



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONSTITUTIONAL CAUSE NO. 5 OF 2015

(Being Criminal Case No. 444 of 2015 before the Blantyre Magistrate Court)

BETWEEN:

MAYESO GWANDA.....APPLICANT

AND

THE STATE.....RESPONDENT

LEGAL AID BUREAU.....1ST AMICUS CURIAE

CENTRE FOR HUMAN RIGHTS EDUCATION,

ADVICE AND ASSISTANCE.....2ND AMICUS CURIAE

PARALEGAL ADVISORY SERVICE

INSTITUTE.....3RD AMICUS CURIAE

MALAWI LAW SOCIETY.....4TH AMICUS CURIAE

CORAM:MTAMBO, KALEMBERA, NTABA, JJJ.

: Mr M. Mambulasa

: Miss A. Itimu, Senior State Advocate, of Counsel for the Respondent

: Mr T. Chakaka-Nyirenda, of Co-Counsel for the Respondent

: Mr T. Kalua, of Counsel for the 1st Amicus Curiae

: Mr F. Maele, of Counsel for the 2nd Amicus Curiae

: Miss V. Jumbe, of Counsel for the 3rd Amicus Curiae



: Mr L. Gondwe, of Counsel for the 4th Amicus Curiae

: Mr Kakhobwe, Official Interpreter

: Mrs Pindani, Chief Court Reporter

JUDGMENT

Kalembere J

The Applicant was charged with the offence of being rogue and vagabond under section 184(1)(c) of the Penal Code before the Senior Resident Magistrate Court sitting at Blantyre. On 25th day of March 2016, his trial was stayed pending the determination of the Applicant's constitutional petition. On 3rd June 2015, the Honourable the Chief Justice certified this matter as a constitutional matter pursuant to section 9(3) of the Courts Act, following a referral by Her Worship Moyo in Form 3 of the Courts (High Court)(Procedures on the Interpretation or Application of the Constitution Rules of the Courts Act. Both parties, including the *amici curiae* have filed detailed submissions and skeletal arguments in respect of their respective positions on the matter. In short, the Applicant's contention is that the offence of rogue and vagabond under section 184(1)(c) of the Penal Code is unconstitutional as it infringes upon his various rights under the constitution in itself and in its application. On the other hand, the Respondent opposes the application on the grounds that issues pertaining to the said section deals with or are to do with law enforcement officers and not the provision itself.

The brief facts of the matter are such that the Applicant was arrested by the Malawi Police Service at Chichiri, in the City of Blantyre, on 20th March, 2015 at around 4:00 am. He, being a vendor, was on his way to Limbe where he sells plastic bags. He was kept in custody at Soche Police Sub-Station in Blantyre until 23rd March 2015 when he was charged with the offence of being a rogue and vagabond contrary to section 184(1)(c) of the Penal Code before the Blantyre Magistrate Court. Subsequently he was released on bail pending trial scheduled for the 25th day of March 2015. On 25th day of March 2015, the trial was stayed pending the determination of this constitutional petition.

The main issues for determination are the following:

1. Whether or not section 184(1)(c) of the Penal Code is unconstitutional on the grounds that it infringes the rights provided under sections 19(1), 19(3), 19(6), 20(1), 21 and 39(1) of the Constitution in itself and in its application.
2. Whether section 184(1)(c) of the Penal Code and its consequent application is such a limitation to one or more of the rights contained in sections 19(1), 19(3), 19(6), 20(1), 21 and 39(1) of the Constitution of the Republic of Malawi that it cannot be said to be reasonable, recognized by international human rights standards, and necessary in an open and democratic society.

I am grateful to counsel for their detailed submissions and skeletal arguments. However, it has not been possible to refer to each and every submission and each and every authority cited. As earlier observed herein, the Applicant and the *amici curiae* contend that section 184(1)(c) of the Penal Code is unconstitutional; whereas the Respondent opposes that contention. The Respondent contends that law enforcement officers are at fault and not the provision itself.

At this point it is paramount that I refer to the provision which has led rise to this constitutional petition. Section 184(1)(c) of the Penal Code provides as follows:

“Every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, is deemed a rogue and vagabond.”

Counsel for the Applicant has strongly argued and submitted that the said section 184(1)(c) in itself and in its effect violated the Applicant’s various constitutional rights. The following Applicant’s constitutional rights are said to have been violated:

1. the Applicant’s right to dignity under section 19(1) of the Constitution.
2. the Applicant’s right to be free from inhumane and degrading treatment and punishment under section 19(3) of the Constitution;
3. the Applicant’s right to freedom and security of person under section 19(6) of the Constitution;
4. the Applicant’s right to be free from discrimination and to equal protection of the law under section 20(1) of the Constitution;
5. the Applicant’s right to privacy under section 21 of the Constitution; and

6. the Applicant's right to freedom of movement under section 39 of the Constitution.

Section 19(1) of the Constitution provides as follows:

"The dignity of all persons shall be inviolable."

If the dignity of a person is upheld and respected by organs of state, there would be no breach or violation of a person's dignity. No human being should have his/her dignity or freedom compromised. However, it is clear as has been said elsewhere, and I agree, that poverty, hunger, oppression and injustice make it impossible to live a life commensurate with this dignity. The sub-title to section 184 is '**Rogues and vagabonds.**' It is important to understand the history behind this law. The whole section 184(1)(c) provides as follows:

"s.184 –(1) The following persons:

- (a) every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;*
- (b) every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself;*
- (c) every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose;*
- (d) every person who, without the prior consent in writing in that behalf of the District Commissioner, collects or makes any appeal for subscription of money in any public place in such District Commissioner's District for any purpose;*
- (e) every person who has collected money by subscription in any place in Malawi, who fails to produce to a District Commissioner or to publish in any newspaper named by a District Commissioner, correct accounts of any money received by such subscription and of the disposal thereof, when called upon so to do by such District Commissioner,*

shall be deemed to be a rogue and vagabond, and shall be guilty of a misdemeanor and shall be liable for the first offence to imprisonment for six months and for every subsequent offence to imprisonment for eighteen months;

Provided that paragraph (d) and (e) shall not apply to –

- (i) any person or to the duly authorized representative of any organization who has received the written consent of the Commissioner of Police to collect, or make any appeal for, subscriptions of money for religious or charitable purposes.*
- (ii) any person authorized to collect, or make any appeal for subscriptions of money, under the provisions of any by-law of a local authority which is in force in Malawi;*

Provided further that for the purposes of paragraph (d) the definition of “public place” in section 4 shall not be deemed to include any recognized place of religious worship.

(2) In granting his consent to any person to collect money or to make an appeal for subscriptions of money under subsection (1)(d), a District Commissioner may impose such conditions as he may think fit. Any person who, having been granted such consent fails to comply with any such conditions, shall be deemed to have committed an offence against subsection (1) and shall be liable to the penalties provided by such subsection.”

Malawi adopted these laws from her colonial masters, Great Britain/the United Kingdom. It is believed that in England vagrancy laws had the following three main purposes:

1. to curtail the mobility of persons and criminalize begging, thereby ensuring the availability of cheap labour to land owners and industrialists whilst limiting the presence of undesirable persons in the cities;
2. to reduce the costs incurred by local municipalities and parishes to look after the poor; and
3. to prevent property crimes by creating broad crimes providing wide discretion to law enforcement officials.

(Ref. W Chambliss, 'A Sociological Analysis of the Law of Vagrancy' (1960) 12 Social Problems, quoted in A Short History of Vagrancy Laws by Southern Africa Litigation Centre). Vagrancy Laws have been passed in England since 1349. And according to Chambliss (supra), *'there is little question that these statutes were designed for one express purpose: to force labourers (whether personally free or unfree) to accept employment at a low wage in order to ensure the landowners an adequate supply of labour at a price he could afford to pay.'* Eventually The Vagrancy Act of 1824 was enacted for the more effectual suppression of vagrancy and punishment of idle and disorderly persons. It was an *'Act for the punishment of idle and disorderly persons, and rogues and vagabonds.'* It was brought in to mainly deal with problems in England following the Napoleonic Wars as large numbers of soldiers were discharged on to the streets with no job and no accommodation. And under the said Vagrancy Act 1824, there are offences created against the homeless, i.e. rough sleeping, squatting, begging are criminal offences; and under the Criminal Justice Act 1967, a person may be arrested without a warrant in any public place if they are guilty, while drunk, of disorderly behavior. And under the Criminal Justice Act, 44 of 2003, removed the possibility of imprisonment for remaining offences relating to being an idle and disorderly person.(refer A Short History of English Vagrancy Laws, SALC).

As already observed herein, the dignity of persons is protected and guaranteed under section 19(1) of the constitution. And under section 211 of the constitution international agreements ratified by Malawi as well as customary international law, except or unless inconsistent with the constitution or an Act of Parliament, shall form part of the law of the Republic. Malawi ratified the *African Charter on Human and Peoples' Rights (ACHPR)* on 17 November 1989 and the *International Covenant on Civil and Political Rights (ICCPR)* on 22nd December 1993. Hence these international instruments are binding on Malawi and applicable in Malawi. This was buttressed by Nyirenda J (as he then was) **In the Matter of David Banda(a male infant, [2008] MLR 1** where he stated:

"In other words, Malawi has consciously and decidedly undertaken obligations dictated by these Conventions. It is therefore our solemn duty to comply with the provisions of the Conventions."

Furthermore, the African Charter on Human and Peoples Rights adopted on 27 June 1981, in Article 4 provides as follows:

“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

And in the case of **Parohit and Another v The Gambia (2003) AHRLR 96 (ACHPR)** the African Commission on Human and Peoples’ Rights held as follows:

“Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.”

Furthermore, in the case of **Floyd and Others v City of New York (2013) 08 Civ 1034 SAS (DC)** Scheindlin J noted that each police stop is a demeaning and humiliating experience that makes people feel unwanted and distrustful of the police. And in the case of **Danwood v Minister of Home Affairs, 2000 (3) SA 936 (CC)**, the South African Constitutional Court held that human dignity informs constitutional adjudication in many ways: It is a value that informs the interpretation of other rights; it is a constitutional value central in analysis of limitation of rights; and it is a justiciable and enforceable right that must be protected and respected. Similarly in the case **S v Makwanyane and Another, 1995 (3) SA 391 (CC)** the South African Constitutional Court held as follows:

“Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights...”

Malawi adopted a progressive constitution when she moved from autocratic rule to the current democratic dispensation. And adopted the Bill of Rights. In essence, the Applicant contends that section 184(1)(c) of the Constitution has got no place in the current dispensation. However the respondent strongly submits that it is incorrect to make that assertion because it is not section 184(1)(c) that allows arrest

and detention in circumstances where there is no evidence but rather that it is an issue to do with the officers that are mandated to enforce the said provision and their lack of understanding. Hence the Respondent contends that section 184(1)(c) does not provide for arbitrary arrests.

I have already stated that, it is clear that poverty, hunger, oppression and injustice make it impossible to live a life commensurate with this dignity. The Applicant was arrested when he was allegedly going to Limbe where he conducts his trade of selling plastic bags, as a vendor. The police were allegedly informed about this but they nevertheless arrested him, locked him up and kept him detained for over three days. They brought him before a magistrate court and proffered against him a charge of being a rogue and vagabond contrary to section 184(1)(c) of the Penal Code. The Respondent wants us to believe that the said offence(s) under section 184 are there to prevent crimes. That as it may, what evidence was there that the Applicant intended to commit an offence? In the case of **Kamwangala v Republic MSCA Miscellaneous Criminal Appeal No. 6 of 2013** the Supreme Court had this to say:

“Speaking for ourselves we believe that law enforcement should only effect an arrest when they have evidence of more than mere suspicion of criminality. We also believe that such evidence should only be the product of investigations. Where there is no investigation there cannot, we believe, be any evidence. Where there is no evidence it would seem only natural that there should be no arrests. We therefore find it rather perverse that law enforcement should arrest with a view to investigate.”

In the matter at hand, it is very clear that there was no investigation, there was no evidence that the Applicant intended to commit an offence or an illegality, and that the law enforcement officers only arrested the Applicant with a view to investigate. Hence the Applicant was presumed guilty until proven innocent. That’s against the presumption of innocence. In the **Canadian case of Regina v Oakes [1986] 19 CRR 306 at page 322**, Dickinson CJC explained that the right to dignity requires a State to be able to prove the guilt of an accused:

“The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in section 11(d) of the Charter, the

presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in section 7 of the Charter.....The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences the presumption of innocence is crucial. It ensure that until the State proves an accused's guilt beyond all reasonable doubt he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in human kind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."

It might indeed be that the law enforcement officers believed that they were preventing crime when they arrested the Applicant, but on what basis other than that there is an offence under section 184(1)(c) of the Penal Code? And other than that the Applicant was on foot? In the case of **Rep v Balala [1997] 2 MLR 67 at page 68** Tambala J (as he then was) had this to say:

*"I have examined the facts which were presented before the magistrate's court. It is not very clear to me for what purpose the juvenile was found wandering about within the trading centre. When he was questioned by the police he said that he came to the northern region to look for employment. **It is possible that the is a person who needs care and protection. He is a needy person. I am concerned that the charge of being a rogue and vagabond can be used to oppress needy persons who are not criminals. The juvenile in the present case would be a clear example where mere poverty, homelessness and unemployment would land a person in prison.** I am of the view that the facts did not support the offence of being a rogue and vagabond.(emphasis supplied)*

There is no doubt in my mind that section 184(1)(c) of the Penal Code, and its application led to the violation of the Appellant's constitutional right to dignity. His dignity was violated. He was presumed guilty until proven otherwise. All because he possibly appeared to be of no means. He was not treated as a human being. And where a person's dignity is violated or compromised, it likely creates a

chain reaction, that is, several of the individual's human rights end up being violated.

The Applicant has further contended his right to be free from inhumane and degrading treatment and punishment under section 19(3) of the Constitution was violated; his right to freedom and security of person under section 19(6) of the Constitution was violated; his right to be free from discrimination and to equal protection of the law under section 20(1) of the Constitution was violated; his right to privacy under section 21 of the Constitution was violated; and that his right to freedom of movement under section 39 of the Constitution. Section 19(3) of the Constitution provides as follows:

“No person shall be subjected to cruel, inhuman or degrading treatment or punishment.”

Article 5 of the African Charter on Human and Peoples' Rights provides as follows:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly.....cruel, inhuman or degrading punishment and treatment shall be prohibited.”

In the case of **Huri-Laws v Nigeria (2000) AHRLR 273 (ACHPR 2000)** the African Commission noted at paragraph 40:

“The term ‘cruel, inhuman or degrading treatment or punishment’ is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental...being detained arbitrarily, not knowing the reason or duration of detention, is itself a mental trauma.”

The Applicant herein, was arrested without warrant of arrest, without any investigation, and without any evidence of intention to commit an offence or indeed commission of an offence. He was incarcerated for three days and three nights and police cells are usually congested. Hence the Applicant was subjected to cruel, inhuman and degrading treatment at the hands of the police. His rights under section 19(3) of the constitution were therefore violated. He was arrested merely

on behavior which was not criminal. Such arrest amounts to inhuman and degrading treatment. He likely suffered psychological trauma so too his family.

Section 19(6) of the constitution safeguards every person's right to freedom and security of the person. In the matter at hand the Applicant's right to security of the person as well as his right to freedom were infringed and curtailed when he was arbitrarily stopped and arrested for conduct which was not criminal. In the case of **King v Attorney General [1981] 1 LR 245**, the Irish Supreme Court held that the provisions on rogue and vagabond (similar to those under section 184 of our Penal Code) violated the right to security of person. The Applicant's rights under section 19(6) of the Constitution were clearly violated.

The Applicant further claims that the rights of the Applicant under section 20(1) of the Constitution were violated. Section 20(1) provides as follows:

“Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.”

In the case of **Kaseka and Others v Republic [1999] MLR 116 at page 118** Chinangwa J(as he then was) had this to say:

“It is further observed that some of the appellants are alleged to have had male companions who were not arrested and the State has not given reasons why they were not prosecuted.....It seems to me that police action was rather discriminatory because only the appellants were arrested leaving their male companions free.

This **Kaseka Case** is a clear case demonstrating discrimination in the application of some of these rogue and vagabond laws, In the matter at hand, as earlier observed, the Applicant was arrested simply because of his status. Those who drive, when stopped by the police, are only arrested, if at all, because of an infringement of the law, e.g. drink driving, or being found in possession of some illegal substance, etc. Hence, I am bound to agree that the application of section

184(1)(c) on the Applicant infringed his rights under section 20(1) of the Constitution.

All in all I do agree and it is my finding that the Applicant's constitutional rights were violated as claimed and contended by the Applicant and *amici curiae*. Section 5 of the constitution provides that any act of Government or any law that is inconsistent with the provisions of this constitution shall, to the extent of such inconsistency, be invalid. An section 12 of the constitution allows for limitation of rights within a prescribed framework. And section 44 of the constitution provides as follows:

“s.44(1) No restriction may be placed on the exercise of any rights and freedoms provided for in this constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(2) Laws prescribing restrictions or limitations shall not negate the essential content of the right to freedom in question, and shall be of general application.”

Any infringement of a right is permissible if the following test is satisfied:

- i. whether the violation to the right is prescribed by a law of general application;
- ii. whether the violation is reasonable and necessary in an open and democratic society;
- iii. whether the violation meets the international human rights standards; and
- iv. whether the violation negates the essential content of a right in question.

I have had occasion to read the analysis of the test and conclusions reached by my learned brother Dr Mtambo J in his judgment herein, and I do not think that I should re-invent the wheel I do concur with his analysis, findings and conclusions. All in all, except as regards the violation of the right not to be discriminated against, where I differ with my learned brother, the prescriptions of section 184(1)(c) of the Penal Code do indeed infringe upon a range of the Appellant's constitutionally guaranteed rights. The effect and extent of the infringement of these rights are not acceptable limitations to these rights. Section 184(1)(c) is not justifiable when there are other policing tools like section 28 of the Penal Code.

This law is further unreasonable as it allows arrests for non-criminal behavior, and violates several of the Applicant's constitutional rights.

The Applicant's prayer is therefore granted. Section 184(1)(c) of the Penal Code is hereby declared unconstitutional and invalid. I further direct and order that the charge against the Applicant be dropped and that he be discharged.

PRONOUNCED in open Court 10th day of January 2017, at the Principal Registry, Blantyre.

A handwritten signature in blue ink, appearing to read 'S.A. Kalembera', is written over a faint, circular stamp or watermark.

S.A. Kalembera

JUDGE