THE REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONSTITUTIONAL CAUSE NO. 5 OF 2015
[Being Criminal Case No. 444 of 2015 at Blantyre Magistrates Court]

BETWEEN:

MAYESO GWANDA……APPLICANT

-AND-

THE STATE…….....RESPONDENT

PARALEGAL ADVISORY SERVICES INSTITUTE……..AMICUS CURIAE

LEGAL AID……AMICUS CURIAE

CENTRE FOR HUMAN RIGHTS

EDUCATION, ADVICE AND ASSISTANCE……..AMICUS CURIAE

CORAM: DR. MTAMBO, KALEMBERA AND NTABA, JJ
Mambulasa, Counsel for the Applicant
Ms. Itimu and Chakaka-Nyirenda, Counsel for the Respondent
Kalua, *Amicus Curiae* –Legal Aid Bureau
Maele, *Amicus Curiae*- Centre for Human Rights Education, Advice and Assistance (CHREAA)
Mrs. Jumbe, *Amicus Curiae*- Paralegal Advisory Services Institute (PASI)
Gondwe, *Amicus Curiae* – Malawi Law Society
Ms. Chimang'anga, Court Clerk
Mrs. Pindani, Court Reporter

JUDGMENT

Dr. Mtambo, J

Background

The applicant was arrested by the Malawi Police Service at Chichiri in the City of Blantyre in the Republic of Malawi on 20 March 2015 at around 4:00 a.m. and charged with the offence of being a rogue and vagabond contrary to section 184(1)(c) of the Penal Code. A rogue and vagabond is defined as including:

> "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".

In its totality, Section 184 of the Penal Code provides that:

"(1) The following persons—

(a) every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;

(b) every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself;

(c) every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose;

(d) every person who, without the prior consent in writing in that behalf of the District Commissioner, collects or makes any appeal for subscriptions of money in any public place in such District Commissioner's District for any purpose;

(e) every person who has collected money by subscription in any

place in Malawi, who fails to produce to a District Commissioner or to publish in a newspaper named by a District Commissioner, correct accounts of any money received by such subscription and of the disposal thereof, when called upon so to do by such District Commissioner,

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

Provided that paragraphs (d) and (e) shall not apply to—

(i) any person or to the duly authorized representative of any organization who has received the written consent of the Commissioner of Police to collect, or make any appeal for, subscriptions of money for religious or charitable purposes.

(ii) any person authorized to collect, or make any appeal for subscriptions of money, under the provisions of any by-law of a local authority which is in force in Malawi:

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

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

Section 184 of the Penal Code is traceable from colonial times and is premised on Section 4 of the English Vagrancy Act 1824 which covered a broad range of conduct

amounting to being a rogue and vagabond. The list included pretending or professing to tell fortunes, wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any visible means of subsistence, and not giving a good account of himself or herself; willfully exposing to view, in any street, road, highway, or public place, any obscene print, picture or other indecent exhibition; willfully, openly, lewdly and obscenely exposing his person in any street, road or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female; wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms; every person going about as a gatherer or collector of alms or charitable contributions under any false or fraudulent pretence; running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they or any of them shall become chargeable to any parish; having in his or her custody or possession any picklock key, crow, jack, bit or other implement, with intent feloniously to break into any dwelling house, warehouse, coachhouse, stable or outbuilding or being armed with any gun, pistol, hanger, cutlass, bludgeon or other offensive weapon, or having upon him or her any instrument, with intent to commit any felonious act.

The ordinary English definition of a rogue is a dishonest or unscrupulous person. A vagabond is someone with no fixed home who lives an unsettled wondering life (see the case of **Stella Mwanza and 12 Others v. Republic**, Confirmation Criminal Case No. 1049 of 2007 (unreported)). It is therefore clear that the legal definition of a rogue and vagabond in section 184 of the Penal Code is narrower than the ordinary English one. Obviously, it could never be a crime for one to be merely dishonest or unscrupulous or a wandering person without a fixed place of abode and no more. This is so because for a criminal offence to be present, one must commit an unlawful act (*actus reus*) and have a guilty mind (*mens rea*).

The applicant claims that he is a street vendor by trade and was carrying plastic bags from at the time of his arrest which he was on his way to sell in Limbe where he plies his trade. The police officers on patrol asked him to explain where he was going. He informed them that he was walking to Limbe from Chilomoni to sell plastic bags. They did not believe him hence the arrest. He was told that he would have to explain his case at the police station.

The police kept the applicant in custody at Soche Police sub-station in Blantyre until 23 March 2015 when he was taken to the Blantyre Magistrates Court. He was charged with the offence of being a rogue and vagabond contrary to section 184(1)(c) of the Penal Code. He was subsequently released on bail pending trial on 25 March 2015. On the scheduled day, the trial was stayed pending the determination of a Constitutional Petition filed by the applicant. On 3 June 2015, the matter was certified by the Chief Justias a constitutional matter to be tried by three judges in terms of section 9(3) of the Courts (Amendment) Act, 2004, hence the present proceedings.

It is contended by the applicant that section 184(1)(c) in itself and in its effect violated his constitutional rights, including his rights to dignity; freedom from inhuman and degrading treatment and punishment; freedom and security of person; freedom from discrimination and equal protection of the law; privacy; and freedom of movement.

It must be noted that vagrancy laws were introduced in Africa and the commonwealth by the English colonial masters presumably to maintain law and order for their smooth rule over the colonies and protectorates. These offences were introduced through a model criminal code drafted by the British colonial office and as already indicated in this judgment, based on the wording of the English Vagrancy Act of 1824. These were in 1916 for Nigeria, 1934 for the Gambia, 1934 for Malawi,

1930 for Zambia, 1950 for Uganda, 1964 for Botswana, 1955 for the Seychelles, and 1930 for Tanzania.

Most of the colonies and protectorates now have new constitutional orders and thus it is argued that these vagrancy laws are now dated.

Four *amicus curaei* were give leave to join the case. They are Mr. Kalua representing Legal Aid Bureau, Mr. Maele representing Centre for Human Rights Education, Advice and Assistance (CHREAA), Mrs. Jumbe representing Paralegal Advisory Services Institute (PASI), and Mr. Gondwe representing the Malawi Law Society. They all arguments in support of the applicant. Apart from the state itself, no *amicus curaei* supported the maintenance of the law although it is clear that this law must be popular with the business community particularly in urban areas such as Limbe and members of the general public as it is common knowledge that the enforcement of this law gives them a sense of security.

The applicant, the state and the four *amicua curaei* all filed skeletal and in the case of the state supplementary skeletal arguments as well which they adopted at the hearing. In addition all sides were given time to highlight the salient features of their arguments. The Court is indebted to their extensive and thorough research.

Applicable law, Arguments and Discussion

This action is brought in the form of a constitutional challenge. This Court has mandate under the section 5 of the Constitution to declare any law invalid if it is inconsistent with the Constitution. It provides:

> "Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid."

Section 46 of the Constitution provides that

> " (1) Save in so far as it may be authorized to do so by this Constitution, the National Assembly or any subordinate legislative authority shall not make any law, and the executive and the agencies of Government shall not take any action, which abolishes or abridges the rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall, to the extent of the contravention, be invalid."

When interpreting the Constitution, Section 11 of the Constitution enjoins this Court as follows:

> " (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.
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> (2) In interpreting the provisions of this Constitution a court of law shall--
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> > (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.
> >
> > …"

It was held in the Privy Council case of **Minister of Home Affairs and Another vs Fisher and Another** [1979] 3 All E.R. that constitutional approach calls for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms, thus, to treat a constitutional instrument sui generis, calling for

principles of interpretation of its own, suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law.

Section 211 of the Constitution provides:

> "(1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by an Act of Parliament.
> (2) Binding International agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.
> (3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic."

Malawi ratified the *International Covenant on Civil and Political Rights* (ICCPR) on 22 December 1993 and the *African Charter on Human and Peoples' Rights* (ACHPR) on 17 November 1989. Nyirenda J. (as he then was) in **In the matter of David Banda (a male infant)** [2008] MLR 1 stated that Malawi has chosen to be bound by the international treaties it ratified. The judge went on to say at page 5 that:

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

Therefore, in the determination of this matter, I have considered comparable foreign case law from common law countries such as Canada, the United States of America and Kenya as well as South Africa. I have also drawn insight from international agreements, conventions and charters to which Malawi is signatory and which qualify

to be applied. This is the case because the Court has to pay attention to the time when the international agreement was entered into *vis a vis* the commencement of the Constitution and what an act of parliament may provide with respect thereto.

The Right to Dignity

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." According to section 19(1) of the Constitution, this right is inviolable.

The applicant asserts that as he is engaged in the business of selling plastic bags and as such, wakes up early in the morning to make his way to the places where he sells his goods, his arrest and detention in terms of section 184(1)(c) of the Penal Code without proof of him having committed or being about to commit any offence violated his inherent right to dignity. Reliance is placed on the South African Constitutional Court case of **S v Makwanyane and Another** 1995 (3) SA 391 (CC) which abolished the death penalty in which O'Regan J. held at para 507A that

> "Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights…"

Learned counsel for the applicant Mr. Mambulasa has submitted that many jurisdictions have elaborated on the importance of the presumption of innocence in upholding the right to dignity and protecting citizens from arbitrary arrests. In Canada, the right to dignity has been held to require a State to be able to prove the guilt of an accused. The presumption of innocence is stated to be a hallowed

principle lying at the very heart of criminal law. It is integral to the general protection of life, liberty and security of the person

The Right to Freedom from Inhuman and Degrading Treatment and Punishment

Section 19(3) of the Constitution provides that no person shall be subjected to cruel, inhuman, or degrading treatment or punishment and according to Section 45(2)(b) of the Constitution, this is a non-derogable right. The right is also entrenched in international and regional treaties which Malawi has ratified such as Article 7 of the International Covenant on Civil and Political Rights and the United Nations' Human Rights Committee.

Article 5 of the African Charter on Human and Peoples' Rights, 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."

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 observed that being detained arbitrarily, not knowing the reason or duration of detention, is itself a mental trauma. The High Court of Kenya in **Anthony Njenga Mbuti & 5 Others v Attorney General & 3 Others** [2015] Constitutional Petition No 45 of 2014 considered the Peace Bond provisions to be a class of crimes that subjects citizens

to inhuman and degrading treatment because there is normally no evidence of suspects actually committing a crime. This negates constitutional safeguards.

The applicant asserts that the broad ambit of section 184(1)(c) of the Penal Code resulted in him being subjected to inhuman and degrading treatment and punishment. By arresting him without cause when he was going about what is a normal activity for street vendors in Malawi and subjecting him to detention for three days, the police's application of section 184(1)(c) of the Penal Code was demeaning and humiliating.

Learned counsel for the applicant Mr. Mambulasa submits that 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 (see **Floyd and Others v the City of New York** 08 Civ. 1034 (SAS)), 2013. Even if detention is only for a short period, the harm done to the individual and his or her family is significant, and includes stress, financial hardship linked to loss of income, transport to the police station and court, fines; and enduring inhuman conditions in detention with a subsequent impact on health.

The Right to Freedom and Security of Person

Section 19(6) of the Constitution provides that

> "Subject to this Constitution, every person shall have the right to freedom and security of person, which shall include the right not to be-
>
> (a) detained without trial;
>
> (b) detained solely by reason of his or her political or other opinions; or

(c) imprisoned for inability to fulfill contractual obligations."

The matters alluded to in this section denote arbitrariness. The Human Rights Committee has defined arbitrariness in the case of **Mukong v. Cameroon** Communication No. 548 of 1991 more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of the law. In the case of **Board of Regents v. Roth** 408 US 564, the United States Supreme Court held that liberty is a broad and majestic term, which is dynamic and changes in accordance with the experiences of the society. The right to liberty includes freedom from arbitrary arrest.

The applicant contends that his arrest and detention was arbitrary and violated this freedom.

The Right to Freedom from Discrimination and to Equal Protection of the Law

Section 12(1)(e) of the Constitution provides that

> "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..."

Discrimination in any form is prohibited by Section 20(1) of the Constitution. The section provides that all persons are, under any law, guaranteed equal and effective protection against discrimination on various grounds, including sex and social status. This section should be read with section 41(1) of the Constitution which provides that every person shall have the right to recognition as a person before the law

Article 3 of the African Charter on Human and Peoples' Rights provides that every individual shall be equal before the law and shall be entitled to equal protection of the law.

The African Commission, in **Zimbabwe Lawyers for Human Rights & IHRD in Africa v Zimbabwe** (2009) AHRLR 268 (ACHPR 2009) 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 of the Charter. 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.

It is submitted that section 184(1)(c), in effect, limits the applicant's right to equal protection of the law and his right not to be discriminated against as it provides the police with an unfettered power to arrest individuals, and exposes the applicant and others in his position, to discrimination based on their economic status in society. In the case of **Somanje v Somanje and Others** [1999] MLR 400 (HC), Ndovi J. (as he then was) observed that the right to equality under the law is an absolute right and it cannot be limited or restricted in terms of section 44(2).

In **Anthony Njenga Mbuti's case** (*supra*), Mumbi Ngugi J. linked the practice of profiling by police to a violation of the right to equal protection before the law: He asked how it could be permissible with respect to mere suspicion that because there is lawlessness and crimes committed in a particular locality, the police can arrest, and the court lock up, persons on mere suspicion that they are likely to commit crimes. He observed that this leads to the worst form of profiling, that those who appear suspicious because of their poverty or their economic status, should be rounded up, taken to court with no evidence of a crime being committed, and yet end up in prison. He concluded that the provisions of the Kenya the Criminal Procedure Code were arbitrary and discriminatory and were unconstitutional and null and void.

Similar concerns have been echoed in our courts in cases such as **Republic v Balala** [1997] 2 MLR 67 (HC) and **Stella Mwanza and 12 Others v Republic** *(supra)*. The latter case involved thirteen women who were arrested in rest-houses during a police sweep. 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. The court commented that surely, the law could not have intended to criminalise mere poverty and homelessness more especially in a free and open society. It could never be a crime for a person to be destitute and homeless. And if a person is homeless he or she is bound to roam around aimlessly. The Court opine that one would have thought it becomes State responsibility to shelter and provide for such people than condemn them merely on account of their lack of means. The Court cautioned that the charge of rogue and vagabond could be used to oppress poor persons who are not criminals. The same view was taken in **Edwards v People of State of California** 314 U.S. 160 (1941) where it was stated that we should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a State to test, qualify, or limit his rights as a citizen of the United State. The mere state of being without funds is a neutral fact – constitutionally an irrelevance, like race, creed or colour.

The applicant submits that the enforcement of rogue and vagabond offences which allow police wide discretion to arrest, inevitably leads to arbitrary arrests which are influenced by police assumptions of criminality based on biases relating to poverty, gender, race, ethnicity, place of origin and social status. This amounts to indirect discrimination as it has a disproportionate effect on marginalised groups in society.

The Right to Privacy.

Section 21 of the Constitution provides that

> "Every person shall have the right to personal privacy, which shall include the

right not to be subject to--

(a) searches of his or her person, home or property;

(b) the seizure of private possessions; or

(c) interference with private communications, including mail and all forms of telecommunications."

The right is also protected in Article 17 of the International Covenant on Civil and Political Rights.

It is submitted on behalf of the applicant that the right to privacy is infringed when persons who are going about their daily activities are targeted to be questioned about their private life, and to have their person searched prior to or during an arbitrary arrest. In the case of **DPP Cape of Good Hope v. Bathgate** CCT 46 OF 2000, the Constitutional Court of South Africa held that in most cases when one's person or property is searched, or when one's possession are seized or communication intercepted, the right to privacy will be infringed.

I agree with the state's submission that as there is no evidence that the applicant's possessions or papers were searched or seized or intercepted, this issue is moot in terms of the cases of **Maziko Charles Sauti-Phiri v Privatisation Commission**, Constitutional Cause No 13 of 2005 and **James Phiri v Muluzi and Another**, Constitutional Case No 1 of 2008 (unreported).

The Right to Freedom of Movement

Section 39(1) of the Constitution provides that

"Every person shall have the right of freedom of movement and residence within the borders of Malawi."

A similar protection is in Article 12 of the International Covenant on Civil and Political Rights and Article 12(1) of the African Charter.

The applicant contends that section 184(1)(c) of the Penal Code violates his right to freedom of movement in that he was arrested and detained when going about his daily business. It is submitted on his behalf that ironically, had the applicant been found in a motor vehicle, it is unlikely that he would have been arrested under section 184(1)(c). On this score, I must point out that it is common knowledge that even people in motor vehicles are stopped and questioned at police road blocks and where necessary, arrested. The reason why they are not disproportionally arrested is because they are able to provide identities in the form of driving licences. People of the applicant's status do not normally have any form of identification. This is compounded by the fact that we do not have national identification in Malawi. As such, people are penalized for the state's own failure to roll out a robust national identification programme.

As is clear in this judgment, the superior courts have shown discomfort with the wide ambit of rogue and vagabond offences and have sought to narrowly interpret them to save them from invalidity. In addition, courts have emphasised that a conviction under rogue and vagabond offences would only be proper where all the elements of the offence have been proved. As such, the High Court, when reviewing convictions under section 184 of the Penal Code, has expressed concern that magistrates frequently allow persons to plead guilty without understanding what they were pleading to or acknowledging all the elements of the offence, and often in instances where there is no attempt to individualise the charges against a group of persons accused of an offence under section 184. 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. In **Republic v Luwanja and Others** [1995] 1 MLR 217, the High Court overturned a conviction under section 184(1)(c) on the basis that there was no evidence that the accused was loitering for an illegal purpose- It was held that the

accused might have been poor, with holes in his pocket, but this unfortunate state of affairs, and often without choice, does not make them criminals.

In **Thomas Brown v. Republic** Criminal Appeal No. 24 of 1996(unreported), the police, following a series of housebreaking in Mwanza, decided to arrest everyone that was moving around aimlessly and charged them with being rogue and vagabond under Section 184(1)(c) of the Penal Code. Justice Tambala (as he then was) in quashing the conviction, stated:

> "Section 184(1)(c) creates an offence of rogue and vagabond if a person is found on or near a building, road or highway or public place and there are circumstances which suggest that the person is there for an illegal or disorderly purpose. It is not an offence merely to be found, during night, on or near a road, highway, premises or public place...It would be wrong and unjust to accuse such a person of committing an offence under Section (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; and
> 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. In light of the new Constitution, offences such as that of rogue and vagabond need to be reviewed as they appear to violate the Constitution...Merely to be found during night at public premises, road or market should not automatically lead to the

conclusion that the person was there for an illegal or disorderly purpose."

Another case in point, is that of **Chidziwe v Republic**, Criminal Appeal 14 of 2013 (unreported), where a person was arrested under section 184(1)(c) because he was found at an odd hour with a bottle of beer. The High Court overturned the conviction and held that there was no evidence that holding a bottle of beer implies an illegal purpose. In the case of **Kaipsya v. Republic** 4 MLR 283 Benson J. in setting aside the appellant's conviction and sentence said at page 284 as follows:

> "In my view, **the words in s.184(4) of the Penal Code – "Under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose" mean 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…" (emphasis applicant's)

In **Republic v. Ganizani and Four Others,** Confirmation Case No. 290 of 1999 (unreported) the accused were found in a classroom sleeping and charged with rogue and vagabond on suspicion that they were in the classroom for an illegal or disorderly purpose. Mtambo J. (as he then was) said as follows:

> "It would not be right to conclude that merely because one cannot give a good account of oneself or has no means of subsistence the he she is up to an illegal purpose. In any case the accused were found sleeping so that the conclusion that they were, or might have been there for any of those purposes might be even harder to sustain or justify than otherwise."

In the case of **Rep v. Balala** [1997] 2 MLR 67, a juvenile was found walking around in Nkhatabay trading centre by a policeman during a patrol who called and questioned him and came to the conclusion that he had no permanent home and no visible means of livelihood. He was charged with the offence of rogue and vagabond contrary to Section 184(1)(c) of the Penal Code and was convicted by the Magistrates Court. The High Court in quashing the conviction said that it had examined the facts which were presented before the magistrate's Court and it was not very clear for what purpose the juvenile was found wandering about within the trading centre. When he was questioned by the Police he said that he came to look for employment. It is possible that the juvenile was a person who needed care and protection. He was a needy person. The Court expressed concern that the charge of being rogue and vagabond could be used to oppress needy persons who are not criminals.

Mr. Thabo Nyirenda for the state has submitted that there is a presumption of constitutionality in the law and that the burden of proof is on the applicant to show that section 181(1)(c) of the Penal Code is unconstitutional. He relies on the cases of **Attorney General v Malawi Congress Party and Others**, [1997] 2 MLR 181 (SCA) and **Ram Dalmia v Justice Tendolkar** ALR 1958 SC 538. On the other hand, Mr. Mambulasa for the applicant submits that the burden of proof is on the applicant to show that his rights have been violated. However, once the applicant has established a *prima facie* violation of his rights, the burden will shift to the respondent to justify that the offence is a justifiable limitation of the rights in the Constitution. The Canadian Supreme Court, in **R v Oakes R v Oakes** [1986] 1 SCR 103 held that the onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.

I find that there is no meaningful divergence between the two positions. The burden initially rests on the applicant but later shifts to the state once a *prima facie* case has

been made.

It has been submitted by learned counsel for the applicant Mr. Mambulasa that where the constitutional right is derogable, the invocation of section 44 of the Constitution requires a consideration of the following: First, is the violation prescribed by a law of general application? Secondly, is the violation reasonable? Third, does the violation meet international human rights standards? Fourth, is the violation necessary in an open and democratic society? Fifth, does the violation negate the essential content of the right? On the first point, he relies on the Canadian Supreme Court decision of **Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component** [2009] 2 S.C.R. 295. On his part, Mr. Thabo Nyirenda disagrees. He asserts that section 44 of the Constitution does not state that the law be of general application.

It is my finding that this disagreement is irrelevant and not useful as section 184(1)(c) of the Penal Code is an act of general application. It applies to the whole country and to everyone. It is not a directive. In **Ralph Mhone v. Attorney General** Misc. Civil Cause No. 115 of 1993 (unreported), it was held that a directive is not law no matter how seriously it is made.

Under the African Commission on Human and Peoples' Rights: Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, 2014, persons shall only be deprived of their liberty on grounds and procedures established by law. Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual.

Vagueness is an important factor in the determination of whether a law is constitutional or not. The standard for evaluating the vagueness principle was discussed in **Grayned v Rockford (City)** 408 U.S. 104 (1972) where it was stated

that if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited.

Another test which a law must satisfy to be constitutional is the proportionality test. This test has been articulated in the Canadian case of **R v Oakes** [1986] 1 S.C.R. 103 as consisting of three components: First, the offence must be rationally connected to its objective and not be arbitrary, unfair or based on irrational considerations; Secondly, the offence, even if rationally connected to the objective, should impair as little as possible the right or freedom in question; and third, there must be proportionality between the effects of the offence which are responsible for limiting the right or freedom, and the objective which has been identified as of sufficient importance to warrant overriding a constitutionally protected right.

The contemporary justification for retaining the rogue and vagabond offences is that of crime prevention. CHREAA and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-related Offences in Blantyre, Malawi*, at page 66. Interviews conducted with police on the use of section 184 indicated that police generally viewed section 184 as a useful tool of law enforcement and crime prevention and protection of the public which, in their opinion, had a deterrent value. But there is no evidence to this effect. It is therefore the applicant's argument and that of learned counsel Mrs. Jumbe that this shows that section 181(1)(c) of the Penal Code does not pass the

proportionality test.

The 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 (unreported), *per* Chikopa J.A., it was stated:

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

Learned counsel Mr. Maere, *amicus curiae* representing CHREAA submits that the best way to deal with security concerns is by using other provisions of the Penal Code and the Criminal Procedure and Evidence Code. Learned counsel Kalua, *amicus curiae* representing the Legal Aid Bureau implores this Court that this opportunity to declare section 184(1)(c) of the Penal Code unconstitutional should not be wasted. On his part, learned counsel Mr. Gondwe, *amicus curiae* representing the Malawi Law Society submitted that section 184(1)(c) of the Penal Code is unconstitutional as its ambiguities have been used to disadvantage marginalized people.

In defence of section 184(1)(c) of the Penal Code, the state has submitted that clearly, the section does not provide for arbitrary arrests. It does not state that marginalized groups should be targeted. If arbitrary arrests have been made under the said provision and convictions made erroneously, the issue is to do not with the provision but rather with lack of understanding thereof by the enforcers, notably the

police and the Magistrates Courts. The state also submits that it is not only section 184(1)(c) of the Penal Code which is prone to abuse in its enforcement. Other laws such as road traffic laws can also be abused. This does not mean that these laws must be discarded. The state suggests that civic education is the answer. Yet a lot of government and donor money has already been spent on the much touted police reform with debatable results to show for it. And the superior courts in Malawi have been reversing a lot of erroneous magistrate convictions in this regard which by now should have served good lessons to the lower bench. It has also been argued that section 184(1)(c) is necessary in an open and democratic society.

Conclusion

The applicant has made out a case that section 184(1)(c) of the Penal Code and its application violated his constitutional right to dignity because his right to be presumed innocent was negated. His right to freedom from inhuman and degrading treatment and punishment was violated in that he was arrested on unsubstantiated grounds and kept in custody for three days. The experience was demeaning and humiliating. The applicant's constitutional right of freedom from discrimination and equal protection of the law was infringed because the negation of this right does not only relate to the content of the law but its enforcement as well. These three rights are not derogable so that a consideration of whether section 184(1)(c) is reasonable and necessary in an open and democratic society and in conformity with international human rights standards is unnecessary. Violation of the right to privacy has not been established as there is no evidence that the applicant's person or papers were searched or his communications were intercepted or interfered with and the Court is not in the business of deciding moot issues or giving advisory opinions.

Section 184(1)(c)is overly broad as there is no reference to reasonable grounds as section 28 of the Criminal Procedure and Evidence Code does. This means that there is too much discretion left in the hands of the police and arguably the courts

as well. Parliament has a duty to provide law enforcers with clear and precise parameters within which to exercise their discretion to avoid leaving the determination of policy issues which are ordinarily the domain of the legislature into the hands of the judiciary and the police. It has become apparent through research work by CHREAA and SALC published in *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre*, Malawi (2013) at pages 64-67, the main reason for arrests under section 184(1)(c) of the Penal Code is to deal with persons found merely loitering at odd hours and common prostitutes who have on occasions suffered abuse as opposed to the preservation of law and order. Research by Women and Law in Southern Africa (WILSA) has shown that women not accompanied by men even at upmarket hotel drinking places have been harassed and yet men not accompanied by women have not been touched. Therefore, the application of section 184(1)(c) produces disproportionate results in many cases with respect to marginalized groups even though that may not have been the intention of the legislature. With respect to the applicant's constitutional rights of security of the person and freedom of movement which were violated but can be limited under section 44 of the constitution, section 184(1)(c) of the Penal Code is unreasonable, does not meet international human rights standards discussed in this judgment, and is not necessary in an open and democratic society.

The fact that the courts have tried to interpret the offence narrowly does not save section 184(1)(c) of the Penal Code from unconstitutionality. Even if the section should be read to include an element of intent, this is not the case in practice. I am not convinced by the argument of learned counsel for the state Ms. Itimu that intent can be implied from conduct as this concept has not been clearly articulated. The offence continues to be applied in an arbitrary manner. Some courts have even pronounced on the unconstitutionality of the section but have not struck it off the statute book presumably because they were not asked to do. These judges were not sitting as a constitutional court as we currently are although it is arguable that even

a single judge can dispose of constitutional matters in the same manner as three judges sitting as a constitutional court. Therefore, the time for action is now upon us to declare section 184(1)(c) of the Penal Code unconstitutional to alleviate the plight of marginalised groups.

Although there is no empirical evidence and it is debatable where the state needs to produce it, it is tempting to say that rogue and vagabond law is useful in the promotion of law and order and security and that is why it is still maintained in other modern democracies some with new constitutional orders like Malawi. Other countries have modified it to make the law specific and targeted and to remove too much discretion accorded to the police. As the state has rightfully observed, vagrancy laws still obtain in the United Kingdom albeit in a modified form and European Community law provides for the arrest of drug addicts. Perhaps, in the long term, our legislature could borrow a leaf from these countries in the drafting of a new vagrancy law for Malawi if they are so minded.

This Court's decision to invalidate section 184(1)(c) of the Penal Code should however not be misinterpreted to mean that the Court has tied the hands of the police and given licence to criminal elements who ravage in our country in the dead of night and early dawn hours armed to the teeth to harm, rob and kill innocent citizens some of who may be enjoying their constitutional rights to pursue economic activity unimpeded and sleep peacefully particularly in urban areas such as Limbe. Therefore, in the short term, the police can still arrest criminals but in a more investigative and/or targeted manner with respect to clear offences such as criminal trespass under section 319 of the Penal Code and attempts as well as under section 28 of the Criminal Procedure and Evidence Code which allows the police to arrest 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. As explained in Black's Law Dictionary, reasonable grounds refers to more than a bare

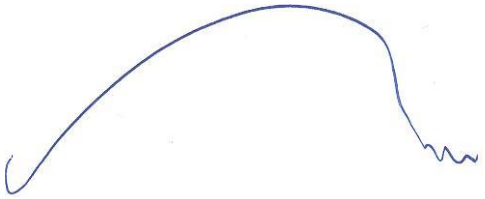
suspicion but less than evidence that would justify a conviction. And according to **Anthony Njenga Mbuti's case** (*supra*), the test is the reasonable man test.

Further, taking into account the requirement to avoid profiling, the police can still stop and question people to identify themselves in the application of section 28 of the Criminal Procedure and Evidence Code. It is therefore imperative that the executive arm of government rolls out a comprehensive national identification programme. But if the police display a heavy hand when conducting arrests under section 28 of the Criminal Procedure and Evidence Code as they have demonstrably done under section 184(1)(c) of the Penal Code, we could again find ourselves with another constitutional challenge that there is a lot of discretion in the hands of the police. It is therefore in the interest of the responsible executive organ of government to ensure that the vast amounts of money including donor funds spent on police reform to comply with the current democratic dispensation are well spent.

In the present case, there has been an admission by the applicant's representative and the *amicus curiae* that section 28 of the Criminal Procedure and Evidence Code is a better option to section 184(1)(c) of the Penal Code. This Court was not called upon to decide the constitutionality of section 28 of the Criminal Procedure and Evidence Code let alone the whole section 184 of the Penal Code. Moreover, the facts of the application do not involve the other provisions of section 184 of the Penal Code. Notably, except for section 184(1)(b) which lamentably criminalises being a suspected or reputed thief without visible means of subsistence who cannot give a good account of himself, the remainder of section 184 refers to specific offences and is not overly broad.

The application therefore succeeds.

Pronounced in Open Court this 10th day of January, 2017 at the High Court Principal Registry, Blantyre.



Dr. M.C. Mtambo

JUDGE