IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
JUDICIAL REVIEW CASE NUMBER 28 of 2018

BETWEEN

THE STATE	**1ST RESPONDENT**
AND	
THE OFFICER IN-CHARGE	**2ND RESPONDENT**
EX PARTE: HENRY BANDA	**1ST APPLICANT**
ISHMAEL MWALE	**2ND APPLICANT**
SIKWEYA SUPIYANI	**3RD APPLICANT**
THE LEGAL AID BUREAU	**AMICUS CURAE**

CORAM: HON. JUSTICE ZIONE NTABA
Ms. C. Chijozi, Counsel for the Applicants
Mr. N. Chisiza, Counsel for the 1st and 2nd Respondent
Mr. D. Banda, Court Clerk and Interpreter

JUDGMENT

1.0 BACKGROUND

1.1 On 11th June, 2018, the Applicants applied for and were granted leave to apply for judicial review by this Court. The facts of the case are that on or about the night of 27th March 2018, at around 11:00 hours and at various bars and bottle stores in Kasungu District, the Applicants were randomly arrested with 20 other people in a purported sweeping exercise by Kasungu Police. At the time of the arrest, the 1st Applicant, Henry Banda, was working as a DJ at American Bar and Bottle Store whilst the 2nd Applicant, Ishmael Mwale, was having a drink at Culture Club's Car Park and the 3rd Applicant, Sikweya Supiyani, was selling Kanyenya (small fried fish) at American Bar. The Applicants stated in their application that at the time of the arrest, they were not informed of the reasons of their arrest, despite specifically demanding this information from the police. They were taken into police custody and spent a night in the police cells without being informed why they were being detained. On 28th March, 2018, they were charged with the offence of being a rogue and vagabond and were told by the police to plead guilty or face being detained in

prison on remand. They were then taken to court, charged and convicted of the offence of rogue and vagabond contrary to section 184(1)(b) of the Penal Code and convicted upon their own plea of guilty. The Court fined each one of them K3,000 in default to imprisonment for 3 months with hard labour.

1.2 The Applicants judicial review is based on the following decisions made by the police –

1.2.1 indiscriminate sweeping exercise and/or arrest is unconstitutional in that it violated the Applicants right to freedom of movement, right to dignity, the right to personal liberty and the right to economic activity as provided and guaranteed under sections 39,19,18 and 29 of the Constitution of the Republic of Malawi respectively;

1.2.2 indiscriminate sweeping exercise and arrest contravenes its duty to protect human rights under sections 15(1) and 15(3) of the Constitution of the Republic of Malawi;

1.2.3 failure to promptly inform the Applicants of the charges against them at the time of arrest and detention is unconstitutional and unlawful in that it violated their right to fair trial provided and guaranteed under section 42(1)(a) of the Constitution of the Republic of Malawi; and

1.2.4 conduct in forcing and compelling the Applicants at the police station to plead guilty to the offence of rogue and vagabond and threatening them of possible detention in prison if they failed to do so is unconstitutional and unlawful in that it violated the right to fair trial provided and guaranteed under section 42(2)(c) of the Constitution of the Republic of Malawi.

1.3 The Applicants prayed for the following reliefs –

1.3.1 a declaration that the police's indiscriminate sweeping exercise and or arrest is unconstitutional, unlawful and contrary to sections 39, 19, 18 and 29 of the Constitution of the Republic of Malawi;

1.3.2 a declaration that the police's indiscriminate sweeping exercise and arrest is contrary to their duty to protect human rights under sections 15(1) and 15(3) of the Constitution of the Republic of Malawi;

1.3.3 a like order to Mandamus compelling the police to develop proper guidelines for sweeping exercises which shall ensure full protection of human rights;

1.3.4 a declaration that the failure by the police to promptly inform the Applicants of the charges against them at the time of arrest and detention is unlawful and contrary to section 42(1)(a) of the Constitution of the Republic of Malawi;

1.3.5 a declaration that the conduct of the police in coercing the Applicants at the police station to plead guilty to the offence of rogue and vagabond and threatening them with possible detention in prison if

they failed to do so is unconstitutional and unlawful and contrary to section 42(2)(c) of the Constitution of the Republic of Malawi; and

1.3.6 an order of compensation for the violation of the Applicants rights under sections 39, 19, 18, 29, 42(1) (a) and 42(2) (c) of the Constitution of the Republic of Malawi.

1.3 The Applicants supported their application with a joint sworn statement. They also filed a skeleton argument highlighting the law. They submitted that they have sufficient interest in the matters to which this application relates. They cited the Supreme Court of Appeal case of ***Civil Liberties Committee v Minister of Justice and Registrar General [***1999] MSCA 12, positively cited the English case of ***R v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Business Limited*** (1982) AC 617, where Lord Diplock held that locus standi should be considered in the factual and legal context of the whole case. They further stated that the English case ***of R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Limited*** (1995) 1 WLR 386 offered further insights as the court considered various factors in establishing whether a sufficient interest was present, including the importance of vindicating the rule of law; the importance of the issue raised; the likely absence of any other responsible challenger and the nature of the breach of duty against which relief was sought.

1.4 The Constitution under section 15(2) entitles the Applicants to seek relief from the courts where their rights have been violated to have them protected and enforced. Further, they highlighted that section 41(2) of the Constitution provides that "every person shall have access to any court of law and any other tribunal with jurisdiction for final settlement of legal issues" whilst subsection (3) provides that "every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law." In the Malawi Supreme Court of Appeal case of ***Attorney General v Malawi Congress Party and Others*** [1997] MWSC 1, where Mtegha JA, referring to the above sections, held that locus standi is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in a sufficient close relation to it so as to give him a right which requires protection or infringement of which he brings the action. Accordingly, the Applicants argued that they have the required locus standi because they were directly affected by the actions of the Respondents which are the subject of this judicial review, and they have a direct personal interest in the relief which is sought. In addition, they and many other innocent persons are at risk of arbitrary arrest and other rights violations if indiscriminate sweeping exercises are allowed to continue.

1.5 The Applicants argued that their case was suitable for judicial review as per Order 20 rule 1 of the Courts (High Court) (Civil Procedure) Rules. The Applicants were questioning the decision-making process for their arrest as noted in ***Gable Masangano v Attorney General and Others*** [2009] MWHC 31. In the High Court case of ***S v Director of Public Prosecutions and Others, Ex parte Chilumpha*** [2006] MWHC 140, the judges described judicial review as a procedure for the exercise by the High Court of its supervisory

jurisdiction over the proceedings and decisions of inferior courts, tribunals, or other persons or bodies which perform public duties or functions. Further in the ***Matter of the Removal of MacWilliam Lunguzi as Inspector General of Police***, Miscellaneous Application Number 55 of 1994, the court held that judicial review is intended to see that the relevant authorities use their powers in a proper manner. The purpose of judicial review is therefore to protect the individual against the abuse of power.

1.6 Interestingly, the South African Constitutional Court in ***Pharmaceutical Manufacturers Association of SA and Another; In re Ex Parte President of Republic of South Africa*** 2000 (2) SA 674 (CC) confirmed that the control of public power by the courts through judicial review is a constitutional matter and that powers conferred by legislation have to be exercised within the ambits of fundamental rights and the rule of law. They also highlighted that the ***Chilumpha*** case argued that the question we however need to ask ourselves is whether this violation is amenable to judicial review. To the extent that the decisions to arrest and initiate criminal proceedings against the applicant were based on evidence obtained in breach of applicant's right under section 21 aforesaid, we are of the conviction that it raises the question of reasonableness, in the Wednesbury sense, of those decisions. The Wednesbury principle explains that decisions of persons or bodies which perform public duties or functions will be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision (See ***Associated Provincial Picture House Limited v Wednesbury Corporation*** (1948) 1 K.B. 223). In that case, the view taken was that had the respondents directed their minds to the manner in which the tape recordings were obtained and the law as stipulated in section 21 of the Constitution, they could not have reached the decisions to arrest and institute criminal proceedings. Therefore, they found that the respondents did not only violate the applicants' constitutional right to privacy but also acted unreasonably. It was their assertion that the Constitution is the supreme law of the land and any exercise of public power which contravenes provisions of the Constitution is unreasonable and ultra vires. And this position was supported by the case of ***The State and Electoral Commission ex-parte Muluzi and Another*** [2009] MWHC 8, that it is appropriate for the High Court in a judicial review to consider whether violations of the Constitution have occurred because the Constitution is supreme everything else derives from it and must conform to it. The courts, therefore, have, invariably, to concern themselves with examination, to some degree, of whether or not the Constitution is followed. In this respect the courts have gone ahead to decide whether or not an act or action by Government was Constitutional or not. This is clear from the declarations made in the ***MacWilliam Lunguzi*** matter. In this respect therefore, we do not think we are constrained from examining the determination by the respondent as to whether or not, it conforms to the Constitution.

1.7 Sections 12 and 44 of the Constitution provide a useful structure within which to measure whether any limitation of rights through any action passes constitutional muster. Section 44 of the Constitution states –

> "(1) No restrictions or limitations 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, recognised by international human rights standards and necessary in an open and democratic society.
> (2) Law prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application."

1.8 It is accepted that the Constitution should be interpreted in a generous and broad fashion as opposed to a strict, legalistic and pedantic one and in a manner that gives force and life to the words used by the legislature, avoiding at all times interpretations that produce absurd consequences. The Applicants submitted that the indiscriminate sweeping exercises, not being informed of the reasons for the arrest and the coercion for them to plead guilty, were ultra vires the provisions of the Criminal Procedure and Evidence Code and the Constitution. In addition, the Applicants argued that the police's actions were unreasonable because they ignored the constitutional rights of the Applicants and in doing so did not act in a manner that was reasonable and necessary in an open and democratic society.

1.9 The Applicants highlighted the history of law relating to arrest during the colonial period, that is arrest served a much different purpose from its purpose in a constitutional democracy. Lukas Muntingh in Arrested in Africa: An Exploration of the Issues (2015) CSPRI, 14-15 noted that an important feature of colonial policing was the creation of a range of offences to be used as a means to bring the local population under criminal justice control. The way colonial law enforcement took place in Malawi is described as the enforcement of minor offences took up most of the police time. In 1937, for instance, no less than 6000 Africans were prosecuted for being resident in townships without permission, or because of failure to produce a pass, over 3000 for crimes against property, more than 4700 for not paying hut taxes, and more than 1000 for vagrancy… The enforcement of the Palm Wine Regulations of 1900 in Nyasaland, hut taxes (to be paid in cash) and vagrancy laws compelled Africans to take up employment but also to limit their exposure to alcohol, which according to the police undermined the quality of their labour. He concluded that the colonial police served a narrow interest group with its own political and commercial concerns; policing was not aimed at general public safety; there was little investigative capacity or purpose in policing, and the style of policing was para-military in character. High volumes of arrests enabled by a myriad of administrative offences were used to control the population and facilitate participation in the colonial economy in order to provide cheap labour.

1.10 In practice, arrests still retain their colonial character, since arrests are easily used as a tool in circumstances where there is no clear indication of an offence having been committed. In contrast, in a constitutional democracy based on

the rule of law, arrest is a prima facie interference with the right to liberty and accordingly the powers of arrest are supposed to be reduced. It is for this reason that the legal framework relating to arrests in Malawi deliberately avoids the colonial character of policing and specifically does not provide for mass arrests. The law relating to arrests and detention can be found in the Malawi Constitution, the Criminal Procedure and Evidence Code as amended in 2010, the Penal Code, as amended in 2010 and the Police Act as amended in 2010 and these illustrates a legal framework which requires respect for human rights.

1.11 The Constitution provides for a range of rights relating to arrests, including: the right to respect for human dignity; the right not to be subjected to cruel, inhuman or degrading treatment or punishment; the right to freedom and security of person, which shall include the right not to be detained without trial; the right to be recognised as a person before the law; and various rights pertaining to arrested and detained persons. Section 42(2) of the Constitution provides that 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 rights to be promptly to be informed, in a language which he or she understands; be released from detention, with or without bail unless the interests of justice require otherwise; be informed with sufficient particularity of the charge to mention a few. Further the Criminal Procedure and Evidence Code provides for increased protection of persons who have been arrested as section 20 prohibits the use of greater force than was reasonable to apprehend a suspect whilst section 20A provides that an arrest is unlawful where the person arrested was not informed of the reason for the arrest at the time of the arrest or as soon as practicable after, the arrest. Additionally, section 20A (6) provides that, once a person is arrested - the police officer shall promptly inform him that he has the right to remain silent and shall warn him of the consequences of making any statement. Further section 32 provides that a police officer making an arrest without a warrant shall, without reasonable delay and in any event within 48 hours, take or send the person arrested before a magistrate or traditional or local court having jurisdiction in the case. Notably, section 32A provides that the police may caution and release an arrested person and in section 32A(4) provides that a police officer must, when exercising his or her discretion to caution and release an arrested person, bear in mind the following: the petty nature of the offence, the circumstances in which it was committed, the views of the victim or complainant, and personal consideration of the arrested person, including age or physical and mental infirmity. Section 32A (5) provides that the Chief Justice may issue guidelines to police on the exercise of the power to caution and release.

1.12 Further, section 28 of the Criminal Procedure and Evidence Code provides for those circumstances under which a police officer may arrest a person without a warrant. The section authorises a police officer to arrest, without a warrant or order from a magistrate, any person whom he finds lying or loitering in any highway, yard or place during the night and whom he suspects, upon reasonable grounds, of having committed or being about to commit a felony. The section also extends to the arrest of any person who is about to commit an arrestable offence or whom the officer has reasonable grounds of suspecting to be about to commit an arrestable offence. Section 28 of the Criminal Procedure and Evidence Code contains the yardstick of “reasonable grounds”

and it further requires that the police officer suspects that a *specific* offence has or is about to be committed. According to Black's Law Dictionary, "reasonable grounds" are defined as amounting to more than a bare suspicion but less than evidence that would justify a conviction. The test is an objective test. The European Court of Human Rights in ***Wloch v Poland***, Case Number 27785/95 (2000) held that "reasonable suspicion" within the meaning of section 5(1)(c) of the European Convention (which is similar to section 28 of the CP & EC) requires that the facts relied on can be reasonably considered as falling under one of the sections describing criminal behaviour in the criminal code. Thus, there could clearly not be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred. Whether there is a reasonable suspicion that gives rise to the use of discretion should be influenced by a number of factors. Whilst Plasket C (1998) 'Controlling the discretion to arrest without warrant through the Constitution' SA Journal for Criminal Justice 1(2) at page 186 stated that (a) the arrestor must have an open mind with regard to factors pointing to both innocence and guilty; (b) in the appropriate circumstances the suspect should have the opportunity to deal with allegations against him before being arrested; (c) for the suspicion to be reasonable, it must extend to all elements of the offence; and (d) the arrestor must be able to prove he considered the rights of the suspect to human dignity and freedom.

1.13 The United Nations Office on Drugs and Crime (UNODC) in its Handbook on Strategies to Reduce Overcrowding in Prisons (2013) notes that an arrest must be based on a reasonable, lawful suspicion that a person has committed an offence defined as such by law. The arrest must be in compliance with the basic principles of proportionality, legality and necessity. The African Commission on Human and Peoples' Rights Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention (2014) in section 3(a) provides that arrests shall only be carried out by police or by other competent officials or authorities authorised by the State for this purpose and shall only be carried out pursuant to a warrant or on reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence.

1.14 The Malawi Police Service's Standing Orders (1995) provide in Part 8 for the procedures to be followed on arrest under –

> 258(1) that an arrest is the restraining of a person from liberty by apprehension or taking the person into custody to answer according to law some specified charge or alleged offence.
> (2) In making an arrest the police shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
> (3) A police officer making an arrest must normally inform his prisoner of the true grounds of arrest. Precise or technical language need not be used but the prisoner should be told in substance the reason why he is being detained. If this is not done the officer may be liable for false imprisonment unless the prisoner has made it impossible to inform him by running away or assaulting the officer or unless the circumstances or the crime are so apparent that the prisoner must know the nature of the crime for which he is detained.
> (4) The main object of an arrest is that the person should be made amenable to the law, and a police officer should be most careful to avoid unnecessary arrest. Arrests should not be made for minor offences when the offenders may be made amenable by summons. A police

> officer has great powers of arrest, but should exercise these powers with intelligence and discretion. A premature arrest may jeopardize the successful investigation of an offence and should be avoided.
> (16) When charging a person the charge should be stated in simple words but with sufficient facts to enable the accused person understand clearly the date, time, place and nature of the alleged offence…"

1.15 The Applicants contended that the Standing Orders do not constitute a law of general application that can pass the limitations standard in section 44 of the Constitution. However, the Standing Orders provide an indication of what would be expected for an officer to consider upon arrest. The Malawi Supreme Court of Appeal has emphasised the problem of using arrest as a tool of law enforcement without facts justifying the arrest, in the case of ***Kettie Kamwangala v Republic***, Miscellaneous Criminal Appeal No 6 of 2013 by stating that they believe that law enforcement should only effect an arrest when they have evidence of more than mere suspicion of criminality. Further that they also believed that such evidence should only be the product of investigations. Where there is no investigation there cannot, we believe, be any evidence. They therefore find it rather perverse that law enforcement should arrest with a view to investigate.

1.16 The Applicants argued that the above principle is completely disregarded in the case of indiscriminate sweeping exercises, where no offence is alleged to have taken place and no evidence collected or investigations conducted to prove any offence. In such instances, people often have no choice but to plead guilty simply to avoid prolonged detention or additional costs related to returning to court for trial. In addition, magistrates might feel constrained to allow such guilty pleas to save people from returning for trial. As is clear from the provisions of the Constitution, Criminal Procedure and Evidence Code and Standing Orders cited above, an arrest is an exercise that must be aimed at a specific individual, must be carefully considered and must only be used when absolutely necessary and when a specific offence is reasonably suspected of having been or about to be committed. These criteria are often not met in the case of sweeping exercises and were not met in respect of the arrest of the Applicants in this matter.

1.17 The catch-all offences used during sweeping exercises is that of being a rogue and vagabond in terms of sections 184(1)(b) or 184(1)(c) of the Penal Code. More recently the offence of being idle and disorderly in terms of section 180 of the Penal Code is also being used, albeit in most cases for acts which do not comply with the elements of the offences in the subsections of section 180. Section 184(1)(b) of the Penal Code provides that "every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself is deemed a rogue and vagabond." In January 2017, the Malawi High Court, in the case of ***Mayeso Gwanda v Republic*** [2017] MWHC 23, ruled that section 184(1)(c) of the Penal Code was unconstitutional. This is despite the police's training and practice that these offences have a purported crime prevention purpose as stated in their Standing Orders (1995) in part 8, under the rationale set out in 244 on Prevention of Crime –

> (1) The primary object of a police service is the prevention of crime. It is more important to prevent crime than successfully to detect an offence after it has been committed.
> (2) Police officers must get to know local criminals and other bad characters so that they can be readily recognized and kept under surveillance when necessary.
> (3) Notification is made in the Police Gazette of releases of criminals from prison, showing their home addresses and intended destinations. Police officers are expected to read this Gazette and make themselves acquainted with the releases of all criminals concerning their station areas.
> (4) Persons of bad character or known criminals should not be allowed to loiter in the vicinity of parked vehicles, shops or other places such as yards where goods are exposed or into which they are likely to break. It is the duty of police, particularly those on beats and patrols, to keep such persons on the move or to arrest them under section 184 of the Penal Code as rogues and vagabond should they fail to account satisfactorily for their presence. Police officers can only do this by remaining alert at all times. It is not sufficient merely to patrol; alleys, passageways and side turnings must be given equal attention. For a beat man only to glance at a building from the middle of the street is not sufficient. All buildings left empty or unattended for any time, particularly during weekends, should be carefully checked and accessible doors and windows inspected and tested by hard to see that they are secure. The fact that there is a watchman does not absolve the police from this duty. Police officers should satisfy themselves not only that the watchman is awake and alert but that the building is intact. Police officers should inspect a building with a watchman if one is employed there."

1.18 The above Standing Order most certainly requires amendment in light of the recent court decision in ***Gwanda.*** However, even in its current wording, it still explicitly refers to individual suspects and not sweeping exercises. It further requires police paying attention to potential criminal suspects but suggests that police exercise their powers to ask a suspect to move on, before using their discretion to arrest. It further suggests that persons are arrested only when they are in areas which create a reasonable suspicion that a crime will take place. The areas in which the Applicants were arrested and in which sweeping exercises are often carried out, do not meet this standard. The reality is that rogue and vagabond offences have become a catch-all category favoured for the procedural laxity that allows police to address what it deems a range of undesirable behaviours whilst circumventing the perceived rigid requirements of criminal law and procedure. The African Commission on Human and People's Rights in its 2017 Principles on the Decriminalisation of Petty Offences in Africa emphasises in section 11.2.2 that criminal laws must be a necessary and proportionate measure to achieve that legitimate objective within a democratic society, including through the prevention and detection of crime in a manner that does not impose excessive or arbitrary infringements upon individual rights and freedoms. There must be a rational connection between the law, its enforcement and the intended objective.

1.19 In 2013, the Southern Africa Litigation Centre (SALC) and Centre for Human Rights Education, Advice and Assistance (CHREAA) released a research report entitled "No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi". The report interviewed police officers and magistrates about their

views of section 184. The report was cited in the ***Gwanda*** case. The research indicated that police officers interviewed displayed a very broad understanding of the offence, with statements such as they conduct a sweeping exercise to arrest all those that have nothing to do but just wander in the towns or standing along the road doing nothing or a person has been found at an odd hour at night to mention a few. Some magistrates interviewed as part of the research also raised concerns regarding sweeping exercises by stating that sometimes they arrest wrong people despite their justification, they are told that the court will have a final say. The State most of the time fails to prove the elements of the offence or most of the time police abuse sweeping exercises by arresting people, especially women from rest houses or at times some of the people who are arrested are not offenders and, in most cases, they enter a plea of guilty so that they should be given a fine or released other than remaining in custody awaiting trial. And at times they discriminate against women, police arrest only women despite that during the arrest they were together with men. For example, in rest houses and bottle [liquor] stores or much as the police sweeping exercises curb criminal activities, the police should not be taking advantage to abuse the law by arresting people anyhow just to punish them.

1.20 Where persons are merely found loitering at odd hours, which appears to be the main reason for arrests under section 184, the arrest in itself is not automatically the most appropriate response and police can for example caution and warn a person as a first response, where after an arrest for a substantive offence could be appropriate where there is a sufficient basis for such arrest. The need for an individualised approach to the rogue and vagabond offence was underscored in a number of High Court cases. For instance, in the case of ***Republic v Agnes Mbewe and 18 Others***, Confirmation No. 166 of 2000 (HC)(Unreported) the court stated that clearly the section does not per se prohibit being found at a particular place or places. It prohibits being found there in such circumstances and at such times as would lead to the conclusion that one is there for an illegal or disorderly purpose. The points of emphasis are the circumstances and the time. It is from them that the offending conclusions will be drawn i.e., conclusions of illegality or disorderliness. Whilst in the case of ***Kaipsya v Republic*** 4 MLR 283, the court ruled, the words in s.184 of the Penal Code – under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose means that such conclusion must be the only one possible. In this case there was only some suspicion regarding the accused's presence at the telephone box and the conclusion of the magistrate that he was there for an illegal purpose was not justified by the evidence. Whilst ***Stella Mwanza and 12 Others v Republic*** [2008] MWHC 228 where thirteen women were arrested in rest-houses during a police sweeping exercise, the court held that the convictions were improper, as there had been no indication from the facts that the women were there for a disorderly purpose.

1.21 The three Malawi judges in ***Gwanda*** who declared section 184(1)(c) unconstitutional each made important statements on the problematic nature of arrests under these types of offences. The Court stated that arrests for behaviour that was not in fact criminal, amounted to inhuman and degrading treatment, violated the rights to freedom and security of person and the right to freedom from discrimination to the extent that the offence was

disproportionately applied to the poor. Specifically, by arresting someone when no offence has been committed, the right to be presumed innocent is infringed. Persons who are arrested are seldom immediately informed of the nature of arrests and the charge against them, and they are often taken to a magistrates' court to plead without access to a legal representative. Since those arrested under section 184 are poor, they are often left with little choice but to plead guilty so that they can pay a fine and be released. Notably, Justice Kalembera emphasised that the police cannot just randomly arrest people, a comment which applies more so in cases of sweeping exercises. If there is no investigation and no evidence that a person intended to commit an offence, then the police cannot arrest. To presume that a person is guilty because he or she appears to be without means is a violation of a person's right to dignity. However, despite the ***Gwanda*** case, these policing practices have not changed. All that has changed is that the police now use other offences to arrest people, particularly the offence of being an idle and disorderly person and section 184(1)(b) of the Penal Code. Sadly, this approach is misinformed, as there is no general offence of being an idle and disorderly person. Under the idle and disorderly heading in the Penal Code, there are a range of offences, but each of the elements of these offences must be present and even then, an arrest might still not be the most appropriate response.

1.22 Additionally, the ***Gwanda*** case took judicial notice of the newspaper reports about sweeping exercises. The Applicants cited more recent examples illustrating that the practice has not changed since the judgment - on 18 May 2017, the Malawi Nation reported that police in Kanengo had arrested 52 people in a sweeping exercise (of these 6 were charged with possession of hemp, 5 with selling liquor without a licence, 2 with possession of property believed to be stolen and 38 with "idle and disorderly".) On 28 July 2017, the Malawi News Agency reported that police arrested 56 people during a sweeping exercise in Kanengo (they were charged with various offences, including idle and disorderly.) On 7 August 2017, Malawi24, reported that police had arrested 126 people in a sweeping exercise in Mchinji (they were charged with idle and disorderly and some with not complying with bail conditions). It should be noted that not all so-called 'sweeping exercises' are indiscriminate. In some instances, they relate to targeted small-scale exercises by the police to arrest suspects in response to reports from the community and police investigations of criminal activity. Such arrests are not necessarily problematic provided they relate to specific offences and each person is arrested after an individual consideration by the police about whether the arrest of that individual is justified. It is when the sweeping exercises involve a substantial number of people and when the charges levelled against such persons do not actually denote any criminal behaviour, such as being charged under section 184(1)(b) or charged for being 'idle and disorderly' then the sweeping exercise becomes ultra vires and unreasonable. The frequency with which police carry out sweeping exercises, the police's assumptions of its utility and the fact that the parameters of such exercises are not delineated in Standing Orders, is the basis for the relief sought by the Applicants. The Applicants submit that the objective of crime prevention is better balanced against the rights of persons if an arrest is only limited to cases where there is a suspicion that a substantive offence has actually been or is about to be committed. Indiscriminate sweeping exercises do not meet this standard. Therefore, they submitted that the police's indiscriminate sweeping exercise

and arrest is unconstitutional in that it violated the right to freedom of movement, right to dignity, the right to personal liberty and the right to economic activity as provided and guaranteed under sections 39, 19, 18 and 29 of the Constitution of the Republic of Malawi. It further contravened the police's duty to protect human rights under sections 15(1) and 153(1) of the Constitution of the Republic of Malawi.

1.23 They also argued a violation of section 19(1) of the Constitution which provides that the dignity of all persons shall be inviolable. The African Charter on Human and Peoples' Rights in Article 4 provides that 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. In the case of ***Purohit and Another v The Gambia*** (2003) AHRLR 96, the African Commission on Human and Peoples' Rights (hereinafter referred to as the 'African Commission') held that "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." In addition to being a substantive right, dignity is also an underlying constitutional principle. Section 12(1)(d) of the Constitution provides that "the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote." Additionally, the South African Constitutional Court in ***Dawood v Minister of Home Affairs*** 2000 (3) SA 936 (CC) 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. Many jurisdictions have elaborated on the importance of the presumption of innocence in upholding the right to dignity and protecting citizens from arbitrary arrests.

1.24 In Canada, in the seminal case of ***Regina v Oakes*** [1986] 19 CRR 306 at 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 ensures 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 humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise. It

was the Applicants submission that indiscriminate sweeping exercises under the auspices of section 184 of the Penal Code disregards the right to dignity by allowing the arrest and detention of persons in instances where no effort is made by the State to prove that the accused committed an offence.

1.25 Section 19(3) of the Constitution provides that no person shall be subjected to cruel, inhuman, or degrading treatment or punishment which is also entrenched in international and regional treaties which Malawi has ratified, such as Article 7 of the International Covenant on Civil and Political Right (ICCPR) and the African Charter on Human and Peoples' Rights, in Article 5 which provides 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. Indiscriminate sweeping exercises expose innocent people to degrading treatment at the hands of the police during questioning, arrest and detention. The High Court of Kenya in ***Anthony Njenga Mbuti and 5 Others v Attorney General and 3 Others [2015] eKLR*** considered the Peace Bond provisions to be a class of crimes that subjects citizens to inhuman and degrading treatment because there is not normally any evidence of actually committing a crime, so constitutional safeguards are negated. Mumbi Ngugi J considered the Peace Bond provisions as constituting a criminal process with severe penal consequences that fall outside of the fundamental rights prescribed by the Constitution. In instances where specific groups of people are more at risk of being stopped, questioned and arrested by the police whilst going about their daily activities, each police stop becomes a demeaning and humiliating experience which makes people feel unwanted and distrustful of the police. It creates a situation where people live in fear of being stopped when they go about their daily activities and alienates the police from the community. The Applicant submitted that indiscriminate sweeping exercises violate the right to freedom and security of person, as protected under section 19(6) of the Constitution and the right to persona liberty in section 18 of the Constitution.

1.26 Article 9 of the ICCPR similarly recognises and protects both liberty (freedom) of person and security of person and the Human Rights Committee's General Comment 35 (2014) explains that liberty of persons concerns freedom from confinement of the body, whilst security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity. In terms of General Comment 35 especially paragraphs 11 to 12 state that the right to liberty prohibits arbitrary arrest and detention and any arrest or detention that lacks any legal basis is arbitrary. "Arbitrariness" is defined as "to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality." General Comment 35 in paragraph 22 further provides that "any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application. Similarly, Article 6 of the African Charter on Human and Peoples' Rights provides every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." The African Commission, in ***Amnesty International and Others v Sudan***

Case Number 48/90-89/93 (1999) on paragraph 59 concluded that Article 6 must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to security forces in a democratic society: that in these cases, the wording of this decree allows for individuals to be arrested for vague reasons, and upon suspicion, not proven acts, which conditions are not in conformity with the spirit of the African Charter. Further the African Commission, in ***Zimbabwe Lawyers for Human Rights & IHRD in Africa v Zimbabwe*** (2009) AHRLR 268, held that unfettered power in the hands of an officer is tantamount to unrestrained power based on "vague and unsubstantiated reasons of a danger to public order" and destroys the right to equality before the law and violates Article 2. The Commission also considered that Article 3 should be read to mean: the right to equality before the law does not [solely] refer to the content of legislation, but [also] … to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws.

1.27 Section 39 of the Constitution protects the right to freedom of movement and residence reflecting similar protection is in Article 12 of the ICCP as well as Article 12(1) of the African Charter. In terms of the Human Rights Committee's General Comment 27 states that liberty of movement is an indispensable condition for the free development of a person. In ***Malawi African Association and Others v Mauritania*** (2000) AHRLR 149 in paragraph 131 the African Commission concluded that Article 2 should be read with Article 12 because it lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings. Therefore, sweeping exercises using the guise of rogue and vagabond offences infringe the right to freedom of movement as recognised in ***Brown v Republic*** Criminal Appeal No. 24 of 1996 (HC)(Unrep) where the accused was arrested for staying at a trading centre without work. He was convicted under section 184(1)(c) and sentenced to five months' imprisonment with hard labour. Overturning the conviction, the High Court of Malawi stated that it is not an offence merely to be found, during the night, on or near a road, highway, premises or public place. An unemployed or homeless person may be found sleeping on the veranda of public premises or beside a road or highway. He could be found loitering or sleeping at a marketplace or in a school building, just because he is poor, unemployed and homeless. It would be wrong and unjust to accuse such person of committing an offence under section 184(1)(c). When faced with a case, such as the present, Magistrates must bear in mind the following: (1) Section 39(1) of the Constitution gives every person the right to freedom of movement and residence within the borders of Malawi; (2) Section 30(2) of the Constitution suggests that the State has a duty to provide employment to its citizens. It would, therefore, seem to me that it is a violation of an individual's right to freedom of movement to arrest a person merely because he is found at night on or near some premises, road, highway or public place.

1.28 The High Court in Malawi has held that it is not an offence for any person to enjoy the freedom, peace and calm of the country and walk about in public places be it aimlessly and without a penny in their pocket. One does not commit an offence by simply wandering about as per ***R v Luwanja and Others*** [1995] 1 MLR 217 (HC). Despite these pronouncements by the courts,

police in Malawi continue to interpret section 184 as allowing them wide discretion to arrest any persons found loitering at night or in the early morning. Given the above serious rights violations, the State has a duty to show that its practice of indiscriminate sweeping exercises has a purpose and effect that is reasonable and necessary in a democratic society. To make its case, the State needs to produce evidence to this effect. A bare statement that indiscriminate sweeping exercises reduce crime will not suffice. In addition, it will not be proportionate for the police to say that some criminals are caught in the net of a sweeping exercise, when the result is that many innocent people's rights are violated in the process. In a democratic society, and under a new constitutional dispensation, policing practices need critical review.

1.29 It is useful to take note of the words in ***Gwanda*** that the rule of law is the tenet of the Malawian constitutional law and indeed Malawian constitutional democracy should always be upheld and should not be compromised merely in the name of public safety or preventive policing. Whilst crime prevention is a legitimate government objective, any measures proposed to deal with this objective should be well researched and not be arbitrary, unfair or based on irrational considerations. B.E Harcourt in Punitive Preventive Justice: A critique, Chicago Institute for Law and Economics Working Paper No. 599 (2012), 10 published in A Ashforth & L Zedner (eds), 2014, Preventive Justice (Oxford University Press) stated that crime prevention is a complex issue with no easy solutions. The United Nations Office on Drugs and Crime (UNODC) notes in its Introductory handbook on policing urban space (2011) at page 12 stated that high levels of urban growth and inadequate services coupled with recent political transitions sometimes lead to rising crime rates and calls from various groups for more repressive policing. All too often beleaguered police fall back on repressive policing strategies to allay demands from political leaders or the population. Inevitably, however, repressive policing tends to have the effect of achieving, at best, short-term reductions in crime and of alienating much of the population from the police. Repressive efforts further corrode law enforcement, making it harder for police to enforce the law in the future. Further the Guidelines for the Prevention of Crime (ECOSOC Resolution 2002/13) at paragraph 11emphasise the use of a knowledge base as one of the basic principles underlying effective crime prevention strategies - crime prevention strategies, policies, programmes and actions should be based on a broad, multidisciplinary foundation of knowledge about crime problems, their multiple causes and promising and proven practices. The types of knowledge required includes knowledge about the incidence and prevalence of crime-related problems; knowledge about the causes of crime and victimisation; knowledge about existing policies and good practices; and knowledge about the process of implementing programmes and measuring their outcomes and impacts as per the UNODC Handbook on the Crime Prevention Guidelines – Making Them Work, 2010, at pages 50-54. The United Nations' Salvador Declaration again emphasised that crime prevention strategies should be based on the best available evidence and good practices and the United Nations' Doha Declaration on Integrating Crime Prevention and Criminal Justice in section 3 recognised the importance of effective, fair, humane and accountable crime prevention strategies as a central component to rule of law, which should be implemented "along with broader programmes or measures for social and economic development, poverty eradication, respect for cultural diversity, social peace and social inclusion." To achieve this, the

Doha Declaration emphasised in section 5, the need to adopt comprehensive and inclusive national crime prevention and criminal justice policies and programmes that fully take into account evidence and other relevant factors, including the root causes of crime, as well as the conditions conducive to its occurrence, and in accordance with our obligations under international law and taking into consideration relevant United Nations standards and norms in crime prevention and criminal justice, to ensure appropriate training of officials entrusted with upholding the rule of law and the protection of human rights and fundamental freedoms.

1.30 Crime prevention has been shown to work in a number of instances, including where police corruption is reduced; direct patrol in crime hot spots; problem-oriented policing; community policing with a clear focus; and improving police legitimacy with the community. The UNODC emphasises that the bedrock of crime reduction and prevention includes respect for human rights; political will; an assumption that all accused persons are innocent until proven guilty; an evidence base for decisions; and police forces which realise they have to work with the community to prevent crime. Arrest practices applied broadly against offenders committing minor offences has not proved to lead to reductions in serious crime; and the rights violations occasioned by arrests requires strategies where arrest is only used as a last resort. The arrests which relate to suspicious as opposed to actual conduct, are a strain on the resources of police, courts and prisons. Thus, it cannot be shown that the alleged deterrent effect of the sweeping exercises outweighs the negative impact it has on the functioning of the justice system and its ability to address serious crimes. The Applicants submitted that claims about sweeping exercises being necessary for crime prevention cannot be accepted without evidence and do not constitute legally relevant facts to be taken into account in a determination of the constitutionality and reasonableness of indiscriminate sweeping exercises.

1.31 The UNODC in its Handbook on Strategies to Reduce Overcrowding in Prisons (2013) at page 25 highlights that the result of punitive criminal justice policies especially when poverty and lack of social support to the disadvantaged are combined with a 'tough on crime' rhetoric and policies which call for stricter law enforcement and sentencing, the result is invariably a significant increase in the prison population. Sometimes described as warehousing, the increased population typically comprises an overrepresentation of the poor and marginalised, charged with petty and non-violent offences. Although unrelated to crime rates this situation is fuelled by media stories which promote tough action to combat crime despite the absence of evidence to demonstrate the link between rates of imprisonment and crime rates. Often the objective of sweeping exercises is to assure the public that sufficient attention is paid to crime prevention. However, in reality people find themselves imprisoned or detained in potentially life-threatening conditions, especially in cases where they cannot afford bail or the fine, even when there is no proof of an actual offence having been committed. The UN Special Rapporteur on Extreme Poverty and Human Rights in 2011 noted that overly broad police powers "increase the exposure of persons living in poverty to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials. Furthermore, Ackermann M (2014) Women in Pre-trial Detention in Africa – A Review of the literature, CSPRI

stated that women are particularly vulnerable to remaining in pretrial detention because they cannot afford fines for minor offences, bail or legal representation. Moreso, sweeping exercises conducted on fridays and during weekends, sometimes mean that persons are detained for longer than a day for what is a very minor offence. Even if detention was only for a short period, the harm caused to the individual and his or her family is significant. Once arrested, police stations provide little or no food to persons in custody, and conditions are often unhygienic and hazardous. Arrests burden families who must spend scarce resources to visit the police station, bring food and pay bail.

1.32 The conditions in custody and consequences of arrest sometimes lead to a person pleading guilty so that he or she can be released even if no offence was committed. The African Commission on Human and People's Rights in its Principles on the Decriminalisation of Petty Offences in Africa noted in section 11.2.4 that laws which allow for arrest and imprisonment for petty offences can be a disproportionate measure which is contrary to the principle of arrest as a measure of laws resort and may work against public health principles. Further that section 9 on the enforcement of petty offences may also be inconsistent with the right to dignity and freedom from ill treatment if the enforcement involves mass arrest operations. Typically, sweeping exercises have only very general objectives, meaning that persons are arrested, for example, for being on the street at night, even when they have not committed a specific offence or engaged in suspicious activity. Sweeping exercises include within their net persons trying to make a living through vending in the context of extremely limited work opportunities, and persons with psychosocial disabilities in the context where there are inadequate social services to support them. The US Interagency Council on Homelessness in its report, Searching Out solutions: Constructive Alternatives to Criminalisation (2012) raised concerns about the effect of sweeping exercises on persons who are homeless in that police action to arrest people or force movement to other areas is costly, contributes to distrust and conflict, and is a short-term intervention. Those arrested may return again to the streets, only now with criminal records or outstanding fines. Those who move to other neighbourhoods in police sweeps remain on the street but may lose their personal belongings. Such police action may exacerbate the problem as criminal records and loss of key personal documents can make it even harder for people to leave the streets.

1.33 Section 42(1)(a) of the Constitution provides that every person who is detained shall have the right "to be informed of the reason for his or her detention promptly, and in a language which he or she understands." Furthermore, the Criminal Procedure and Evidence Code in section 20A provides that an arrest is unlawful where the person arrested was not informed of the reason for the arrest at the time of, or as soon as practicable after, the arrest and once a person is arrested, the police officer shall promptly inform him that he has the right to remain silent, and shall warn him of the consequences of making any statement as per section 20A. The failure of the police to promptly inform the Applicants of the charges against them at the time of arrest and detention violated the right to fair trial provided and guaranteed under section 42(1)(a) of the Constitution.

1.34 The African Commission, in the case of ***Huri-Laws v Nigeria*** (2000) AHRLR 273 (ACHPR 2000), noted "that 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." In this case it was contended that "being detained arbitrarily, not knowing the reason or duration of detention, is itself a mental trauma." Additionally, in ***Institute for Human Rights and Development in Africa v Angola***, Case no. 292/04 (2008), held that Article 6 of the African Charter provides for the prohibition of arbitrary arrest. In its Resolution on the Right to Recourse Procedure and Fair Trial, the African Commission further states that 'persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them'…In the present case, there is nothing from the Respondent State to indicate that the manner of victims' arrest and subsequent expulsion was not arbitrary as alleged by the complainant. As the Complainant puts it, at no point were any of the victims shown a warrant or any other document relating to the charges under which the arrests were being carried out. The African Commission thus finds the Respondent State to have violated Article 6 of the African Charter. Accordingly, the police's failure to inform the Applicants of the reason for their arrest was ultra vires the provisions of the Criminal Procedure and Evidence Code and the Constitution and caused the Applicants unnecessary distress and violated their rights to dignity and freedom from cruel, inhuman and degrading treatment. The conduct of the police in coercing the Applicants at the police station to plead guilty to the offence of rogue and vagabond and threatening them with possible detention in prison if they failed to do so violated the right to fair trial as provided and guaranteed under section 42(2)(c) of the Constitution of the Republic of Malawi.

1.35 Section 42(2) (c)the Constitution of the Republic of Malawi provides that 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 not to be compelled to make a confession or admission which could be used in evidence against him or her. Whilst Section 42(2) (a) of the Constitution creates an obligation on the State to promptly inform the accused person of their right to remain silent and warn him or her of the consequences of making any statement. From the reading of section 42(2) (a), the duty upon the State or the police is not only to inform the accused person that he has the right to remain silent but also to explain to him or her the consequences of making such a statement. It is the accused person's right to fair trial under section 42(2) (f) (iii) to be presumed innocent before and during trial. The police conduct in coercing the applicants in this matter to plead guilty to the offence of rogue and vagabond under section 184(1) (b) of the Penal Code, infringed on their right to remain silent and the presumed innocent. In the case of the Applicants, where their conduct in no way can be said to constitute criminal behaviour, it would have been impossible for them to plead guilty to the elements of the offence. The police officers were well aware of this, which is why the Criminal Procedure and Evidence Code places a duty on magistrates to ascertain whether any guilty plea was in fact coerced. 142. The High Court of Malawi, when reviewing convictions under section 184, has expressed concern that magistrates frequently allow persons to plead guilty under section 184 without understanding what they were pleading to. In ***Republic v Foster and Others*** [1997] 2 MLR 84 (HC), twelve accused were arrested at three different places and accused in one charge of being a rogue

and vagabond. The court held this to be a misjoinder. The court held that the acceptance of guilty pleas can only be made where each accused person admitted all essential elements of the charge.

1.36 Section 251 of the Criminal Procedure and Evidence Code provides the procedure for reading out charges as well as the recording admissions in terms of guilty pleas. In the case of ***Michael Iro v R*** [1966] 12 FLR 104 stated that there is a duty cast on a trial judge when the accused is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted, the accused person should fully comprehend exactly what a plea of guilty involves. Therefore, the proviso to section 251 of the Criminal Procedure and Evidence Code is clear that before a court records a plea of guilt, the court must ascertain that the accused person understands the nature and consequences of the plea and that he intends to admit without qualification to the truth of the charge. It would follow that a court cannot enter a plea of guilty before it ascertains that the accused understand the nature and consequences of the plea of guilty. The provisions of section 251 are applicable whether the accused is represented or not. It is trite that when taking plea an accused must plead personally. Where the accused is unrepresented like in this case, it becomes imperative that the court should explain the charges to the accused and where the accused pleads guilty, to ascertain if the accused person intends to plead guilty to the charge and if he understands the consequences of the plea. The proviso to section 251 is there to make sure that apart from understanding the charge itself, an accused person must understand the consequences of the plea of guilty before the court enters it. It is notable that whilst section 251(2) provides that the accused "may" be convicted, the proviso uses the word "shall". The use of the word "may" clearly shows that even where there is a plea of guilty, a court has the discretion to accept the plea and convict thereon or not. On the other hand, ascertainment of whether the accused person understands the nature and consequences of the plea, by the use of the word "shall" is a mandatory requirement before a plea of guilty is recorded.

1.37 A valid plea of guilty has several consequences. It waives substantially all the fundamental procedural rights afforded an accused in a criminal proceeding, such as his rights to the assistance of counsel, confrontation of witnesses, and trial. Most of all a plea of guilty, relieves the prosecution of the burden to prove the case. A plea of guilty means the case will end there and then and the accused will be convicted and sentenced there and then. An accused person must therefore be aware of these things before a court can accept a plea of guilty. In the Malaysian case of ***Lee Weng Tuck and Another v PP*** [1949] MLJ 98,the Supreme Court of Malaysia held that when an accused person pleads guilty, there must be some indication on the record to show that he knows not only the plea of guilty to the charge but also the consequences of his plea, including that there will be no trial and the maximum sentence may be imposed on him. Similarly, in the case of ***Chua Ah Gan v Public Prosecutor*** [1958] MLJ Liv, held that if the plea is one of guilty, the magistrate must make it clear on the record that the accused understands the nature and consequences of the plea. Ascertainment that an accused person understands the nature and consequences of a plea of guilty is also important as it excludes the possibility of a forced plea or a plea of guilty on the belief that the accused will get a lenient sentence upon such a plea. Section 251 of

the Criminal Procedure and Evidence Code is a protective measure which anticipates the power relations accused persons are faced with within a police station which might affect their ability to make an informed choice in how to plead. Consequently, the actual plea should be ascertained in court. Ironically, in the case of an indiscriminate sweeping exercise, police are aware that many people have been arrested who have not committed an offence. By forcing the Applicants to plead guilty, the police achieve two purposes. Firstly, they succeed in reducing the number of people whom they have to attend to in the police cells and in taking persons to a remand centre, which can be considerable when mass arrests have just taken place. Secondly, the police cannot be held accountable for unlawful arrests or scolded by magistrates or their superiors, if the accused plead guilty. It is for this reason that explicit directives are required to prevent the vary frequent occurrence of people who have been arrested during a sweeping exercise being coerced at the police station to plead guilty in court. It should be added that section 42(2)(f)(vi) of the Constitution provides that an accused person's right to a fair trial includes the right "not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done.

1.38 In the Supreme Court of Nigeria case of ***Chief Olabode George and Others v Federal Republic of Nigeria*** SC 180/2012, the Court considered the offence of disobedience to lawful order issued by Constituted Authority in section 203 of the Criminal Code of Nigeria and held that the section of the Criminal Code is at variance with provision of section 36(12) of the Constitution. They therefore declared it unconstitutional and null and void. Section 36(12) of the Constitution provides subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law. The Applicants were arrested under circumstances which were entirely innocent and their conviction amounts to being convicted for behaviour which has not been criminalised, contrary to section 42(2)(f)(vi) of the Constitution. It was their submission that the conduct of the police in forcing the applicants to plead guilty to the offence of rogue and vagabond under section 184(1)(b) of the Penal Code, when the circumstances under which the Applicants were arrested, does not amount to any offence violates their right to fair trial which includes the right to be presumed innocent, the right to and to be informed of the right remain silent and the consequences of making a statement and not to be compelled to make a confession or admission which could be used in evidence against them.

1.39 The African Commission on Human and Peoples' Rights in its Resolution 259 on Police and Human Rights in Africa (2013), called on States Parties to ensure that in the execution of their duties, police fully comply with the respect for human rights and the rule of law" and to take appropriate measures to ensure that police services respect the dignity inherent in the individual in the discharge of their duties. The Applicants contended that the absence of guidelines on sweeping exercises as a crime prevention measure frequently results in rights violations. The Applicants argued that the State's duty to develop directives or Standing Orders which will guide the police and ensure

sufficient supervision during sweeping exercises so that rights violations do not occur. In conclusion the Applicants submitted that this Honourable Court is well placed to direct the State to develop such measures and to put in place a timeline for the State to report back to the Court on whether it has indeed developed such measures in a manner that is compliant with the law. In conclusion, the Applicants prayed that they be granted the orders as prayed for.

1.40 The State did not file any written submissions in response despite on 21st June, 2021 after being present in court and hearing the contents of this Court's Order that they will file the same by 12th July, 2021.

2.0 THE LAW AND FINDINGS

2.1 Firstly, let me address something in terms of the conduct of this case. This Court should put on record the disappointment in the unprofessional handling of matters by the Attorney General's Chambers. A brief of the Court's displeasure will be seen from the following incidences. Leave for judicial review was granted on 11th June, 2018 and the Court set the matter for the hearing of the judicial review on 22nd January, 2019 but on the same day, the Attorney General brought an *inter partes* application for leave to be dismissed for procedural irregularity. The Court heard the application and on 25th February, 2019 made a ruling dismissing the application. The Attorney General on 1st March, 2019 filed a Notice of Appeal which was granted including a stay of the proceedings. The Attorney General did not pursue the appeal and the Applicants applied for the stay of proceedings to be dismissed which was granted on 14th January, 2020. The judicial review hearing was heard on 21st June, 2021 and again at this hearing, the Attorney General decided to not be professional. The Court allowed the hearing to proceed and ordered that upon the request of the Attorney General to allow them to respond by submitting submissions by 12th July, 2021 and no submissions have been filed to date. This Court would like to remind the Attorney General of the constitutional position it plays and that disregard of its officers of their court duty is something which should not be tolerated. They are reminded that possible censure can follow for such disregard to the court and for their conduct.

2.2 Secondly, in dealing with this matter which was filed a judicial review but in essence had significant constitutional parameters, it became paramount for this Court to review its jurisdiction as it related to the issues. Section 9 of the Constitutions the High Court shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. Furthermore, it shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law. This Court also reminded itself of the prescripts of Section 11 of the Constitution –

> (1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.

> (2) In interpreting the provisions of this Constitution a court of law shall—
> (a) promote the values which underlie an open and democratic society;
> (b) take full account of the provisions of Chapter III and Chapter IV; and
> (c) where applicable, have regard to current norms of public international law and comparable foreign case law.
> (3) Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution.
> (4) Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid.

2.3 This Court found it interesting that it found itself again at this point of having to deal with another rogue and vagabond case after a Constitutional Court in 2017 of ***Gwanda*** dealt with another case of a similar nature. What this Court finds frustrating is that the issues which the Court in the ***Gwanda*** painstakingly took its time to raise why section 184 of the Penal Code was problematic as well as some of the arresting practices of the Malawi Police Service. This Court today finding itself dealing with rogue and vagabond contrary to section 184(1)(b) of the Penal Code makes it question whether the Executive arm including law enforcement institutions charged with investigating and prosecuting cases understand the significance of upholding human rights and the rule of law. indicate from the beginning that this case has raised very interesting and fundamental issues on both sides of the argument. It may be important that we remind each other that Malawi chose a constitutional dispensation underlined with human rights as noted by the Bill of Rights in the Malawian Constitution. Before this Court turns back to the issues in this case, this Court takes judicial notice of the decisions of Justice Mtambo, Kalembera and myself in ***Gwanda*** as a lot of the sentiments in that case apply to the issues in this matter herein.

2.4 The Court as it proceeded with this matter noted the importance of tackling that the matter herein was not just an ordinary judicial review in that it only dealt with the decision making process but that as noted by Order 20 rule 1 of the CPR that it dealt with (a) a law, an action or decision of the Government or a public officer for conformity with the Constitution; or (b) a decision, action or failure to act in relation to the exercise of a public function in order to determine - (i) its lawfulness; (ii) its procedural fairness; (iii) its justification of the reasons provided, if any; or (iv) bad faith, if any, where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened. Furthermore, this is also a judicial review as per the Constitution as noted by various legal writers like Austin Msowoya in his paper titled Judicial Review in Malawi: Demystifying the Constitutional Grant, the Constitutional Court and the Oxymoron of Certification presented at the Malawian Constitution at 18: Constitutionalism, Diversity and Socio-Economic Justice held in Blantyre, Malawi from 25-28 July, 2012. Malawian courts have also noted that judicial review has expanded as per ***Muluzi v Director of Anti-Corruption Bureau*** [2015] MWSC 442 where the court held that according to section 5 and 108 of the Constitution, the court has powers to review the law in question as well as the Act of Parliament and this is not judicial review under Order 53 of the RSC. Such are limited to review of

administrative decisions but now extends to judicial review of Acts of Parliament.

2.5 At this point, it is imperative, the Court reminds itself of the case before it – the Applicants were charged with the offence of being a rogue and vagabond under section 184(1) (b) of the Penal Code after being arrested in 2018 at two different bars/clubs in Kasungu. Incidentally, the judicial review which the Court allowed to proceed arises from a decision the Respondents made to arrest the three (3) in a purported sweeping exercise as well as prosecute them for the offence of rogue and vagabond. Notably, the Applicants that at the time of their arrest, Henry Banda was working as a DJ at American Bar bottle store whilst Ishmael Mwale was having a drink at Culture Club car park, whereas Sikweya Supiyani was selling kanyenya (fried fish) at American Bar. The Applicants further argued that they were not given any reasons for their arrests, until the following day when they were told that they were charged and convicted with the offence of rogue and vagabond by the magistrate court. Interestingly, the Applicants also submitted that they were told by the police to admit the charge or risk being sent to prison on remand.

2.6 This Court also reminds itself of the areas of violations which the Applicants are seeking redress on. Firstly, they highlighted that the police indiscriminate sweeping exercise and arrest which they were subjected contravened the duty to protect various human rights under sections 15, 18, 19, 29 and 39 of the Constitution. They further argued that failure to promptly inform them of the charges levelled against them at the time of arrest and detention violated their right to fair trial as provided and guaranteed under section 42(2) of the Constitution including the conduct of police in coercing them to plead guilty to the offence of rogue and vagabond, as well as threatening them of possible detention if they failed to admit the offence.

2.7 Firstly, on the question of whether the Applicants have sufficient interest to bring this claim before the court. Sections 15 (2), 41(2) and (3) as well as 46 (2) of the Constitution are very instructive in this matter. The said provisions allow any person with a belief that a right has been violated can institute proceeds for the protection and enforcement of rights under the Bill of Rights by seeking the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights. Section 41(2) of the Constitution further provides that when a person seeks redress, such person should have access to any court of law and any other tribunal with jurisdiction for final settlement of legal issues and have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law. Consequently, the Applicants have decided to seek their redress in the High Court as provided in section 46(2) of the Constitution. This Court appreciates the sentiments by Mwaungulu J (as he then was) in ***Thandiwe Okeke v Minister of Home Affairs, Controller of Immigration***, Miscellaneous Civil Application No.73 of 1997 (HC)(PR)(Unrep) on section 15 (2) of the Constitution that it does not only refer to the individual or group whose rights have been affected. It refers to a person or group of persons with a sufficient interest in the protection and enforcement of rights. Notably, this Court agrees with the Applicants that they have the required *locus standi* because they were directly affected by the

actions of the Respondents which are the subject of this judicial review as they are the ones who were arrested and detained as a result of the sweeping exercise. Further they are the ones with a criminal record because of the Respondents decision to prosecute them after the arrest as such they have therefore a direct personal interest in this matter. To stress the issue of constitutional sufficient interest in Malawi's rule of law, this Court adopts the enunciated principle in ***My Vote Counts NPC v The President of the Republic of South Africa and Others*** 4 All SA 840 (WCC) -

> *" But it does not follow that resort to constitutional rights and values may be freewheeling or haphazard. The Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law – to which one must look first. These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right.*
> *This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.*
> *..Although the application falls under this Court's exclusive jurisdiction, PAIA is the legislation envisaged in section 32(2) of the Constitution. The applicant has not challenged it frontally for being constitutionally invalid. In accordance with the principle of subsidiarity, it ought to have done so as that principle is applicable to this application. The application must fail"*

2.8 Turning to the second issue before the court, that is, the unconstitutionality of police indiscriminate sweeping exercise and/or arrest as well as unlawful contrary to sections 39,19,18, and 29 of the Constitution of the Republic of Malawi. Notably, the law on arrest in Malawi is already set down clearly in the Criminal Procedure and Evidence Code as well as the Police Act. The law is stated that it should be in compliance with the Bill of Rights prescriptions in the Constitution. The necessary sections in question have already been highlighted by the Applicants however, since the sweeping exercise has taken place within the category of offences which are termed vagrancy or nuisance related offences, this Court thought it prudent it deals with the issues under vagrancy before going to the Court's opinion on sweeping exercises. Malawi like many former British colonies have nuisance-related or vagrancy offences originate from English vagrancy laws. Notably, Southern Africa Litigation Centre in their publication titled A Short History of Vagrancy Laws published in 2017 highlighted that English vagrancy laws were rooted in a variety of motivations and produced a myriad of negative effects for the most marginalized members of English society. It is imperative, this Court again just highlights the common definition of vagrant as found in the Oxford English Dictionary which is a vagrant is a person without a settled home or regular work who wanders from place to place and lives by begging. The history of English vagrancy laws reveals little concern for the actual plight of vagrants, though it may rather suggest various economic and cultural concerns regarding indigent persons and their place in a rapidly-industrializing English society. Sociologists have suggested three main purposes for English vagrancy laws - 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; to reduce the costs incurred by local municipalities and parishes to look after the poor; and to prevent property crimes by creating broad crimes providing wide discretion to law enforcement officials. The development of English vagrancy laws was by no means an objective or democratic exercise. In essence, vagrancy laws amounted to the exercise of control over a marginalized group in society by a more privileged class, primarily for its own interests and based on its own notions of the bounds of appropriate social behaviour. Indeed, the terminology employed in vagrancy laws and government reports of the period reveals contempt for and disdain towards vagrants. Turning to our country, Malawi, where the majority of the population is poor, the effect on society of incorporating English vagrancy laws into its Penal Code continues to be profound and had already been considered by Malawian courts noting from the numerous cases Malawian courts have decided namely – ***Foster*** in 1977, ***Kaseka*** in 1999, ***Mwanza*** in 2008, ***Kamwangala*** in 2013 and ***Gwanda*** in 2017. This Court on noting all these decisions on the same issue especially warning the police as well as quotes for the parameters of the offence begs the question as to when will the law start being utilized as decided by Malawian courts in line with constitutional tenets. Societies across the world and courts have noted that vagrancy laws over centuries have typically featured a characterization of targeted individuals as indolent, lazy, worthless, unwilling to work, or as habitual criminals, outcasts or morally depraved individuals. Notably, the development of vagrancy laws generally did not consider the rights of individuals to freedom of movement, human dignity, equality, fair labour practices or a presumption of innocence. Worst still early English vagrancy laws reflected these trends and indeed reinforced such attitudes. However, many of these laws began to be repealed in many countries and it is something which from the history of Malawian cases something which Malawi has been saying that needs serious review. The SALC paper also highlighted that a common law country, Canada in 1972 repealed the provisions prohibiting begging in a public place, wandering abroad without an apparent means of support and not giving a good account of his or her presence, and being a common prostitute who is found in a public place and without giving a good account. These repeals were premised on five factors: that vagrants were no longer seen as a threat to the social or moral order of the nation; that there was a need to make the criminal law more modern, compassionate and remedial; that the law was unevenly applied between different classes of persons; that criminal law was seen as too punitive a measure to rely on; and that the provisions were too vague for the purpose of criminal law. United States courts have further held that the state may not make it an offence to be idle, indigent, or homeless in public places. These amendments and conceptual shifts reflect the recognition that the original vagrancy laws are archaic and anachronistic. Furthermore, the changes to and repeal of vagrancy laws reflect in part different cultures' evolving views on indigence, dignity, and respect for human rights. In 2013 paper, Dr Kimber in her article titled Poor Laws: A Historiography of Vagrancy in Australia, Dr Kimber documenting the policing of vagrants in New South Wales in the early 1900s pointed out that by-laws were often applied hypocritically and inconsistently and the attractiveness of vagrancy provisions in smaller localities lay less in their ability to maintain social order, and more in their ability to provide a convenient legal mechanism to remove, exclude, brand and punish those deemed offensive.

2.9 Turning to 'sweeps', 'raids' or 'sweeping' or 'swooping' exercises which refer to coordinated police actions in which they seek out and arrest large numbers of offenders. Sweeps are also referred to crackdowns and characterized by aggressive behaviour by police meant to clean up usually in an urban setting of "undesirables" like sex workers, street children, beggars etc or those believed to be criminals or target certain groups like illegal immigrants to mention a few. The concept of police sweeps is historical, or colonial as noted by their aim. These are also characterized by massive arrests aimed at boosting police presence as well crime prevention. The legitimacy of police sweeps, or raids is not in question, but it is when they are meant to target certain groups in society without reasonable grounds or suspicion for arrest as set up in the law. They also lack legitimacy since they are usually one category of offences, that is, vagrancy or nuisance related offences like idle and disorderly, rogue and vagabond, public nuisance or loitering to mention a few. In African and more especially Malawi they lack legitimacy because are typically flout with arbitrary arrests at most times conducted by police over weekends especially a Friday and at night so that offenders are unable to apply for bail or consult legal counsel.

2.10 The Criminal Procedure and Evidence Code has set out the parameters for arrest including for arrest without a warrant. Further under Section 32A provides that the police may caution and release an arrested person for the petty nature of the offence, the circumstances in which it was committed, the views of the victim or complainant, and personal consideration of the arrested person, including age or physical and mental infirmity. Interestingly, section 28 of the Criminal Procedure and Evidence Code contains the test for arresting without a warrant, that is, there must be "reasonable grounds" for arresting an individual and the arresting police officer must suspect that a specific offence has or is about to be committed. In defining reasonable grounds, to Black's Law Dictionary, defines "reasonable grounds" as amounting to more than a bare suspicion but less than evidence that would justify a conviction. International jurisprudence from the European Court of Human Rights and African Commission on Human and Peoples' Rights are informative in defining "reasonable grounds or suspicion" as noted by ***Wloch v Poland***. Conversely, section 3(a) of the African Commission on Human and Peoples' Rights Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention, 2014 recommends that arrests by police should be carried with a warrant or on reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence and this position is reflected in Malawi by the case of ***Kettie Kamwangala***.

2.11 Interestingly, this Court notes that all this reveals that an arrest is an exercise that must be aimed at a specific individual after careful consideration and only used when absolutely necessary and when a specific offence is reasonably suspected of having been or about to be committed. Turning to indiscriminate sweeping exercises, it is this Court's considered view that the above criteria is at most times not met or were not met. In respect of the arrest of the Applicants in this matter, an examination of their lower court records illustrates that most of the criteria herein was not met. Notably, there was no reasonable suspicion, nor a specific offence committed that was highlighted that promptly police to arrest them. This Court is fortified by the various rogue

and vagabond cases herein like the ***Stella Mwanza*** case where 13 women were arrested in rest-houses during a police sweep exercise and the court vacated the convictions for being improper, as there had been no indication from the facts that the women were there for a disorderly purpose, in essence highlighting that no offence had been committed nor was one reasonably suspected. Furthermore, the three Malawi judges in ***Gwanda*** who declared section 184(1)(c) unconstitutional in their individual judgments made important statements on the problematic nature of arrests under these types of offences. This Court once again reiterates that the sentiments in the ***Gwanda*** case as they similarly apply here especially, the fact that Malawian courts abhor the police practice of randomly arresting people without proper grounds, prosecuting and convicting them on vagrancy or nuisance related offences which upon review, confirmation or appeal do not stand the test of legality as well as constitutionality.

2.12 These massive arrests with exceptions of sweeps that have been properly planned (arrested persons are promptly charged with appropriate offences not vagrancy ones), crime targeted (removal of concealed weapons during festive season), and evidence-based (unroadworthy cars after road officials have provided information of the same) sweeps result in human rights violations as people are harassed, forced to plead without proper legal counsel, fined or imprisoned for offences that should not have carried custodial sentences as per section 339 and 340 of the Criminal Procedure and Evidence Code. Considering our prison or detention centres, such are fraught with problems from a lack of food, lack of proper health care and are overcrowding. It would seem that Malawi's policing systems in terms of criminal justice seems to be going against various Constitutional standards as well as standards that Malawi agreed has to be bound by. This is evidence noting the sentiments expressed in the ***Masangano*** case of decongesting prisons –

> "*The next aspect we must consider is insufficient or total lack of space in the cells as they are always congested. An example was given that in a cell meant for 80 prisoners, 120 prisoners would be placed there. In fact the Chief Commissioners of Prisons concedes that in some cases prison population is almost double the number of prisoners the prison was designed to hold. The 2004 Malawi Prison Inspectorate report observed that congestion continued to be the most serious problem in our prisons. The prison population continues to grow as a result of rising crime rate while the prison structures remain the same with a total holding capacity of 4,500 inmates when at the time of reporting the figure had been over 9,000 inmates. The Prison Inspectorate Report 2004 observed that the problem of overcrowding in our prisons is aggravating by poor ventilation. It noted that death in custody remained a matter of concern with a total of 259 deaths between January 2003 and June 2004.*
> *…. While we commend the Respondents for the initiatives and the developments taking place in many of our prisons aimed at decongesting the prisons, the legal question which needs to be answered here is whether keeping inmates in overcrowded prisons aggravated by poor ventilation amounts to torture and cruel, inhuman and degrading treatment or punishment and therefore unconstitutional.*
> *…. In the case at hand, we would like to observe that the Applicants complain of overcrowding. It is the same overcrowding which the Prison Inspectorate noted was aggravated by poor ventilation and which contributed to the death of 259 inmates in a space of about 18*

> *months. In a room meant for a certain number of inmates one would find almost double the number. That overcrowding has been noted as one factors creating the spread of diseases in prison such as tuberculosis which has been said to be a major cause of sickness and death in prison, along with HIV (see Malawi Policy on Tuberculosis Control in Prisons, June 2007). Apart from poor ventilation and therefore lack of adequate fresh air in our prisons, inmates become packed like sardines, obviously making sleeping conditions unbearable for the inmates. Such kind of conditions in relation to overcrowding and poor ventilation are not consistent with treatment of inmates with human dignity. Put simply, the overcrowding and poor ventilation in our prisons amounts to inhuman and degrading treatment of the inmates and therefore contrary to Section 19 of the problem of overcrowding in our prisons is not attributable to the Respondents alone. In fact the Respondents appear to be at the receiving end of inmates. As has been stated, it is the rise in crime that accounts for the overcrowding for the most part. Perhaps use of alternative ways of dealing with offenders apart from sending them to prison is part of the solution to the problem. While we find that it is unconstitutional to place inmates in an overcrowded and poorly ventilated prison we would wish to state that the responsibility does not lie on the Respondents only, although they certainly bear part of the blame. It is their responsibility to provide more prison space and better ventilated prisons.*

2.13 It is this Court's considered opinion that police sweeps that result in massive arrests for people who normally would not have been arrested as set up in the Criminal Procedure and Evidence Code as well as the parameters in the Police Standing Orders. Let it be stressed again that this Court does not believe that there is no legitimacy in police 'swoops'. 'sweeps' or 'raids' if they are done within the confines of the law and without disproportionality in terms of a set section of society. This Court underscores that indiscriminate police sweeps like the one in the Applicants' case actually undermine the legitimacy of policing and overall the criminal justice system as it disproportionately affects the poor, marginalized and not legally empowered and it is these who are usually serving jail terms for petty or vagrancy offences who are causing congestion in the prisons, increasing human rights violations in criminal justice system but also creating a bad reputation for the criminal justice players especially police and courts.

2.14 Dealing with the issue of the police's inability or failure to promptly inform the Applicants of the charges against them at the time of the arrest and detention and that the same was unlawful and contrary to section 42(2)(a) of the Constitution of the Republic of Malawi. The said section sets out the right to fair trial principles in Malawi for every detained person including the right to be informed of the reason for his or her detention promptly, and in a language which he or she understands; the right to remain silent and to be warned of the consequences of making any statement; as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released. Further section 42(2)(f)(ii) of the Constitution provides that as an accused person's right to a fair trial, shall include the right to be informed with sufficient particularity of the charge. These rights are further supplemented by

the provisions stipulated in section 20A of the Criminal Procedure and Evidence Code. This Court supports the proposition that the right to be informed of one's charges promptly, is not just a privilege but a fundamental freedom due to any accused. Additionally, Lord Wilberforce's words emphasized in ***Minister of Home Affairs v Fisher*** [1979] 3 All E.R. 2 that when interpreting the constitutional provisions dealing with fundamental freedoms and rights the courts should give those provisions a generous interpretation and avoid what has been called "the austerity of tabulated legalism". Additionally, this Court recognizes the position taken by the African Commission in ***Institute for Human Rights and Development in Africa v Angola*** which held that Article 6 of the African Charter provides for the prohibition of arbitrary arrest which translates that persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them. It further noted that the Court stated in the case before it, there was nothing from the Respondent State to indicate that the manner of victims' arrest and subsequent expulsion was not arbitrary as alleged by the complainant. As the Complainant puts it, at no point were any of the victims shown a warrant or any other document relating to the charges under which the arrests were being carried out. The African Commission found the Respondent State to have violated Article 6 of the African Charter.

2.15 This Court agrees with the Applicants submission that the failure of the police to promptly inform them of the charges against them at the time of arrest and detention violated their right to fair trial provided and guaranteed under section 42(1)(a) of the Constitution as it was stated in the ***State v Director of Public Prosecution & Others ex-parte Cassim Chilumpha***, Constitutional Case No. 5 of 2006 (HC)(Unrep) where the Court held that promptly was interpreted to mean immediately at the time of arrest or detention, or if the circumstances do not permit, then as reasonably practicable thereafter. Failure to inform promptly the reasons of arrest by the arresting authority is an indication of the violation of the procedural component of the right to fair trial, and according to ***Republic v Namazomba*** (1993) 16 (MLR) 741, in such circumstances the accused has a right to resist such arrest.

2.16 A critical continues to emerge in this vagrancy or nuisance related offences or unrepresented offenders is the conduct of the police in forcing people to plead guilty to the offence and threatening them with possible detention in prison if they failed to plead guilty. Malawi's legal position is that this behaviour is unconstitutional and unlawful and contrary to section 42(2)(c) of the Constitution of the Republic of Malawi because every arrested or accused person has a right not to be compelled to make a confession or admission which could be used in evidence against him or her. This right is an extension of the right remain silent protected under section 42(2)(a) as well as section 42(2)(f)(iv), on the right against self-incrimination. It should be noted that this behaviour goes beyond as to who bears the burden of proving that a confession was made freely because this is not a confession. In ***Republic v Fulton & Others*** (No. 8) (2006) NICC 33 the court stated that it is the State that bears the burden of proving whether a confession was made voluntary even if the accused fails to prove he or she did not make that confession freely. In the present case, the State failed to disprove the allegations levelled against by the Applicants concerning the compulsion to confess to the offence of rogue and

vagabond. Furthermore, Mwaungulu J, in ***Stanley Palitu & Others v Republic*** showed disdain against evidence or confessions obtained via threats or coercion when he stated that it is offensive to public policy and human dignity for the judicial process to use evidence obtained in this way. The risks of miscarriage of justice are phenomenon. More importantly, allowing such evidence may license public officials to use torture in pursuit of public goals and interest with so much compromise on citizen's rights.

2.17 This Court as it was dealing with this judicial review in examining this issue of compelling a plea of guilt, this Court had to examine the law as it related to that the plea of guilty. This Court sets out the provisions of section 251 of the Criminal Procedure and Evidence Code –

> (1) When an accused appears or is brought before a court, a charge containing the particulars of the offence of which he is accused shall be read and explained to him and he shall be asked whether he admits or denies the truth of the charge.
> (2) If the accused admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and he may be convicted and sentenced thereon:
>
> Provided that before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification the truth of the charge against him.

2.19 The above position sets the duty on the trial court to ascertain a plea of guilt is fully comprehended as well as what it involves especially for an unrepresented person as noted in case of ***Mc Innis v R*** (1979) 143 CLR 575 at p. 589, where Murphy J remarked quite pointedly that the notion that an unrepresented accused can defend himself adequately goes against experience in all but the rarest cases. Even an experienced lawyer would be regarded as foolish to represent himself if accused of a serious crime. In ***Republic v Luwanja and Others*** [1995] 1 MLR 217, the court expressed concern that magistrates allowed persons to plead guilty without understanding what they were pleading to. Consequently, the proviso to section 251 of the Criminal Procedure and Evidence Code **is clear that before a court records a plea of guilt, the court must (*my emphasis)*** ascertain that the accused person understands the nature and consequences of the plea and that he intends to admit without qualification to the truth of the charge. Courts are therefore duty bound not enter to a plea of guilty before they have ascertained that the accused understood the nature and consequences of the plea of guilty and this is applicable whether the accused is represented or not. Criminal law sets down that a plea is an individual endeavour thus a plea is personal even where there are people jointly charged. In the case of an unrepresented accused, it is critical that a court takes all the necessary measures of explaining the charges, where there is plea of guilty so to ensure that they mean to plead guilty. Additionally, the court should also explain the consequence and impact of a guilty plea, that is an accused person must understand the consequences of the plea of guilty before the court enters it. It is notable that as indicated in ***Pempho Banda and 18 others v Republic****,* Criminal Review Number 58 of 2016 (HC)(ZA)(Unrep) stated that whilst section 251 (2) of the CP and EC provides that the accused ***"may"*** be convicted, the proviso uses the word ***"shall".*** The use of the word "may" clearly shows that the even where there is

a plea of guilty, a court has the discretion to accept the plea and convict thereon or not. On the other hand, ascertainment of whether the accused person understands the nature and consequences of the plea, by the use of the word **"shall"** is a mandatory requirement before a plea of guilty is recorded. The Applicants arguments that a valid plea of guilty has several consequences because it waives substantially all the fundamental procedural rights afforded an accused in a criminal proceeding, such as his rights to the assistance of counsel, confrontation of witnesses, and trial is exactly why section 251 of the Criminal Procedure and Evidence Code was legislated to be a safeguard for an accused.

2.20 Most of all a plea of guilty, relieves the prosecution of the burden to prove the case. Further it means the case will conclude and he will be convicted and immediately. An accused person must therefore be aware of these things before a court can accept a plea of guilty.

2.21 This Court recognizing the constitutional safeguards on the right to fair trial, understands the need for ascertainment ensures that it excludes possibility a forced plea or a plea of guilty on the belief that the accused will get a lenient sentence upon such a plea. The Appeals Chambers of the International Tribunal of the Former Yugoslavia in the case of ***The Prosecutor and Drazen Erdemovic,*** Case No IT-96-22-A-7 October 1997 by four votes to one held that the case must be remitted to a Trial Chamber, other than the one which sentenced the Appellant, so that the Appellant may have the opportunity to re-plead in full knowledge of the nature of the charges and the consequences of his plea. Under paragraph 15, the court stated that -

> *"We feel unable to hold with any confidence that the Appellant was adequately informed of the consequences of pleading guilty by the explanation offered during the initial hearing. It was not clearly intimated to the Appellant that by pleading guilty, he would lose his right to a trial, to be considered innocent until proven guilty and to assert his innocence and his lack of criminal responsibility for the offences in any way. It was explained to the Appellant that, if he pleaded not guilty he would have to contest the charges, whereas, if he pleaded guilty he would be given the opportunity of explaining the circumstances under which the offence was committed*."

2.22 This Court is therefore inclined to side with the Applicants in that their right as provided for in the Constitution was violated. The conduct of the police in coercing the Applicants at the police station to plead guilty and threatening them with possible detention in prison if they failed to do so violated the right to fair trial as provided and guaranteed under section 42(2)(c) of the Constitution of the Republic of Malawi.

2.23 This Court finds itself again very concerned about the issues of rights oof offenders in the criminal justice system especially where the courts are not paying special attention. It is the role of the courts to ensure there is accountability from the police, in that, cases brought are the right ones but also the evidence is sufficient to support such cases. From the Applicants arguments and evidence on the lower court record with regard to this case, this Court finds that their case did not fit the essential elements of the offence of rogue and vagabond as provided in section 184 (1)(b) of the Penal Code, that is, 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. The ***Agnes Mbewe*** case stated that clearly what the section prohibits being found at a place but an arresting officer as well as a court can only conclude illegality or disorderliness. In the present, at the time of their arrest Henry Banda argued that he was working as a DJ at American Bar whilst Ishmael Mwale was having a drink at Culture Club car park and Sikweya Supiyani was selling kanyenya at American Bar. From the circumstances of the arrest, it would be absurd for one to conclude that the Applicants herein were there for illegal or disorderly purpose. Taking into consideration the sentiments in ***Foster and Others***, the court held that the acceptance of guilty pleas can only be made where each accused person admitted all essential elements of the charge. In the case of the Applicants herein, where their conduct in no way can be said to constitute criminal behaviour, it would have been impossible for them to plead guilty to all the elements of the offence as charged.

2.24 The Universal Declaration on Human Rights (UDHR) guarantees the right to be free from arbitrary arrest, detention or exile so does Article 9 of the ICCPR and it is acknowledged that the deprivation of liberty may be necessary in certain circumstances, but that it must not be arbitrary and be done with respect for the rule of law. The UN Working Group on Arbitrary Detention regards deprivation of liberty as arbitrary in the following instances - when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I); when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the UDHR and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR (category II);when the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III); when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV); or when the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category). Therefore, arrest and detention are arbitrary if the grounds for the arrest are illegal or the victim was not informed of the reasons for the arrest or the procedural rights of the victim were not respected, or the victim was not brought before a judge within a reasonable amount of time. In the Applicants situation, a number of these scenarios occurred as such this Court agrees that their arrest was arbitrary and unlawful.

2.25 The African Commission on Human and Peoples' Rights adopted the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) in 2014 and they provide that laws

regarding arrest and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual. It is therefore correct to state that arrest must not be executed on the basis of discrimination of any kind, such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, disability or any other status. The Luanda Guidelines limit the powers of arrest to police or by other competent officials or authorities authorized by the state for this purpose. Further, they provide that an arrest shall only be carried out if authorized by a warrant of arrest or when there are reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence. The African Court on Human and People's Rights Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa, No. 001/2018 declaring national laws that criminalize vagrancy to be incompatible with human rights standards. The opinion concluded that laws that essentially criminalize homelessness, poverty, or unemployment are overly broad and allow for abuse. The Court held that such laws that punish individuals for their status rather than their actions, are a discriminatory and disproportionate State response, and violate numerous human rights – including specific rights of children and women. Some of the issues that the opinion considered were –

2.25.1 whether vagrancy laws and by-laws, including but not limited to: those that contain offences which criminalize the status of a person as being without a fixed home, employment or means of subsistence; as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have a visible means of subsistence and cannot give good account of him or herself, violate Articles 2, 3, 5, 6 ,7, 12 and 18 of the African Charter on Human and Peoples' Rights;

2.25.2 whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant or rogue and vagabond, summarily orders such person's deportation to another area, violate (Articles 5, 12, 18 of the African Charter on Human and Peoples' Rights and Articles 2, 4(1) and 17 of the African Charter on the Rights and Welfare of the Child);

2.25.3 whether vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without warrant simply because the person has no 'means of subsistence and cannot give a satisfactory account' of him or herself, violate (Articles 2, 3, 5, 6, 7 of the African Charter on Human and Peoples' Rights, Articles 3, 4(1), 17 of the African Charter on the Rights and Welfare of the Child and Article 24 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa).

2.26 Interestingly the African Court found that in relation to the application of vagrancy laws, no reasonable justification existed for the distinction that the

law imposes between those classified as vagrants and the rest of the population except their economic status. The individual classified as a vagrant will, often times, had no connection to the commission of any criminal offence hence making any consequential arrest and detention unnecessary. The arrest of persons classified as vagrants, clearly, was therefore largely unnecessary in achieving the purpose of preventing crimes or keeping people off the streets. It also recalled that any arrest without a warrant required reasonable suspicion or grounds that an offence has been committed or is about to be committed. Notably, where vagrancy-related offences are concerned, most arrests were made on the basis of an individual's underprivileged status and the inability to give an account of oneself. In that context, therefore, arrests were substantially connected to the status of the individual who was being arrested and would not be undertaken but for the status of the individual. Arrests without a warrant for vagrancy offences, therefore, were also incompatible with Articles 2 and 3 of the Charter. In light of the above, the court therefore found that vagrancy laws, both in their formulation as well as in their application, by, among other things, criminalizing the status of an individual, enabling the discriminatory treatment of the underprivileged and marginalized, and also by depriving individuals of their equality before the law are not compatible with Articles 2 and 3 of the Charter. The Court that arrests for vagrancy-related offences, where they occur without a warrant, were not only a disproportionate response to socioeconomic challenges but also discriminatory since they targeted individuals because of their economic status.

2.27 The Court noted what that Article 6 of the Charter provides in terms of the right to liberty and the security of his person. In line with its jurisprudence, any arrest and detention is arbitrary if it has no legal basis and has not been carried out in accordance with the law. In the circumstances, deprivation of liberty in line with an existing law did not of itself make the process legal. It was also important that deprivation of liberty be supported by clear and reasonable grounds. Any restriction of an individual's liberty, therefore, must have a legitimate aim and must also serve a public or general interest. However, in vagrancy cases, the court noted that a major challenge with enforcement, in practice, was that the enforcement of these laws often resulted in pretextual arrests, arrests without warrants and illegal pre-trial detention. This exposed vagrancy laws to constant potential abuse. It also conceded that arrests under vagrancy laws may, ostensibly, satisfy the requirement that the deprivation of freedom must be based on reasons and conditions prescribed by law. Nevertheless, the manner in which vagrancy offences are framed, in most African countries, presents a danger due to their overly broad and ambiguous nature. It was also noted that one of the major challenges was that vagrancy laws did not, ex ante, sufficiently and clearly lay down the reasons and conditions on which one can be arrested and detained to enable the public to know what is within the scope of prohibition. In practice, therefore, many arrests for vagrancy offences were arbitrary. For the reasons set out above, the Court held that arrests and detentions under vagrancy laws were incompatible with the arrestees' right to liberty and the security of their person as guaranteed under Article 6 of the Charter. The Court invariably found the case where the arrest was without a warrant.

2.28 In terms of the right to fair trial, Article 7 of the Charter is significant and the African Court noted that the right to fair trial was a fundamental human right which was enshrined in all universal and regional human rights instruments. Further Article 7(1)(b) of the Charter reiterates the fundamental principle of the presumption of innocence. Notably, the Court held that the essence of the right to presumption of innocence lies in its prescription that any suspect in a criminal trial is considered innocent throughout all the phases of the proceedings, from preliminary investigation to the delivery of judgment, and until his guilt is legally established. Although the Charter does not have a provision specifically dealing with the protection against self-incrimination, it was clear to the Court that the Charter's omnibus provision for fair trial included a proscription of self-incrimination. In any event, the Court has already established that Article 7 of the Charter should be interpreted in light of article 14 International Covenant on Civil and Political Rights in order to read into the Charter fair trial protections which were not expressly provided for in Article 7. Additionally, the Court noted that the Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003(hereinafter "the Fair Trial Principles") provided useful guidance in interpreting Article 6 of the Charter. According to the Fair Trial Principles, "[i]t shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him or her to confess, to incriminate himself or herself or to testify against any other person." The Court observed that because vagrancy laws often punished an individual's perceived status, such as being "idle", "disorderly" or "a reputed thief", which status did not have an objective definition, law enforcement officers could arbitrarily arrest individuals without the sufficient level of prima facie proof that they committed a crime. Once they were taken into custody, such arrested persons would have to explain themselves to the law enforcement officer(s) to demonstrate that, for example, they were not idle or disorderly, were not a reputed thief or that they practice a trade or profession. A failure to provide an explanation acceptable in the eyes of law enforcement officers could result in them being deemed unable to give an account of themselves and thereby, supposedly, providing justification for their further detention. The Court noted, however, that forcing a suspect to explain himself/herself may be tantamount to coercing a suspect to make self-incriminating statements. Law enforcement officers may exert undue pressure on suspected criminals by pre-textually arresting them under vagrancy laws and then soliciting incriminatory evidence even in relation to crimes not connected to vagrancy. Given the above, the Court also held therefore, that arresting individuals under vagrancy laws and soliciting statements from them about their possible criminal culpability, is at variance with the presumption of innocence and is not compatible with Article 7 of the Charter. Notwithstanding, the Court was also mindful that even if vagrancy laws contributed to the prevention of crimes in some cases, other less-restrictive measures such as offering vocational training for the unemployed and providing shelter for the homeless adults and children were readily available for dealing with the situation of persons caught by vagrancy laws. Where policy alternatives that do not infringe on individuals' rights and freedoms exist, policies that infringe on fundamental human rights such as the right to freedom of movement were unnecessary and should be avoided.

2.29 Taking all the above legal analysis, this Court sees that the enforcement of vagrancy laws, as that provided for in section 184(1)(b) in practice, often resulted in pre-textual arrests, arrests without warrants and illegal pre-trial detention, thereby resulting in constant potential abuse. Understandably, vagrancy laws in their origin nor current use did not, *ex-ante*, sufficiently and clearly lay down the reasons and conditions on which one can be arrested and detained to enable the public to know what is within the scope of prohibition. Notably, vagrancy arrests were and have been arbitrary. It is this Court's considered view that they will continue to be arbitrary if they continue to be implemented in the manner, they are currently being implemented without regard to human rights and safeguards set in criminal procedure statutes. Consequently, Courts shall continue declaring them unconstitutional for infringing on the rights to liberty and security. As regards the critical criminal justice element of prevention of crime. This Court is in agreement with the the African Court's Advisory Opinion position that the individual classified as a vagrant will, often times, have no connection to the commission of any criminal offence hence making any consequential arrest and detention unnecessary. The arrest of persons classified as vagrants, clearly, was therefore largely unnecessary in achieving the purpose of preventing crimes or keeping people off the streets. Criminal justice courts nor this Court is not saying that vagrancy laws do not contribute to the prevention of crimes in some cases but that it is crucial as noted by the African Court that other less-restrictive measures such as offering vocational training for the unemployed and providing shelter for the homeless adults and children were readily available for dealing with the situation of persons caught by vagrancy laws. Where policy alternatives that do not infringe on individuals' rights and freedoms exist, policies that infringe on fundamental human rights such as the right to freedom of movement were unnecessary and should be avoided.

2.30 In buttressing, the African Court's statement that it was noted that because vagrancy laws often punished an individual's perceived status, such as being "idle", "disorderly" or "a reputed thief", which status did not have an objective definition, law enforcement officers could arbitrarily arrest individuals without the sufficient level of prima facie proof that a crime had been committed. Once they were taken into custody, such arrested persons would have to explain themselves to the law enforcement officer(s) to demonstrate that, for example, they were not idle or disorderly, were not a reputed thief or that they practice a trade or profession. A failure to provide an explanation acceptable in the eyes of law enforcement officers could result in them being deemed unable to give an account of themselves and thereby, supposedly, providing justification for their further detention. This Court is reminded to find that in terms of Malawi, it is the law which is problematic as well as the actions of the police officers because they are ignoring their own Standing Orders as well as the Criminal Procedure and Evidence Code. The Court therefore concludes that such means the criminal justice system is failing to uphold the rule of law in which it is duty bound to operate in.

2.31 This Court having decided the ***Gwanda*** decided as a matter of principle and prudence in reviewing its decision to address the broader issue if the matter of

the three Applicants was *res judicata* due to the ***Mayeso Gwanda*** decision. The general principles of *res judicata* were summarised by Lord Sumption JSC in ***Virgin Atlantic Airways Limited v Zodiac Seats UK Limited*** as follows –

> *"Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.*
> *The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.*
> *Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336.*
> *Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W494, 504 (Parke B).*
> *Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 State Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197–98.*
> *Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.*
> *Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.*

2.30 The Malawian Case of ***Finance Bank of Malawi Ltd (in Voluntary Liquidation) v Lorgat & Other***¸ Commercial Cause Number 56 of 2007 (HC)(CD)(Unrep) also discussed the doctrine to great length when Justice Mtambo stated at pages 2 - 4 that -

> *"Res Judicata is a special form of estoppel. The rule is to the effect that parties to a judicial decision should not afterwards be allowed to re-litigate the same question. As between themselves the parties are bound by the decision even though it may be wrong and the only way out by an aggrieved party is to appeal. Apart from being barred from re-litigating the same cause of action, the parties are precluded from re-opening any issue which was an essential part of the decision. This position of the law was enunciated in Crown Estate Commissioners v. Desert County Council [1990] Ch.D."*
> *This principle of issue estoppel is to the effect that parties should not re-litigate an issue once it is disposed of by a court of competent jurisdiction.*

In Senner No.2 1 W.L.R. 490, 499, Lord Brandon held that:
"in order to create an issue estoppel, three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied as creating an estoppel must be a) of a court of competent jurisdiction, b) final and conclusive and c) on merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue is the same issue as that decided by the judgment in the earlier action".

2.31 Lord Upjohn in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No.2) b [1967] A.C. 853,946 discussed the rationale behind the rule in the words that is the broader principle of res judicata is founded upon the twin principles so frequently expressed in Latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause. The same sentiment is apparent in ***Mkandawire v Council of the University of Malawi*** MSCA Civil Appeal Number 24 of 2007 (Unrep) in which a litigant who had lost an action in the Malawi Supreme Court of Appeal for wrongful dismissal on appeal by the Council for the University of Malawi from the Zomba High Court Registry where he had been successful recommenced an action against the same party on the same facts in the constitutional court claiming violation of a constitutional right of fair labour practices and subsequently in the Industrial Relations Court claiming unfair termination. Delivering the judgment of the court, Kalaile Ag. C.J dismissing a second appeal to the Malawi Supreme Court of Appeal in the recommenced action observed that res judicata bars litigation of the same cause of action between the same parties where there is prior judgment. It should be noted that in ***Arnold and Others v National Westminister Bank PLC*** [1991] H.L 93, the court decided that although issue estoppel constitutes a complete bar to re-litigation between the same parties of a decided point, its operation could be prevented in special circumstances where further material became available which was relevant to the correct determination of a point involved in earlier proceedings but could not, by reasonable diligence, have been brought forward in those proceedings. Therefore, issue estoppel must be contrasted with cause of action estoppel. A cause of action can be defined as a set of facts on the basis of which a claim is proffered. Therefore, where a set of facts is available but a Plaintiff does not invoke all the set of facts in an action, that party will be estopped from bringing a second action against the same party based on some of the set of facts available in the prior action but not utilized.

2.32 Consequently, courts should not attempt to define or categorize fully what may amount to an abuse of process. However, it is an abuse of the process of the court and contrary to public policy for a party to re-litigate the issue of fraud after the same issue has been tried and decided by the court in ***House of Spring Gardens Ltd. v Waite*** [1991] 1 Q.B. 241; [1990] 2 E.R. 990, CA). It is an abuse of the process of law for a party to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata as noted in ***Stephenson v Garnett*** [1898] 1 Q.B. 677, CA and ***Spring Grove Services Ltd v Deane*** (1972) 116 S.J. 844. This rule of law is similar to cause of action estoppel. It is however not an abuse of the process of the court for defendants to re-litigate issues of non-disclosure and misrepresentation involving insurance cover decided against them in an earlier action by different plaintiffs when they intend to cross examine witnesses

whom they had been unable to cross examine in the first action, because in that action they had called those witnesses on subpoena as their own witnesses to produce documents as per ***Bragg v Oceanus Melchior & Co***. [1988] 1 W.L.R. 1394; [1989] 1 All. E.R. 129, CA. It is an abuse of the process of the court to raise in subsequent proceedings matters which could have and should have been litigated in earlier proceedings as held in ***Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd*** [1975] A.C. This point of law was also recognized by Nyirenda J (as he then was) in ***Nthara v ADMARC*** [1995] 1 MLR, 180 where the learned judge stated that the point made here is simply that it should not be competent on the part of a litigant who is aware that he has a good case to torment the other party to the case by bringing against him piecemeal actions. There must be an end to litigation and this is why courts might even go beyond the res judicate estoppel and stop litigants in any subsequent proceedings from raising issues which were open to them in earlier proceedings.

2.33 It is this Court's considered opinion that there was no *res judicata* in this matter even as a matter of general principle because of the violations of the human rights in this case, From the case law cited above, one can conclude that the matters of vagrancy laws have been largely discussed by both local courts in Malawi, regional courts and international courts and it is trite law that most courts consider them unconstitutional because among other things, they presume guilt of the alleged offender. This Court acknowledges that the vagrancy issue has already been decided, it is worth noting that as per the ***Verwaltungsgesellschaft mbH v Owners of The Senner and others*** [1985] 1 WLR 490, HL that, the parties are required to be the same in order for the plea to succeed. Nevertheless, it is important that this Court distinguishes the ***Gwanda*** decision as it declared section 184(1)(c) of the Penal Code to be unconstitutional whilst the challenge in this matter is directed at section 184(1)(b) of the Code, dealing with a lack of visible means of subsistence and failure to give an account of oneself. Further, the Applicants sought to challenge to police's sweeping operation, which appears to have taken place regardless of the declaration of unconstitutionality in respect of section 184(1)(c). *Prima facie* there would appear to be sufficient grounds for distinction between the two cases, such that res judicata would not apply. Courts especially in a human rights regime where the right to access justice is guaranteed recognizes mere fact that a law provides for a procedure to be followed in accessing redress like the review, appeal or confirmation available to the Applicants did not stop them from seeking redress as they did herein. The Constitution envisaged that people could get an effective remedy by using the procedure and/or structures established by the Constitution or the law which directly violated their rights. In conclusion, this Court concludes that the arrest and trial was unconstitutional because the three (3) Applicants were arrested and tried for conduct which was not criminal at all. Malawi rebirthed itself in 1994 as a human rights country as per the Constitution, therefore Malawian courts shall guard jealously the tenets under the Bill of Rights and more so provisions dealing with the life and liberty of a person.

2.34 In conclusion, this Court would like to underscore that the criminal justice system especially police investigators as well as prosecutors cannot rely on the courts to be doing their work for them. The Criminal Procedure and Evidence Code supplemented by Police Standing Orders have set down how serious and petty crimes should be handled. Further, the law has already also ensured that

there are safeguards for protecting a person as well as their human rights. This Court recognizes that the criminal justice needs to stop putting heavy reliance on section 3 and 5 of the Criminal Procedure and Evidence Code to deal with issues where they should have done so diligently as well as legally. Malawi's current human rights dispensation emphasizes that there should be legality in the criminal justice system, thus abhorring absurdity in penal provisions like in section 184 (1)(b), particularity and certainty in charges as well as legality in pleas of guilty. It is therefore, important that Malawi in the implementation of all the decisions which Malawian courts have decided in vagrancy or nuisance-related to adopt the Principles on the Decriminalisation of Petty Offences in Africa as adopted by the African Commission. Every person needs to trust the criminal justice system but more so the law enforcement agencies. In terms of the police, they are first responders, protectors of the law, promoters of public security and safety but most of all they should the first to guard against illegality. Lastly, all criminal justice players are duty bound to promote justice and protect human rights.

3.0 CONCLUSION

3.1 Taking all the above matters into consideration, this Court is in agreement that the Applicants had a significant number of their rights enshrined in sections 18, 19, 29 and 39 of the Constitution of the Republic of Malawi violated when they were arrested and charged with the offence of being a rogue and vagabond as contained in section 184(1)(b) of the Penal Code.

3.2 This Court further finds that the said section and its consequent application constitutes an unjustifiable limitation on the rights contained in the above sections of the Constitution of the Republic of Malawi. Furthermore, the language therein of the provision, that is, **every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself (my emphasis)** is repugnant to the tenet of criminal justice that a person is presumed innocent even at arrest. The provision fails to take into account the principles of fair trial as provided for in section 42 of the Constitution. Further the language of the section is discriminatory in nature as it violates the right to equality as enshrined in section 20 of the Constitution as the provision convicts the person before trial due to their reputation as well as category of person they belong to in society. Furthermore, if the same should be considered a limitation, then it is not reasonable, it is not recognized by international human rights standards, and cannot be said to be necessary in an open and democratic society. The Court cannot in good conscience as the current provision stands consider that section 184(1)(b) of the Penal Code is in line with section 44 of the Constitution, that it is, legally justifiable, reasonable, necessary and acceptable in an open and democratic society; as well as meeting internationally acceptable human rights standards. This Court if it had been requested would have declared the said provision unconstitutional but strongly urges the Executive and Legislature to urgently review the said provision.

3.3 It is imperative at this point; this Court raises a significant socio-legal impact that these arrests and subsequent convictions have. Malawi for the time being has yet to establish a proper database in terms of arrests and convictions but when it does, these arrests as noted above will start to have a negative impact

on the people whose arrest were wrong in law from the beginning and further whose convictions for most times not appealed against and sometimes even at confirmation will usually be confirmed. It should be noted that the negative impact will not evenly be felt by all Malawian society but certain categories and classes of people, that is, sex workers, poor people, homeless, people who work in bars or former convicts. The law and its application should not and must not be inherently discriminatory and it is therefore critical that all three arms of Government remind themselves of the important role they place especially as dictated by section 4 of the Constitution which stipulates that this Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it. Further supported by section 12(1)(d)(e)(f) which state –

> (1) This Constitution is founded upon the following underlying principles—
> (d) the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote;
> (e) as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and
> (f) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law.

3.4 Courts should be very aware of the social conditions and experiences of the law on various categories of people and must not be blind to these issues. Malawian courts especially magistrates must be very vigilant as protectors of human rights as well as enforcers of the rule of law. This Court has pointed out in the ***Mayeso Gwanda*** and ***Pempho Banda*** case, the importance of diligence and scrutiny of cases before it especially in terms of human rights. Magistrates being the first justice responders in the judiciary, they have to be the first checkpoint for checking illegality. Therefore, Malawian courts should be slow to sanction or encourage illegality perpetrated by other law enforcement against people who are powerless but also unrepresented and unaware of their rights.

3.5 At this point this Court expresses that Malawian Courts since the dawn of democracy and adoption of the current Constitution have been making declarations of invalidity on a number of legal provisions and leaving the task of the eventual amendment or replacement of those invalidated provisions or law to the Executive and the Legislature however it seems the two organs do not take their Constitutional role serious as to date most of those provisions remain in our statute book. A good example would be the declarations in the ***Mayeso Gwanda*** case which have a strong bearing in the matter herein since 2017 remain unchanged. This Court strongly agrees in the separation of powers as pronounced in sections 7,8 and 9 of the Constitution but where the other organs responsible to amend or replace, or indeed take any other legislative measures remain non-complaint or in abeyance of their duty, then Courts need to make stronger orders and hold certain offices and office bearers responsible because otherwise as previously expressed that such Court

declarations shall create a vacuum in law and more so for an important area of the preservation of law, order and security in the country. Crime prevention and control must still be maintained but appropriate measures need to be adopted by the Executive and Legislature so that criminals are dealt with under the law which is constitutional because society must and always be protected from those harming or doing illegal activities. The legislature is being reminded of their role and should be aware and Courts that as per Ngcobo J (as he then was), in the case of ***Zondi*** case held correctly, that whatever remedy a court chooses, it is always open to the legislature, within constitutional limits, to amend the remedy granted by the court.

3.6 The Court hereby grants the Applicants the orders as prayers as follows –

3.6.1 a declaration that the police's indiscriminate sweeping exercise and or arrest is unconstitutional, unlawful and contrary to sections 39, 19, 18 and 29 of the Constitution of the Republic of Malawi.

3.6.2 a declaration that the police's indiscriminate sweeping exercise and arrest is contrary to their duty to protect human rights under sections 15(1) and 153(1) of the Constitution of the Republic of Malawi;

3.6.3 a like order to Mandamus compelling the police to develop proper guidelines for sweeping exercises which shall ensure full protection of human rights;

3.6.4 a declaration that the failure by the police to promptly inform the Applicants of the charges against them at the time of arrest and detention is unlawful and contrary to section 42(1)(a) of the Constitution of the Republic of Malawi;

3.6.5 a declaration that the conduct of the police in coercing the Applicants at the police station to plead guilty to the offence of rogue and vagabond and threatening them with possible detention in prison if they failed to do so is unconstitutional and unlawful and contrary to section 42(2)(c) of the Constitution of the Republic of Malawi; and

3.6.6 an order of compensation for the violation of the Applicants rights under sections 39, 19, 18, 29, 42(1) (a) and 42(2) (c) of the Constitution of the Republic of Malawi.

3.7 This Court in ordering compensation understands such is rare in judicial review cases. Police in Malawi continue to not reform despite the numerous resources that have been sunk into trainings, behaviour change, awareness, policy and legislative reforms. This Court wishes to remind itself and everyone that the issue of these arrests has continued despite numerous court pronouncements for police to stop indiscriminate arrests and prosecutions which are usually thrown out on confirmation, review and appeal. It is therefore imperative at this point that courts show that the same is not acceptable and that law enforcement needs to stop getting away with such behaviour that undermines the rule of law especially noting that it is the same laws which has empowered them.

3.8 In light of the foregoing, I would make the following additional declarations –

3.8.1 the Executive through the Ministry of Justice (the Attorney General, Director of Public Prosecutions and Chief Legislative Counsel) as well the Ministry of Home Affairs and Inspector General and the Legislature through Speaker working with the relevant committees should within 24 months from the date hereof, effectively review the entire section 184 of the Penal Code and effectively amend the provisions especially those declared unconstitutional in a manner that ensures consistency with the Constitution and to take care of any unintended gaps in the law. The said offices to report to the Court on the progress of the legislative reform by 22nd July, 2024;

3.8.2 the Executive and Legislature are reminded that until they vacate an order or judgment of the Court, such remains a valid order or judgment of the Court as such non-compliance of the same is contempt as such the Attorney General being legal adviser to the two arms is reminded of the decision of ***Republic v Mayeso Gwanda***, Constitutional Case No, 5 of 2015 which called upon both the Executive and Legislature to undertake both legislative and policy reforms on vagrancy laws in Malawi generally and where appropriate initiate legislative changes in order to ensure such laws' consistency with the Constitution;

3.8.3 the Ministry of Home Affairs as well as the Inspector General of Police to review its training curriculum for police officers to ensure that it covers constitutional fair rights issues especially the right to be informed of the reasons of arrest during the arrest. Further appropriate standing operating procedures be developed or amended and provided to every police officer as well as police post, unit and station on the parameters of these fair rights issues as well as for when and how sweeping exercises can be conducted.

3.9 This Court in determining this application also reviewed (being a role that this Court is duty bound to perform) the criminal case which gave rise to these proceedings, that is, Criminal Case No. 185 of 2018 in the First Grade Magistrate sitting in Kasungu as per sections 42 (2) of the Constitution, 25 and 26 of the Courts Act as well as 360 of Criminal Procedure and Evidence Code. In reviewing, this Court is examined the record of the criminal proceedings before the FGM 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. the foregoing discussion it is the finding of this court that the proceedings in the lower court were characterized by gross procedural irregularities and to a large extent unfairness and bias and an affront to justice. In reviewing the record, this Court took cognizance that section 5 of the Criminal Procedure and Evidence Code enjoins the court not to alter decisions on review or appeal unless the irregularities have occasioned a failure of justice. In the present case, the irregularities indeed occasioned a failure of justice in that had the trial Magistrate did not put the elements of the offence charged to the Applicants plus the five other persons who they were jointly charged with under section 251 of the Criminal Procedure and Evidence Code and explained to them to the gravity of a plea of guilt because

if it had they would have pleaded otherwise. Therefore, this Court makes the following orders -

3.9.1 the conviction and the sentence imposed are hereby set aside.

3.9.2 the fines ordered by the lower court are hereby declared to have been wrong and shall accordingly be returned to the 8 persons charged under the above case in Kasungu by 31st August, 2022.

3.10 Finally, let me state that if the Executive, Legislature and Judiciary continue to handle the vagrancy laws in the manner we have been doing especially section 184 of the Penal Code, the Judiciary will continue to deal with these matters either as criminal appeals or reviews or constitutional challenges, judicial reviews or false imprisonment claims to mention a few. The matters shall not be *res judicata* because the issues will remain different due to the charges proffered as well as human rights violations alleged. Therefore, wisdom calls upon us to act and act with expediency as eventually the cost whether material, personnel, financial or reputation will get to levels that cannot be sustained by us as organs as well as a country.

Delivered this 22nd day of July, 2022 in Zomba.

Z.J.V. Ntaba
Judge