



**IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY**

CRIMINAL CASE NO. 295 OF 2019 AND HOMICIDE CAUSE NO. 183 OF 2018

**IN THE MATTER OF CRIMINAL PROSECUTION BETWEEN THE STATE
AND MAXWELL MATCHINA SOSOLA, DICKSON MANESI NDENGU,
BASHIRU LILONGWE, ALFRED YOHANE, MASTER MPHULANYA
INJESI, THOMAS MUHOSHA, LIMBANI KAMANGA, CHIKONDI
CHILEKA, INNOCENT WALASI, MUSSA LILONGWE, CASSIM WHITE
MASAMBUKA, LUCKNESS MAGOMBO**

AND

**IN THE MATTER OF SECTION 35 AND 36 OF THE CONSTITUTION OF THE
REPUBLIC OF MALAWI AS READ WITH SECTION 60 OF THE COURTS
ACT (CAP 3:02 OF THE LAWS OF MALAWI) AND SECTION 71(1)(a) OF
THE CRIMINAL PROCEDURE AND EVIDENCE CODE (CAP 8:01 OF THE
LAWS OF MALAWI**

BETWEEN:

**MALAWI BROADCASTING
CORPORATION (MBC)**

APPLICANT

AND

**THE STATE
MAXWELL MATCHINA SOSOLA
DICKSON MANESI NDENGU
BASHIRU LILONGWE
ALFRED YOHANE
MASTER MPHULANYA INJESI
THOMAS MUHOSHA
LIMBANI KAMANGA
CHIKONDI CHILEKA
INNOCENT WALASI
MUSSA LILONGWE
CASSIM WHITE MASAMBUKA
LUCKNESS MAGOMBO**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT
10TH RESPONDENT
11TH RESPONDENT
12TH RESPONDENT
13TH RESPONDENT**

CORAM : Z NTABA, J.
: Dr. S. Kayuni, Mr. D. Malunda, Mr. Masanja, Mr. Matonga, Counsel for
the State
: Mr. M. Chamkakala and Mr. T. Kalua, Counsel for 1st to 5th, 8th to 11th
Accused
: Mr. T. Chirwa, Counsel for the 7th and 8th Accused

- : Mr. C. Gondwe, Counsel for the Applicant
- : Mr. D. Banda, Court Interpreter
- : Mrs. G. Chirombo, Court Recorder

Ntaba J.

RULING

1.0 BACKGROUND

- 1.1 The Applicant, Malawi Broadcasting Corporation which is a statutory corporation established by an Act of Parliament applied for leave to obtain and broadcast audio and visual and/or alternatively audio recordings of court proceedings under section 35 and 36 of the Constitution as read with section 60 of the Courts Act and section 71(1)(a) of the Criminal Procedure and Evidence Code as well as the Court's inherent jurisdiction. They supported their application with an affidavit from Aubrey Sumbuleta where he stated that MBC have a television and radio station providing services to the nation and they are allowed to broadcast live any programme or event as long as they are in line with their licence obligations. They are seeking to broadcast the criminal proceedings in this matter because the murder of Macdonald Masambuka has attracted public interest and attention especially in the spate of killings and abductions of persons with albinism. MBC argued that Malawians have a legitimate interest in the case before the court and it is within their rights to access the above information however only a few Malawians have been able to enter the court room. Further only a handful of Malawians have access to print and electronic media platforms through media reports that are usually inaccurate and delayed.
- 1.2 MBC argued that they would like to exercise their right to freedom of expression and freedom of the press and discharge their duty under the Communications Act to broadcast live audio and video and/or alternatively audio of the entire proceeding and the delivery of the judgment on the matter. They argued that the application for leave for such an application was laid out in *Republic v Oswald Lutepo*, Criminal Case No. 2 of 2014 (HC)(ZA)(Unrep). Further it submitted that the court should allow the application because such would be in line with open justice and interest of justice principles. Furthermore, it would ensure that the court ensures their freedom of expression as well as fair trial rights principles. The Applicant's prayer is that they be allowed to –
- (a) install cameras in the court room where hearing and judgment is going to be delivered to take still photographs of the proceedings including delivery of judgment; and
 - (b) obtain and broadcast live audio-visual and/or alternatively audio of proceedings in the delivery of judgment in the matter.

- 1.3 The State argued that their response to this application was being given as Officers of the Court who are there to assist the said Court to arrive at the justice of this matter by providing the Court with comparative position of law from various jurisdictions and from local case law. They indicated that the application was covering the actual trial but their position would have been much more pronounced if it wasn't the Defence Case. Their submission as officers of the Court was to provide guidance and suggested good practice and their suggestions herein were *ad idem* to the Court.
- 1.4 The State highlighted that this application was novel as this is the second time our Courts have been visited upon by such an application with the first being ***Republic v Kumbwembe, Manondo and Ralph Kasambara***, Criminal Case No. 65 of 2013. The State highlighted that interests of justice require that these matters for purposes of jurisprudence should always come inter-partes. The State acknowledged that the Applicants have expressly acknowledged the position of the law that in all circumstances and regardless of constitutional provisions on freedom of expression, freedom of the press, right to fair trial and interests of justice, the decision lies with the strict discretion of the Court in the way it can conduct its own proceedings.
- 1.5 The State argued that broadcasting court proceedings might encourage judges to act in a way which might be seen as playing to the camera or that they might feel pressurized by public opinion into making a particular decision or passing a particular sentence. The New York State Committee to Review Audio-Visual Coverage of Court Proceedings surveyed 351 judges in 1997, during the initial experiment allowing cameras in court. A disturbing 37% of these judges said that television coverage causes judges to render rulings they otherwise might not issue. Judges may also feel that broadcasts could put them at increased risk of attack by members of the public who do not agree with their decision or who have a more general grudge against the judiciary. They argued one of the reasons in favour of the wearing of wigs and gowns by judges and lawyers has always been that this, to an extent, serves to conceal their identity and reduce security risks. They added that broadcasters have a duty to be objective and fair and it has been argued that they tend to give more balanced coverage than printed media. Indeed, it has also been suggested that other media will be encouraged to avoid unbalanced reporting if balanced broadcast coverage is available. On the other hand, the UK Parliamentary Select Committee on Broadcasting, in its First Report of 1999, expressed disappointment that television coverage of the House of Commons "has failed, and continues to fail, the people of the United Kingdom by broadcasters cherry-picking the sound-bite and the confrontational" as reported in paragraph 77 of The Development of Parliamentary Broadcasting
- 1.6 The State acknowledged that the central understanding should always be that the proceedings of a court have the overriding objective of delivering fair civil or criminal justice to the litigants or the accused. Viscount Haldane, L.C in the case of ***Scott v Scott*** [1913] AC 417 stated that

“while the broad principle is that the Courts ... must ... administer justice in public ... the chief object of Courts of justice must be to secure that justice is done.”

1.7 Accordingly, it was observed that is vital that any arrangements made do not disturb this or affect the conduct of participants, or their willingness to participate, in a way which detracts from justice. What was obvious was that the issue of broadcasting court proceedings whether live or otherwise raises complex issues that must be handled with the seriousness and caution as what is at stake is justice itself. Interestingly, jurisdictions such as New York only allows cameras into appellate courts whereas Rule 980 of the Californian Rules of Court specifies the factors which are to be considered by the judge in making an “Order on a Media Request to Permit Coverage” as follows –

- (a) importance of maintaining public trust and confidence in the judicial system;
- (b) importance of promoting public access to the judicial system;
- (c) parties’ support of or opposition to the request;
- (d) nature of the case;
- (e) privacy rights of all participants in the proceeding, including witnesses, jurors and victims;
- (f) effect on any minor who is a party, prospective witness, victim, or other participant in the proceeding;
- (g) effect on any ongoing law enforcement activity in the case;
- (h) effect on any unresolved identification issues;
- (i) effect on any subsequent proceedings in the case;
- (j) effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health and safety of any witness;
- (k) effect on excluded witnesses who would have access to the televised testimony of prior witnesses;
- (l) security and dignity of the court;
- (m) undue administrative or financial burden to the court or participants;
- (n) interference with neighbouring courtrooms;
- (o) maintaining orderly conduct of the proceeding;
- (p) any other factor the judge deems relevant.

1.8 Indeed, the open justice principle is aptly captured in the case of ***The Republic v Chilumpha and Matumula***, Criminal Case No. 13 of 2006 (HC)(Unrep). In addition, section 60 of the Courts Act stipulates that proceedings of every court should be in open court where the public can have access as echoed by section 71(1) of the CP & EC. Turning to freedom of expression and freedom of the press, the State was of the view that the opinion of Sachs J., in case of ***South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others***, 2007 (1) SA 523 (CC) was illuminating here. The learned judge said in relation to television and radio coverage of court proceedings -

“There is one systemic problem however that has specific relevance to television and radio. This relates to the special dangers of distortion brought about by selective presentation.

The very factor which gives television, and to a lesser extent, radio, its force and credibility, namely that you are seeing and hearing actuality, constitutes its danger. The public feel that they are getting 'the real thing'. Extracting highlights and giving balanced reports requires great expertise and sensibility. Potential broadcasters must establish that they have developed the requisite capacity, coupled with objective and independent forms of control, before they can expect to have free use of their cameras and microphones."

- 1.9 The exercise of the freedoms under sections 35 and 36 of the Constitution in relation to court proceedings must be done with the full appreciation of the primary function of a court of law. The administration of justice, especially in criminal matters and in particular this application, requires balancing the right to fair trial for of the accused and the prosecution with the rights of the press and media as well as the open justice principle as noted in the ***Lutepo*** case where Kapindu J., summarized the sentiments of Mlambo J., in ***Prosecuting Authority & Oscar Leonard Pistorius***, Case Number 10193/2014 –

"The matter, according to Judge President Mlambo who presided over the case, brought into sharp focus the interface between the functioning of the criminal justice system on the one hand and the quest by the media and press to participate in that system on the other hand. This interface, according to Mlambo J, found expression in a number of critical constitutional rights that were seemingly on a collision course with one another. These, he observed, were the rights of an accused person and the prosecution to a fair trial on the one hand and the freedom of expression rights of the media as well as the open justice principle."

- 1.10 The State acknowledged that the role of the media in promoting access to justice through making court proceedings public cannot be emphasized enough. However, different modes of press access have been treated differently by courts in all jurisdictions for the very purpose of ensuring fair trial as well as maintaining integrity of the system of administration of justice. However, they argued that while the freedoms of expression and the press must be enjoyed, the right to fair trial must be keenly protected. In the exercise of both sets of rights the public at large is the ultimate beneficiary. The competing interests as to the administration of justice are seen in the eyes of the public as well not just the parties that are directly affected. In the present matter, the interests of justice would demand a balancing act of permitting the Application vs. the welfare of witnesses and effects on potential witnesses in future. In so far as the broadcasting takes away the rights of both the accused and the prosecution as well as the proper administration of justice by the Court, the State would submit consideration of this application in the negative. It is a continuation of a trial. If it were judgment delivery that would have been favourably considered by the State.

- 1.11 The State finally summarized that –

- (a) the paramount function of the courts is to ensure that justice is administered fairly and without prejudice. Nothing must be done to impede this and cameras should only be allowed into court if it can be

demonstrated that they operate in such a way as to ensure that this is the case;

- (b) limiting broadcasting of Court proceedings in not being unaccountable or hiding judicial conduct but rather safeguarding the integrity of the administration of justice and public confidence in the fairness of trials.
- (c) there is no set procedure in Malawi to regulate any permitted broadcasting to ensure unbiased and unedited broadcasting during witness testimony. What has been visited upon the Courts is broadcasting of delivery of judgment only;
- (d) the terms ‘public trial’ and ‘open court’ do not mean permitting broadcasting of Court proceedings;
- (e) at all times, whether or not broadcasting is to be allowed is the discretion of the presiding Judicial Officer as long as the interests of justice are considered as paramount in their determination;
- (f) were the Court to grant that the application, there are several practical issues that must be considered including but not limited to –
 - (a) how the Cameras would be installed in the Court room to ensure that the persons so recording do not obstruct members of the public who are actually in the Courtroom;
 - (b) how the integrity of the recordings would be secured;
 - (c) whether the recordings so conducted would be ever part of the Court record or would be excluded from the court record as it has not been recorded under the custody and control of Court officials;
 - (d) whether the Application once granted only applies to the Applicants and excludes other members of the media who have not lodged their applications although the application of Section 35 and 36 of the Constitution is not limited to the Applicants alone – this is of particular importance as there are currently too many members of the Media with Broadcasting capabilities and their employees alone could fill the Court room and there is the danger that their full ensemble actually act as a distraction of ordinary court proceedings hence might not serve the interests of justice.

1.12 The State conceded that ultimately being defence stage, the Court is better placed to determine where the interests of justice lie without the State coming out with an actual position either for or against. The State’s plea would only be that should the Court grant the request, very strict rules must be placed to ensure the integrity of the recordings and what use they can be put to after the day in addition to any other rules that the Court may deem appropriate.

1.13 The Legal Aid Bureau responded on behalf of the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, and 11th accused through an affidavit sworn by Trouble Kalua. They argued that the criminal proceedings have indeed attracted significant public interest, since they commenced on 23rd August 2018 including a ruling for plea and

directions. Further, the matter has been in Court for hearing so many times, having initially been set down as a 10 (ten) day trial from 8th October, 2018 to 19th October 2018, thereafter as a 5 (five) day trial from 26th November 2018 to 30th November 2018, and again as a 5 (five) day trial between 5th March 2019 to 8th March 2019 at which time the defence case was expected to commence but did not do so. Additionally, the prosecution already closed its case, having paraded a total of thirteen (13) witnesses herein.

- 1.14 The Defence argued that the Court has inherent powers to regulate its own procedure where the same has not been laid down by statute as such media houses can only capture motion or still images and audios of Court proceedings with express leave of the Court in which those proceedings are being conducted as stated in *Oswald Lutepo* case. Furthermore, in the determination of any criminal charge against any person, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law and they shall be presumed innocent until proven guilty by a competent Court of law as per section 42 (2) (f) of the Constitution. Mike Molan in his 4th Edition of Cases and Materials on Criminal Law stated that in any trial, the press or the public may be excluded from all or any part of the proceedings in the interests of morals, public order or security, where the interest of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.
- 1.15 These proceedings have attracted public interest from the time of the alleged commission of the crimes, the commencement of trial and throughout the conduct of the prosecution's case. The Applicant never showed any interest to cover the proceeding whatsoever. The entire prosecution's case that included the said 13 (thirteen) prosecution witnesses was never conducted in front of TV Cameras or Audio Recorders. As such to subject the accused persons only to a trial in front of the cameras when the prosecution witnesses were never subjected to the same treatment heavily compromises the accused persons right to a fair trial. This application for leave therefore, coming at a time when the accused persons are about to testify, smacks of bad faith. It cannot be justified by reference to the Applicant's statutory or constitutional mandate. The application would have made sense and indeed the Applicant would have demonstrated good faith and impartiality in the dissemination of information to the public if it were made at the beginning of the proceedings. Viewers would have had the benefit of hearing or viewing both sides of the story. As it is the application cannot be justified on the ground of public interest.
- 1.16 The right to a fair trial would entail equal treatment in matters affecting the conduct of the case to both parties to the proceedings. The Applicant never beamed the prosecution's case. State witnesses were never subjected to the extra pressure of having to testify live on national TV and radio. To subject the accused persons only to such scrutiny amounts to procedural unfairness. It would be tantamount to a breach of the accused persons' right to a fair trial. There is no justification for subjecting the accused persons only to such added pressure when the prosecution witnesses testified freely. This would make a fair

trial unlikely herein. As conceded by all parties, the allegations herein are sensitive. Any broadcast of these proceedings would have to take into account the sensitivity of the allegations. There is therefore a high likelihood that uncensored beaming of the proceedings herein may ignite public fury and anger thereby compromising the conduct of the proceedings. The accused persons herein are to be presumed innocent until judgement herein. Owing to the sensitive nature of these allegations the security of the accused persons herein would be jeopardized by a live bearing of the proceedings. And in the event of their acquittal, the accused persons would find it extremely difficult to reintegrate into society and proceed with a normal and productive life. The risk of their communities taking matters into their own hands cannot be downplayed. Additionally, owing to the sensitivity of the allegations herein, exposing the accused persons' identities in this manner has the likelihood of compromising their security and chances of reintegrating into society in the event that they are acquitted of the charges herein and this is not an appropriate case in which the leave sought ought to be granted. They prayed that the motion be dismissed.

2.0 COURT'S DETERMINATION

- 2.1 Let me state at the onset that this Court appreciates the application by Malawi Broadcasting Corporation as it brings to the fore issues of what their role in Malawi's democracy is. Furthermore, the application is further appreciated as it highlights the need for reporting on issues of national importance and the Court is glad that MBC are taking issues of the killing and abductions of persons with albinism in Malawi which has been ongoing for a long time but serious reporting on the issue started less than five (5) or six (6) years ago. The Court notes that the more a public broadcaster with national coverage raises issues about these issues, as a country, we might begin to see changes that we as a nation and citizens are hoping for.
- 2.2 The Court has noted that the Applicant under the Constitution has been guaranteed fundamental freedoms as the press under section 36. Furthermore, they have freedom of expression as provided for under section 35. These freedoms plus the licence granted to them under the Communications Act as well as their own statutory obligations under the Broadcasting Corporation Act gives them power to broadcast on various issues including expressing their opinion on such issues. However, I would like to raise one issue that this Court did not appreciate in their application where they insinuated that the other media reports on the case have been misleading as such theirs is not and that should be one of the reasons this Court should grant them leave. Such disparaging statements on other media is uncalled for and not in good taste.
- 2.3 However, aside from the constitutional freedoms which they are asserting herein includes the right to an opinion which this Court has no power over and more so if they are allowed to live broadcast as there are no safeguards where statements are made in court which this Court will disregard or have withdrawn. Therefore, if such statements make their way into the public, they will remain there for perpetuity but would have been struck off from the court record. This position

is clearly echoed in the *South African Broadcasting Corporation Limited* case and it is the duty of this Court to ensure that it safeguards the interests of everyone and more so the persons involved in the case from the victims, family members, witnesses, prosecutors, defence counsel as well as the accused persons.

- 2.4 It should be stressed that Malawian law has fundamentally ensured that in terms of the justice system, that cases are publicly handled with the exception of those exempted under the Criminal Procedure and Evidence Code or other laws or under the Court's inherent jurisdiction. This particular case has been open to the public as well as the media from its commencement. The Applicant was not stopped from reporting on the case nor barred from attending the proceedings as such a request for live broadcasting of the proceedings or the judgment at this stage was rather surprising. This Court agrees with the sentiments that publicity is the very soul of justice and it is the keenest spur to exertion and the surest of all guards against improbity as per Lord Woolf in *R v Legal Aid Board* [1998] 3 W.L.R. 925 where he was quoting Bentham in *The Works of Jeremy Bentham*, Volume 9 at page 49.
- 2.5 In conclusion, this Court agrees with the State's argument that the primary and most important role and duty of courts including to ensure that justice is administered fairly and without prejudice. This Court believes this is a fundamental aspect of our justice system. Furthermore, the safeguarding of the justice system in that there should be nothing which should hamper, impede, tamper, destroy or distort the delivery of justice. It is therefore this Court's considered opinion that allowing Malawi Broadcasting Corporation's request will definitely interfere with the proceedings which have reached an advance stage and which is the most critical one in terms of the right to fair trial for the persons accused as the State has finished its case.

3.0 CONCLUSION

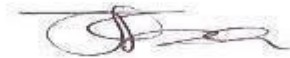
- 3.1 The Court has carefully considered the application by Malawi Broadcasting Corporation to publicly air the proceedings in this matter through their television and radio stations. The Court appreciates that MBC have a statutory duty to inform Malawians on issues of national interest. Arguably, the disappearance and killing of persons with albinism is such an issue. However, it is interesting that they have decided to make this request so late in the trial where even the public will not have had access to the initial part of the trial. This court has been allowing journalists to report on the case since the matter commenced last year. I should highlight that this Court values press freedom however in this instance, this Court agrees with the Defendants that granting such an application would not be in the best interest of their case.
- 3.2 Accordingly, this Court hereby denies Malawi Broadcasting Corporation, the rights to live broadcast the remaining parts of this criminal trial however, they

are free to continue to monitor and report on the proceedings as it is being done by all other journalists. My order during pleas and directions to the press of ensuring the integrity of the proceedings which I made on 23rd August, 2018 still stand.

- 3.3 Let me state that this ruling should not be misunderstood to suggest that the court may not, in appropriate cases, grant such an application. This application was dealt with in the circumstances that were prevailing herein, which was an application to be allowed live broadcasting after the State had finished its case which forms a crucial part. It is this Court's considered opinion that courts in Malawi are amenable to allowing such requests for example in cases involving election involving a presidential dispute. Such an application may necessarily be granted as was the case in Kenya because the whole country is a directly interested party.

I hereby order accordingly.

Made in Chambers on 3rd day of April, 2019 at Zomba.



Z.J.V Ntaba
JUDGE