible to bribe or pay for a specific outcome in the ***Constitutional reference Case Number 1 of 2019***. This Court concludes that after the accused person had failed in his mission, he was desperately seeking ways of reducing the damage or any possible eventuality bearing in mind that he was afraid of having been reported to the ACB. Further, the accused person was possibly seeking ways or laying groundwork for disarming any intentions by Justice Tembo to report the matter. He was also attempting to disarm Justice Tembo from reporting the matter..

43. The accused person has also argued that the word “corruptly” which is one of the crucial elements of the offence of offering an advantage is missing. As shown from the evidence of the transcribed audio clips, which the accused person considers to be the ‘trustworthy’ evidence, the whole issue taken together shows that the accused person corruptly offered an advantage to Justice Potani and Justice Tembo. Again, as he was pleading to the counts of offence, the law as read to him showed that he was being accused of corruptly offering an advantage to the judges and not voluntarily giving gifts and donations to leaders of political parties, or substantive and unpaid loans to the DPP. The evidence, as a whole shows one explanation, that the purpose of the parcel was to corruptly offer an advantage to the Judges in return of a favourable outcome of the ***Constitutional reference Case Number 1 of 2019*** to the Respondents.

44. The accused person has presented himself as a person not affiliated or interested in any one political party. While the evidence prosecution is mandated by the law to prove the case against an accused person, the evidence of the accused person is also critical to show the veracity of his claims. Indeed, the evidence of the accused person herein was meant to show that the accused person was not partial to any political party as he helped all political parties. However, in cross examination by the State, the accused person successfully showed that he was in fact affiliated with the DPP as a political party than any other political party.

- a. The accused person held more position in public bodies in while the DPP was in power than any other time. Further, this agrees with the assertion by the accused person that he works with the leadership and Government in power, because of his interests in business with government or anyone else. At the time of the occurrence of this attempt to bribe or offer an advantage to the panel of judges, the DPP was in power.
- b. He stated in cross examination that he was approached to take a leadership position in the DPP by Ngolongoliwa, the Paramount Chief of the Lhomwe and patron of the *Mlakho wa Alhomwe*, who was affiliated to DPP. The accused person did not dispute that Brown Mpinganjira, his brother/cousin was in the leadership of the DPP and was the source of the information that judges of the Constitutional reference Case Number 1 of 2019 panel were receiving bribes from other parties and from the DD as well.
- c. In the audios clips as transcribed, the accused states that he was a person with interests. A look at the interests, especially as pertaining to the money that he gave as loans, it is clear that the accused person's interests would lie with the DPP retaining power because the DPP owed him money. The accused explained that he borrowed money through his TFM Trust and passed on the loan to the DPP and as of June 2021, he was owed by DPP money in excess of MK946 million from August 2018 to May 2021 when the evidence was presented to the Court. This huge sum of money remains unpaid. The accused person acted illegally in the way he lent this money to the DPP because the TFM Trust is not a registered lending institution. This conduct of the accused person, in using the TFM Trust to lend money, which is a separate entity at law, ought to be investigated and clarified, especially as regards to political party funding.
- d. The amounts of money allegedly given to the other political leaders, and not political parties, are said to have been given as donations and loans. This was his money, and he was free to give it out. The accused claims that he gave Dr. Joyce Banda of the People's Party donations from May

2019 to March 2020, a total of MK40 million. As regards Dr. Chilima, he gave donations and loans from August 2018 to March 2020. His witness, DW2, indicated to this Court that MK40 million had been given as a loan and it was repaid. Most of the loans to Dr Chilima were paid. The accused used his bank FDH to guarantee a loan as pertaining to the purchase of campaign vehicles. This amount of MK350million was done legally through FDH Bank and as such the accused person cannot claim that he was funding the United Transformation Party.

- e. The money in terms of donations allegedly given to Dr. Chakwera amounted to MK94 million from February 2019 to May 2020. However, in cross examination the accused person and his witness DW2 were not able to state or give evidence to show that this money was directly requested by and directly given to Dr. Chakwera. The transactions were always between third parties.
- f. In conclusion as pertaining the issue of donations and gifts, the accused person and his witness DW2 confirmed to the Court that the evidence had no bearing on the charges the accused is facing. This Court concludes that the evidence was meant first to support and lend credence to the accused claim and narrative that he was in danger from the MCP supporters; and second, just to embarrass people he had voluntarily given donations to, and/or used his bank to lend them money. This Court concludes that the accused person was partial to the DPP

45. It should be stated here that counts 2 and 5 are alternative counts to counts one and four. The defence has argued that these counts are not valid in that the law under section 35 of the Corrupt Practices Act does not provide for attempts as separate charges and that if one attempts the offence he commits the principal offence. The whole scheme of attempts in the general terms is that where the full offence has not been achieved, the accused having done everything pertaining to the commission of the offence, he should be found guilty of attempt for the commission, see ***Chimwalila v R and Republic v Nankhope (supra)***. However, in the case of the Corrupt Practices Act, is such an attempt is proved, the person would simply be convicted and sentenced for the principal offence. In cases where an accused person is convicted on the

substantive charge the alternative charge falls away. The defence relies on the case ***Authorities of Mgondo v Republic 12 MLR 342*** and ***DPP v Central African Company Limited 6 ALR Mal. 1***. Indeed, this is the position under the law, the attempts would fall away. In this case, there are two main charges in count 1 and count 4. The rest of the counts are in the alternative, meaning that they become applicable if the two major counts have not been proved. It must be emphasised that the whole purpose of the scheme of alternative charges is to ensure justice of the case is achieved where the prosecution fails to prove the substantive charge against the accused. Therefore, the accused cannot be convicted on the alternative charges if he has been convicted on the substantive charges.

46. The 3rd and 6th counts relate to the offence of attempting to induce a public officer to abuse public office contrary to section The defence challenges these counts in the same way as in counts 2 and 5. It is clear that the discussion in respect of the said counts two and five applies to the present counts substantively. As regards the general law on attempts, the actions of the accused person in desperately seeking the contact numbers of Justice Potani and offering the parcel, and desperately trying to get Justice Tembo PW2, to deliver the parcel to Justice Potani before returning to Lilongwe for continued hearing of the case, was beyond preparation to offer an advantage, but the attempt of offering the advantage, which advantage was not received. The accused person had done all the actions and there was just the issue of having the 'advantage received'. The intended persons refused to receive the offered the advantage. Section 400 of the Penal Code is applicable here even if the Corrupt Practices Act does not define 'attempts'.

47. The accused person and his Counsel have sought to paint Justice Tembo as a culprit in this case, as a person who entrapped the accused person by recording their conversation, as a less objective person in giving his evidence, as a person labouring under confirmation bias for seemingly pushing the matter when the intended contact person was Justice Potani, and as a person who made ill-conceived conclusions. Looking at the evidence in *Transcript One*, this Court finds that, firstly, it is the accused person who sought out Justice Tembo at all times. The issue of entrapment does not arise because the accused

person confirmed that he did have the conversation and that he adopted the *Transcripts* as the 'trustworthy evidence. Secondly, the accused person had asked Justice Tembo to ask direct questions and that he would answer, yet he kept on dodging the questions when the direct questions were asked by Justice Tembo. Thirdly, the accused person considered Justice Tembo as the 'fallback person', and as such he pursued Justice Tembo and naturally Justice Tembo, who did not want to operate under assumptions, wanted to understand the situation. This Court does not find that Justice Tembo's evidence is conjecture, nor does this Court find any confirmation bias as alleged by the accused person.

Court's determination

48. Having analysed the evidence in its totality, this Court finds that the evidence points to the guilt of the accused person as there is no other possible explanation. To that extent, this Court finds the accused person, Thomson Frank Mpinganjira guilty as charged under Count 1 and Count 4, for corruptly offering an advantage to Justice Tembo and Justice Potani, who were public officers for the benefit of the other judges namely, Justice Ivy Chatha Kamanga, Justice Dingiswayo Madise and Justice Redson Kapindu, as an inducement that the judges decide the ***Constitutional reference Case Number 1 of 2019*** in favour of the Respondents. The accused person is hereby convicted accordingly.

49. The other counts, 2nd Count, 3rd Count, 5th Count, and 6th Count were in the alternative and they fall away.

It is so ordered

**Pronounced in OPEN COURT at PRINCIPAL REGISTRY this 10th day of
September 2020**


D. A. D. Gabriele

J U D G E