



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISC CRIMINAL REVIEW CASE NO. 5 OF 2021

BETWEEN:

- FRANCIS KAPU1ST APPLICANT
- ROBERT SAMASON.....2ND APPLICANT
- CHANCY MATEMBA.....3RD APPLICANT
- INNOCENT CHIMWANGULINDA.....4TH APPLICANT
- YAMIKANI NYAMBALO.....5TH APPLICANT
- MAYAMIKO ROBERT.....6TH APPLICANT
- SHABAN COSTA.....7TH APPLICANT
- GIFT SPIKI.....8TH APPLICANT
- AND
- THE STATE.....RESPONDENTS

CORAM: THE HONOURABLE JUSTICE J. M. CHIRWA

Mr. Salamba, Senior State Advocate for the Respondents.

Ms. Chijozi Senior Legal Aid Advocate for the Applicants.

R. Chanonga, Official Court Interpreter.

Ms. Mthunzi, Court Reporter.

JUDGMENT

1. Introduction:-

This is an application by **Francis Kapu** and 7 others (“the Applicants”) for the review of the propriety of their detention at the Limbe Police Station.

The grounds for the review are as follows:

- (a) The orders of the lower court remanding the Applicants into police custody are unlawful as they do not comply with Section 96 of the Child Care, Protection and Justice Act;*
- (b) The orders of the lower court remanding the Applicants into police custody do not take into account the best interests of the Applicants as it exposes them to an environment that interferes with their education and is hazardous to their health, physical, mental and social development, which is contrary to Sections 23(1) of the Constitution of the Republic of Malawi, Section 88 of the Child Care, Protection and Justice Act and Article 3 of the Convention on the Rights of the Child.*
- (c) The orders of the lower court remanding the Applicants into police custody violate the Applicants’ right to a fair trial by detaining them under conditions in which they are not provided adequate nutrition, does not take into account their vulnerability and is not desirable at their age for promotion of their reintegration into society which is contrary to Section 42(1) (b) and 42(2) (g) (v) and (vi) of the Constitution of the Republic of Malawi.*

The application is supported by Skeleton Arguments.

The Respondents by their submissions do not oppose this application.

2. Issues for determination:-

- (a) whether or not the orders of the lower court remanding the Applicants into police custody at the Limbe Police Station are contrary to Section 96 of the Child Care, Protection and Justice Act (“the Act”).

- (b) whether or not the orders of the lower court remanding the Applicants into police custody, as aforesaid, do not take into account the best interests of the Applicants as it exposes them to an environment which interferes with their education and is hazardous to their health, physical, mental and social development, contrary to Section 23(1) of the Constitution of the Republic of Malawi (“the Constitution”), Section 88 of the Act and Article 3 of the Convention on the Rights of a Child (“the Convention”); and
- (c) whether or not the orders of the lower court remanding the Applicants into police custody, as aforesaid, violate the Applicants’ right to fair trial by detaining them under conditions in which they are not provided with adequate nutrition, does not take into account their vulnerability and is not desirable at their respective ages for the promotion of their reintegration into society contrary to Section 42(1) (b) and 42(2) (g) (v) and (vi) of the Constitution.

3. Jurisdiction:

This Court is in agreement with both the parties hereto in their submissions that the High Court has jurisdiction to hear the present application under Section 42(2) (f) (viii) of the Constitution and Section 25 of the Courts Act. For the avoidance of any doubt this Court proceeds to reproduce the said provisions as follows:

First, Section 42 (2) (f) (viii) of the Constitution;

“42 (2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right-

(f) as an accused person, to a fair trial, which shall include the right-

(viii) to have recourse by way of appeal or review to a higher court than the court of first instance;”

And Secondly, Section 25 of the Courts Act,

“25. The High Court shall exercise powers of review in respect of criminal proceedings and matters in subordinate courts in accordance with the law for the time being in force relating to criminal procedure.”

It is, in the premises, the view of this Court that the present application is properly before it.

4. Determination:-

It is the intention of this Court to determine the issues herein in the same order as stated under the issues for determination above.

(a) whether or not the orders of the lower court remanding the Applicants into police custody at Limbe Police Station are contrary to Section 96 of the Act.

It is here the case of the Applicants that Section 96 of the Act stipulates that the lawful place to detain children before a finding of liability against them is a safety home. It is the further case of the Applicants that Section 96(2) of the Act gives power to the officer in charge or the prosecutor to apply for an alternative place of detention on grounds set out under Section 96 (2) (a) to 96 (2) (d).

It is thus the contention of the Applicants that the lower court had no powers to make an order of detention into a police custody and the lower court's orders were thus unlawful.

Section 96 of the Act as is material for the purposes of the determining the present issue provides as follows:

"96 (1) where a decision has been made to detain a child before a finding against the child, the child shall, subject to subsection [2], be detained in a safety home.

(2) where a decision has been made to detain a child in accordance with subsection (1) and the officer-in-charge of a police station responsible for the child or the prosecutor is of the opinion that-

(a) it is impossible to do so;

(b) the child is of unruly or depraved character that he or she cannot be safely so detained;

(c) by reason of the state of health or mental or physical condition of the child, it is not advisable so to detain the child; or

(d) the detention is not otherwise in the best interests of the child, the officer-in charge or prosecutor shall immediately apply to the inquiry magistrate, child justice court or any other court that made the order for any necessary alternative order."

It should be evident from the wording of Section 96 (1) of the Act that before a finding of liability has been made against a child, the child can only be detained lawfully in a safety home and that it is only if one of the conditions stipulated in subsection of 2 of Section 96 of the Act has been satisfied that a child can be detained lawfully in some other place than a safety home.

A “safety home” has been defined in Section 2 of the Act as safety home established under section 157. Section 157 of the Act is hereby reproduced as follows:

“157 (1) The Minister shall establish places or institutions as public reformatory centres or public safety home for the purposes of this Act.

(2) All institutions which at the commencement of this Act are operating as public reformatory centres shall be deemed to have been established under this Act.

(3) All public reformatory centres and safety homes shall be managed by a person appointed by the Minister.

(4) The establishment of public reformatory centres and public safety homes under this section shall be published in the Gazette.

(5) The publication shall state whether the public reformatory centre or public safety home is for female or male children or for both and shall specify the number of children to be detained in that centre.”

Turning to the present application, it is not in dispute that at all material times all the Applicants herein were children answering various charges before the Child Justice Court and that no finding of liability had then been made against them. It is further not in dispute that the court made orders that all the Applicants be remanded in police custody whilst awaiting the further hearing of their cases.

Now, regard being had to the legal requirements of the sections referred to above what justification would there be in ordering the detention of the Applicants in police custody? This Court finds none.

In the case of **the Republic v Children in Detention at Bvumbwe and Kachere Prisons**, Review Case No. 21 of 2017 (unreported) **Kalembera J** in considering the issue of detention of children in prison and the provisions of Section 96 of the Act had this to say:

“Only in those exceptional circumstances should a child be detained before a finding of responsibility for commission of an offence. Where a decision has been made to detain a child before a finding against him, then as stipulated under Section 96(1) of the Act, he shall be detained in a safety home. In exceptional circumstances, and on application to the inquiry magistrate by the prosecutor, the child might be detained in a reformatory centre.”

The learned judge went further to state that

“... ..a safety home and a reformatory centre are not prisons. If the law required that children be remanded or imprisoned in a prison it would have specifically provided as such. It is therefore improper and illegal to detain or remand a child in a prison or to imprison a child for any offence.”

This Court fully subscribes to the interpretation of Section 96 (1) of the Act by **Kalembera J** in the above cited case.

In the absence of any evidence to show that an application had been made before the lower court under Section 96 (2) of the Act for the detention of the Applicants other than in a safety home this Court would thus not hesitate to find the contention of the Applicants that their detention in police custody at Limbe Police Station is unlawful merited.

(b) whether or not the orders of the lower court remanding the Applicants into police custody, as aforesaid, do not take into account the best interests of the Applicants as it exposes them to an environment which interferes with their education and is hazardous to their health, physical, mental and social development, contrary to Section 23 (1) of the Constitution, Section 88 of the Act and Article 3 of the Convention.

It is here the case of the Applicants that since the 1st Applicant had been in custody for more than 4 months and the other Applicants had been in custody for more than 2 weeks without provision of food, beddings, recreation and education, the lower courts order did not thus take into account the best interests of the Applicants herein which is contrary to Section 23(1) of the Constitution, Section 88 of the Act and Article 3 of the Convention.

Section 23 of the Constitution deals with the rights of children. And sub Section (1) of Section 23 relied upon by the Applicants provides as follows:

“(1) All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting a child.”

From the wording of Section 23 quoted above it should be apparent that any decision affecting a child or children ought to take into consideration the best interests and welfare of the said child or children. Any decision which fails to comply with this constitutional requirement is thus unconstitutional and unlawful.

And Section 88 of the Act also relied upon by the Applicants provides as follows:

“88. A Court, when dealing with a child who is brought before such court either as an offender or in need of care or protection, shall-

(a) in a proper case, take steps for removing him or her from undesirable surrounding and for security that proper provision is made for his or her nutrition, education, and training; and

(b) give primary consideration to the rights of the child as recognised by the Convention on Rights of the Child set out in the Third Schedule.”

The wording of Section 88 of the Act also requires the court when dealing with a child offender before it to have regard to the best interests or welfare of the child. The provision, aforesaid, further requires the court to ensure that the child be kept in a proper and suitable environment which would give him or her access to nutrition, education and training. It would thus seem to follow that if a decision made by the court fails to comply with the requirements of the section, as aforesaid, then such a decision is unlawful.

And finally, Article 3 of the Convention also makes the child's best interests a primary consideration in all actions concerning children and requires States Parties to ensure their care and protection.

It can thus be summarised that Section 23(1) of the Constitution, Section 88 of the Act and Article 3 of the Convention all require courts to uphold the best interests and welfare of the children brought before those courts. This entails that courts ought

to take necessary steps or make arrangements to ensure that a child or children are removed from any undesirable surroundings or environments and placed them in suitable surroundings or environments which would allow them access to nutrition, education and training.

Turning to the present application, there is no evidence before this Court to show that before the orders for the detention of the Applicants in police custody at the Limbe Police Station the lower court had considered the welfare of the Applicants and been satisfied that such a place had the best interests of the Applicants as children, such as adequate nutrition, beddings, education and recreation.

In the premises, this Court would be inclined to concur with the contention of both the parties hereto that the detention of the Applicants in police custody at the Limbe Police Station was clearly in breach of Section 23(1) of the Constitution, Section 88 of the Act and Article 3 of the Convention and thus unlawful.

(c) whether or not the orders of the lower court remanding the Applicants into police custody, as aforesaid, violate the Applicants' right to a fair trial by detaining them under conditions in which they are not provided with adequate nutrition, not take into account their vulnerability and is not desirable at their respective ages for the promotion of their reintegration into society contrary Sections 42 (1) (b) and 42 (2) (g) (v) and (vi) of the Constitution.

It is here the case of the Applicants that the orders of the lower court detaining the Applicants into police custody, as aforesaid, did not take into account their ages and vulnerability as children and therefore, violated their rights under Section 42 (2) (g) (v) and (vi) of the Constitution. It is the further case of the Applicants that the said orders subjected the Applicants as children to an environment that is hazardous, interferes with their education and harmful to their health, physical, mental, spiritual and social development contrary to Section 23 (5) of the Constitution.

It is thus the contention of the Applicants that the lower court's said orders of detention are unlawful as they do not comply with Section 96 of the Act and therefore, violating Article 37 of the Convention.

It is worthy of note that the case of the Applicants under this ground of review is premised on Section 42 (1) (b) and 42 (2) (g), (v) and (vi) of the Constitution and not Sections 23 (5) of the Constitution, 96 of the Act and Article 37 of the

Convention as argued by the Applicants in both their skeleton arguments and oral arguments. As a court law, this Court's duty is to determine only the matters raised by the parties either in their pleadings or averments. Thus, had the Applicants intended their case to be premised on those other provisions as well then they should have specifically stated so in the grounds of this application. Put simply, this Court has no intention of considering the merits or demerits as regards the legal provisions not specifically stated in the grounds in support of this application..

Section 42 (1) (b) of the Constitution provides as follows:

“(1) Every person who is detained, including every sentenced prisoner, shall have the right to-

(b) to be held under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State.”

And Section 42 (2) (g) (v) and (vi) of the Constitution provide as follows:

“(2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has a detained person, have the right-

(g) in addition, if that person is a person under the age of eighteen years, to treatment consistent with the special needs of children, which shall include the right-

(v) to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role;

(vi) to be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards.”

This Court has earlier in this judgment held that there is no evidence before this Court to show that the orders of detention of the lower court had considered the best interests of the Applicants herein and were thus in contravention of Section 23(1) of

the Constitution on grounds that it did not take into consideration their best interests and welfare. It would thus be contradictory for this Court now to hold that the Applicants were held under conditions consistent with human dignity as required by Section 42 (1) (b) of the Constitution.

In the premises, it is the finding of this Court that the Applicants' contention that their detention in police custody at Limbe Police Station was in contravention of Section 42 (1) (b) of the Constitution or that the same had not taken into account their ages as stipulated in Section 42 (2) (g) (v) of the Constitution merited.

And as regards the Applicants' contention that the said detention also contravened Section 42 (2) (g) (vi) of the Constitution it is pertinent to note that this provision deals with legal proceedings and not detention. And in the absence of any evidence being proffered to prove that the legal proceedings before the lower court did not reflect the vulnerability of the Applicants, this Court would thus loathe to hold that Section 42 (2) (g) (vi) of the Constitution had also been contravened by the Respondents.

5.0 Conclusions:-

In conclusion the following are the findings of this Court;

- (a) that the orders of the lower court for the detention of the Applicants in police custody at Limbe Police Station are contrary to Section 96 of the Act and thus unlawful. The proper place for the detention of the Applicants being a safety home (vide Section 96(1) of the Act).
- (b) that the orders of the lower court detaining the Applicants herein at Limbe Police Station are indeed contrary to Sections 23(1) of the Constitution and 88 of the Act since they do not take into account the best interests of the Applicants which is of paramount consideration when dealing with children and thus unlawful.
- (c) that the orders of the lower court detaining the Applicants herein at Limbe Police Station under conditions in which they were not provided with adequate nutrition, did not take into account their vulnerability and were not desirable at their respective ages for the promotion of their reintegration into society is indeed, contrary to Section 42(1) (b) and 42 (2) (g) (v) of the Constitution and thus unlawful.

Consequently, it is the order of this Court that if the Applicants are or any one of them is still being detained at the said police station then they or he/she should be released forthwith.

And since there appears to be no safety homes designated by the Minister as mandated by Section 157(1) of the Act, it is the further order of this Court that the Minister responsible for the welfare of children should within the next 30 days from the date hereof proceed to designate or establish places or institutions as public safety homes in terms of the said provision. The Minister as a duty-bearer ought to have discharged this statutory duty soon after the Act became operational. The Minister's failure to do so by this date is thus a clear abdication of a statutory duty.

The safety homes to be so designated or established should have regard to the guiding principles in matters concerning children set out in the Third Schedule to the Act. It is so further ordered.

Dated this thirtieth day of July, 2021.



CHIRWA J.
JUDGE