



**IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CRIMINAL REVIEW NO. 06 OF 2021
(Being Criminal Case No. 183 of 2021)
(In the First Grade Magistrate Court Sitting at Balaka)**

BETWEEN

THE REPUBLIC

AND

YUSUF WILLY

CORAM: Hon. Justice Z Ntaba

Ntaba, J

ORDER ON REVIEW

1.0 BACKGROUND

- 1.1 The accused Yusuf Willy aged 22 hailing from Kalimba village under Traditional Authority Nsamala in Balaka was arrested and charged with defilement contrary to section 138 of the Penal Code. The girl, CH was aged 17 at the time of offence. The offence was stated to have taken place on 9th June, 2021.
- 1.2 The trial before the First Grade Magistrate sitting in Balaka commenced on 17th June, 2021 and the accused was found with a case to answer on 30th June, 2021. The Defence commenced their case and around August 2021, the High Court received a complaint regarding the conduct of the matter in particular, the Magistrate's behaviour during the trial. The complaint was raised through Justice Chipao when the parent physically came to her office to raise the issue. The High Court accordingly requested that the lower court file be brought before it for review to determine the veracity of the complaint.

2.0 THE REVIEW

- 2.1 By law, under sections 42 (2) of the Constitution, 25 and 26 of the Courts Act as well as 360 of Criminal Procedure and Evidence Code (hereinafter referred to as "the Code") this Court is seized of this case for purposes of review. In

reviewing, this Court is requested to examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. Additionally, it is a fundamental principle of law that substantial justice should always be done without undue regard for technicality which shall always be adhered to in all criminal matters as stipulated under section 3 of the Code.

2.2 In determining matters before them, it is important that courts must always ensure and protect a person's constitutional rights, that is, the victim as well as offender. This Court recognizes that the freedoms and rights provided for in the Constitution should be promoted and protected. Notably, this Court as it undertakes this review reminds itself of the Constitutional tenets of a right to a fair trial as espoused in section 42 are central to proper adjudication of all matter before the courts. It is paramount that throughout the process of trial, an accused person's rights should be considered and where possible upheld. Incidentally, a recognition that justice must be done by ensuring fairness and equity for the persons involved as well as in all aspects of the trial is one this Court and Malawian courts adhere to. Consequently, the victim also has rights which a court must be protected, and these rights are also enshrined in the Constitution. For instance, section 15 of the Constitution provides that the human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter.

2.3 At the onset let me reiterate that the constitutional imperative centralizes human rights and consequently criminal justice is to be administered accordingly. Being human rights centered, it is imperative that this Court and courts in Malawi when dealing with sexual violence cases also remember the principles espoused in section 19 of the Constitution which states that –

- (1) The dignity of all persons shall be inviolable.
- (2) In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

2.4 Fundamentally, Article 1 of the Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights. Further the International Covenant on Civil and Political Rights in its preamble reads in part that these rights derive from the inherent dignity of the human person. In keeping in line with the concept of dignity, there are a number of issues which must be maintained in courts to ensure that the same is not violated. Dignity stands pivotal in the rule of law and is one that is considered by courts as they determine issues of equity, justice, and good conscience. In ***Naz Foundation v Government of NCT and others***, the Indian Court stated that the constitutional safeguard of human dignity expects the recognition of the worth and value of all people as an individual of our society. This concept becomes fundamental in cases dealing with sexual offences.

- 2.5 The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power also states that victims should be treated with compassion and respect for their dignity. This means that a victim's fundamental need from a court is the need for recognition of their status as well as necessary measures of protection. It is fundamental that courts should not therefore victimize them during their interaction whether it be from other court users, law officers, judicial officers and staff or any person involved in the judicial process. It is therefore important that to also point out the following which the above said Principles have also highlighted –

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

- 2.6 It is important that at this point this Court highlights the chronology of the cases herein because of the issues which the Court wants to address going forth.

<u>Date</u>	<u>Event</u>
9 th June, 2021	Offence occurred
14 th June, 2021	Accused arrested
17 th June, 2021	Trial commenced
30 th July, 2021	State concluded case and case to answer ruling
30 th July, 2021	Case for defence commences but does not proceed and adjourned to 4 th August, 2021
	Court writes that it would like to find means to see if he can have an erection.
	Foses a woman stands up in court to volunteer try to jerk off the accused to see if he can have an erection
6 th August, 2021	Defence case commences and accused raised the inability to have an erection. And asks that girl who volunteered to show the court his problem by trying to get him erect
11 th August, 2021	Magistrate, prosecutor, court interpreter,

accused, girl and Foses (unsure who this is) supposedly in chambers and girl present plays with accused genitals to jerk him off for more than 30 minutes. Observation by court is that the penis got a bit hard but not very hard.

Case adjourned to 16th August 2021 for judgment

- 2.7 The complaint to the Court included that during this process of examining whether the accused has ability to become hard and therefore perform sex occurred in the presence of the CH, the girl who was sexually assaulted. Notably, the issues that were raised above of secondary victimization or revictimization of sexual offences victims or survivors in courts can emanate from various issues. This Court is of the considered opinion that if this occurred at the lower court in this matter, the same was very unfortunate and highly illegal. It has been indicated in the discussion above that the Criminal Procedure and Evidence Code including the accused person seeking that he introduces expert evidence on his condition through a medical report.
- 2.8 This Court during this review was at pains to understand what could have prompted the magistrate to take this pervasive root of allowing such a gross display to occur in his court. This Court was further surprised to note that the issue of this illegal show seemed to have been introduced out of the blue. A careful perusal from the record shows that it was raised by the magistrate, thereby making the Court conclude that there were extra judicial discussions that took place outside court and in the absence of the prosecutor and the public. This Court noting the above issues drew several inferences from the magistrate's conduct. Firstly, that it was possible that the magistrate and accused person colluded and decided to circumvent the course of justice by putting forward this lewd act and equating the same to evidence in a criminal matter. Secondly, this Court could conclude that this was because the magistrate had an underlying bias in that he did not believe the victim's testimony stemming from underlying stereotypes. As a court of law, stereotypes have negative impact on justice.
- 2.9 In terms of bias, the observations in *Piersack v Belgium* (Series No 3 (1982)) which held that the test to be used here is subjective bias. It is very rare and difficult to prove subjective bias. Nevertheless, to the subjective test, bias may be deduced from appearance, with the principle borne in mind that, justice must not only be done, but it must also be seen to be done. Interestingly, the case of *Haulschildt v Denmark the European Court of Human Rights* aids this Court on the subjective test. The court in this case noted that the determination is whether, apart from a judicial officer's personal conduct, there are certain ascertainable facts, which might raise doubt as to his impartiality. In this respect, even appearance may be of certain importance. What is at stake is the confidence, which the courts in a democratic society must inspire in the public and above all, as criminal proceedings are concerned.
- 2.10 In the case of *Sumuka Enterprises Ltd v The Registered Trustees of African Businessmen Association (MW)* 10 MLR 264, Skinner CJ quoted with

approval the definition of "bias" as set out in the opinion of Lord O'brian CJ in **R v County**, Cook JJ [1910] 1 IR 275 –

"By "bias" I understand a real likelihood of an operative prejudice, whether conscious or unconscious, there must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicion of whimsical, capricious and unreasonable people should be made a standard to regulate our actions here. It might be a different matter if suspicion rested on reasonable grounds - was reasonably generated - but certainly mere flimsy, elusive morbid suspicion should not be permitted to form a ground of decision".

- 2.11 Turning back to stereotypes, these can be in various forms but for the purposes of this review, this Court concentrated on judicial and gender stereotypes. Simone Cusack in her paper submitted in 2014 to the Office of the High Commissioner for Human Rights titled *'Eliminating Judicial Stereotyping'* on page 2 stated that judicial stereotyping refers to the practice of judges ascribing to an individual specific attributes, characteristics or roles by reason only of her or his membership in a particular social group (e.g. women). It is used, also, to refer to the practice of judges perpetuating harmful stereotypes through their failure to challenge them, for example by lower courts or parties to legal proceedings.
- 2.12 Interestingly, in 2011 the Inter-American Commission on Human Rights in *'Access to Justice for Women Victims of Sexual Violence: Education and Health'*, OEA/Ser.L/V/II. Doc at page 65 noted that judicial stereotyping is a common and pernicious barrier to justice, particularly for women victims and survivors of violence. Such stereotyping causes judges to reach a view about cases based on reconceived beliefs, rather than relevant facts and actual enquiry.
- 2.13 In dealing with gender stereotypes and the courts, this Court recognizes that these do harm a sexual offences victim but also contribute to further violation of their rights. This Court takes into consideration, what the CEDAW Committee, General Recommendation 33 in paragraphs 26 and 28 –

"stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants ... Women should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. Eliminating judicial stereotyping in the justice system is a crucial step in ensuring equality and justice for victims and survivors."

- 2.14 Interestingly the CEDAW Committee has made several pronouncements on issues of gender stereotyping. For instance, in **V.K. v Bulgaria**, Communication No. 20 of 2008 delivered in 2011 where the Committee observed that "stereotyping affects women's right to a fair trial and that the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence". Simone Cusack (supra) at para

38 states that judges can play a significant role in ridding the justice system of harmful stereotypes. They have an important responsibility to base their decisions on law and facts in evidence, and not engage in gender stereotyping. This requires judges to identify gender stereotyping, and identify how the application, enforcement or perpetuation of these stereotypes discriminates against women or denies them equal access to justice. Stereotyping might compromise the impartiality of a judge's decision and affect his or her views about witness credibility or the culpability of the accused person.

- 2.15 The Bangalore Principles of Judicial Conduct (hereinafter referred to as the 'Bangalore Principles') adopted in 2002 has set equality as a value and states the following –

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties

- 2.16 The United Nations Office on Drug and Crime Commentary on the Bangalore Principles adopted in September, 2007 (hereinafter referred as the 'Commentary') on equality clearly stated that judges must avoid stereotyping and in paragraph 184 stated that fair and equal treatment have long been regarded as essential attributes of justice. Equality according to law is not only fundamental to justice but is a feature of judicial performance strongly linked to judicial impartiality. For example, a judge who reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived. A judge should not be influenced by attitudes based on stereotype, myth or prejudice. The judge should, therefore, make every effort to recognize, demonstrate sensitivity to, and correct such attitudes. Further in paragraph 185 on gender discrimination that the judge has a role to play in ensuring that the court offers equal access to men and women. This obligation applies to a judge's own relationships with parties, lawyers and court staff, as well as to the relationship of court staff and lawyers with others. Although overt instances of gender bias by judges towards lawyers may not occur frequently in court today, speech, gestures or other conduct - for example, using terms of condescension in addressing female lawyers (such as "sweetie", "honey", "little girl", "little sister") or commenting on their physical appearance or dress - that would not be ventured in relation to a male counterpart may be perceived as sexual harassment. Patronizing conduct by a judge ("this pleading must have been prepared by a woman") undermines the effectiveness of women as lawyers by sometimes diminishing self-esteem or decreasing the level of confidence in their skills. The insensitive treatment of female litigants ("that stupid woman") may

also directly affect their legal rights both in actuality and appearance. Sexual harassment of court staff, advocates, litigants or colleagues is often illegal as well as unethical. It is also critical that the commentary at paragraph 189 on treating people in court with dignity which states that it is the judge who sets the tone and creates the environment for a fair trial in his or her court. Unequal or differential treatment of people in court, whether real or perceived, is unacceptable. All who appear in court – be they legal practitioners, litigants or witnesses - are entitled to be treated in a way that respects their human dignity and fundamental human rights. The judge must ensure that all people in court are protected from any display of prejudice based on race, gender, religion, or other irrelevant grounds.

- 2.17 The Commentary sets out another of principles including value 4 on propriety which states propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge. In paragraph 111, it states that propriety and the appearance of propriety, both professional and personal, are essential elements of a judge's life. What matters more is not what a judge does or does not do, but what others think the judge has done or might do. For example, a judge who speaks privately and at length with a litigant in a pending case will appear to be giving that party an advantage, even if in fact the conversation is completely unrelated to the case. Since the public expects a high standard of conduct from a judge, he or she must, when in doubt about attending an event or receiving a gift, however small, ask the question, "How might this look in the eyes of the public?" Further it also states that a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities. Paragraph 112 provides the test for impropriety which is whether the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality, independence and competence, or whether it is likely to create, in the mind of a reasonable observer, a perception that the judge's ability to carry out judicial responsibilities in that manner is impaired. For example, treating a State official differently from any other member of the public by giving that official preferential seating creates the appearance to the average observer that the official has special access to the court and its decision-making processes. On the other hand, school children often tour the courts and are seated in special places, at times on the bench. Children are not in a position of power and, therefore, do not create an appearance of exerting improper influence, especially when it is explained that they are present for educational reasons.
- 2.18 In determining this review, the Court appreciated the sentiments of the Supreme Court of India in *Aparna Bhat and others v State of Madhya Pradesh and another*, Criminal Appeal No. 329 of 2021 where Rav J started the judgment with the quote from Henrik Ibsen that "a woman cannot be herself in the society of the present day, which is an exclusively masculine society, with laws framed by men and with a judicial system that judges feminine conduct from a masculine point of view." The Appellantse brought to the notice of this Court, several other instances in which similar directions had been made by High Courts and Trial Courts across the country but sought the urgent intervention of this Court to firstly, declare that such remarks in various circumstances were unacceptable and have the potential to cause grave harm to the prosecutrix and the society at large, secondly, reiterate that judicial orders have to conform to

certain judicial standards, and thirdly, take necessary steps to ensure that this does not happen in the future.

- 2.19 The *Bhat* case also further stated that interestingly, the Attorney General on gender equality and gender sensitization, argued that to achieve the goal of gender justice, it is imperative that judicial officers, judges, and members of the bar are made aware of gender prejudices that hinder justice. Accordingly, he submitted that the foremost aspect to facilitate a gender sensitive approach, is to train judges to exercise their discretion and avoid the use of gender-based stereotypes while deciding cases pertaining to sexual offences. Secondly, judges should have sensitivity to the concerns of the survivor of sexual offences. Reliance was placed on the Bangkok General Guidance for Judges on Applying a Gender Perspective in South East Asia, by the International Commission of Jurists. The Court in the decision was pointed out a number of stereotypes which are often encountered in the course of judicial decision-making and should be avoided. The Attorney General also submitted that training for gender sensitization for judges at all levels of the judiciary should mandatorily be conducted at regular intervals by the National Judicial Academy and State Judicial Academies. He emphasized that any directions towards gender sensitization should include judges of all levels of the judiciary. Further, the counsel urged that courses on gender sensitization should be included in the curriculum of law schools, and the All-India Bar Exam should include questions on gender sensitization as well. In addition to this, he recommended that a detailed curriculum may be prepared with the help of subject matter experts by each High Court, to be a part of the syllabus for the Judicial Services Exams and training for inducted judges.
- 2.20 The Supreme Court in the *Bhat* case interestingly in calling out the nature of the beast which it deemed it as a problem stated that women often experience obstacles in gaining access to mechanisms of redress, including legal aid, counselling services and shelters. They are re-victimized and exposed to further risk of violence through the denial of redress in the context of informal trials or negotiations between families and community leaders. The payment of financial compensation by the perpetrator or his family for acts of violence against women, in lieu of legal remedies, was a recurrent concern *vis-à-vis* the formal and informal justice systems. Violence against women in India is systematic and occurs in the public and private spheres. It is underpinned by the persistence of patriarchal social norms and inter- and intra-gender hierarchies. Women are discriminated against and subordinated not only on the basis of sex, but on other grounds too, such as caste, class, ability, sexual orientation, tradition and other realities. Further that gender violence is most often unseen and is shrouded in a culture of silence. The causes and factors of violence against women include entrenched unequal power equations between men and women that foster violence and its acceptability, aggravated by cultural and social norms, economic dependence, poverty and alcohol consumption, etc. In India, the culprits are often known to the woman; the social and economic "costs" of reporting such crimes are high. General economic dependence on family and fear of social ostracization act as significant disincentives for women to report any kind of sexual violence, abuse or abhorrent behaviour. Therefore, the actual incidence of violence against women in India is probably much higher than the

data suggests, and women may continue to face hostility and have to remain in environments where they are subject to violence. This silence needs to be broken. In doing so, men, perhaps more than women have a duty and role to play in averting and combating violence against women. Unlike many other victims of interpersonal crimes such as theft, robbery or muggings, survivors of sexual assault are vulnerable to being blamed for their attack, and thus victim-blaming (overtly or in more subtle forms) in sexual assault cases has been the focus of several writings.

- 2.21 Rav J in **Bhat** in adopting a number of reports stated that myths and stereotypes “underlie and fuel sexual violence against women and inform negative societal reactions”. Joanne Conaghan points out pertinently that “removing the doctrinal debris of a legally instituted gendered hierarchical order does not necessarily get rid of deeply ingrained social (Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, on her Mission to India (22 April to 1 May, 2013) A/HRC/26/38/Add.1 (accessible at www.ohchr.org › Documents › A-HRC-26-38-Add1_en) . Shannon Sampert, “Let Me Tell You a Story: English-Canadian Newspapers and Sexual Assault Myths” (2010) 22:2 Canadian Journal of Women and the Law 301 at 304; also Janice Du Mont, and Deborah Parmis; “Judging Women: The Pernicious Effects of Rape Mythology” (1999) 19:1-2 Canadian Woman Studies 102 at 102 and cultural attitudes which law has long endorsed and which continue to infuse the criminal justice process, albeit in more covert, less accessible forms.” In *The Standard of Social Justice as a Research Process*²⁵ two scholars of psychology made a strong indictment of the (contextually, Canadian) criminal justice process –

“The more general indictment of the current criminal justice process is that the law and legal doctrines concerning sexual assault have acted as the principle [sic] systemic mechanisms for invalidating the experiences of women and children. Given this state of affairs, the traditional view of the legal system as neutral, objective and genderblind is not defensible. Since the system is ineffective in protecting the rights of women and children, it is necessary to re-examine the existing doctrines which reflect the cultural and social limitations that have preserved dominant male interests at the expense of women and children.”

- 2.22 Rav J also noted that the Supreme court held, in *State of Punjab v. Gurmit Singh & Ors.* 1996 SCC (2) 384 that –

“The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterised her as a girl “of loose morals” or “such type of a girl”. ... We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a judge. ... The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole – where the victim of crime is discouraged – the criminal encouraged and in turn crime gets rewarded!”

“Language is 'a medium of social action' not 'merely a vehicle of communication' and the written judicial opinion is the primary, if not the sole, medium in which judges within our judicial system execute language.”

...the text of judicial decisions and opinions constitutes the law by which our common law system abides and the basis on which judges, lawyers, and citizens make reasoned legal judgments about future action.”

2.23 It is evident that there are glaringly concerns with the issues raised in the complaint in this case. Notably, the complaining party was raising various concerns of judicial bias as well as possible corruption or collusion with the accused. Their assumption was made due to the fact there was nothing on record how this defence of erectile dysfunction was raised, their only conclusion was that the accused and magistrate had spoken outside the court case. Notably, this Court when faced with this situation, reviewed the case in line with what it had on record and tried to ensure that it avoided working on these assumptions but had to note that the circumstances was circumspect. This Court focused and questioned the lower court’s competence and it is this that this Court thought was very appropriate for detailed discussion.

2.24 In response, this Court once again went to the Bangalore Principles, in terms of value 6 calls for competence and diligence as prerequisites to the due performance of judicial office. The application of the value should be –

6.1 The judicial duties of a judge take precedence over all other activities.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

2.25 The Commentary on competence in paragraph 192 states that competence in the performance of judicial duties requires legal knowledge, skill, thoroughness and preparation. A judge’s professional competence should be evident in the discharge of his or her duties. Judicial competence may be diminished and compromised when a judge is debilitated by drugs or alcohol, or is otherwise

mentally or physical impaired. In a smaller number of cases, incompetence may be a product of inadequate experience, problems of personality and temperament, or the appointment to judicial office of a person who is unsuitable to exercise it and demonstrates that unsuitability in the performance of the judicial office. In some cases, this may be the product of incapacity or disability, in which case the only solution, albeit an extreme one, is the person's constitutional removal from office. In terms of diligence, paragraph 193 states that a judge must consider soberly, to decide impartially, and to act expeditiously are all aspects of judicial diligence. Diligence also includes striving for the impartial and even-handed application of the law, and the prevention of the abuse of process. The ability to exhibit diligence in the performance of judicial duties may depend on the burden of work, the adequacy of resources (including the provision of support staff and technical assistance), and time for research, deliberation, writing and judicial duties other than sitting in court.

- 2.26 Interestingly, Commentary on Value 6.6 in paragraph 211 states that the role of the judge has been summed up in *Jones v. National Coal Board*, Court of Appeal of England and Wales [1957] 2 QB p.55 at p.64, per Lord Denning that –

The judge's part . . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure, to see that the advocates behave themselves seemly and keep to the rules laid down by law, to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. if he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. . . Such are our standards.

- 2.27 The Judicial Ethics Training Manual for the Nigerian Judiciary highlights that competence is the primary obligation of the judge. They emphasize that a judge's primary duty is the due performance of the judicial function, the principal elements of which are the interpretation and application of the law. But a judge must manage as well as decide cases. The judge is responsible for the efficient administration of justice in his or her court. This involves case management, including the prompt disposition of cases, record-keeping, management of funds, and supervision of court staff. If the judge is not diligent in monitoring and disposing of cases, the resulting inefficiency will increase costs and undermine the administration of justice. A judge should therefore maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of court officials.
- 2.28 Interestingly, the Bangkok Principles General Guidance for Judges on Applying a Gender Perspective in South and Southeast Asia, May 2022 under General Guidance for the Application of a Gender Perspective in Judicial Decision-Making in paragraph 11, 12 and 15 states that judges have the responsibility to ensure that they act in an impartial manner, uphold the right to equality and non-discrimination of all those affected, including the internationally and domestically protected rights of the accused/defendant. Further unequal gender

relations and norms are socially constructed and often find their way into laws and policies that unfairly codify and normalize socially constructed gender norms. It is the responsibility of the judges to be aware of such laws and policies and ensure that they do not further reinforce unequal gender relations. Additionally, when hearing and adjudicating cases, judges must be aware of possible unconscious, implicit or reverse bias they themselves may harbour, and should be careful to avoid using gender stereotypes. Some common stereotypes judges should take care to avoid include but are not limited to...Furthermore judges should employ a victim-centered approach during the hearing, particularly in cases relating to sexual offences and other gender-based violence, including domestic violence cases. Additionally, judges should also be mindful of the victim's/survivor's gender-specific needs and concerns, including but not limited to maternal care, reproductive rights, and protection from sexual or other forms of gender-based violence.

2.29 Simone Cusack states that judicial stereotyping is a common and pernicious barrier to justice, particularly for women victims and survivors of violence. Such stereotyping causes judges to reach a view about cases based on preconceived beliefs, rather than relevant facts and actual enquiry. This can have potentially wide-ranging consequences. It may, for instance, distort judges' perception of the facts, affect their vision of who is a 'victim', and influence their views about witness credibility. Ultimately, however, it compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice and the revictimization of complainants. Women victims and survivors 'should be able to rely on a [justice] system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions'. Eliminating judicial stereotyping is therefore a crucial step in ensuring equality and justice for victims and survivors.

2.30 This Court adopts in entirety the statement by the Honourable Madame Justice Claire L'Heureux-Dubé, 'Beyond the Myths: Equality, Impartiality, and Justice' (2001) 10(1) *Journal of Social Distress and the Homeless* 87, 88 at p102

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"[t]ogether, our overarching goal must be to ensure that substantive equality and impartiality are the predominant reality in our courts and in our communities, rather than a mythical ideal. The more we strive to reach this goal, the more myths and stereotypes will be eradicated from the law, where they have no rightful place. With every success, we will be one step closer to attaining our goal of doing justice for all."

2.31 Incidentally, in the case of **R v Ewanchuk**, [1999] 1 S.C.R. 330, para. 95 where L'Heureux-Dubé, J said -

"This case has not dispelled any of the fears I expressed in Seaboyer, supra, about the use of myths and stereotypes in dealing with sexual assault complaints (see also Bertha Wilson, "Will Women Judges Really Make a Difference?" (1996), 28 Osgoode Hall L.J. 507). Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The Code was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected

in the reasons of the majority of the Court of Appeal. It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law."

- 2.32 Recognizing judicial stereotyping and how such practice perpetuates harmful stereotypes through their failure to challenge stereotyping. Further acknowledging that these stereotypes affects a person's right to a fair and just trial therefore judicial officers must not apply stereotypes to victims or survivors of violence. In ***Karen Tayag Vertido v The Philippines***, the CEDAW Committee stressed that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general. Whilst in ***R.P.B. v. The Philippines***, the CEDAW Committee affirmed that stereotyping affects women's right to a fair trial and urged the State Party to ensure that all criminal proceedings involving rape and other sexual offences are conducted in an impartial and fair manner and free from prejudices or stereotypical notions regarding the victim's gender, age and disability; Provide adequate and regular training on the Convention, the Optional Protocol thereto and the Committee's general recommendations, in particular general recommendations Nos. 18 and 19, to the judiciary and legal professionals so to ensure that stereotypes and gender bias do not affect court proceedings and decision-making.
- 2.33 It is trite law that judicial decisions as well as judges must be impartial and devoid or not influenced by stereotypes or other biases. General Comment No. 32 on article 14 of the ICCPR, the Human Rights Committee noted that there are two aspects to the requirement of impartiality. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. The case of ***Karen Tayag Vertido*** at paragraph 8.4 also stresses this position. Additionally, the Human Rights Committee, General Comment No. 32 at paragraph 21 also offers significant assistance as they noted that the requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.³⁴ Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial. Notably, this position was also reiterated in ***Karttunen v. Finland***, Communication No. 387/1989 at paragraph 7.2.
- 2.34 This position is buttressed in the dissenting positions of L'Heureux-Dubé & Gonthier JJ in ***R. v. Seaboyer***, [1991] 2 S.C.R. 577 at 708-709 where they stated that the common law has always viewed victims of sexual assault with suspicion and distrust. As a result, unique evidentiary rules were developed. The

complainant in a sexual assault trial was treated unlike any other. In the case of sexual offences, the common law “enshrined” prevailing mythology and stereotype by formulating rules that made it extremely difficult for the complainant to establish her credibility and fend off inquiry and speculation regarding her “morality” or “character”. For instance, it is only recently that Malawi has removed the long standing rule of corroboration in sexual offences as noted in the decision of Mwale J in *Steven Kaliyati v Republic*, Criminal Appeal No. 109 of 2018 (HC)(LL)(Unrep). The judiciary cannot condone the perpetuation of structural gender-based violence, where courts instill fear in women and girls who are victims of sexual offences using the criminal justice system.

- 2.35 This Court was at pains to understand the conduct of the magistrate in this matter noting that Malawi criminal justice has safeguards in the Criminal Procedure and Evidence Code in terms of how a defence is mounted including the introduction of evidence especially scientific or medical. There was no need for the magistrate to come to the aid of the accused in defence and in any case, a demonstration was uncalled for, gross but more so inappropriate. Malawi recognizes that there is still room for improvement but it is conduct like this that the UN Special Rapporteur highlights as having negative impact on the criminal justice system. In 2011 under UN General Assembly A/66/289, the UN Special Rapporteur on the Independence of Judges and Lawyers submitted an interim report where she discussed the negative impact of stereotyping on the criminal justice system. Among other things, her report recognised that judicial stereotyping is widespread in this system and undermines access to justice and equality for women. She also highlighted how stereotyping harms women within the system. As part of that discussion, she explained: Procedures and rules of evidence in the criminal justice system are often infiltrated by strong gender stereotypes which can result in engagement in gender-biased behaviour by court officials and discrimination against women by the criminal system in general. Gender stereotypes particularly affect procedures in rape and violence against women cases. In many States, provisions on rape and sexual assault in criminal codes are based on gender stereotypes and prejudices which result in the discriminatory treatment of victims, who are disproportionately female. Hence, high levels of attrition plague the prosecution of rape and sexual violence cases throughout the world, resulting in a significant problem of impunity.
- 2.36 It is critical to underscore that the UN Special Rapporteur also stressed the importance of judges being able to challenge gender stereotyping. Judges must be in a position to challenge gender stereotyping and discrimination when they encounter it in the form of wrongful charging of suspects, charges being brought without any supporting evidence of wrongdoing and merely on the basis of hearsay, or mischarging of a particular form of conduct (like charging abortion as infanticide). Judges must also be willing to challenge stereotyping and discrimination by not detracting from women’s testimony or discounting their credibility, which applies whether women are the accused or victims. ... Challenging gender stereotyping further means challenging common assumptions: about male perpetrators — such as, for instance, their entitlement to control women in various ways and their supposed inability to control their

own sexual urges; about male victims, for example, their ability, in cases of male rape, to have defended themselves; and about women as perpetrators of crimes of violence against men. Similar sensitivity is required when dealing with gender norms and expectations regarding lesbian, gay, bisexual and — particularly — transgender victims and perpetrators.

- 2.37 Warnings are being issued out especially to judiciaries as to stereotyping does for the justice system like the *V.K. v Bulgaria* case. Notably, in a review of a case, where there is an allegation of judicial bias, interference, corruption and/or abuse, the Court must take into consideration the aspect of what a fair-minded and informed-observer might adduce from the trial. In the herein case, it can be ascertained that the actions of the magistrate prejudiced the trial, especially look at the victim's rights as there was inappropriateness in the way the defence was handled.
- 2.38 It is well set in Malawian criminal law, that is section 3 of the Criminal Procedure and Evidence Code together with section 5 that the principle that substantial justice should be done without undue regard for technicality shall at all times be adhered to in applying this Code. In this, herein case the gravity of the injustice is such that it cannot be cured by sections 3 and 5 despite that the matter has not concluded. A number of factors might affect borrowing for the numerous amount of cases on unfair trial, the recourse to a victim. As stated above, the herein case cannot be cured by section 3 and 5 of the code. In addition, upon review, the reviewing court where a finding by a lower court result in a failure of justice, such failure must be rectified.
- 2.39 Justice Chipeta (as he was then) in the case of *Chauya & Another v Republic*, Criminal Appeal No. 9 of 2007 (HC)(PR)(Unrep) stated that criminal law it should always be recalled thrives on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than to err by convicting and sending to undeserved punishment one innocent soul. Nevertheless, this Court is of the view that this sentiment cannot be just in the herein case, and hence it would be more efficient, effective, and fair on the accused and the parties involved for there to be a retrial. However, it must be noted that an irregularity must be an error of law for retrial to be justified as per *Chief Public Prosecutor v Ng'oma and another* [1990] 13 MLR 94. What should also be borne in mind when it comes to a retrial is whether to order a retrial so that an accused gets a fair trial or that legality is ensure. It is also imperative that the court which rehears a matter is also directed to ensure that proper procedure is followed upon rehearing taking all the relevant and requisite legal provisions into account. *The Republic v John Mponda*, Child Criminal Review Case No. 8 of 2017, on the aspect of the magistrate, it was noted by Mwale J, said that where the court is not convinced that the magistrate lacks the knowledge of procedure, the only way to determine whether it is a case of lack of competence or indiscipline or corruption. It is a mandate of disciplinary proceedings be instituted forthwith to maintain the integrity of the judiciary and the sanctity of the oath of office that a judicial officer takes.
- 2.40 In conclusion, this Court wants to reiterate that both an accused person as well as a victim expect the court to be independent and impartial. Considering the

Malawian context, it is evident that the Constitution has in detail highlighted the rights of the accused. Victims do not have such detailed constitutional protection. It is important that as a country, these protections are accorded to victims in the criminal justice space as we continue to see need for such redress. This Court quotes with approval, the Supreme Court pronouncement in the *Bhat* case at paragraph 31 –

“The role of all courts is to make sure that the survivor can rely on their impartiality and neutrality, at every stage in a criminal proceeding, where she is the survivor and an aggrieved party. Even an indirect undermining of this responsibility cast upon the court, by permitting discursive formations on behalf of the accused, that seek to diminish his agency, or underplay his role as an active participant (or perpetrator) of the crime, could in many cases, shake the confidence of the rape survivor (or accuser of the crime) in the impartiality of the court. The current attitude regarding crimes against women typically is that “grave” offences like rape are not tolerable and offenders must be punished. This, however, only takes into consideration rape and other serious forms of gender-based physical violence. The challenges Indian women face are formidable: they include a misogynistic society with entrenched cultural values and beliefs, bias (often sub-conscious) about the stereotypical role of women, social and political structures that are heavily malecentric, most often legal enforcement structures that either cannot cope with, or are unwilling to take strict and timely measures. Therefore, reinforcement of this stereotype, in court utterances or orders, through considerations which are extraneous to the case, would impact fairness.”

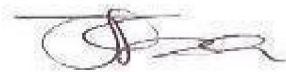
- 2.41 This need of protection is more critical noting what was held in *Bhat*, when the Court also held that the law does not permit or countenance such conduct, where the survivor can potentially be traumatized many times over or be led into some kind of non-voluntary acceptance, or be compelled by the circumstances to accept and condone behavior what is a serious offence. The judge also said that the instances spelt out in the present judgment are only illustrations; the idea is that the greatest extent of sensitivity is to be displayed in the judicial approach, language and reasoning adopted by the judge. Even a solitary instance of such order or utterance in court, reflects adversely on the entire judicial system of the country, undermining the guarantee to fair justice to all, and especially to victims of sexual violence (of any kind from the most aggravated to the so-called minor offences).

3.0 CONCLUSION

- 3.1 This Court declares that the proceedings in the lower court had procedural irregularities including blatant bias especially when one examines how the case progressed from case to answer. Accordingly, in upholding the constitutional freedoms and rights as guaranteed and recognizing the fundamental principles of criminal law espoused in section 3 and 5 of the Criminal Procedure and Evidence Code, it is evident that this matter should not proceed before the said magistrate. Undoubtedly, this Court holds that there were non-judicial factors that influenced the conduct of the magistrate. This Court cannot find as a fact that those facts are attributed to corruption, familial relations or friendship but what it finds is that there was some bias elements noted in his conduct.

- 3.2 The Court orders that the trial in this matter recommence before a different magistrate assigned by the Chief Resident Magistrate. The said trial to recommence by first week of January, 2023.
- 3.3 The State is ordered through the Director of Public Prosecutions to assist the victim and her family with resources to ensure her attendance at court. Further that counselling services be provided from now until when the identified doctor deems.
- 3.4 The issues herein are being referred to the Judicial Service Commission for gender bias issues to be dealt with including the magistrate's conduct in the case.
- 3.5 It is also critical that the Judiciary through the Commission or the Chief Justice's office review practice direction on sexual offences. Furthermore, the Chief Justice through the Training Committee develop training programmes for training of our judicial officers to avoid this situation in the future dealing with gender stereotypes, evidence in sexual offences, safeguarding and revictimization to mention a few.

Made on this 1st day of December, 2022.



Z.J. V. Ntaba
Judge