

JOSHUA CHISA MBELE v THE DIRECTOR OF PUBLIC PROSECUTIONS & THE ATTORNEY GENERAL [2025] MWHC (Constitutional Referral No. 2 of 2024)

High Court of Malawi (Constitutional Court): Kachale J, Mwale J, Mvula J — July 2025

Headnote

The claimant, Joshua Chisa Mbele, challenged the constitutionality of section 200 of the Penal Code of Malawi, which criminalised defamation. He argued that the provision infringed his right to freedom of expression under section 35 of the Constitution and was inconsistent with Malawi's obligations under regional and international human rights law. The claim was made amidst pending criminal proceedings against him for alleged defamatory statements concerning a public official. The State and the Attorney General defended the provision as a lawful, necessary, and proportionate restriction to protect reputation, dignity, and public order.

The Constitutional Court, applying principles of purposive constitutional interpretation and having regard to comparative and international jurisprudence, held that section 200 imposed a disproportionate and unjustifiable limitation on freedom of expression. It noted that civil remedies for defamation provided a less restrictive and more proportionate alternative, and that the criminalisation of defamation, especially with the threat of imprisonment, had a chilling effect on public discourse. The Court declared section 200 unconstitutional and struck it down with immediate effect.

Held,

- The right to freedom of expression under section 35 of the Constitution is a foundational value in Malawi's constitutional democracy, subject only to limitations that are lawful, reasonable, recognised by international human rights standards, and necessary in an open and democratic society (section 44(2) of the Constitution).
- 2. Section 200 of the Penal Code, which imposes criminal sanctions for defamatory statements, is not the least restrictive means available for the protection of reputation, given the adequacy of civil defamation remedies.
- 3. The breadth of the section, its potential for arbitrary enforcement, and the deterrent effect of criminal prosecution on legitimate public discourse render it incompatible with constitutional guarantees.
- 4. Comparative and regional human rights jurisprudence strongly supports the decriminalisation of defamation, favouring civil remedies as the appropriate legal response to reputational harm.
- 5. Section 200 of the Penal Code is therefore unconstitutional and void for inconsistency with section 35 of the Constitution. The provision is struck down with immediate effect; no further prosecutions may be brought thereunder.

Judgment

The Court (Kachale J, Mwale J, Mvula J):

The Claimant, charged with criminal defamation under section 200 of the Penal Code, sought constitutional redress, arguing the offence unduly restricted his freedom of expression. He submitted that civil remedies sufficed for the protection of reputation and that criminal defamation laws were anachronistic, vague, and susceptible to abuse, creating a chilling effect on speech. The State and the Attorney General argued that criminal sanctions for defamation were a lawful and necessary means to protect dignity and public order and were consistent with international standards.

The Court reviewed the constitutional framework, emphasising the supremacy of the Constitution (sections 10 and 11), and the stringent test for restrictions on rights (section 44(2)). It found that the availability of civil remedies for defamation rendered criminal prosecution disproportionate. Comparative jurisprudence, including decisions from African regional courts and other Commonwealth states, was considered. The majority of these authorities supported the decriminalisation of defamation as a matter of democratic principle.

The Court concluded that section 200 could not be justified as necessary or proportionate and failed to provide adequate safeguards to prevent arbitrary or excessive interference with free speech. Upholding the constitutional challenge, the Court declared section 200 void and ordered that no further prosecutions be brought under it. Each party was ordered to bear its own costs.

Result

- Section 200 of the Penal Code declared unconstitutional and struck down.
- No further prosecutions to be brought under the provision.
- Each party to bear its own costs.