JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL REGISTRY)
JUDICIAL REVIEW CAUSE NO. 7 OF 2020

BETWEEN:

THE STATE

AND

THE INSPECTOR GENERAL OF POLICE ……. 1ST RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY ……... 2ND RESPONDENT

THE MINISTER OF FINANCE ……...……... 3RD RESPONDENT

EX-PARTE:

M.M ……..……. 1STAPPLICANT

A. K ……..…..……. 2ND APPLICANT

C.T. ……..……. 3RDAPPLICANT

E. S ……..……. 4TH APPLICANT

E.B ..……..……..... 5TH APPLICANT

A. M ..……..……..... 6TH APPLICANT

E. M. …..……....…….....7TH APPLICANT

D. K. ……..... 8TH APPLICANT

E. S. ……..…….... 9TH APPLICANT

E.W. ……..……. 10TH APPLICANT

M. K. ……..…….. 11TH APPLICANT

S. B. ……..…….. 12TH APPLICANT

D. T. ……..…….. 13TH APPLICANT

A. L. …….. 14TH APPLICANT

L. M. ..…….. 15TH APPLICANT

E. C. ……..…….. 16TH APPLICANT

F. C. ……..…….. 17TH APPLICANT

P.Y……..…… 18TH APPLICANT

WOMEN LAWYERS ASSOCIATION ……..…….. 19TH APPLICANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Messrs. Soko, Maluza and Makoka, Counsel for the Applicants
Mr. Chisiza, Principal State Advocate, for the Respondents
Mr. Henry Kachingwe, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

INTRODUCTION

1. This is this Court's judgement on two matters, namely:

   (a) an application by the Applicants for *"a sanction and striking-out of the defence, the Respondents having failed to comply with the Order of this Court to file and serve them the witness statements and skeleton arguments within 14 days from the 26th day of May 2020"* [hereinafter referred to as the "Application for Sanction"]. The Application for Sanction is brought under Order 2, r.3 and Order 14, r.5 of the Courts (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"]; and

   (b) the main case, that is, the judicial review proceedings.

BACKGROUND INFORMATION

2. On 27th January 2020, the Applicants filed an application for permission to commence judicial review proceedings.

3. The failures of the Respondents which the Applicants seek to be judicially reviewed are stated as follows:

> *"1. The failure of the 1st Respondent to put in place a credible system of ensuring that the officers of the Malawi Police Service, who had been deployed to M'bwatalika and Mpingu on the 8th of October, 2019 should discharge their duties in a manner that was not in violation of the Constitution and the Police Act, by amongst others:*
>
> *a) Resorting to sexual assault and rape to bring order and peace in the two areas, following the death of Superintendent Usuman Imedi.*
>
> *b) Resorting to physical abuse, plunder and emotional violence to bring order and peace in the two areas, following the death of Superintendent Usuman Imedi.*
>
> *2. The failure by the 1st Respondent to conduct prompt, proper, effective and professional investigations into the complaints of sexual assault and rape made by the Applicants including complaints of all other women and girls that were sexually molested, harassed, assaulted or raped by officers of the Malawi Police Service in M'bwatalika and Mpingu in Lilongwe District on 8th of October, 2019.*
>
> *3. The failure by the 2nd Respondent to advertise for the position of the Independent Complaints Commissioner and to appoint the Independent Complaints Commissioner and operationalize the Independent Police Complaints Commission as provided for under Section 133(2) of the Police Act.*
>
> *4. The failure by the 3rd Respondent to lay before the National Assembly for its approval a budget for the operation of the Independent Complaints Commission."*

4. The following reliefs are sought by the Applicants:

(a) a declaration that the failure of the 1st Respondent to put in place a credible system of ensuring that the officers of the Malawi Police Service (MPS) acted in accordance with the law amounts to torture, cruel, inhuman and degrading treatment and punishment (Hereinafter referred to as Relief No.1);

(b) a declaration that the conduct of officers of the MPS who were deployed to M'bwatalika and Mpingu by the 1st Respondent and

used sexual assault and rape to bring peace and order in the said areas, following the death of Superintendent Usuman Imedi, is unlawful, unreasonable and ultra vires the police powers under section 153 of the Constitution and section 34 of the Police Act (Hereinafter referred to as Relief No.2);

(c) a declaration that the conduct of officers of the MPS who were deployed to M'bwatalika and Mpingu who used sexual and assault and rape to bring peace and order in the said areas under the charge of the 1st Respondent, following the death of Superintendent Usuman Imedi violated the rights to dignity, equality and freedom from torture, cruel, inhuman and degrading treatment as provided under sections 19(1),19(3) and 20 of the Constitution for all the women and girls that were sexually assaulted and raped in the areas (Hereinafter referred to as Relief No.3);

(d) a declaration that the failure by the 1st Respondent to conduct prompt, proper, effective and professional investigations into the complaints of sexual assault and rape made by the Applicants including of all other women and girls that were allegedly sexually molested, harassed, assaulted or raped by officers of the MPS in and around M'bwatalika and Mpingu in Lilongwe District on 8th October, 2019 is unreasonable in the Wednesbury sense and in breach of the Applicants' legitimate expectations (Hereinafter referred to as Relief No.4);

(e) a declaration that the failure by the 1st Respondent to take steps to conduct prompt, proper, effective and professional investigations into the complaints of sexual assault and rape made by the Applicants including of all other women and girls that were allegedly sexually molested, harassed, assaulted or raped by officers of the MPS in M'bwatalika and Mpingu in Lilongwe District on 8th October, 2019 and failure to arrest the perpetrators violates their right to dignity, equality and access to justice as provided under sections 19, 41 and 20 of the Constitution (Hereinafter referred to as Relief No.5);

(f) a declaration that the failure by the 1st Respondent to take steps to conduct prompt, proper, effective and professional investigations into the complaints of sexual assault and rape made by the Applicants including of all other women and girls

that were allegedly sexually molested, harassed, assaulted or raped by officers of the MPS in M'bwatalika and Mpingu in Lilongwe District on 8th October, 2019 and failure to arrest the perpetrators amounts to dereliction of duty on the part of the MPS to respect and uphold human rights and freedoms and to provide for the protection of public safety and rights under Sections 15(1) and 153(1) of the Constitution respectively (Hereinafter referred to as Relief No.6);

(g) a declaration that the failure by the 2nd Respondent to advertise the position of the Independent Complaints Commissioner (hereinafter abbreviated as "ICC") and to appoint the ICC as provided for under section 133(2) of the Police Act is unreasonable in Wednesbury sense and in breach of the Applicants' legitimate expectations (Hereinafter referred to as Relief No.7);

(h) a declaration that the failure by the 2nd Respondent to advertise the position of the ICC and to appoint the ICC as provided for under section 133(2) of the Police Act amounts to breach of statutory duty and is unlawful and illegal (Hereinafter referred to as Relief No.8);

(i) a declaration that the failure by the 2nd Respondent to appoint the ICC under section 133(2) of the Police Act has hindered investigations of police actions against the 1st and 2nd Applicants and has the effect of promoting impunity on the part of officers of the MPS who sexually harassed, assaulted and raped the 1st and 2nd Applicants (Hereinafter referred to as Relief No.9);

(j) a declaration that the failure by the 2nd Respondent to appoint the ICC is perpetuating impunity on the part of officers of the MPS who commit crimes or commit acts of misconduct while on duty (Hereinafter referred to as Relief No.10);

(k) a declaration that the 1st and 2nd Respondents' inaction is a violation of the Applicants' right to access justice in terms of section 41 of the Constitution (Hereinafter referred to as Relief No.11);

(l) an order of mandamus requiring the 1st Respondent to take concrete steps to investigate and arrest the perpetrators of sexual

violence against the Applicants and all other women and girls that were sexually molested, harassed, assaulted and raped by officers of the MPS in M'bwatalika and Mpingu, Lilongwe District on 8th October 2019 (Hereinafter referred to as Relief No.12);

(m) an order of mandamus compelling the 1st Respondent to report to the court within 14 days or such period of time fixed by this court, all steps taken to investigate and arrest the perpetrators of sexual violence against the Applicants and all other women and girls that were allegedly sexually assaulted and raped by officers of the MPS in M'bwatalika and Mpingu in Lilongwe district on 8th October 2019 (Hereinafter referred to as Relief No.13);

(n) an order of mandamus compelling the 1st Respondent to within 14 days or such period of time fixed by this court, furnish the court with their occurrence book register of the contingent of their officers that were deployed to M'mbwatalika and Mpingu on 8th October 2019 (Hereinafter referred to as Relief No.14);

(o) an order of mandamus compelling the 2nd Respondent to immediately issue a public advertisement calling for nominations of qualified persons for the office of the ICC (Hereinafter referred to as Relief No.15);

(p) an order of mandamus compelling the 3rd Respondent to lay before the National Assembly for its approval a budget for the operation of the ICC (Hereinafter referred to as Relief No.16);

(q) if leave to apply for Judicial Review is granted, a direction that the hearing of the application for Judicial Review be expedited (Hereinafter referred to as Relief No.17);

(r) an order for compensation for violation of the constitutionally guaranteed rights of the Applicants in terms of section 46 (4) of the Constitution (Hereinafter referred to as Relief No.18);

(s) an order for effective remedy under section 41(3) of the Constitution (Hereinafter referred to as Relief No.19); and

(t) further or other relief as the Court may deem just (Hereinafter referred to as Relief No.20).

5. Having granted the Applicants permission to apply for judicial review, the application for judicial review was duly served on the respective Respondents on 10th February 2020.

6. On 12th March 2020, the Defendant filed the following Statement of Defence:

> *"1. The Defendants refer to the list of the Claimants in the Claimant's application for judicial review and contend that Women Lawyers Association do not have locus standi in these proceedings and during trial, the Defendants will seek an order dismissing their claim for costs.*
>
> *2. The 1st Defendant refers to paragraph 1 of the impugned decisions in the Claimants' application for judicial review and notes that the Claimants' claim has not been substantiated. The 1st Defendant therefore is not able to comment on the same and at trial, the Claimants will put to strict proof thereof.*
>
> *3. The 1st Defendant refers to paragraph 2 of the impugned decisions in the Claimants' application for judicial review and denies the contents thereof. The 1st Defendant contends that it carried out the investigations of the alleged violations of human rights and that the report is in the finalization stage.*
>
> *4. The 1st Defendant refers to paragraph 3 of the impugned decisions in the Claimants' application for judicial review and denies the contents therein and puts the Claimants to strict proof thereof. The 2nd Defendant contends that, contrary to the claims by the Claimants, it advertised for the position of the Independent Complaints Commissioner and is in the process of operationalizing the office of the Independent Complaints Commission*
>
> *5. The 1st Defendant refers to paragraph 1 of the impugned decisions in the Claimants' application for judicial review and denies the contents therein and at trial, the Claimants will be put to strict proof thereof.*
>
> *6. The Defendant repeat the foregoing paragraph and state that even if the 3rd Defendant did not provide for the said allocation, which is denied, Parliament can still operationalize the office of the Independent Complaints Commission just as it did with the Office of Declaration of Assets and Office of Legal Aid Bureau, which offices did not require allocation as the Claimants are trying to make the Court believe.*
>
> *7. The Defendants further believe that the Claimants have failed to clearly isolate issues that should go for further inquiry in judicial review.*

8. Consequently, the Defendants pray that the reliefs sought herein should be denied in their entirety.

9. Save as herein before expressly admitted, the Defendants deny each and every allegation of fact as if each were set forth and specially traversed seriatim.

***THEREFORE** the Defendants pray to this Honourable Court that the action herein be dismissed with costs."*

SCHEDULING CONFERENCE

7. Acting pursuant to Order 19, rule 25, of the CPR, a scheduling conference was set for 16th day of April 2020. The scheduling conference was conducted and the relevant part of the Order for Directions states thus:

"1. Issues for determination:

(a) whether or not there was failure by the 1st Respondent to put in place a credible system of monitoring the conduct of the officers of the Malawi Police Service, who were perpetrators of sexual violence and rape against the Applicants and if yes:

(i) whether that failure resulted in the violation of the Applicants right to dignity, equality and access to justice as provided for under sections 19 (1), 20 and 41 of the Constitution;

(ii) whether that failure resulted in torture, cruel, inhuman and degrading treatment and punishment towards the Applicants as proscribed under section 19(3) of the Constitution;

(iii) whether that failure is lawful and reasonable?

(b) whether or not there was failure by the 1st Respondent to take concrete steps to investigate and arrest the officers of the Malawi Police Service, who were perpetrators of sexual violence and rape against the Applicants? And if yes, whether the failure violates the Applicant's right to equality, dignity, access to justice and effective remedies as provided for under sections 19, 20 and 41 of the Constitution?

(c) Whether or not there was failure by the 1st Respondent to conduct prompt, proper, effective and professional investigations into the complaints of rape and sexual assault made by the Applicants and if yes:

(i) whether that failure was lawful and reasonable?

(ii) *whether the failure to arrest perpetrators amounts to dereliction of duty on the part of the 1st Respondent contrary to sections 153 and 154 of the Constitution?*

(d) *whether or not the failure by the 2nd Respondent to advertise and operationalize the ICC as provided for under section 133(2) of the Police violates the applicant's right of access to justice as provided for under Section 41 of the Constitution?*

(e) *whether or not the failure by the 2nd Respondent to advertise and operationalize the ICC as provided for under section 133(2) of the Police Act is unlawful and unreasonable?*

(f) *whether or not the failure by the 2nd Respondent to advertise and appoint the ICC under section 128 of the Police Act perpetuates acts of impunity by officers of the Malawi Police Service who commit crimes or act unlawfully in the discharge of duties?*

(g) *whether or not the failure by the 3rd Respondent to lay before the National Assembly for its approval of a budget for the operationalization of the ICC is unlawful and unreasonable?*

5. Evidence:

The parties will lead evidence in chief through adoption of witness statements

6. Witness statements:

(a) *the Claimants to provide names of their witnesses within 7 days of this order*

(b) *the Defendants to provide names of their witnesses within 7 days of this order*

(c) *the parties will file and serve signed witness statements at least 14 days before the date scheduled for trial*

7. Cross-examination:

The parties intend to cross-examine witnesses of the other parties

8. Pre-Trial Conference:

Pre-trial conference is set down for the ***26th day of May, 2020*** *at 11 o'clock in the forenoon*

9. Trial:

(a) *the trial shall be by a single judge sitting alone.*

*(b) the trial shall be for the duration of two full days, that is, on the **2nd day of June, 2020** and the **3rd day of June, 2020***

*(c) skeleton arguments to be filed and served by the **12th day of May, 2020***

*(d) paginated trial bundle (including skeleton arguments) to be agreed and lodged by the **19th day of May, 2020***

10. Deadlines

Counsel are advised that all of the deadlines established by this Trial Scheduling order are firm deadlines. Failure to meet these deadlines, absent good cause shown, may result in the Court refusing to allow extension regardless of the consequences."

WITNESS STATEMENTS

8. The Applicants complied with the Order of Directions by, among other matters, filing with the Court seventeen witness statements. The statements contain various accounts of the pain, distress and hardship that the Applicants suffered at the hands of some members of the MPS. To better appreciate what actually took place, I have randomly selected accounts by two Applicants, namely, AK and ES.

9. The witness statement of AK reads:

"4. I am a resident of M'bwatalika village, Traditional Authority M'bwatalika in Lilongwe District.

5. On 8th October 2019, around 2 pm there were disruptions in the area as police officers had invaded our area and people were running away.

6. I decided to go and pick up my child from school.

7. Upon reaching at four ways, which is few meters from my house, I met two police officers from the Malawi Police Service in their uniforms, who had covered their faces with masks.

8. The two police officers questioned me as to why I was moving about and where I was going. I told them that I was going to pick my child from school.

9. The two police officers then started abusing me verbally, during which one of the police officers commanded me to undress.

10. When I refused, the police officers dragged me into a nearby bush where one of the police officers raped me without wearing a condom.

11. During the assault and rape, one of the police officer snatched my phone and went away with it.

12. I reported the matter to my husband who has since the incident left our matrimonial home, leaving me and our kids and has never returned.

13. I was afraid to report the incident to police since the perpetrators were also police officers. I feared that I might face the same abuse I faced if I reported.

14. The Malawi Human Rights Commission visited M'bwatalika and interviewed most of the women who were either raped or sexually assaulted and published a report. I attach here a report from the commission marked A.K 1.

15. On 16th December 2019, through the encouragement from the Malawi Human Rights Commission and Women Lawyers Association, I and other women that were also raped or sexually assaulted, reported the matter at Area 30 Police headquarters.

16. Since the date when we reported the issue, no police officer from the Malawi Police Service has been arrested in connection with my rape.

17. The conduct of the officers from the Malawi Police Service in failing to protect me, raping me, failing to investigate the issue and arrest the perpetrators within a reasonable time has resulted in the violation of my rights to dignity, equality and access to justice.

18. Wherefore, I pray to this Court that the reliefs and declarations prayed for in the judicial review application be granted."

10. The witness statement by ES is couched in the following terms:

"4. I am a resident of Chiwere village, Traditional Authority M'bwatalika in Lilongwe District.

5. It was on Tuesday the 8th October, 2019 when my daughter in-law, who is the third applicant fell sick and I visited her to look after her.

6. At around 11:00 a.m I heard people running randomly and noticed that police officers in their police camouflage uniform were firing teargas all over.

7. Upon finishing their package of teargas which they took with them, the police officers took sharp objects and panga knives from their vehicles and started chasing people around, breaking doors and damaging assorted household items from different houses.

8. I locked myself together with my daughter-in-law inside the house.

9. Suddenly, we heard a heavy bang on the door and I saw 2 policemen entering the house with force after they broke the door and the police officers asked what I and CT were doing in the house.

10. I informed them that CT, was sick and the officers demanded that I uncover blankets where she was sleeping.

11. Afterwards, the police officers demanded that CT and I should take off our clothes but we resisted the demand.

12. One police officer pointed a gun on me and forcefully undressed me.

13. The other police officer undressed CT at the same time and in the same room.

14. We were subsequently raped as the police officers had unprotected sex with me and CT, who is my daughter-in-law in the same room.

15. I was (and I'm still) traumatized by the conduct and act by the police officers.

16. I do not understand why they did this to me. I shared the calamity with relatives and some friends within the village.

17. Some of those who happen to have come to know about the calamity, are teasing me and my daughter in-law that we are wives of police officers.

18. We have not only been raped but humiliated by everyone in the community by the conduct of the police officers.

19. I was afraid to report the incident to police since the perpetrators were also police officers. I feared that I might face the same abuse I faced if I reported the issue.

20. On 16th December 2019, through the encouragement from officers from Malawi Human Rights Commission and Women Lawyers Association, I and other women that were also raped or sexually assaulted, reported the matter to the Police at Area 30 Police headquarters

21. Since the date we reported the issue to police, no police officer has been arrested in connection with my rape.

22. The conduct of the officers from the Malawi Police Service in failing to protect me, raping me, and failing to investigate and arrest the perpetrators has resulted in the violation of my rights to dignity, equality and access to justice.

23. Wherefore, I pray to this Court that the reliefs and declarations prayed for in the judicial review application be granted."

11. The total picture that emerges from the witness statements, including exhibits thereto, can be summed up as follows. On 8th October 2019, the former President of Malawi, Professor Arthur Mutharika, addressed a public meeting at Kamuzu Institute for Youth in the City of Lilongwe. Some aggrieved people set up road blocks along the Mchinji/Lilongwe road. This caused blockage of traffic. Police officers were deployed to quell the protest. The initial group of police officers was overpowered and one officer was actually stoned to death.

12. Reinforcements, almost 100 police officers, were deployed to Msundwe, M'bwatalika and Mpingu. In the course of controlling the protestors, some police officers went into the villages and started throwing teargas into houses,

beating people and breaking into houses. In fear of their safety, most of the villagers, particularly men and the youth fled their villages.

13. The Applicants fall into two broad groups. The first group is that of the women who were left behind in the villages. The second group consists of women arrived in the villages after the other people had fled. Both groups were violently beaten up, raped and indecently assaulted.

APPLICATION FOR SANCTION

14. The Application for Sanction was filed with the Court on 30th June 2020. It was accompanied by a sworn statement and skeleton arguments.

15. The sworn statement was made by Counsel Hilda Soko and reads as follows:

> *"2. The Court issued order for directions to both the Applicants and the Respondents on the 16th of April, 2020.*
>
> *3. The directions mandated the parties to file their witness statements as well skeleton arguments by the 12th of May, 2020.*
>
> *4. The Applicants filed their documents within the time prescribed by the Rules.*
>
> *5. On the contrary, the Respondents did not comply with the said directions and the matter was called on the 26th of May, 2020 for a pre-trial conference.*
>
> *6. During the conference, the Respondents' counsel apologized to the Court and undertook to file the witness statements and skeleton arguments within 14 days.*
>
> *7. To date, however, the Respondents have neither filed nor served their witness statements and their skeleton arguments.*
>
> *8. As the foregoing unambiguously shows, there is no indication that the Respondents will comply with the order of directions.*
>
> *9. The Court has the power to order a sanction including the striking out the Defence where the non-complying party is a Respondent.*
>
> *10. Wherefore I pray for an order striking out the Defendant's defence for non-compliance with the order of directions."*

16. The material part of the Applicants' skeleton arguments state thus:

> *"**3. Law and Analysis***
>
> ***The Overriding Objective of the Civil Procedure Rules***

3.1 Order 1 Rule 5 of the Civil Procedure Rules provides the overriding objective of the Civil Procedure Rules and the Court is mandated to deal with proceedings justly and this calls on the Court to engage in active case management by giving directions to ensure that the trial of a proceeding continues quickly and efficiently. The Court may also assist the parties to settle proceedings where there is no plausible defence.

*3.2 In the case of **Ibrahim & Others v Phiri & Other** Personal Injury Case No. 227 of 2018, the Court stated that to allow parties amendments that redefined issues would go against the overriding objective of the civil procedure rules of active case management.*

3.3 Enforcement of the overriding objective by this Court and more importantly active case management will entail striking out the defence filed by the Defendant for non-compliance with the order of directions made on the 16th of April, 2020. The Defendant were given a second chance to file the requisite documents within 14 days from the 26th of May, 2020. They have not filed the necessary processes and such conduct does merit a sanction.

Setting Aside a Step Taken or Defence in a Proceeding for Non-Compliance with the Order of Directions

3.4 Further, order 2 Rule 3 Sub Rule (b) and (f) of the Civil Procedure Rules provides that where there has been a failure to comply with the rules or direction of the Court, the Court may set aside a step taken in a proceeding or make any order that the Court may deem fit.

3.5 With regard to the effect of non-compliance with directions given during a scheduling conference, order 14 Rule 5 Sub Rule (b) of the Civil Procedure Rules provides that where a party fails to comply with any directions, the Judge may strike out the defence where the non-complying party is a Defendant.

*3.6 The principles applicable on application for a sanction were summarized by the Court in **Mitchell v News Group** [2013] EWCA Civ 1537 as follows:*

> *Trivial errors:*
>
> *"It will usually be appropriate to start by considering the nature of the noncompliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the Court will usually grant relief provided that an application is made promptly."*
>
> *"If the non-compliance cannot be characterized as trivial, then the burden is on the defaulting party to persuade the Court to grant relief. The Court will want to consider why the default occurred. If there is a good reason for it, the*

Court will be likely to decide that relief should be granted … In short, good reasons are likely to arise from circumstances outside the control of the party in default".

On incompetence the Court stated that: "well-intentioned incompetence, for which there is no good reason, should not usually attract relief from sanction unless the default is trivial" Relief from sanction:

"The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously."

*3.7 In the case of **Isaac Chiwale v Shaima Gabriel and Prime Insurance Company** Personal Injury Cause No. 354 of 2014, the Court did strike out a defence for non-compliance with the order of direction that was made. The rationale behind was that the Defendant was given further time within which to comply with directions but nonetheless failed and such conduct was an irregularity.*

*3.8 In the case of **Annas Mtuwa v Isaac Zalira & Others** Personal Injury Case No. 85 of 2018, the Court did strike out a defence due to failure to comply with the filing of a mediation bundle.*

3.9 It is our submission before the Court that the Defendant has failed to comply with the order of directions that was made by the Court on the 16th of April 2020. The Defendant was given a further 14 days within which to file their witness statements and skeleton arguments from the 26th of May, 2020 and they have not done. The Defendant has further not filed any documents before the court to explain the 3 months delay in failing to file the relevant documents. In terms of order 2 Rule 3 and Order 14 Rule 5, the Defendant must be given a serious sanction have the defence strike out for non-compliance with the rules. The omission by the Defendant can further not be categorised as being trivia and no reasonably explanation has been given for such failure."

17. Hearing of the application was set for 16th July 2020. The Respondents filed neither sworn statements nor skeleton arguments in response to the application.

18. On the set hearing date, Counsel Soko adopted her sworn statement and the Applicants' skeleton arguments.

19. On his part, Mr. Chisiza, the learned Principal State Advocate, informed the Court that the Office of the Attorney General had taken time to reconsider the matter, having special regard to the Report by the Malawi Human Rights Commission. He stated that, having reconsidered the matter, the position of the Respondents was that they were *"not wholly opposed"* to the application. Going into specifics, Counsel Chisiza stated that:

(a) Reliefs No.s 5 to 17 should be entered;

(b) Reliefs No.s 1, 2, 3, 4 and 18 should be pended.

20. Counsel Chisiza then proceeded to argue that the basis for pending some of the declarations is to allow for a comprehensive investigation into the allegations of rape and sexual assaults at Mpingu and M'bwatalika.

21. At this point, it occurred to the Court that the oral submissions by the Respondents were not addressing the application before the Court: the submissions were taking the matter well beyond the application that was before the Court for consideration and determination, that is, the Application for Sanction. We had now moved into the realm of determining the main case before the Court.

22. To prevent the Respondents taking the Applicants and the Court by surprise, I directed the Respondents to reduce into writing their proposal and arguments thereon and have them filed with the Court within 3 days of 16th July 2020. The Applicants were given 7 days within which to respond after being served by the Respondents.

23. The direction by the Court was complied with by all the parties.

RESPONDENTS' RESPONSE TO THE APPLICATION FOR SANCTION

24. The Respondents filed with the Court document entitled "**DEFENDANTS' RESPONSE TO THE CLAIMANTS' APPLICATION"**. The relevant part of the said document will be set out in full:

> *"1.0 Background*
>
> *1.1 The Claimants commenced this proceeding seeking several declaratory reliefs. The said reliefs as follows:*
>
> *[As set out above under paragraph 4 of this Judgement]*
>
> *1.2 The Defendants filed their defence, denying the allegations of rape and other sexual assaults.*
>
> *1.3 The matter proceeded for Scheduling Conference where directions were issued by the Court. The Defendants were directed to file witness statements.*

1.4 However the Defendants failed to comply with the Court's direction to file witness statement.

2.0 The Defendants' Position

2.1 The Defendants have reconsidered their position. The incidences that led to the allegations that are subject matter of this proceeding took place on 8th October, 2020. Almost 10 months have lapsed and there is no official report of investigations of the alleged acts. It is on the foregoing basis that the claims of failure to act promptly are admitted.

2.2 During the hearing of the Claimants' application for sanction, the Defendants position was indicated as follows:

2.2.1 Declarations 1.1.5 to 1.1.17 should be entered.

2.2.2 Declarations 1.1.1 to 1.1.4 should be pended together with declaration 1.1.18. The basis for pending these declarations is to allow for a comprehensive investigation into the allegations of rape and sexual assaults at Mpingu and M'bwatalika. This is in line with declaration 1.1.12 which the Claimants themselves seek. The said declaration reads as follows:

An order of Mandamus requiring the 1st Respondent to take concrete steps to investigate and arrest the perpetrators of sexual violence against the Applicants and all other women and girls that were sexually molested, harassed, assaulted and raped by officers of the Malawi Police Service in M'bwatalika and Mpingu, Lilongwe District on 8th October, 2019;

2.2.3 My Lord, like we indicated above, we do not object to this declaration and other declarations as already pointed out.

2.2.4 Our view is that the investigation team should be composed of officials from different Government institutions with different professional backgrounds.

2.2.5 In the event that the investigation team establishes that indeed women and girls of Mpingu and M'bwatalika were raped and sexually assaulted, perpetrators will have to be prosecuted and the Court will proceed to enter declarations 1.1.1 to 1.1.4 and declaration 1.1.18 as the allegations will have been substantiated.

2.2.6 At the moment, the declarations 1.1.1 to 1.1.4 remain mere allegations and it would be misleading to urge the Court to enter them as if they have been proved.

2.2.7 Again, we have in mind that the Court is not exercising its criminal jurisdiction to hear as to whether or not, rape and other alleged sexual offences took place.

2.2.8 Entering declarations 1.1.1 to 1.1.4 would be as if the investigation had been concluded, the perpetrators convicted and the Court proceeds to enter the declarations based on the investigation report and the convictions, which is not the case herein.

2.2.9 Further, our view is that declaration 1.1.18 can only be entered if the allegations of rape and other sexual abuses have been substantiated by the investigation report and conviction of the perpetrators.

2.2.10 The Attorney General considers allegations of rape and sexual offences to be very serious criminal acts. They need to be thoroughly investigated and acted upon.

2.2.11 Considering the delays that have been there, we urge the Court to consider giving strict timeframes within which the investigations should be done, including the propositions made by the Claimants in declarations 1.1.13 and 1.1.14 above."

DETERMINATION OF THE APPLICATION FOR SANCTION

25. As pointed out in paragraph 1 above, the Application for Sanction is for *"a sanction and striking-out of the defence, the Respondents having failed to comply with the Order of this Court to file and serve them the witness statements and skeleton arguments within 14 days from the 26th day of May 2020"*.

26. As already stated at paragraph 14, the application is supported by a sworn statement and skeleton arguments. This is in line with Order 20(1) of the CPR which provides, in respect of skeleton arguments, as follows:

> *"1.-(1) In all interlocutory applications the parties shall file and serve skeleton arguments to be relied upon at least 2 days before the hearing of the application."* – Emphasis by underlining supplied

27. It is noteworthy that Order 20(1) of the CPR is couched in mandatory language. The provision is meant to ensure that a party does not take the other party by surprise. Contrary to the requirements of Order 20(1) of the CPR, the Respondents filed neither a sworn statement nor skeleton arguments in opposition to the application. The conduct of the Respondents, through Counsel Chisiza, in advancing arguments of which no prior notice had been

given to the Applicants by way of sworn statements and skeleton arguments is precisely what the CPR is against.

28. Further, it is not lost on the Court that the Respondents have not advanced any reason whatsoever for not complying with (a) the order of directions made on 16th April 2020 despite being given a further period of 14 days within which to do so and (b) Order 20(1) of the CPR to file skeleton arguments in response to the present application. The Court vividly recalls Counsel Chisiza assuring the Court on 26th May 2020 that the Respondents' witness statements had been prepared. The matter was put thus:

> *"We have prepared our witness statements but not filed them yet. The reason is that we have attached the Investigation Report by the Police. This has not yet been published because we are waiting for an OK from the Attorney General. The Attorney General is aware of this matter and he intends to attend to it within 14 days. This will shape the direction of our case."*

29. We will revert to the issue of the "Investigation Report by the Police" shortly.

30. Furthermore, neither the "**DEFENDANTS' RESPONSE TO THE CLAIMANTS' APPLICATION"** nor the oral submissions made by Counsel Chisiza on 16th July 2020 addressed the Application for Sanction.

31. By reason of the foregoing, the Applicant for Sanction is allowed. The appropriate sanction to impose in the circumstances of this case is to strike out the Statement of Defence. Accordingly, the Statement of Defence is struck out, as prayed. It is so ordered.

ISSUES FOR CONSIDERATION IN THE MAIN CASE

32. The fact that the Statement of Defence has been struck out does not perforce mean that the Applicants are entitled to the reliefs being sought. It is trite that the Court will not automatically grant reliefs sought in judicial review simply because the Defendants have not filed any statement of defence to the application. The Court is still duty bound to be meticulous to ensure first that it approaches the issues for determination from a correct legal standpoint and, secondly, that the determinations are supported by the evidence before the Court.

33. As already stated under paragraph 7 above, there are eight issues for the consideration of the Court. These issues can be divided into two broad

categories. The first category of issues relates to the 1st Respondent and the second category pertains to the 2nd and 3rd Respondents.

34. With regard to the first category of issues, it is the case of the Applicants that:

(a) t*he actions of the police officers under the charge of the 1st Respondent, and failure by the 1st Respondent to put in place measures to prevent those under his command from violating the rights of the Applicants, constitutes a violation of the Applicants' rights to dignity, freedom from torture and cruel and inhumane treatment, and to equality and non-discrimination and is therefore unlawful and unreasonable; and*

(b) failure by the 1st Respondent to take concrete steps to investigate and arrest perpetrators of sexual violence against the 18 individual Applicants is unlawful, Wednesbury unreasonable and in breach of the Applicants' legitimate expectations.

35. It is necessary that we set out in full the submissions by the Applicants:

"III. *THE LAW: DISCUSSION AND ANALYSIS*

The failure by the 1st Respondent to investigate the violence suffered by the 1st to 18th Applicants

Obligation on the MPS to investigate and prosecute cases of physical and sexual violence, including rape

7. *Section 153(1) of the Constitution establishes the MPS. Under the Constitution, the MPS shall be an independent organ of the Executive which shall be there to provide for the protection of public safety and the rights of persons in Malawi in accordance with the prescriptions of the Constitution and any other law.*

8. Further, Section 15 (1) of the Constitution states as follows;

> *"The human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter."*

9. In the case of ***R-v- Cheuka & 3 others,***[1] *the Court observed the duties of the MPS as envisaged under Section 15 of the Constitution as follows;*

[1] Criminal Case no 73 of 2008

> *"It was submitted that Section 15(1) of the Constitution obliges all organs of Government and its agencies as well as legal and natural persons to uphold the Human Rights enshrined in the Constitution. Therefore, the accused persons are not exempt from either in the capacity of agents of Government or in their natural capacity from observance of Section 15 of the Constitution, being the upholding of the Human Rights provided for in the Constitution"*

10. *In the **R-v-Cheuka case (Ibid)**, the Court held that the four Policemen charged with Manslaughter of three civilians were guilty of the charge and refused the defense's story that the 3rd accused person in that case had shot at the deceased in execution of police duties of executing an arrest. The Court went on to state as follows;*

> *"Section 153(1) of the Constitution provides that the Malawi Police Service shall be an independent organ of the Executive which shall be there to provide for the protection of public safety and the rights of persons in Malawi according to the prescriptions of the Constitution and any other law. Indeed under Section 15(1) of the Constitution, the Malawi Police Service as an organ of the Executive is engendered to respect and uphold the Human rights enshrined in the Constitution. The Police Act, Cap 13:01of the Laws of Malawi spell out in detail the powers, duties and privileges of Police Officers."*

11. *Section 4 of the Police Act[2] provides for the general functions of the MPS. Section 4 states that;*

> *"The police service shall be employed in and throughout Malawi for;*
>
> *(a) The prevention, **investigation and detection of crime,***
>
> ***(b) The apprehension and prosecution of offenders***
>
> *(c) The preservation of law and order*
>
> *(d) The protection of life, property, fundamental freedoms and rights of individuals*
>
> *(e) The due enforcement of all laws with which the police are directly charged.*
>
> *(f) The exercise or performance of such other powers, functions and duties as are conferred on the police by or under thus Act or any other written law or as may be by law be exercised, performed or otherwise discharged by the police." (emphasis ours).*

[2] Act No.12 of 2010

12. The Police Act imposes on the MPS positive duties (see section which refers to "The police service shall" (emphasis ours)). Those duties include the "investigation and detection [of] crime" with a view to the "apprehension and prosecutions" of offenders. In this case, therefore, the MPS was required to investigate the reports of sexual abuse filed by the 1st to 18th Applicants. The MPS failed to do so and therefore is in direct breach of its statutory obligations.

13. This statutory obligation is confirmed by the constitutional obligations placed upon MPS.

<u>Human Rights implicated by the failure of the MPS to investigate and prosecute cases of sexual violence, including rape</u>

14. The rights implicated by the failure by the MPS in its obligation to investigate the instances of violence in this case are the rights to equality, dignity, to remain free from torture, inhuman and degrading treatment, and to privacy. These rights are protected in the following terms under Sections 19(1) and 19(3), 20(1) and 21 of the Constitution:

> *19. Human dignity and personal freedoms*
>
> *1. The dignity of all persons shall be inviolable.*
>
> *[…]*
>
> *3. No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment*
>
> *20. Equality*
>
> *1. Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.*
>
> *21. Privacy*
>
> *Every person shall have the right to personal privacy […]*

13. The Constitution and the Police Act impose on the MPS a positive duty to investigate breaches of law including incidents of rape and sexual and physical assault. Failure by the MPS in executing this duty in circumstances where they know or ought to have known of their occurrence results in the MPS being liable for the rights violations experienced by the victims of the offences. The 1st to 18th Applicants had their rights to equality, right to remain free from torture, inhuman and degrading treatment, like the sexual violence, including rape, perpetrated by MPS officers violated. Broken down, there are three strands to this argument:

a. *Sexual violence including rape is a violation of the rights to dignity, to remain free from torture and degrading treatment, to privacy and equality;*

b. *The Police Act and the Constitution impose positive obligations on the State to investigate and prosecute instances of violence including rape and sexual abuse; which investigation must be effective;*

c. *The MPS failed, in this case, to carry out such an effective investigation giving rise to the 1st Respondent's liability for the violation of the 1st to 18th Applicants' rights as cited above*

16. *These arguments will be examined individually.*

Sexual violence including rape as a breach of the rights to dignity, inhuman and degrading treatment, privacy and equality

Breach of the rights to dignity, inhuman and degrading treatment and privacy

17. *Sexual assault is a traumatic event to victims of such assaults and specifically violates the right to dignity and the freedom to live without inhuman and degrading treatment. Sexual assaults also violates the victims' rights to privacy. The damage done to victims of sexual assaults is quite serious as victims live with that terrible memory of sexual violence and carry the stigma throughout their lives. The harm occasioned to sexual assault victims include; physical injuries (genital and non- genital injuries), pregnancy as a result of the sexual assault, and many women and girls contract sexually transmitted diseases such as HIV/AIDS. Sexual violence including rape is therefore widely – and correctly – regarded as inhuman and degrading treatment, and a violation of the rights to dignity and privacy.*

18. *First, the European Court of Human Rights (**ECtHR**) has repeatedly held that rape, because it "leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence", amounts to a violation of Article 3 of the European Convention of Human Rights (**ECHR**) which prohibits, like Section 19(3) of the Constitution, torture, inhuman and degrading treatment (See **Aydin v Turkey** (57/1996/676/866) 25 September 1997, para 83).*

19. *The failure to investigate sexual abuse has, in addition, long been considered a violation of the right to privacy guaranteed under Article 8 ECHR (See **X and Y v The Netherlands** (Application no. 8978/80) 26 March 1985).*

20. *It is of note that the ECtHR has characterised rape as a form of torture, depending on the gravity and the surrounding circumstances. The courts have stressed that rape is particularly serious if the perpetrators are state officials (i.e. police or security services), and makes it more likely that the*

*rape amounted to torture. In **Aydin** the ECtHR held at para 83 that "Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment […]". This is of particular relevance to the present case, as the perpetrators were agents of the state. It is therefore submitted that the rape and sexual abuse in this case can properly be considered torture – in addition to inhuman and degrading treatment.*

21. *Second, the Inter-American Commission on Human Rights ('**IACHR**') in **Ana, Beatriz, and Celia Gonzales v Mexico** Report Nº 53/01, 4 April 2001, para 45, has held that rape amounts to a breach of the right to humane treatment and to privacy in Articles 5 and 11 of the American Convention, in no uncertain terms:*

Sexual violence committed by members of the security forces of a State against the civilian population constitutes, in any situation, a serious violation of the human rights protected under Articles 5 and 11 of the American Convention, as well as the guidelines of international humanitarian law. (emphasis ours)

22. *Third, the Convention on the Elimination of All Forms of Violence Against Women ('**CEDAW**') has characterised sexual abuse as a violation of the right to remain free from torture and degrading treatment, and as a violation of privacy (as the right to security and liberty of the person). (See **General Recommendation No. 19**, 1992, paragraph 7). This Convention is the core international human rights instrument for the protection of women's human rights.*

23. *Fourth, in South Africa, the Supreme Court of Appeal held in **S v Chapman** [1997] ZASCA 45 at para 3 that rape "is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim" (emphasis ours).*

24. *The Constitutional Court has also held that rape is a "violation of the victim's dignity, bodily integrity and privacy" **Masiya v Director of Public Prosecution (Centre for Applied Legal Studies and Another as Amici Curiae)** [2007] ZACC 9, para 78 (Langa CJ).*

25. *This point was affirmed very recently in **Tshabalala v S; Ntuli v S** [2019] ZACC 48 by Mathopo AJ and Khampepe J, at paragraphs 1 and 71.*

26. *The Applicants therefore argue that the court should find that sexual abuse, assaults including rape constitute violations of Section 19(1), 19(3) and 21 of the Constitution.*

27. *This conclusion would be fully consistent with domestic case-law. Commenting on the right to dignity, the Court in the case of **Mayeso Gwanda –v- S**[3] stated as follows;*

[3] Constitutional Case no. 5 of 2015

> *"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 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. Recognizing a right to dignity of human beings is an acknowledgement of the intrinsic worth of human beings; Human beings are entitled to be treated as worthy of respect and concern."*

28. *As the above-mentioned jurisdictions have all found sexual violence including rape is, by definition, a denial of the "intrinsic worth of human beings", and is the antithesis of "respect and concern". The court should, it is submitted, therefore find that rape and sexual assault is a violation of the above-mentioned rights.*

Breach of the right to equality

29. *First, in its General Recommendation No. 19 the CEDAW Committee laid the international law basis establishing the link between violence against women and equality, stating that "[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men". (See* ***General Recommendation No. 19****, 1992, paragraph 1)*

30. *Second, in* ***Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt*** *Communication 323/06, 2011, the first case to address the link between discrimination and violence against women, the African Commission on Human and Peoples' Rights recognised that violence against women is a form of unlawful discrimination, amounting to a violation of Articles 2 and 18 (3) of the African Charter.*

31. *Third, in* ***González et al. ("Cotton Field") v. Mexico****, Judgement of 16 November 2009 the IHCHR highlighted the historical unequal power relations between men and women and found that a state of general tolerance and an ineffective judicial system in addressing violence against women constituted discrimination.*

A positive duty on the MPS to investigate rape and sexual assault

32. *Positive duty on the State to investigate rape and sexual assault. The Police Act and the Constitution places this obligation in the MP*

33. *In* ***O'Keeffe v Ireland*** *Application no. 35810/09 28 January 2014, the ECtHR has, in the context of a case concerning sexual abuse, held that there is a positive obligation to investigate the same:*

> *"The Court reiterates that Article 3 [ECHR] enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment.[…] States [are required] to take measures designed to ensure that individuals within their jurisdiction are not subjected to*

> *torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals"*

34. *In the case of **MC v Bulgaria,**[4] a case concerning rape investigations, the ECtHR held that the right to remain free from degrading and inhuman treatment and the right to privacy required a state to put in place "efficient criminal-law provisions" (para 150). This, in turn imposed a "positive obligation to conduct an official investigation" (para 151). The content of that obligation was described as follows in para 153:*

> *[…] the Court considers that States have a positive obligation inherent in Articles 3 [against torture, inhuman and degrading treatment] and 8 [right to privacy] of the [ECHR] to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution*

35. *The ECtHR has also stressed that the importance of conducting an effective investigation is all the more important in this context given the nature of rape. In **Maslova and Nalbandov v Russia**, App No 839/02, 24 January 2008, para 91, the ECtHR held as follows:*

> *"[W]here an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Article 3 [the State must conduct] an effective official investigation. **The Court finds further that rape is an offence of manifestly debasing character and thus emphasises the State's procedural obligation arising in this context**" (Emphasis ours).*

36. *IACHR has held that there are positive obligations on the state to investigate breaches of rights under the American Convention. In the **Velásquez Rodríguez** case, Judgment of July 29, 1988, it held at para 176 that:*

> *"The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."*

37. *This has been relied on to protect women from gender-based violence in the form of domestic abuse (see **Maria Da Penha Maia Fernandes,** Report No 54/01 April 16, 2001) It has further held that the failure to properly investigate sexual assault and rape may be a breach of the rights to human treatment and privacy (See **Gonzales v Mexico,** paras 52 to 54).*

[4] (2003) ECHR

38. *CEDAW requires State parties to eliminate violations of women's rights whether committed by the State, private persons, groups or organizations. In 1992, General Recommendation 19 recognized that gender-based violence committed by the state "may breach that State's obligations under general international human rights law and under other conventions, in addition to breaching this Convention" (para 8) and that the "failure to due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation" (para 9) could likewise breach CEDAW and other international conventions.*

39. *The CEDAW Committee in the most recent General Recommendation 35 on violence against women of 2017 has re-affirmed that:*

> *'State parties will be held responsible should they fail to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparations for, acts or omissions by non-State actors that result in gender-based violence against women."*[5]

40. *Similarly in the case of* ***Abdel Hadi, Ali Radi & others vs Republic of Sudan,***[6] *the African Commission on Human and People's Rights held that if a state party fails to respect, protect, promote or fulfill any rights guaranteed in the Charter, this constitutes a violation of Article 1 of the African charter. The respondent state failed to investigate allegations of wrongdoing by its agent and took no measures to afford an adequate remedy to the victims.*[7]

41. *In the case of* ***C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others***[8] *the High Court of Kenya at Meru, held that the failure to conduct prompt, effective proper and professional investigations was an infringement of the victims' rights under the Constitution and under international human rights instruments:*

> *"This [failure to investigate] infringed the petitioners' fundamental rights and freedoms under inter alia Articles 21(1),(3), 27,28,29,48,50(1) and 53(1),(d) of the Constitution of Kenya, 2010 and the general rules of international law, including any treaty or convention ratified by Kenya, which form part of the law of Kenya as per Article 2(5) and 2(6) of the Constitution of Kenya, 2010. That*

[5] UN. CEDAW, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 2017.

[6] 368/09 ACHPR

[7] In **Nationale des droits de l'homme et des Libertes vs Chad, communication 74/92 ACHPR** it was further held that if a state neglects to ensure the rights in the African Charter, this can constitute a violation even if the state or its agents are not the immediate cause of the violation

[8] [2013] eKLR

these international instruments are applicable to the petitioners cases[9]"

42. The Court in the above case, found that the Police inaction and failure to investigate the offences of defilement, the Police violated the rights of the victims. The court stated that;

"The respondents in this petition failed to implement the rights and fundamental freedoms as enshrined under Article 21 of the Constitution of Kenya,2010. The respondents have failed in their fundamental duties as stated under Article 21 in failing to observe, respect, protect, promote and fulfill the petitioners' fundamental rights and freedoms in particular the rights and freedoms relating to special protection as members of vulnerable group(Article 21(3), equality and freedom from non-discrimination (Article 27) humanity dignity(Article 29), access to justice (Article 48 and 50) and protection from abuse, neglect, all forms of violence and inhuman treatment (Article 53(1),(d) under the Constitution of Kenya, 2010... the police have allowed the dangerous criminals to remain free and/or at large. The respondents are responsible for arrest and prosecution of the criminals who sexually assaulted the petitioners and the failure of State agents to take proper and effective measures to apprehend and prosecute the said perpetrators of defilement and protect the petitioners being children of tender years, they are in my opinion responsible for torture, defilement and conception of young girls and more particular the petitioners herein[10]"

An Effective Investigation

43. Turning to the third and final point, an investigation must be effective in order to comply with the positive obligations under the Constitution and under international human rights instruments.

44. The positive obligation to investigate, prosecute and punish perpetrators rests with the State.[11]

45. The obligation to investigate and prosecute violations is triggered after the occurrence of a human rights breach. It is aimed at ensuring accountability and punishment for the violation, and providing a form of justice for the victim(s) and thereby also contributing to the prevention of future violations.

46. The CEDAW Committee has affirmed due diligence when considering complaints on the failure on the State to effectively investigate and

[9] Ibid at pg 10
[10] Ibid at pg 12
[11] Communication 245/02 *Zimbabwe Human Rights NGO Forum v Zimbabwe* paras 68-70P; *Malawi African Association and Others v. Mauritania*, (2000) ACHPR para 142; *Amnesty International and Others v. Sudan* (1999) ACHPR para 51.

prosecute cases of violence against women (VAW).[12]*This Committee has found that the failure to effectively investigate and prosecute VAW is a violation of the right to non-discrimination under articles 1, 2, 3 and 5 of CEDAW.*[13]

47. *The CEDAW Committee has also determined that, when state officials fail to take effective action to respond to a victims' attempt to seek State assistance after having experienced violence, it is a violation of the State's obligation to take all appropriate measures to prevent and protect women from violence.*[14] *These decisions show that a State can be held liable under international law not only for its officials' actions but also for its officials' inaction.*[15]

48. *The ACHPR stated in Zimbabwe Human Rights NGO Forum v. Zimbabwe:*

> *'Where States […] routinely disregard evidence of murder, rape or assault, States generally fail to take the minimum steps necessary to protect their citizens' rights to physical integrity and, in extreme cases, to life. This sends a message that such attacks are justified and will not be punished.'*[16]

49. *In **W v Slovenia**, App. No 24125/06, 23 January 2014 the ECtHR has held, at paragraph 64, that an effective investigation required the following:*

> *"[…]Any investigation should* ***in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible for an offence****. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, such as by taking witness statements and gathering forensic evidence, and a requirement of promptness and reasonable expedition is implicit in this context. The promptness of the authorities' reaction to the complaints is an important factor. Consideration has been given in the Court's judgments to matters such as the time taken to open investigations, delays in identifying witnesses or taking statements, and unjustified protraction of the criminal proceedings resulting in the expiry of the statute of limitations. (emphasis ours).*

50. *In **Maslova** the ECtHR held, at para 91, that the "minimum standards as to effectiveness defined by the Court's case-law" also include the requirements that the investigation must be independent, impartial and*

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[12] Communications No. 5/2005, *Hakan Goekce et al.* v. *Austria*, views, 6 August 2007; No. 6/2005, *Banu Akbak et al*. v. *Austria*, views, 6 August 2007.

[13]Communications No. 5/2005, *Hakan Goekce et al.* v. *Austria*, views, 6 August 2007; Communication No. 6/2005, *Banu Akbak et al*. v. *Austria*, views, 6 August 2007.

[14] Communication No. 2/2003, *Ms. A.T. v. Hungary*, Views adopted on 26 January 2005.

[15] Bonita Meyersfeld, "Developments in International Law and Domestic Violence", *INTERIGHTS Bulletin*, vol. 16, No. 3 (2011), p. 110.

[16]Communication 245/02*Zimbabwe Human Rights NGO Forum v. Zimbabwe* para. 160.

subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness.

*51. In **Assenov and Another v Bulgaria**[17], some investigations had been undertaken but the court considered them not sufficiently thorough and effective to meet the requirement that investigations must be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. The conclusions in the investigations were not based on evidence, and there was delay in commencement of the investigations. The event complained of had taken place in public view yet no attempt was made to ascertain the truth of the matter contacting and questioning witnesses in the immediate aftermath of the incident when memories would have been fresh. A statement was taken only from one independent witness, who was unable to recall the events. The court considered this conduct failure to carry out proper and effective investigations.*

52. In determining effectiveness of investigations courts consider whether the authorities reacted promptly to the complaints in light of factors such as the opening of investigations, delays in taking statements, the length of time taken for the initial investigation, impartiality (or lack thereof) of the investigating authority, whether the authorities had taken all reasonable steps to secure evidence including forensic evidence, and to secure eyewitness evidence.[18]

*53. Other cases have found breaches of the right to remain free from inhuman and degrading treatment due to other deficiencies in the investigation of the rape. These include: "manifest incompetence" in the gathering of evidence (**Maslova**, para 96); prolonged delays and numerous retrials (**W**, para 67); failure to take steps to determine the location of the accused (**PM v Bulgaria**, App No. 49669/07, 24 January 2012, para 65); failure to investigate the trustworthiness and reliability of the accused's account before formally discontinuing the criminal investigation and exonerating the accused (**IG v Moldova,** App. No. 53519/07, 15 May 2012, para 43).*

54. The IACHR, relying on these sources, has elaborated on the standards to be followed by states in the investigation of rape allegations as follows:

a. the victim's statement should be taken in a safe and comfortable environment, providing privacy and inspiring confidence;

b. the victim's statement should be recorded to avoid the need to repeat it, or to limit this to the strictly necessary;

c. the victim should be provided with medical, psychological and hygienic treatment, both on an emergency basis, and

[17] European Commission of Human Rights, 28 October 1998

[18] Ibid 85, 103. See also ECtHR, DJ v Croatia (2012) 24 July 2012, at para. 85.

continuously if required, under a protocol for such attention aimed at reducing the consequences of the rape;

d. complete and detailed medical and psychological examination should be made immediately by appropriate trained personnel, of the sex preferred by the victim insofar as this is possible, and the victim should be informed that she can be accompanied by a person of confidence if she so wishes;

e. the investigative measures should be coordinated and documented and the evidence handled with care, including taking sufficient samples and performing all possible tests to determine the possible perpetrator of the act, and obtaining other evidence such as the victim's clothes, immediate examination of the scene of the incident, and the proper chain of custody of the evidence, and

f. access to advisory services or, if applicable, free legal assistance at all stages of the proceedings should be provided.[19]

55. In its decision in Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan, the ACHPR set out further criteria for an investigation into violence against women, providing that for a state "[t]o discharge itself from [due diligence] responsibility, it is not enough to investigate" but rather investigations must be effective.[20] *By referencing its own jurisprudence and the jurisprudence of the ECtHR,*[21] *the ACHPR developed the following minimum standards for an investigation into violence against women:*

a. Investigations must be carried out by entities independent from the suspects.

b. Investigations must be conducted promptly and expeditiously.

c. Investigations must have sufficient resources.

d. The findings must be published for public scrutiny.

e. Prosecutions must be initiated where sufficient evidence is found.[22]

[19] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 194

[20] Communication 279/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan* para. 150.

[21] See for example ECtHR, *M. and Others v. Italy and Bulgaria*, App. No. 40020/03, 31 July 2012, para. 100.

[22] Communication 279/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan* para. 150.

56. The obligation to conduct investigations must be carried out in a non-discriminatory way. Thus, the state must "use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for violence against women as they do with regards to other forms of violence."[23]

57. Other instances in which courts/commissions have held the state responsible for a failure to conduct effective investigations include:

a. Refusals to receive a complaint[24]*;*

b. Stereotyping about the victim and his or her behaviour leading to a lack of prompt investigation[25]

c. Requiring the complainant to give his or her complaint in a public place where privacy could not be respected[26]*;*

d. Failure to survey and secure evidence at crime scenes[27]*;*

e. Failure to investigate and discipline officials responsible for irregularities in the investigation[28].

58. On the other hand, as held by the Inter-American Court on Human Rights, the obligation to investigate effectively "has a wider scope when dealing with the case of a woman who is killed or, ill-treated or, whose personal liberty is affected within the framework of a general context of violence against women"[29]*. The court stated that "when an act of violence against a woman occurs, it is particularly important that the authorities in charge of the investigation conduct it in a determined and effective manner, taking into account society's obligation to reject violence against women and the State's obligation to eliminate it and to ensure that victims have confidence in the State institutions for their protection".*[30]

59. States cannot discharge their obligation to investigate and prosecute by delegating their duties to victims of the violations. In Zimbabwe Human Rights NGO Forum v. Zimbabwe, the ACHPR confirmed that States have an obligation to ensure investigations and cannot rely on victims to initiate

[23] Commission on Human Rights (2006), 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk ', UN Doc. E/CN.4/2006/61, 20 January 2006 at para. 33.
[24] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 193.
[25] IACtHR, Gonzalez et al. v Mexico (Cottonfields Case) (2009) 16 November 2009, at para. 196.

[26] IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 195
[27] IACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 298; IACtHR, *Fernandez Ortega et al. v Mexico* (2010) 30 August 2010, at para. 195.
[28] ACtHR, *Cottonfields Case* (2009) 16 November 2009, at para. 346.
[29] IACtHR, Gonzalez et al. v Mexico (Cottonfields Case) (2009) 16 November 2009, at para. 293.

[30] IACtHR, Fernandez Ortega et al. v Mexico (2010) 30 August 2010, at para. 193.

procedures.[31] *In Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt, where the complainants had reported to the authorities but the Public Prosecution Office took the decision not to prosecute because the victims could not identify the perpetrators, the ACHPR found that the state by dismissing the cases failed to fulfil its duty to investigate the violations.*[32]*This decision reiterates the principle that states must ensure "a thorough or scrupulous procedure which leads to results that identify the perpetrators and punishes those responsible".*[33]

60. The ACHPR for instance has found, in a case where police officers witnessed the abduction of a girl who was gang rape by non-state actors, that the Democratic Republic of the Congo did not act with due diligence because:

> *'it suffices that the Respondent State was informed of the situation and did not undertake the necessary actions to remedy them."*[34]

61. From the above discussion of the law as stipulated in the Police Act[35]*, the Constitution, and international human rights instruments the law is clear. There is a positive obligation upon the state to effectively investigate allegations of rape and other forms of violence against women. This is required by the international instruments as part of the bundle of rights to dignity, to be free from degrading and inhuman treatment, to privacy and equality.*

62. In Malawi, the state is not only bound by the tenets of local laws. In the matter of ***David Banda (a male infant)*** *Nyirenda J. (as he then was) 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."*

63. The court is urged to accept the positive obligation on the State through the MPS to effectively investigate rape and other forms of VAW relevant in this matter a failure of which raises a violation of the bundle of rights conferred by Sections 19(1), 19(3), 20(1) and 21 of the Constitution. This would be consistent with Malawi's its international obligations, and the court's "solemn duty" to comply with and vindicate them.

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[31]Communication 245/02*Zimbabwe Human Rights NGO Forum v. Zimbabwe*para. 70.

[32]Communication 334/06*Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt*, 2011, para. 233.

[33] Ibid, para. 230.

[34]Communication 325/06*Organisation Mondiale Contre la Torture et Ligue de la Zone Afrique pour la Défense des Droits des Enfants et Elèves c. République Démocratique du Congo*, 2015, para. 38. See also CEDAW, *Goekce v. Austria*, Communication 5/2005, 6 August 2007, para. 12.1.4; CEDAW, *Fatma Yildirim v. Austria*, Communication 6/2005, 6 August 2007, para. 12.1.4; and CEDAW, *Angela González Carreño v. Spain*, Communication 047/2012, 16 July 2014, para. 9.3; ECHR, *Opuz v. Turkey*, App. No. 33401/02, 9 June 2009, para. 129.

[35] See Section 15 of the Constitution and Sections 34(3)(b) of the Police Act.

Application to the facts

64. It is clear that the MPS has failed in its duty to conduct an effective investigation.

65. It is irrelevant whether the perpetrators were police officers on duty, police officers acting outside of their duties or private individuals purporting to be police officers. Once the State was notified of the violations against the 1st to18th Applicant, there arose a responsibility to take steps to investigate and prosecute those responsible whether there were police officers or not. In failing in this obligation, by failing to undertake a credible investigation, the State is liable for the human rights violations experienced by the Applicants contrary to provisions in the Constitution and international law.

66. In the present matter, the 1st to 18th Applicants suffered various degrees of sexual violence. Some of the Applicants herein were raped, whilst others were sexually assaulted in various ways. From the ordeal, the Applicants suffered mental anguish and lost their dignity.

67. The 1st Respondent and his officers, upon being notified of these violation, did not act with speed and promptness to commence investigation and apprehend and interrogate the perpetrators of the offences that were committed against the 1st to 18th Applicants.

68. It has been almost seven months since the 1st to 18th Applicants were violated and no single person has been arrested or investigated in relation to the incident. The victims have suffered horrible, unspeakable and immeasurable harm due to acts of sexual violence committed against them. Some of them have suffered psychological harm from the assaults made worse by the threat, fear and reality of contracting HIV/AIDS and other sexually transmitted diseases or infections.

69. The collection of the evidence by the MPS was fundamentally flawed in that:

a. MPS or any organ of the state did not promptly make any contact with the victims or secure eye witnesses in order to obtain information about the allegations while memories were still fresh.

b. No attempts were made to secure forensic evidence. MPS did not conduct a survey of the crime scene or facilitate medical examination of the victims

c. There is no evidence that MPS summoned and questioned the officers who had been deployed to the areas in question on that day. Thus, the state conducted itself in an indifferent manner towards the complaints. No one has been disciplined for the occurrence, or for the lack of conclusive investigations.

70. Contrary to the internationally accepted norms in rape investigations, and the right to dignity conferred by Article 19 of the Constitution, the victims

were not provided with medical and psychological support following the incidents, or given access to advisory services.

71. It is not enough that the 1st Respondent's Officers went to M'bwatalika and Mpingu on 8th October, 2019 to restore general order. What was required was a specific investigation into the complaints of rape and sexual assault made by the 1st to 18th Applicants. The 1st Respondent's failure to do so is a clear abrogation of its statutory duties, and is inconsistent with its constitutional and international obligations.

72. From the above discussion of the various Conventions which Malawi ratified and Court pronunciations in litigation where various State obligations were in issue, it is clear that the state, either through itself or its Agents such as the 1st Respondent herein has the obligation to uphold human rights as well as investigate alleged breaches of such a duty. Where the state through the 1st Respondent herein fails to take reasonable steps to investigate the alleged breach of human rights arising from instances of violence against women, such an omission is in breach of tenets of the Constitution, the Police Act and International Conventions to which Malawi is a party."

36. Turning to the second category of issues, it is the case of the Applicants that failure by the 2nd and 3rd Respondents to operationalize the ICC:

(a) constitutes an unlawful abrogation of duty;

(b) is a breach of the Applicants' legitimate expectations;

(c) is unreasonable;

(d) perpetuates violation of human rights with impunity on the part of members of the Malawi Police Service; and

(e) is unlawful.

37. Here again, it is necessary that the submissions by Counsel for the Applicants be quoted in full:

*"**Failure by the 2nd and 3rd Respondent to Advertise and Operationalise the Independent Complaints Commission***

73. The Applicants submit that the failure by the 2nd Respondent (National Assembly through the relevant Parliamentary structures) to act in terms of section 133(2) of the Police Act was unlawful, unreasonable and a violation of the Applicants' right to access justice under section 41 of the Constitution.

74. The Applicants further submit that the failure by the 2nd Respondent at the time of the alleged assault, to advertise for and appoint the Independent Complaints Commissioner in terms of section 128 of the Police Act perpetuates acts of impunity by police officers.

75. Finally, the Applicants submit that the failure by the 3rd Respondent (Minister of Finance) to lay before the National Assembly for its approval of a budget for the operationalization of the Independent Complaints Commission is unlawful and unreasonable.

76. The Minister of Finance under the Public Finance Management Act is responsible for the formulation of economic and fiscal policy of the Government of Malawi, and for the financial management of ongoing operational activities, both annually and for such longer periods as he considers appropriate, specifying agreed policies, outcomes and outputs to be achieved, and taking into account the views of prior policy consultations (section 4 of the Public Finance Management Act of 2003).

77. Section 128 of the Police Act establishes the Independent Complaints Commission, which is an administrative channel for the receipt and remedying of complaints levelled against members of the MPS. According to section 129 of the Police Act, it is the function of the Commission to receive complaints from the public against members of the police service, and to investigate such complaints.

78. The Commission is empowered to investigate any misconduct or offence allegedly committed by a police officer or the police service whether on its own initiative or upon receipt of a complaint. In the exercise of its mandate, the Commission may obtain information from the Inspector General, any police officer or any other person or authority as may be necessary for conducting such an investigation and may obtain the cooperation of any person for the purposes of conducting investigations. In terms of section 130 of the Police Act, the Commission has the power to commence an investigation of any matter even if such a matter is already being investigated by another authority.

79. The Commission therefore is an avenue through which effective investigations may be undertaken. The fact that the Commission has power to obtain information from and obtain the cooperation of literally any person makes it an effective means through which violations by the police may be investigated, perpetrators brought to book and victims compensated. The Commission provides oversight for the Police and is intended to ensure that the MPS is always accountable to the Public.

80. The power to establish the Commission is vested in the 2nd Respondent. Section 133(2) of the Police Act places a duty on the Public Appointments Committee (PAC) of the National Assembly to appoint an Independent Complaints Commissioner, upon receipt of nominations from the public. To obtain such nominations, the PAC has to advertise the position. The Commission will then comprise of the Commissioner and other members in the service of the Commission.

81. The duty to ensure the exercise of the functions of the Commission depends on the appointment of the Commissioner. As provided under section 136 of the Police Act, the Independent Complaints Commissioner is responsible for appointing other members of the Commission and approving the

membership of other members who may be transferred to the Commission. He or she is also responsible for the performance and exercise of the functions of the Commission, as well as its management and administration (section 135 of the Police Act). Thus, the appointment of the Commissioner is critical to the existence and functioning of the Independent Complaints Commission.

82. By not appointing the Commissioner thereby failing to operationalize the Commission, the 2nd Respondent failed to make use of such an effective avenue for the investigation of human rights violations and abuse committed by the police.

83. The 2nd Respondent clearly abrogated the duty to operationalize the Independent Complaints Commission, at the expense of the Applicants. This abdication of duty compromises the process of investigating the violations and the possibility of bringing to book those responsible. It therefore hampers the right of the 18 Applicants to access remedies for the violations they suffered, and is thus unlawful, unreasonable and contrary to the Applicants' legitimate expectation to access justice.

*84. There is an inherent risk of lack of objectivity and independence when police investigate abuse perpetrated by other police officers. It is precisely for this reason that an independent police complaints body has been envisaged to investigate such cases. This is not simply an issue of holding police to account, but crucially an issue of respecting victims' rights, including their right to dignity and freedom from cruel, inhuman and degrading treatment and discrimination, in how their complaints are attended to. Thus, it is critical to the State's protection of victims' rights that an independent investigative body is properly established. For example, in the European Court of Human Rights case of **B.S. v. Spain** (no. 47159/08, 24 July 2012) the Court considered the State's institutional failure to investigate police abuse of a woman. The Court went on to state that the decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a sex worker. Although the applicant's complaint of police abuse was investigated, the investigation was not effective. The authorities thus failed to comply with their duty under Article 14 of the Convention (discrimination) taken in conjunction with Article 3 (cruel, inhumane and degrading treatment) to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events.*

*85. The benefits to victims and the broader public of an independent body is clear. In a case relating to the independent police complaints body, **Mcbride v Minister of Police and another (Helen Suzman Foundation as amicus curiae)** [2016] JOL 36535 (CC), the South African Constitutional Court held that the law requires that the body functions independently from the police, "to ensure that it is able to investigate cases or complaints against the police without any fear, favour or prejudice or undue external influence."*

*86. Articulating the role of an independent police complaints body in the UK, in **R (on the application of Green) v Police Complaints Authority** [2004] 2 All ER 209, it was held that:*

> *"[53] The authority have not been given their functions so as to secure proper behaviour by police officers: that is the objective of good training, of force discipline, of codes of conduct and, ultimately, of the criminal law. Nor is it any part of the authority's functions to see that wrongdoers are 'brought to book' by being prosecuted. That is a matter for the independent prosecuting authorities. The aim of the authority in carrying out their functions must be to satisfy the legitimate interests of both complainants and the wider public that the investigation of complaints against police officers, and any decisions on taking disciplinary proceedings should be, and should be seen to be, independent and thorough."*

*87. Accordingly, courts have been willing to recognize a constitutional duty on the State to establish a complaints body, even if that body is not explicitly provided for in the Constitution. In the South African Constitutional Court case of **Glenister v President of the RSA and Others; Helen Suzman Foundation as Amicus Curiae** 2011 (7) BCLR 651 (CC) the Court held that there was a duty on the State to establish an independent corruption fighting unit even when the Constitution did not explicitly require it. This duty was based on the fact that corruption undermined the rights in the Bill of Rights and that the Constitution imposed a duty on the State to respect, protect, promote and fulfill the rights in the Constitution, and that these rights bound all branches of government. It is submitted that this duty is also implicit in section 15 of Malawi's Constitution.*

*88. The South African High Court case of **Sonke Gender Justice NPC v President of the Republic of South Africa and others** 2020 (2) BCLR 218 (WCC) which looked at the independence of the prisons inspectorate, considered the tests laid in the **Glenister** case mentioned above:*

> *"[44] It is perhaps fitting to start with an understanding endorsed in both Glenister and Helen Suzman that the Constitution does not envisage absolute independence; such may not be attainable having regard to the South African context. What is envisioned is adequate independence, which should be demonstrated by the structure of the institution and its operation. In Helen Suzman, the court said "[t]he correct approach . . . is . . . to examine each of the impugned provisions and determine whether they militate for or against a corruption fighting agency which, though not absolutely independent, should nevertheless be adequately independent in terms of both its structure and operations."*

*89. This Court is empowered to determine whether Parliament has abrogated its legal duties. The Zimbabwe Supreme Court in **Biti & another v Minister of Justice, Legal & Parliamentary Affairs & another** [2002] JOL 9955*

(ZS) held that it is for the courts, in a constitutional democracy, to determine the lawfulness of the actions of other bodies, including Parliament.

*90. Recognising the limits imposed by the separation of the powers, the South African Constitutional Court in **Economic Freedom Fighters v Speaker of National Assembly and others; Democratic Alliance v Speaker of theNational Assembly and others (Corruption Watch (RF) NPC as amicus curiae)**[2016] JOL 35595 (CC) at para 93, held:*

> *"Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations."*

Similarly in this case, the Applicants are not asking the Court to dictate what measures to establish but to make a finding on the extent to which the Respondents' failure to operationalize an independent police complaints body negatively affects its duty to protect and promote victims' constitutional rights, including their right to access justice."

38. Having taken time to consider the evidence contained in the witness statements, including exhibits thereto such as the Investigations Report by the Malawi Human Rights Commission into the Alleged Rape, Defilement and Indecent assault by Police Officers on Some Women and Girls in Lilongwe West (M'bwatalika, Kadziyo and Mpingu Areas) and the submissions by Counsel, the following are the Court's findings and holdings:

(a) the Applicants were victims of sexual violence and rape and the same was perpetrated by officers of the MPS;

(b) the 1st Respondent failed to put in place a credible system of monitoring the conduct of the officers of the Malawi Police Service;

(c) the 1st Respondent failed to conduct prompt, proper, effective and professional investigations into the complaints of rape and sexual assault made by the Applicants;

(d) the 1st Respondent failed to arrest the officers of the MPS who were perpetrators of sexual violence and rape against the Applicants;

(e) the failures by the 1st Respondent referred to in paragraphs (a), (b), (c) and (d) violate the Applicants' right to equality, dignity, access to justice and effective remedies as provided for under sections 19, 20 and 41 of the Constitution;

(f) there has been failure by the 2nd Respondent to operationalize the ICC as provided for under section 133(2) of the Police Act;

(g) the failure by the 2nd Respondent to operationalize the ICC as provided for under section 133(2) of the Police Act is unlawful and it violates the Applicants' right of access to justice as provided for under section 41 of the Constitution;

(h) the 2nd Respondent failed to appoint the ICC under section 128 of the Police Act; and

(i) the failure by the 2nd Respondent to appoint the ICC under section 128 of the Police Act perpetuates acts of impunity by officers of the MPS who commit crimes or act unlawfully in the discharge of their duties.

39. A comment or two might not be out of order. Firstly, the only document attached to the Defendants' List of Documents is the 2nd Defendant's Advert for the post of the ICC. The advertisement was done on 5th March 2020. Needless to say so, the advertisement was inordinately delayed bearing in mind that the Police Act was enacted in 2010 and this case commenced on 27th January 2020. Further, at the time of hearing this matter on 16th July 2020, no appointment of the ICC had taken place. Thus much as the post of the ICC had taken place, there is still failure with regard to the appointment of the ICC.

40. Secondly, it is important to point out that the Court has found no failure on the part of the 3rd Defendant. The Court is not persuaded by the Applicants' argument that the 3rd Respondent was duty bound to lay before the National Assembly a budget for the operationalization of the ICC just because the Minister of Finance is, under section 4 of the Public Finance Management Act, responsible for the formulation of economic and fiscal policy of the Government of Malawi, and for the financial management of ongoing operational activities: see paragraphs 76 and 77 of the Applicants Submissions. These were the only paragraphs that spoke to this issue.

RELIEFS SOUGHT IN THE MAIN CASE

41. As already stated, the Applicants seek twenty reliefs: see paragraph 4 above. The Respondents pray that the granting of five of the reliefs, namely, Reliefs No.s 1, 2, 3, 4 and 18, be pended to allow for a comprehensive investigation into the allegations of rape and sexual assaults at Mpingu and M'bwatalika: see paragraphs 19 and 20 above.

Reliefs No.s 1, 2, 3, 4

42. The Applicants are opposed to this prayer by the Respondents. Reliefs No.s 1, 2, 3 and 4 have been covered in the Applicants' Supplementary Submissions as follows:

> *"1.28 The applicants' prayer for the court to order the defendant to conduct investigations would not serve the purpose of proving that the complainants were sexually assaulted as this was already done by the MHRC.*
>
> *1.29 The further investigations prayed by the applicants will serve the purpose of identifying the actual perpetrators of the sexual assaults among the police officers that were sent to work in the areas of Mpingu and Mbwatalika.*
>
> *1.30 The case of **Weldon v. Rivera** (301 A.D.2d 934 (N.Y. App. Div. 2003), illustrate the point that applicants can pursue a civil suit and claim compensation in cases where there are no known prior or pending criminal proceedings. In the Weldon case, the plaintiff complained that defendant Gilbert Rivera had sexual intercourse with her in her dormitory room after "she verbally objected to the act of intercourse," and "was so intoxicated that she passed in and out of a state of consciousness. She further complained that co-defendant Edwin Touma, acted in concert with Rivera by encouraging her to consume additional alcohol after she was intoxicated and watching and kissing her during the act of intercourse with Rivera. The plaintiff sought damages for injuries caused by the Defendants' conduct. No prior or pending criminal proceedings resulting from the defendants' conduct were cited in the court's opinion. As for proceeding in this civil arena, the defendant Rivera did not challenge whether he might be held liable based on the facts alleged in the plaintiff's complaint. Moreover, both the trial court and the appellate court held that plaintiff had stated a legal claim under which defendant Touma might also be held liable. The court held that the plaintiff could proceed with her case on the theory of concerted action that "those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it. . . or who lend aid and encouragement to the wrongdoer ... are equally liable with him."*

43. I have perused the respective submissions with regard to Reliefs No. 1, 2, 3 and 4. With due respect to the Respondents, their prayer lacks legal basis. In addition to the valid points raised by the Applicants, the prayer has to fail because the Respondents seek to ambush the Applicants and the Court. It will be recalled that the Respondents filed a Statement of Defence wherein they (a) took issue with the locus standi of the 19th Applicant (the Women Lawyers Association) and (b) denied the contents of paragraphs 1, 2 and 3 of the impugned decisions in the Applicants' application for judicial review. The issue of locus standi was dealt with in the Order of Directions.

44. The Order of Directions also set out issues for determinations. I have meticulously gone through the issues for determination and I see nothing therein to suggest that determination of the issues would have to wait until comprehensive investigation into the allegations of rape and sexual assaults at Mpingu and M'bwatalika take place.

45. Further, it appears the Respondents have forgotten why this matter came to Court as a judicial review case before possible alternative remedies had been exhausted. The Applicants dealt with the issue of alternative remedies as follows:

> *"3.1. The Applicants have no alternative remedy as the Malawi Police Service has the sole authority to investigate and arrest the perpetrators of the sexual violence against the women and girls in M'bwatalika and Mpingu. This therefore, leaves the Applicants with no remedy but recourse to this Court where the Malawi Police Service has failed to take concrete steps to investigate and arrest the perpetrators.*
>
> *3.3(sic)The Independent Complaints Commission has not been established by the 2nd Respondent and therefore leaving the Applicants with no alternative remedy where their complaint relates to conduct of officers of the Malawi Police Service.*
>
> *3.4 The Applicants have no any other remedy other than through the Courts."*

46. The Respondents did not contest that the Applicants did not have alternative remedies. In my opinion, it is too late for the Respondents to start raising this issue at this stage.

47. Furthermore, it will also be remembered that the Statement of Defence, in paragraph 6 thereof, stated that the 1st Defendant had *"carried out the investigations of the alleged violations of human rights and that the report is in the finalization stage."* A draft of the Investigation Report by the 1st Respondent was ready at the time of the pre-trial conference: see paragraph 28 above. I do not think that the Court is being naive to believe that the reference to the Report was meant to put forward an alternative story to that of the Applicants. The Court had in a way to bend backwards in term of timelines regarding the hearing of this matter to allow the 1st Respondent finalise its report and have it tendered in Court. Having waited for more than four months, the 1st Respondent turns around and decides not to tender the Report nor call any witnesses to put forward an alternative story. What is the Court to make of the failure by the 1st Respondent to adduce the Investigation Report in these circumstances. I believe the Court is entitled to presume that contents of the Report are adverse to the case of the Respondents: See

Maonga and Others and Leyland Motor Corporation v. Mohamed [1991] 14 MLR 240, **NBS Bank Limited v. B.P. Malawi Limited** (Commercial Case No. 225 of 2009) and **Dr. Lanjesi and Others v. Joshua Chisa Mbele** (Commercial Cause No. 225 of 2009).

48. To make matters worse, at no time was the Statement of Defence amended.

49. All in all, the prayer by the Respondents to pend the grant of Reliefs No.s 1, 2, 3 and 4 is refused. In the premises, and taking into account the findings and holdings set out in paragraph 38 above, Reliefs No.s 1, 2, 3 and 4, are granted.

Reliefs No. 5

50. Having regard to the findings and holdings set out in paragraph 38 above and bearing in mind the fact that the Respondents are not opposed to the grant of this relief, Relief No. 5 is granted.

Reliefs No. 6

51. Based on the findings and holdings set out in paragraph 38 above and taking into account the fact that the Respondents are not opposed to the grant of this relief, Relief No. 6 is granted.

Reliefs No. 7, 8, 9, 10 and 11

52. These reliefs relate to the position of the ICC. It is commonplace that no appointment of the ICC has been made despite the Police Act being enacted more than ten years ago. As already discussed herein, failure to appoint the ICC hindered investigations of police actions in this case. In this regard, having regard to the findings and holdings set out in paragraph 38 above and bearing in mind the fact that the Respondents are not opposed to the grant of this relief, Reliefs No. 7, 8, 9, 10 and 11 are granted subject to the qualifications that the declaration will not include the aspect of the 2nd Respondent failing to advertise the post of the ICC.

Reliefs No. 12, 13 and 14

53. The Applicants seek orders of mandamus requiring the 1st Respondent to take concrete steps to investigate and arrest the perpetrators of sexual violence against the Applicants and all other women and girls that were sexually molested, harassed, assaulted and raped by officers of the MPS in M'bwatalika and Mpingu, Lilongwe District on 8th October 2019 and to report thereon to the court within 14 days or such period of time fixed by this court

54. As was aptly submitted by the Applicants, it is important that the officers of the MPS that sexually assaulted and raped the Applicants and all other women and girls in M'bwatalika and Mpingu be arrested and prosecuted. I, however,

believe that a period of 14 days might not be enough to carry out meaningful investigations. I. therefore, order that this be done within a period of 30 days from the date hereof.

55. In view of the foregoing, and taking into account the findings and holdings set out in paragraph 38 above, Reliefs No.s 1, 2, 3 and 4, are granted , subject to the qualification regarding the time period within which the 1st Respondent is required to report to the Court on steps taken to investigate and arrest the perpetrators of sexual violence against the Applicants and all other women and girls that were allegedly sexually assaulted and raped by officers of the MPS in M'bwatalika and Mpingu in Lilongwe district on 8th October 2019.

56. In the interest of clarity and avoidance of doubt, the time period within which the 1st Respondent must furnish the Court with the occurrence book referred to in Relief No. 14 is 14 days from the date hereof

Relief No. 15

57. Under this relief, the Applicants seek the Court to compel the 2nd Respondent to immediately issue a public advertisement calling for nominations of qualified persons for the office of the ICC. This prayer has been overtaken by events: an advertisement for the post of the ICC was already issued on 5th March 2020.

Relief No. 16

58. The Applicants' prayer for an order of mandamus compelling the 3rd Respondent to lay before the National Assembly for its approval a budget for the operation of the ICC has to fail for the reasons stated at paragraph 40 above.

Relief No. 17

59. When granting the Applicants permission to commence judicial review, the Court also directed that the hearing of the application for Judicial Review be expedited. In the circumstances, the prayer for Relief No. 17 is otiose.

Relief No. 18

60. It will be recalled that the Respondents pray that the grant of this relief, that is, an order for compensation for violation of the constitutionally guaranteed rights of the Applicants in terms of section 46 (4) of the Constitution, should be pended to allow for a comprehensive investigation into the allegations of

rape and sexual assaults at Mpingu and M'bwatalika: see paragraphs 19 and 24 above.

61. The Applicants are opposed to this prayer by the Respondents. The issue is covered in the Applicants' Supplementary Submissions as follows:

> *"1.24 The applicants contend that they have a right to bring civil action in sexual assault cases even in cases where criminal prosecution was not pursued. The first respondent failed to conduct and conclude investigations into the alleged sexual assault cases. The Respondent has argued that compensation should not be entered because investigations have not been conducted by the first respondent.*
>
> *1.25 The applicants submit that non investigation of their assaults by the Malawi Police Service does not preclude them from claiming compensation in a civil suit. Further, it is on record that the Malawi Human Rights Commission which is an independent body mandated by the Malawi Constitution to investigate into rights violations already conducted investigations on the matter.*
>
> *1.26 The MHRC investigations duly found that the applicants were sexually assaulted by the employees and agents of the Respondent (Refer to the attached MHRC report). The report by a credible and legally mandated institution as the MHRC can be used by the court to substantiate the claims of the claimants of the sexual assaults.*
>
> *1.27 As such, the defendant's argument that the declaration for compensation be pended to allow a comprehensive investigation into the sexual allegations should not be upheld."*

62. The summary in the Applicants' Supplementary Submission is also relevant and it reads:

> *"1.31 The Relief 1.1.18 remains relevant to the rights violations, conceded to by the Respondents, as set out in Relief 1.1.5 and 1.1.6. The right to reparation (including compensation) for victims of violence against women is universally acknowledged in various international and regional treaties discussed above.*
>
> *1.32 Compensation as a form of reparation flows from the State's responsibility to remedy human rights violations. And where a concession has been made on the state failure to conduct an effective investigation and the violations that arose therefrom, it follows that an order of compensation for that violation should be made.*
>
> *1.33 It is intolerable that the Respondents should further delay the right of the applicants to an effective remedy for sexual assaults against its own people. Indeed, it would be the height of hypocrisy for the Malawi government to enforce the constitutional provisions on access to justice and effective remedy against sexual assault in other contexts, while refusing or delaying to be held accountable for its own misconduct.*

> *1.34 It is unthinkable that the survivor of sexual violence would be left without any remedy for prolonged periods of time on administrative excuses in any court against either the government itself or its agents."*

63. I have considered the respective submissions. Paragraphs 42 to 49 inclusive of this Judgement apply to the declaration under discussion with equal force. In the premises, Relief No. 18 is granted. In this regard, I direct that the issue of assessment of compensation payable to the 1st to 18th Applicant be dealt with by the Registrar. This has to be done within 21 days of the date hereof.

Relief No.s 19 and 20

64. Relief No. 19 relates to the Applicants' prayer for an order for effective remedy under section 41(3) of the Constitution. The Applicants made no submissions on this item. In the absence of clarity on the nature or type of effective remedy being sought, other than the specific reliefs that were pleaded, the prayer for Relief No. 19 is refused

65. The reasoning and holding in paragraph 64 applies to the Applicants' prayer for Relief No.20 (further or other relief as the Court may deem just) will equal force.

CONCLUSION

66. To sum up, the Applicants have succeeded in both the Application for Sanction and in the main case, that is, the judicial review proceedings.

67. With the exception of Reliefs No. 15, 16, 17, 18 and 19, all the twenty reliefs sought by the Applicants have been granted. Of course, the grant of certain reliefs (Reliefs No. 7, 8, 9, 10 and 11) is subject to qualifications: see paragraph 52 above.

COSTS

68. Costs are in the discretion of the court but normally follow the event: see section 30 of the Courts Act as read with Order 31 of the CPR. The Applicants have succeeded in most of their claims in the present case. In the premises, I order that the costs of these proceedings be borne by the Respondents.

Pronounced in Court this 13th day of August 2020 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE