

DETERMINATION



REPUBLIC OF MALAWI

**INQUIRY BY THE OMBUDSMAN**

**IN THE MATTER**

**BETWEEN**

*EVANCE GANIZA KANYALIKA.....COMPLAINANT*

**AND**

*JUDICIARY.....RESPONDENT*

**INQUIRY NO: 08/2018**

**FILE NUMBER - OMB/BT/C/116/2004**

**DETERMINATION**

**CORAM**

- MARTHA CHIZUMA - OMBUDSMAN**
- Evance Ganiza Kanyalika - Complainant**
- Honourable Mzonde Mvula (Ass. Registrar)- Respondent**

## DETERMINATION

1. Through a letter dated 27<sup>th</sup> April, 2004 the Complainant lodged a complaint with our Blantyre office against the Malawi Judiciary alleging delay and or omission of duty to dispense justice.
2. The evidence on file show that despite numerous reminders by our office for comments by the Respondents there was no response until the matter was recommended for Public Inquiry in 2007.
3. During the first inquiry only the Complainant testified and after that the inquiry suffered quite a good number of adjournments due to problems within the office but in other cases due to non-availability of witnesses.
4. However a fresh inquiry was set up and was conducted on 21<sup>st</sup> June, 2017. The Respondents were represented by Honourable Mzonde Mvula, the Assistant Registrar of the High Court.
5. In his evidence the Complainant stated that he was an employee for Government Press and was dismissed in 1986. He challenged the dismissal through his lawyers Wilson and Morgan under Civil Cause No. 6 of 1987.
6. The matter was set down for hearing only once in 1987. He later learnt that his lawyers Wilson and Morgan left. He then made so many follow ups of his case with the High Court where he has been meeting the court clerk Mr. Green. The clerk advised him that his file could not be traced at the High Court and referred him to his lawyer who told him that his offices were sealed.
7. Thus when he lodged a complaint at this office.
8. During cross-examination the Complainant stated that he only entered court once and this was in Lilongwe before Justice Makuta. The issue in court was about his employment.
9. In response honourable Mzonde Mvula stated that they could not trace the file and requested for some time to make a follow up on the matter with the archives. I gave him almost a month from the date of the inquiry to give us their position on the matter. To date almost six months down the line he has not given us any response.
10. The main mandate of the Ombudsman is to investigate instances of maladministration. For maladministration to be proved, according to section 123 of the Constitution and section 5 of the Ombudsman Act the complaint against the public authority has to allege either or several of the following instances; injustice; abuse of power; unfair treatment; manifest injustice or conduct qualifying as oppressive or unfair in an open and democratic society; the exercise or performance of powers duties and functions in an unreasonable, unjust or unfair way. As per section 5 (2) this further includes decision or recommendation made by or under the authority of any organ of Government or any act or omission of such organ that is unreasonable, unjust or unfair or based on any practice deemed as such and also that the powers, duties and functions which vest in any organ of Government are exercised in a manner which is unreasonable, unjust or unfair.

11. Instances of maladministration though are not limited to above and as stated by S De Smith and R Braize " Constitutional and Administrative Law, 6th edition p 649

*'maladministration covers a multitude of administrative sins; sins of commission and omission, corruption, bias, unfair discrimination, harshness misleading members of the public as to his right, failing to notify him properly of his rights or to explain the reason for decision, general highhandedness, using powers for wrong purpose, failing to consider relevant materials, taking irrelevant materials into account or failing to reply to correspondence.*

12. Again injustices has not been defined but it includes things like financial loss or unnecessary expense, hurt feelings, distress, worry or inconvenience, anxiety, loss of right or amenity, time and trouble of pursuing a justifiable complaint.
13. Accordingly the question that needs to be determined is whether or not the Respondents are guilty of maladministration. As per the Complainant's unchallenged evidence he lodged his claim with the High Court in Lilongwe 30 years ago and was partially heard. To this date the hearing of the case is yet to be concluded.
14. By failing in their duty to adjudicate on the matter the Respondents have effectively denied the Complainant his day in court. They denied him his right to access justice. This is maladministration.
15. Where an allegation complained of has been proved Section 126 of the Constitution gives me powers to direct an appropriate administrative action to be taken to redress the grievance complained of and section 8(1) (b) gives me powers to take appropriate action or steps to call for or require the remedying or reversal of matters or instances complained of.
16. In the instant case the remedy that would redress this injustice is for the Respondents to set the matter down for a hearing where he is given a chance to have a day in court something that he was deprived of by the Respondents' maladministration.
17. However in the instant case this matter has been outstanding for 30 years. Moreover there is no any documentation of the matter in the custody of neither the Complainant himself nor more importantly with the Respondents themselves and as it is there is literally no chance of any such documentation being found. Thus over and above there being no possibility of the matter being reheard as a result of no documentation issues of limitation would also come into play. In other words there is no way the Complainant would have his day in court.
18. Thus this is a wrong that in the circumstances is irremediable by any administrative action or reversing any action. But this does not mean that an injustice hasn't been suffered. And in the instance I must be clear that the injustice that has been suffered is the denial of a day in court. Whether he would have succeeded in his action or not is none of my concern as Ombudsman and should not even exercise my mind.

19. On the other hand I am mindful that this malfeasance is so rampant in the judiciary going by the number of similar complaints my office is currently receiving. As I have opined in similar cases whilst for the judiciary this is just another file missing from the system for complainants like one in the present case the loss may be as far as complete loss of livelihood.
20. Considering all this it is still my considered opinion that the injustice suffered by the Complainant should be remedied. In view of my powers as provided for under section 8(1)(b)(i) I direct that the matter be set down for a negotiation of an appropriate remedy for the Complainant which will be presided over by myself on a date to be communicated.

#### 20. RIGHT OF REVIEW

Any Party dissatisfied by this determination and with sufficient interest in the matter has a right to apply for review to the High Court in accordance with section 123 (2) of the Constitution within 90 days from the date of this determination.

DATED THIS 4<sup>th</sup> DAY OF OCTOBER, 2018



Martha Chizuma  
OMBUDSMAN

ENQUIRY NO. 09/2018

FILE NUMBER - 09/2018/001

DETERMINATION

COPIES

MARTHA CHIZUMA

CHIZUMA

CHIZUMA

OMBUDSMAN

Complainant

Respondent