



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION

CONSTITUTIONAL CASE NUMBER NO. 4 & 5 OF 2021

(Being Criminal Case No.5 of 2021 High Court, Principal Registry & Being
Judicial Review Case No. 9 of 2021 High Court, Zomba District Registry)

(Before Hon. Justice Ntaba)

(Before Hon. Justice N'riva)

(Before Hon. Justice Mambulasa)

**IN THE MATTER OF AN APPLICATION BY CENTER FOR APPLIED LEGAL
STUDIES TO JOIN MATTER AS AN *AMICUS CURIAE***

AND IN THE MATTER OF

BETWEEN:

A.J (A MINOR).....APPLICANT

-VS-

**THE
STATE.....RESPONDENT**

-AND-

THE STATE

-AND-

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

-AND-

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX-PARTE STANDFORD SILIRO SHABA ON BEHALF OF T.S. (A MINOR)

WRITTEN SUBMISSIONS / SKELETAL ARGUMENTS

INTRODUCTION

1. CALS submits that at the outset, it is important to emphasise what this case is not about. It is not about whether children should or should not engage in sexual conduct. It is also not about whether Parliament may set a minimum age for consensual sexual conduct. Rather, it concerns concerned with a far narrower issue: whether it is constitutionally permissible for children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith.

2. CALS makes the following submissions that it submits are relevant to the present matter:
 - 2.1. First, the principle of evolving capacities as understood in international law;

- 2.2. Second, the right to freedom of expression by adolescents; and
 - 2.3. Comparative case on criminalising adolescents consensual sexual intercourse.
3. Section 211 of the Malawian Constitution makes provision for the direct application of international law as part of domestic law. It provides for the instances in which treaty law can be applied as part of Malawian law, and instances where customary international law may or may not be applied as domestic law.
 4. Section 11(2)(c) of the Malawian Constitution provides that, “[i]n interpreting the provisions of this Constitution, a court of law shall, where applicable, have regard to current norms of public international law”. The language of the Constitution gives discretion to the courts on whether to apply international law under these provisions; but, at the same time, where international law is applicable, the Constitution makes the consideration thereof peremptory.
 5. In *Re David Banda*,¹ the High Court held that courts must interpret the Constitution, statutes, and all other laws in a manner that, as far as

¹ 2008] MWHC 243.

possible, avoids conflict with international law. This is a well-known principle in most jurisdictions around the world.

6. In *Re Chifundo James*,² the Malawi Supreme Court of Appeal re-affirmed the principle of avoiding conflict between domestic law and international law. It held that:

In all cases therefore the courts will have to look at our Constitution and our statutes and see if the international agreement in question or the customary international law in question is consistent or in harmony with the law of the land and the Constitution.

² MSCA Adoption Appeal No. 28 of 2009.

EVOLVING CAPACITY OF THE ADOLESCENT

7. Malawi acceded to the Convention on the Rights of the Child on 2 January 1991 (“**the Convention**”).³
8. Section 30 of the Malawian Constitution provides that everyone – this includes children – has a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and persons with disabilities in particular shall be given special consideration in the application of this right.
9. This right should be understood in relation to the Convention. Article 5 of the Convention states that direction and guidance, provided by parents or others with responsibility for the child , must take into account the capacities of the child to exercise rights on his or her own behalf.⁴
10. CALS submits that this principle has profound implications for the human rights of the adolescent. It establishes that as adolescents acquire enhanced competencies, there is a reduced need for direction

³ See Celebrating 30 years of the Convention on the Rights of the Child accessed at <https://www.ohchr.org/EN/HRBodies/CRC/CRC30Pledges/Pages/Malawi.aspx>.

and a greater capacity to take responsibility for decisions affecting their lives.

11. The Convention recognises that adolescents in different environments and cultures who are faced with diverse life experiences that will acquire competencies at different ages, and their acquisition of competencies will vary according to circumstances. It also allows for the fact that children's capacities can differ according to the nature of the rights to be exercised.
12. The concept of evolving capacities is central to the balance embodied in the Convention between recognising children as active agents in their own lives, entitled to be listened to, respected and granted increasing autonomy in the exercise of rights, while also being entitled to protection in accordance with their relative immaturity and youth.
13. This concept provides the basis for an appropriate level of respect for children's agency without exposing them prematurely to the full responsibilities normally associated with adulthood. All the rights in the Convention extend to all children irrespective of capacity.

14. CALS submits that applying a rights-based approach to the evolving capacities of the child can be understood through three conceptual framework.
 - 14.1. First, as a developmental concept, recognising the extent to which children's development, competence and emerging personal autonomy are promoted through the realisation of the Convention rights. In this sense it imposes obligations on States parties to fulfil these rights.
 - 14.2. Second, as a participatory or emancipatory concept emphasising the rights of children to respect for their capacities and transferring rights from adults to the child in accordance with their level of competence. It imposes obligations on States parties to respect these rights.
 - 14.3. Third, as a protective concept, which acknowledges that because children's capacities are still evolving, they have rights to protection on the part of both parents and the State from participation in or exposure to activities likely to cause them harm, although the levels of protection they require will diminish in accordance with their evolving capacities. It imposes obligations States parties to protect these rights.

15. CALS submits that the real effect of section 138(1) of the Penal Code seem to be aimed more at policing morality and children's sexuality rather than protecting adolescents from sexual abuse. The consensual sexual experiences of adolescents are considered taboo in the Malawian society. Adults feel more comfortable believing that adolescents are ignorant of sex due to their conceptions of the innocence of childhood. In fact, during the the hearing of the Teddy Clinic case in South Africa, evidence was provided by Flisher and Gevers to demonstrate that it is developmentally normative for adolescent children between ages 12 and 16 to be engaged in intimate relationships.
16. CALS submit that recognising the right to evolving capacities is in the best interest of the child.
17. CALS submits that by not making this recognition and by upholding the Penal Code exacerbates harm and risk to adolescents by undermining support structures, preventing adolescents from seeking help and potentially driving adolescent sexual behaviour underground⁵.

⁵ Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another 2014 (2) SA 168 (CC) at para 72.

18. Further, the Penal Code is likely to create an atmosphere in which adolescents will not freely communicate about sexual relations with parents and counsellor. This could lead to potential breakdowns of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can.

19. Moreover, the imposition of criminal liability under the impugned provisions may lead to imprisonment which is apposite to the best interest of the child. The best interest is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.

FREEDOM OF EXPRESSION

20. The United Nations Convention on the Rights of the Child (CRC) provides that the child shall have the right to freedom of expression. This right is also in the Malawian Constitution in section 35, which provides that “every person shall have the right to freedom of expression”. This right extends to adolescents. Adolescent’s freedom of expression is rarely considered and discussed.

21. Adolescents learn to describe how their rights are respected or infringed upon by expressing their thoughts and opinions and to speak up for the rights of others, by expressing their feelings and opinions. Article 13 of the Convention makes no mention of a child's developing capacities, nor does it specify a minimum age or level of maturity for exercising the right to freedom of expression. In this sense, freedom of expression has been viewed as having a developmental aspect, as its goal is to enable children to develop their minds and themselves in society with others, allowing them to grow into citizens engaging in public life.

22. Freedom of expression includes the right to sexual freedom. This right is infringed upon by the Penal Code.

COMPARATIVE CASE LAW

23. Section 11 of the Malawian Constitution provides that where applicable, the Court must have regard to comparative foreign case law. In this section, CALS will refer to case law from South Africa, Zimbabwe, Kenya and Peru.

South Africa

24. In the *Teddy Bear Clinic v Minister of Justice and Constitutional Development*⁶, the Constitutional Court in South Africa dealt sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (“**the Act**”), which criminalised criminalise consensual sexual conduct between adolescents.
25. The Constitutional Court found that sections 15 and 16 of the Act are unconstitutional in that they infringe the rights of adolescents (12- to 16-year olds) to dignity and privacy, and further in that they violate the best-interests principle contained in section 28(2) of the Constitution. Relying on expert evidence, the Court concluded that the impugned provisions criminalise what constitutes developmentally normative conduct for adolescents, and adversely affect the very children the Act seeks to protect. The effects of the impugned provisions were found not to be rationally related to the State’s purpose of protecting children.
26. The Constitutional Court held that the provisions were declared invalid only to the extent that they criminalise consensual sexual conduct between adolescents: the criminal prohibitions against non-consensual

⁶ 2014 (2) SA 168 (CC).

sexual conduct with children of any age, and against sexual activity between adults and older children on the one hand, and adolescents on the other hand, remain in place.

Zimbabwe

27. In *State v. B Masuku*,⁷ the High Court of Zimbabwe heard a case of a boy aged 17, who had consensual sexual intercourse with his girlfriend aged 15. He was consequently convicted of the offense of having sexual intercourse with a young person. In her decision, Justice Amy Tsanga commented on the question of criminalisation of adolescent consensual sexual conduct. She was cognisant of the intention of criminal law to protect adolescents from sexual predation, discourage early sexual debut between adolescents, and to protect them from the risks and harms of sexual intercourse including sexually transmitted infections (STIs) and teenage pregnancies. However, she observed that an unintended consequence of the criminal law was the punishment of young people in romantic relationships, because the law did not distinguish between the predatory adult and adolescents in relationships. In her judgment, she noted as follows

⁷ [2015] ZWHHC 106, CRB B467/14 (High Court of Zimbabwe)

Ignoring the reality of consensual sex among teenagers and adopting an overly formalistic approach to the crime can result not only in an unnecessarily punitive sentence, but also a criminal record and stigmatisation as a sex offender.

28. She further noted as follows:

Sex among peers is a reality of adolescent sexuality. It does not justify a suspended imprisonment term for the teen male offender who has had sex as part of a romantic relationship with a peer.

29. Justice Tsanga expressed the view that criminalising minors for having consensual sexual conduct was probably not the best way to achieve the intention of protecting adolescents, especially girls, from harms of sexual conduct.

Kenya

30. In ‘*Eliud Waweru Wambui v Republic*’,⁸ the appellant was sentenced to 15 years imprisonment for “defiling” a 15-year-old female. In its judgment, the Court observed that while the law expressly provides that a person below the age of 18 years cannot consent, most teenagers are engaging in consensual acts; hence it is unfair to have ‘young men’ jailed in such circumstances. It further noted that although adolescents

may not have attained the age of maturity, they may have well reached the age of discretion and can make intelligent and informed decisions about their lives and bodies.⁹ Accordingly, the Court allowed the appeal and quashed the conviction.

31. The judges, in this case, called for the re-examination of the law criminalisation adolescents. The Court held :“[w]here to draw the line for what is elsewhere referred to as statutory rape is a matter that calls for serious and open discussion... A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years.¹⁰

Peru

32. In a Peruvian case,¹¹ the Constitutional Tribunal gave judgment, declaring article 1^o of Law N^o 28704 unconstitutional, due to the

⁹ Id at 7.

¹⁰ Id at 7.

¹¹ File N^o. 00008-2012-PI/TC.

violation of sexual freedom of adolescents aged 15 to under 18. The Court ruled that all teenagers have the right to sexual freedom, understood as the capacity of self-determination regarding their sexuality, which means to decide with whom, how, and when they have sex.

CONCLUSION

33. CALS supports the order that is prayed for by the applicants as this order will ensure that section 138 is declared unconstitutional. This order will give effect to the right to development and the right to freedom of expression.

8 FEBRUARY 2022

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