



IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 49 OF 2024

ESTIFANOS ABIYANE AND 24 OTHERS..... APPLICANTS

VS

THE STATE..... RESPONDENT

CORAM: THE HON. JUSTICE J.A. KISHINDO

Mr. D. Kuyokwa Counsel for the State

Mr. C. Chithope-Mwale Counsel for the Applicants

Mr. K. Thadzi Official Interpreter

Mrs. R. Luhanga Senior Court Reporter

Kishindo, J

JUDGMENT

The Applicants, who are incarcerated at Mzuzu Prison for illegal entry into Malawi contrary to the Immigration Act, applied to this Court for their release from illegal detention and for effective remedies under section 42(1)(f) of the Constitution and section 16(6)(a)(ii) of the Statute Law (Miscellaneous Provisions) Act, Cap. 5:01, Laws of Malawi, as read with sections 15(2), 41(3), 46(2)(a), 46(3) of the Constitution. They contended that their continued detention was illegal because, for one category of Applicants, their remand warrants expired and, for another group of Applicants, they finished serving their sentences. They contended that their continued detention violates several human rights and freedoms, namely liberty, dignity, fair trial and not to

be discriminated against on the grounds of nationality or any status. They therefore prayed for the following reliefs captured in paragraph 24 of the affidavit in support of the application which reads:

"24. WHEREFORE I pray that the Honourable Court grants the Applicants the following reliefs:

- (a) An order of immediate release of the Applicants from their illegal detention at Mzuzu Prison;
- (b) Pending the Applicants' deportation, to grant the Applicants effective remedies by ordering the Respondent to accord the Applicants the following options:
 - i. The Respondent through the Department of Immigration and Citizenship Services considers granting them temporary permits;
 - ii. The Respondent through the Department of Immigration and Citizenship Services considers releasing them on bonds;
 - iii. The Applicants be kept at a facility other than a prison, for instance Dzaleka Refugee Camp;
 - iv. That the Respondent offers the Applicants the option of self-repatriation, for those who are capable.
- (c) An order that the reasonable period pending deportation by the Respondent shall not exceed 30 days from the date an illegal immigrant is due for deportation;
- (d) An order that any illegal immigrant who is a child should not be detained in prison, notwithstanding that he or she may be a foreign national;
- (e) A Structural Interdict giving the Respondent timelines and intervals of reporting to the Court about its implementation of the Honourable Court's Orders made herein."

This Court is of the opinion that the Applicants' demands under paragraph 24 of Counsel's affidavit in support are generally reasonable and must be accepted.

The Applicants have acknowledged the difficulties the State is facing in repatriating illegal immigrants back to their countries of origin. That is why the Applicants have proposed several options to the State. It is not like the Applicants want the State to allow them to roam freely in our streets. They want to be processed within a reasonable period of time and not to be illegally detained.

It should also be noted that whatever the Applicants are proposing is already provided for under the Immigration Act. Any person who is suspected to be a prohibited immigrant can only be detained for a period not exceeding 14 days, (section 14 (1) of the Immigration Act). The suspected immigrant can be released on bond if he is a suitable candidate for that. That option seems not to be appealing to the State.

Section 15 of the Immigration Act does not specify the period within which a prohibited immigrant must be detained in prison or any other place of custody. Sections 14 and 15 of the Act must be read together with Regulation 14 (3) of the Immigration Regulations which states that:

"No such person shall be detained in custody for any longer period than is necessary for the purposes of any prescribed enquiry or the completion by an immigration officer of arrangements for the removal of such person from Malawi at the first reasonable opportunity."

The Applicants suggest that 30 days is a reasonable period. This Court agrees with that suggestion. In the current Constitution dispensation, we cannot have people detained indefinitely be they citizens or foreign nationals. We all know that whenever there is need for an extension of a detention period, Courts have to be involved.

This Court declines the immediate release of the Applicants as we have valid detention warrants on record. We all know that the warrants are a reaction to

the summons by the Applicants, but this Court will let the warrants stand for now subject to review by this Court at the expiry of the 14 days from the date of issue.

There is no need for this Court to recommend to the Minister that the Applicants be deported to their home countries. Surely, the State has had a lot of time to figure out what to do with the Applicants. It has already started deporting the Applicants.

The Court declines the relief sought in paragraph 24 (a) of the Applicants' affidavit, that is the immediate release of the Applicants, but accepts the reliefs sought in paragraphs 24 (b) to 24 (e), considering that the state has been given a wide range of options under those reliefs: -

24 (b) Pending the Applicants' deportation, an order granting the Applicants effective remedies by ordering the Respondent to accord the Applicants the following options: -

- i. The Respondent through the Department of Immigration and Citizenship Services considers granting them temporary permits.
- ii. The Respondent through the Department of Immigration and Citizenship Services considers releasing them on bonds.
- iii. The Applicants are kept at a facility other than a prison, for instance Dzaleka Refugee Camp.
- iv. That the Respondent offers the Applicants the option of self-repatriation, for those who are capable.

24 (c) An order that the reasonable period pending deportation by the Respondent shall not exceed 30 days from the date an illegal immigrant is due for deportation.

24 (d) An order that any illegal immigrant who is a child should not be detained in prison, notwithstanding that he or she may be a foreign national.

24 (e) A Structural Interdict giving the Respondent timelines and intervals of reporting to the Court about its implementation of the Honourable Court's Orders made herein.

The Court will expect a progress report within 30 days of the granting of this order. Since the Applicants are in prison a Judge has the powers of prison oversight. The powers are derived from amongst several other provisions from section 32 of the Prisons Act. The Court can go and visit a prison and hear requests from prisoners but in this case the prisoners have decided to come to the Court. So, the detention warrants cannot be issued willy nilly without the approval of the Court considering that the prisoners have overstayed in custody.

Made this 29th day of July 2024 in Open Court.



J.A. Kishindo
JUDGE