



DRAFT

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY

CONSTITUTIONAL CASE NO. 12 OF 2007

CHREXX

**BETWEEN:**

EVANCE MOYO .....APPLICANT

AND

THE ATTORNEY GENERAL .....RESPONDENT

**CORAM: THE HON. JUSTICE H.S.B. POTANI**

**THE HON. JUSTICE DR. M. MTAMBO**

**THE HON. JUSTICE S. A. KALEMBERA**

Mr. S. Kayuni, Senior State Advocate, of Counsel for the Respondent

Mr. Mambulasa, of Counsel for the Applicant

Mr. Kammayani, of Counsel for Amicus Curiae (Malawi Human Rights Commission)

Mr. J. Gulumba, of Counsel for Amicus Curiae (Eye of the Child)

Mrs. Jumbe, of Counsel for Amicus Curiae (Centre for Human Rights, Education, Advice and Assistance)

Mrs. Chimtande, Official Interpreter

Mrs. Mangisoni, Recording Officer

**JUDGMENT**

The plaintiff, Evance Moyo, Commenced this action by Originating Summons dated 30<sup>th</sup> day of May 2007 seeking the Courts determination and declaration on the following questions:

1. Whether or not by remanding the applicant at Chichiri prison from 10<sup>th</sup> August, 1997 to December 2002 and imprisoning him during the pleasure of the president from December 2002 to date under the same circumstances, the State has violated section 42 (2) (g) (iii) of the Republican Constitution as read with section 4 of the Children and Young Persons Act (Cap 26:03) of the Laws of Malawi and disrespected or violated Article 37 (c) of the Convention on the Rights of the Child 1989 and Article 10 (2) (b) of the International Convention on Civil and Political Rights.
2. Whether or not by imprisoning the applicant for a period of 11 years, 5 months and 16 days the State has not violated section 42 (2) (g) (ii) of the Republican Constitution as read with section 11 (4) of the Children and Young Persons Act and disrespected or violated Article 37 (b) of the Convention on the Rights of a Child.
3. Whether or not the applicant has not been severely prejudiced as he has not benefitted from the application of Constitutional Revisions, Children and Young Persons Act and the Penal Code (Cap 7:01) of the Laws of Malawi
4. A declaration that section 26 (2) of the Penal Code and Section 11 (1) of the Children and Young Persons Act are unconstitutional
5. Consequent upon the High Court interpreting / finding in favour of the applicant of any or all of the questions above, an order that the Court exercises its powers under its inherent jurisdiction to order the immediate release of the applicant as the only effective remedy for the violation of his rights and the prejudice he has there by suffered. Alternatively, that the Court makes a declaration that the applicants' case must as of necessity and urgency be immediately considered by the Board of Visitors with a view to recommending to the President that he be discharged on Presidential Licence if the Board itself cannot order his discharge.

6. The plaintiff also seeks compensation from the defendant for the violation of his Constitutional Rights and the substantial prejudice that he has thereby suffered as a result of failure by the State to secure proper provision of his education and training and to review his development to determine a date for his release
7. Such further or other relief as the Court may determine
8. An order that the defendant pays costs of this action.

The application is supported by an affidavit sworn by the plaintiff as well as skeletal arguments. There are also skeletal arguments / submissions or presentations from Amicus Curiae which in one respect or the other support the plaintiffs' action. There are also skeletal arguments in opposition to the plaintiff application.

The brief facts of this matter are such that the applicant was arrested on 1<sup>st</sup> August, 1997 in Chiradzulu District on suspicion of having committed the offence of murder. He was 16 years old. The applicant had earlier on, on 31<sup>st</sup> July, 1997 gone out with his friends to a drinking party at about 20:00 hours. At the party a fight broke out between the applicant and one Moses Chibwana (deceased). Other friends on either side joined the fight. It was later discovered that the deceased had been stabbed and he died a few minutes later. The next morning the applicant and his parents went to report the matter to Chiradzulu Police and the applicant and his friends were later arrested. His friends were later released after a few days.

On 10<sup>th</sup> August, 1997 the applicant was remanded at Chichiri Maximum Prison in Blantyre after committal from Chiradzulu Magistrate Court. He was remanded in the adult section up to December, 2002 when he turned 20 years old and when he

went for trial. The High Court found the offence of murder proved Contrary to section 209 of the Penal Code, (Cap 7:01) of the Laws of Malawi. At that time the offence of murder attracted mandatory death sentence. However, the applicant being a juvenile at the time of commission of the offence and in compliance with section 11 (1) of the Children and Young Persons Act and section 26 (2) of the Penal Code, the trial judge ordered that the applicant be detained at Chilwa Approved School during the pleasure of the President.

The main issues for determination are therefore whether the applicants Rights were violated when he was incarcerated with adults when he was a juvenile; whether section 11 (1) of the Children and Young Persons Act and section 26 (2) of the Penal Code are unconstitutional; whether the applicants should be immediately released or his case be urgently considered by the Board of Visitors; and whether the applicant Right to be compensated.

We are grateful to Counsel for their elaborate, detailed and well researched submissions. Unfortunately it has not been possible to refer to each and every submission made by Counsel.

It is paramount at this stage to refer to the Law (s) in issue. The Constitution of the Republic of Malawi is the Supreme Law of the Land, that is, Malawi. It provides under section 4 that the Constitution shall bind all executive, Legislature and judicial organs of the State at all the peoples of Malawi are entitled to the equal protection of this Constitution, and Laws made under it. All Laws enacted in this Country therefore derive their authority from this Constitution. According to section 5 of the said Constitution any act of Government or any Law that is inconsistent with the provisions of this Constitution shall, to the extent of such

