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RESEARCH ARTICLE

# Taking One for the Team? Some Reflections on the Trial of Malawi's *Hyena-man*

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**Abstract**

Following a public outcry about Eric Aniva being hired to have sex with children, he was arrested, tried and convicted of attempting to engage in a harmful practice and also of engaging in a harmful practice, contrary to Malawi's Gender Equality Act. Aniva's trial attracted significant public attention and highlighted *kulowa kufa*, the cultural practice at the centre of his trial. This article revisits Aniva's trial. By focusing on the operation of the law in judicial processes as well as the dynamics of judicial decision-making, it demonstrates and concludes that Aniva's trial may have been compromised. Specifically, the article analyses the state's failure to identify and parade material witnesses notwithstanding the alleged multiplicity of Aniva's victims, the role of the media in the trial as well as the probable effects of the trial court's selective recourse to international human rights standards.

**Keywords:** criminal law and society; trial by the media; fair trial; human rights and culture; Malawi

## Introduction

Eric Aniva (Aniva) must still be cursing the day, in July 2016, that he gave an interview to the BBC reporter, Ed Butler.[1] Clearly, were it not for Ed Butler's report, Aniva would, in all probability, have remained a free *hyena* roaming without hindrance in Nsanje District, southern Malawi. As fate would have it, Aniva's interview brought him so much publicity that he quickly found himself in trouble.[2] Following his interview, there was public outcry condemning Aniva specifically, and the practice of hiring *hyenas*, generally.[3] In short order, Aniva was arrested by the Malawi Police Service and put on trial. Strikingly, Aniva's arrest followed a presidential directive in the wake of the BBC story.[4]

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1 E Butler "The man hired to have sex with children" (21 July 2016) *BBC*, available at: <http://www.bbc.com/news/magazine-36843769> (last accessed 17 July 2023).

2 See N Jacewiz "Malawi's 'hyena' men: Paid by parents to have sex with their daughters" (29 July 2016) *Goats and Soda*, available at: <http://www.npr.org/sections/goatsandsoda/2016/07/29/487672132/malawis-hyena-men-paid-by-parents-to-have-sex-with-their-daughters> (last accessed 17 July 2023); and J Shammas "HIV-infected man dubbed 'the hyena' is paid £3 to spend three days taking virginity of girls as young as 12" (21 July 2016) *Mirror*, available at: <http://www.mirror.co.uk/news/world-news/hiv-infected-man-paid-3-8461262> (last accessed 17 July 2023). In parts of Malawi, a *hyena* is someone who is hired for the purposes of ritual "cleansing".

3 F Karimi "Malawi arrests 'hyena' man who bragged about sex with children" (27 July 2016) *CNN*, available at: <https://edition.cnn.com/2016/07/27/africa/malawi-hyena-man-arrested/index.html> (last accessed 17 July 2023).

4 "Malawian 'hyena-man' arrested for having sex with children" (26 July 2016) *BBC*, available at: <http://www.bbc.com/news/world-africa-36892963> (last accessed 17 July 2023).

The directive for his arrest included condemnation of the practice of hiring *hyenas* and also an instruction to the police to arrest anyone else involved in the practice.

This article analyses Aniva's trial before the Principal Resident Magistrate Court (the Court), sitting at Nsanje, Malawi. It highlights how the social context prevailing in Malawi may have influenced the outcome of Aniva's trial and made his conviction a foregone conclusion. The article begins with a brief presentation of the cultural practice known as *kulowa kufa*, which was at the centre of Aniva's trial. A summary of his trial, highlighting the Court's key findings, follows. The article then discusses the applicability of international human rights law under the Constitution of the Republic of Malawi of 1994 (the Constitution). This is done in order to provide the broad legal context that, arguably, exerted influence on Aniva's trial The article then analyses some selected issues emerging from Aniva's trial. A conclusion wraps up the analysis.

## Locating the *hyena* in the context of *kulowa kufa*

Ed Butler's report actually refers to two cultural practices, *kulowa kufa* and *kuchotsa fumbi* (also known as *kusasa fumbi*), although no clear distinction is made between the two.[5] *Kulowa kufa* can be understood as the "cleansing of widows / widowers" while *kuchotsa fumbi* refers to the cleansing of pubescent girls.[6] Admittedly, both practices involve sexual intercourse between a designated individual, often male, and another individual who is in a particular situation: bereavement for *kulowa kufa* and attainment of sexual maturity for *kuchotsa fumbi*. It is the first individual that is referred to as the *hyena*, locally known as *Fisi*. It is notable that there are several variations of the *Fisi* tradition among different ethnic groups in Malawi, with the common denominator being the belief that sexual intercourse can be "used as a tool for sorting out social problems".[7]

Although both *kulowa kufa* and *kuchotsa fumbi* involve pre-arranged sexual relations, there are differences between the two practices.[8] For example, *kulowa kufa* involves widows / widowers and one can presume that the participants may have some knowledge of the impending execution of the practice and may even consent.[9] *Kuchotsa fumbi* involves adolescent girls who can be presumed either to be not fully aware of the practice before being made to participate in it, or to be incapable of giving informed consent.[10] The focus of this article, for the purpose of analysing Aniva's trial, is on *kulowa kufa* because this is the practice for which Aniva was charged and convicted.[11] Ironically, much of the publicity around Aniva focused on him being hired to have sex with

5 "Culture and tradition in Malawi: Other lessons from Aniva's arrest" (19 August 2016) *Tiunike*, available at: <https://www.tiunike.com/post/2016/08/19/culture-and-tradition-in-malawi-other-lessons-from-mr-aniva-s-arrest> (last accessed 17 July 2023).

6 J Chakanza "The HIV/AIDS pandemic in Malawi: Cultural and gender perspective" (2005) 19 *Journal of Humanities* 75 at 77–79.

7 *Fisi* can be used, among other roles, for: procreation where a husband is impotent; for birth cleansing where the father of a child is away, has denied responsibility for pregnancy or is dead; for death cleansing; and for cleansing infidelity: "Cultural practices and their impact on the enjoyment of human rights, particularly the rights of women and children in Malawi" (Malawi Human Rights Commission), available at: <http://www.mwfountainoflife.org/files/4413/9395/3331/cultural_practices_report.pdf> (last accessed 17 July 2023).

8 Ibid.

9 The type of consent present in such a scenario remains questionable: *Report of the Law Commission on the Development of the Gender Equality Act* (2011, Government of Malawi) at 27–28.

10 A Kamlongera "What becomes of 'her'? A look at the Malawian *Fisi* culture and its effects on young girls" (2007) 74 *Agenda: Empowering Women for Gender Equality* 81; and J Banda and P Atansah "An agenda for harmful cultural practices and girls' empowerment" (12 December 2016, Center for Global Development), available at: <https://www.cgdev.org/publication/agenda-harmful-cultural-practices-and-girls-empowerment> (last accessed 17 July 2023).

11 For a full discussion of "harmful cultural practices" in Malawi and their impact on human rights, see "Cultural practices", above at note 7.

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children, thus suggesting he was practising *kuchotsa fumbi* while he was actually tried and convicted for *kulowa kufa*.[12]

The term *kulowa kufa* literally translates as "entering death" or depending on the tone "death has entered". It is a practice conducted, predominantly, among the Sena ethnic group of southern Malawi. *Kulowa kufa* is believed to be capable of fixing an anomaly brought about by death. Communities that practice *kulowa kufa* believe that the occurrence of death brings about "a corrosive potency" that lingers among various objects around the household if the living come into contact with those objects. It is further believed that, if these objects are not ritually cleansed, those left behind will die or wither away as if taking "the same course of decay seen in the dead body of the deceased".[13] It is because of this that the entire compound where the deceased lived requires cleansing so that death can be defused.[14] The cleansing also involves sexual intercourse by the bereaved with a chosen individual. *Kulowa kufa*, however, is just one of the several practices that must be carried out following a death in Sena societies. It is thus part of a continuum of cultural practices meant to re-establish balance in society.

Although much has been made of the term "sexual cleanser" in connection with *kulowa kufa*, the cleanser, in this context, must be understood as someone who is believed to help bring back the stability that has been lost due to death. While the act of *kulowa kufa* does involve sexual intercourse, the English translation "sexual cleansing / sexual cleanser" is inaccurate. In the local dialect, the expression *kulowa kufa* does not have any sexual connotations.[15] It seems, however, that the human rights discourse and public health campaigns against HIV/AIDS have isolated the sexual component of the practice and highlighted it for the dangers that it poses to society, to the exclusion of the other social roles that the practice is believed to perform. This is decontextualization and contributes little to a full understanding of *kulowa kufa*.

As a practice, *kulowa kufa* is "deeply institutionalized within the community's way of life".[16] The practice is overseen by local village authorities acting together with the elders. The village head will have a committee, comprising both males and females, who are responsible for coordinating *kulowa kufa*. It is this committee that manages the inter-village networks that facilitate the exchange of *hyenas* and also ensures compliance with the other practices that must happen either before or after *kulowa kufa*. Ultimate responsibility for ensuring that *kulowa kufa* is carried out, however, lies with the local village head.

While there have been assumptions about the sex of the *hyena*, in reality they can be either male or female.[17] Admittedly, societies practising *kulowa kufa* are also affected by gender dynamics, especially the inequalities that affect Malawi as a whole, but the assumption that *hyenas* are always male is wrong. *Kulowa kufa*, however, is not detached from the patriarchal elements in society and this may explain the common assumption that men utilize the practice to perpetrate patriarchal domination.

The name *hyena*, therefore, speaks to the nocturnal character of the practice and not the masculinity of the principal actor. Depending on whether the bereavement has befallen a man or a

12 See Jacewiz "Malawi's 'hyena' men" and Shammas "HIV-infected man", both above at note 2.

13 MM Kaufulu "A non-academic documentary of a sexual cleansing ritual called *kulowa kufa* in Malawi" (2008), available at: <https://www.researchgate.net/publication/305541342_A_NON-ACADEMIC_DOCUMENTARY_OF_A_SEXUAL_CLEANSING_RITUAL_CALLED_KULOWA_KUFA> (last accessed on 17 July 2023).

14 There have been suggestions that *kulowa kufa* has spiritual dimensions: A Steinforth *Troubled Minds: On the Cultural Construction of Mental Disorder and Normality in Southern Malawi* (2009, Peter Lang GmbH) at 56–58. However, it is arguable that there is nothing spiritual about the practice and that it is generally about restoring a natural balance in society to prevent material decay. The practice is underlain by an indigenous epistemology pertaining to how balance is maintained in society: Kaufulu "A non-academic documentary", above at note 13.

15 Kaufulu, ibid.

16 Ibid.

17 M Seyani "*Kulowa kufa* evolved not abolished" (3 January 2014) *The Nation*, available at: <http://mwnation.com/kulowa-kufa-evolved-not-abolished/> (last accessed 17 July 2023).

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woman, the *hyena* to conduct *kulowa kufa* may also be either female or male. As a cultural practice, therefore, *kulowa kufa* represents the "terms of interaction needed to maintain a coherent social life within a culture".[18]

It would be remiss not to point out that *kulowa kufa* has been identified as one of the cultural practices that contributes to the spread of HIV/AIDS and also to the denigration of women's rights.[19] This has led to condemnation of the practice, as was confirmed by the public reaction to Ed Butler's story. It is doubtful though whether much of the public condemnation follows from a full understanding of the cultural place and role of *kulowa kufa*. This is because, for example, while there is evidence that, in places, there have been efforts to "renegotiate" the practice to eliminate aspects that increase exposure to sexually transmitted infections, acknowledgment of such "renegotiation" is sparse.[20] The danger here is that otherwise well-intentioned interventions to deal with, for example, HIV/AIDS may be mis-structured due to a lack of a proper understanding of the role of cultural practices in the transmission of the disease.[21]

## Eric Aniva's trial: Summary of the proceedings

Aniva was charged with two offences: engaging in a harmful practice and attempting to engage in a harmful practice. Both offences were said to be contrary to section 5 of the Gender Equality Act (the Act).[22] Section 5 of the Act provides: "(1) [a] person shall not commit, engage in, subject another person to, or encourage the commission of any harmful practice. (2) Any person who contravenes this section commits an offence and is liable to a fine of one million Kwacha (K1,000,000) and to a term of imprisonment for five (5) years." Under section 3 of the Act a "harmful practice" means: "[a] social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to (a) undermine the dignity, health or liberty of any person; or (b) result in physical, sexual, emotional, or psychological harm to any person."

For the offence of engaging in a harmful practice, the particulars of the charge alleged that "between 2013 and 2016, in villages in Nsanje District within the Republic of Malawi, [Aniva] had carnal knowledge of women in the name of *kulowa kufa* a harmful practice".[23] As for attempting to engage in harmful practices, the particulars alleged that Aniva had "in July 2016 attempted to have carnal knowledge of one Mary Bornface in the name of *kulowa kufa*".

Aniva denied both charges. He also opted to exercise his right to silence. The state called six witnesses in a bid to prove its case. The first witness was the local chief and his testimony attempted to explain the various cultural practices prevalent in his area including *kulowa kufa*.[24] It was his testimony that, due to the advent of HIV/AIDS, the practice of *kulowa kufa* had been extensively discouraged in his area. During cross-examination, this witness conceded that no complaint had been

18 In Luo societies in Kenya, for example, a similar practice is believed to facilitate the acceptance of widows back into society and also to cleanse them of the evil of death: R Ayikukwei et al "Social and cultural significance of the sexual cleansing ritual and its impact on HIV prevention strategies in western Kenya" (2007) 11/3 *Sexuality Culture* 32.

19 "Cultural practices", above at note 7; M Makwemba et al "Survey report: Traditional practices in Malawi" (March 2019), available at: <https://www.unicef.org/malawi/media/1546/file/Traditional%20Practices%20in%20Malawi:%20Survey%20Report.pdf> (last accessed 17 July 2023); and "Health sector strategic plan 2011–2016: Moving towards equity and quality" (Government of Malawi), available at: <https://www.resakss.org/sites/default/files/Malawi%20MH%202011%20Malawi%20Health%20Sector%20Strategic%20Plan%202011%20-%202016.pdf> (last accessed 17 July 2023).

20 F Banda "Renegotiating cultural practices as a result of HIV in the eastern region of Malawi" (2015) 17/1 *Culture, Health & Sexuality: An International Journal for Research, Intervention and Care* 34.

21 See S Page *Development, Sexual Cultural Practices and HIV/AIDS in Africa* (2019, Palgrave Macmillan) at 61–106.

22 Act No 49 of 2012, Laws of Malawi.

23 These details are from the charge sheet as captured in the Court's judgment.

24 There are different categories of chiefs in Malawi, including village headmen, group village headmen and traditional authorities. The judgment, however, simply mentions that Chief Malemia testified as PW 1 without specifying his precise designation. Specifying the rank of the chief would generally have indicated his proximity to where Aniva lived.

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lodged with his office alleging that Aniva was engaging in *kulowa kufa* and that, to his knowledge, no woman had ever reported Aniva to the police for practicing *kulowa kufa*.[25] The second prosecution witness, Ntonya Fole, admitted having had sex with Aniva as part of *kulowa kufa*. She, however, conceded that the sexual intercourse took place before the Act was enacted.

The third witness was Mary Bornface and the fourth witness was her son, Ernest Bornface. The testimony of these two witnesses related to the charge of attempting to commit a harmful cultural practice. They both testified that Aniva had, sometime in June 2015, come to their house for the purpose of carrying out *kulowa kufa*. According to these witnesses, Aniva was rebuffed on both occasions and he never returned. From the testimony of Mary Bornface, it was also clear that it was her parents-in-law that had arranged for Aniva to come and conduct *kulowa kufa* following the death of her husband.

The other two witnesses were police officers who testified as to how they arrested and processed Aniva. From their testimony, it was clear that the instructions to arrest Aniva emerged only after the publication of the BBC report.[26] Once Aniva was arrested, a statement was recorded from him and the prosecution relied on this statement to prove that Aniva had confessed to the commission of a harmful practice.

### Key findings of the Court

The Court found that the testimony of the second prosecution witness, Ntonya Fole, was irrelevant. This was because her entire testimony related to events that happened before the Act was enacted. As a result, although this witness admitted having had sexual intercourse with Aniva as part of *kulowa kufa*, the Court held that the sexual intercourse happened "outside the period in the charge … [her / the] evidence is therefore not relevant to the case at hand".[27] Poignantly, Ntonya Fole was the only witness who testified to having actually had sexual intercourse with Aniva as part of *kulowa kufa*.

As for the testimony of Mary Bornface and Ernest Bornface, the Court found that Aniva never conducted *kulowa kufa* with Mary Bornface. While it was established that Aniva had visited Mary Bornface's residence, supposedly for the purpose of conducting *kulowa kufa*, the Court accepted that Aniva was rejected on both occasions. The Court also accepted that Aniva neither forced himself on Mary Bornface nor even attempted to force himself on her.

The Court also established that, after he had been arrested, Aniva made a statement to the police in which he admitted having practised *kulowa kufa*. According to the Court, this statement, together with the fact that Aniva had gone to Mary Bornface's house, where he had attempted to carry out *kulowa kufa*, made it "abundantly clear that the State had proved beyond reasonable doubt that the accused was doing *kulowa kufa* thereby engaging in a harmful practice contrary to section 5 of the Gender Equality Act".[28] In a similar vein, the Court found that the offence of attempting to engage in a harmful practice was proved, since Aniva had visited Mary Bornface's house for the purpose of conducting *kulowa kufa*.

The Court convicted Aniva on both counts and on 22 November 2016 he was sentenced to 24 months imprisonment on the first count and ten months imprisonment on the second count, with the sentences to run concurrently. Although section 5 of the Act gives a convicted person the option of paying a MK1,000,000 fine, the Court rejected this in favour of a custodial sentence. The Court also rejected the Sentencing Guidelines guidance requiring that, where the law provides for a fine and / or imprisonment, a custodial sentence must always be the last resort.[29] According to the

25 This point was corroborated by the testimony of the police officers who arrested Aniva.

26 *R v Eric Aniva* criminal case no 87 of 2016, PRM, Nsanje, 18 November 2016 (judgment) at 2.

27 Id at 4.

28 Id at 6.

29 *Magistrates' Court Sentencing Guidelines* (2007, Malawi Judiciary), part A (copy on file with the author).

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Court, "imposing a fine or a suspended sentence would be a mockery to the administration of justice".[30]

Although it was established that Aniva was a first-time offender and that this should, ordinarily, have entitled him to a less severe sentence including the option of a non-custodial sentence, the Court found that there were aggravating circumstances militating otherwise. Some of the aggravating factors identified by the Court were that Aniva had taken "advantage of the vulnerability of women and girls and their disadvantaged or vulnerable status in the community".[31] The Court was also of the view that the case against Aniva "in spite of its cultural backing, centered on the exploitation of the victims for the financial or material gain of the convict".[32] According to the Court, the fact that "the offence took some deliberation and planning, spanning over a considerable period of time" was another aggravating factor.[33] It was also the Court's finding that Aniva's case was aggravated in so far as "the convict showed no remorse by pleading not guilty and not admitting the crime. He was thus non-repentant".[34]

The Court further held that the Act must be understood as an offshoot of Malawi's obligations under the various treaties to which it is party. The treaties to which the Court expressly referred included the: Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol); and Convention on the Rights of the Child (CRC). According to the Court, "Malawi has a specific obligation under national and international law to eliminate harmful social and cultural practices that negatively impinge on the rights of vulnerable groups such as women".[35] This obligation, the Court established, "requires Malawi to prevent the commission of harmful practices by private individuals. It further requires appropriate judicial actions in order to prevent and eliminate harmful practices".[36]

The next section of this article provides an overview of the constitutional place of international human rights law in Malawi. In this way, the author hopes that the broad canvas against which Aniva's trial was conducted can be appreciated.

## International human rights law in Malawi

Any discussion of the place of international human rights law in Malawi must, invariably, refer to Malawi's transition from a one-party state to multiparty democracy and the adoption of the new Constitution in 1994. This is because, in transitioning to multiparty democracy, Malawi discarded its 1966 Constitution, which only obliquely acknowledged the relevance and applicability of international law, and adopted, instead, a constitution that expressly acknowledges the role and relevance of international law.

One of the clearest examples of the effect of the transition, and also the establishment of a new constitutional order, was Malawi's newfound willingness to accede to key human rights instruments.[37] Normatively, apart from references to the applicability of international law, the 1994 Constitution contains an extensive Bill of Rights. The Constitution also established various

30 *R v Eric Aniva* criminal case no 87 of 2016, PRM, Nsanje, 22 November 2016 (sentence ruling) at 7.
31 Id at 5.
32 Ibid.
33 Ibid.
34 Ibid.
35 Id at 4.
36 Ibid.
37 For example, Malawi acceded to both the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights on 22 December 1993 (around the time of the transition to multipartyism), and to both the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Convention Against All Forms of Racial Discrimination on 11 June 1996 (after the adoption of the Constitution): "UN treaty body database: View the ratification status by country or by treaty", available

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institutions to support Malawi's democratization. For example, for the first time in the country's history, the office of the ombudsman was established, as was a national human rights commission.[38]

Section 211 of the Constitution, which governs the applicability of international law, provides:

> "(1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by an Act of Parliament.
> (2) Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.
> (3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic."

Section 211 envisages several scenarios. First, section 211(1) confirms the dualist nature of the legal system in Malawi in so far as treaty law is concerned. As per this provision, treaty law is only applicable if an act of Parliament so provides. Secondly, section 211(2) seemingly covers international agreements that were already binding on Malawi at the time the Constitution entered into force. These agreements are given continued validity unless an act of Parliament provides otherwise. Thirdly, according to section 211(3), customary international law is automatically part of the laws of Malawi unless it contradicts the Constitution or an act of Parliament.

Quite apart from section 211, several other constitutional provisions expressly invite the application of international law in Malawi. For example, section 13(k) of the Constitution stipulates, as a directive principle of national policy, that the state shall "govern in accordance with the law of nations and the rule of law and actively support the further development thereof in regional and international affairs". Under section 11(2)(c), the Constitution directs that "in interpreting the provisions of this Constitution, a court of law shall, where applicable, have regard to current norms of public international law." Further, section 44(1) provides that one of the necessary conditions for a valid limitation on a right guaranteed under the Bill of Rights is that the limitation must be "recognised by international human rights standards". Given these provisions and other provisions of similar intent, it is clear that the Constitution accords international law a major and important role in constitutional adjudication.[39]

The Constitution's pro-international law posturing has had mixed results in practice. Writing in 2002, Hansen concluded that, notwithstanding the promise of the Constitution, "international human rights law [was] still not playing any important role in the courts of Malawi".[40] In a 2012 presentation, Mzikamanda argued that, although there was a strong case for the application of international human rights law in Malawi, there was little evidence of its application.[41] As of 2022, however, it is Kapindu's position that, arguably, correctly captures the prevailing situation. According to Kapindu, "the judiciary and legal profession … have made significant strides … towards infusing international human rights law norms into local jurisprudence" even though progress is not as extensive and profound as would be ideal.[42]

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at: <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=104&Lang=EN> (last accessed 17 July 2023).

38 See the Constitution, secs 120 and 129.

39 T Maluwa "The role of international law in the protection of human rights under the Malawian Constitution of 1995" (1995) 3 *African Yearbook of International Law* 53 at 77–79.

40 T Hansen "Implementation of international human rights standards through the national courts in Malawi" (2002) 46/1 *Journal of African Law* 31 at 42.

41 R Mzikamanda "Application of international human rights law in Malawi" (paper presented at the Malawi Human Rights Commission workshop for legal practitioners, Mangochi, 23 February 2012: copy on file with the author).

42 RE Kapindu "The relevance of international law in judicial decision-making in Malawi" in A Meerkotter (ed) *Using Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana, Malawi and Zambia* (2015, Southern Africa Litigation Centre) 74 at 75, available at: <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/9Kapindu.pdf> (last accessed 17 July 2023).

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So far as judicial adjudication is concerned, the "progress" to which Kapindu alludes has arguably nudged Malawi into a position where international human rights law suffuses the interpretation and application of law, with varying levels of sophistication. This "progress", however, is not without challenges. From the perspective of the judiciary, among others, two challenges seem apparent: the reluctance by the courts to apply international human rights instruments; and the lack of consistency by the courts when recourse is had to international law.[43] Additionally, notwithstanding Malawi's enthusiasm for ratifying or acceding to human rights instruments, there persists a disconnect between the formal commitment and implementation of the standards in those instruments.[44] It is this disconnect that, fundamentally, compromises the realization of human rights.

The adoption of the Act must, therefore, partly be understood as a consequence of Malawi's international law obligations. This connection is most clearly evident in the Malawi Law Commission's report that preceded the adoption of the Act. In making its proposals for the adoption of the Act, the Malawi Law Commission proceeded on the basis that, "Malawi has a specific obligation under international law to outlaw harmful social or cultural practices".[45] Given this context, this article next analyses selected issues emerging from Aniva's trial.

## Analysis of selected issues

The focus of the analysis in this section is on the processes that led to Aniva's conviction. By analysing the position(s) that the Court took, or failed to take, it is hoped that a deeper understanding can be gained of how and why Aniva was convicted.

### *Human rights on trial? The Court's assessment of kulowa kufa*

One of the unique attributes of the Constitution is that it, invariably, guarantees human rights to "every person".[46] Although Aniva's trial implicated several human rights, the following constitutionally guaranteed rights were, arguably, central to the charges that he faced: the right to dignity (section 19); the rights of women to equal protection of the law (section 24); the right to engage in cultural practices of one's choice (section 26); and the right to a fair trial (section 42). At one level, Aniva's trial was an opportunity for the Court to explore whether *kulowa kufa*, as a cultural practice, could stand the test of constitutionality, especially in the light of a law (the Act) that outlaws harmful cultural practices. On a literal reading of the Constitution, section 26 could be raised as justification for engaging in *kulowa kufa*. It is trite, however, that rights in the Constitution must be read holistically, meaning that section 26 should be considered together with, for example, sections 19 and 24.

In Malawi's legal system, if the Court, in Aniva's case, was of the view that the case before it "expressly and substantively" related to or concerned the interpretation and application of the Constitution, the matter should have been referred to the chief justice, for certification of the constitutional issues arising.[47] On the chief justice's certification, the High Court would then sit as a "constitutional court" to resolve any constitutional questions. Given the absence of a referral, it can safely be surmised that the magistrate did not see any constitutional issues worth the High Court's attention. Notably, magistrates' courts in Malawi are only barred from determining matters

43 Mzikamanda "Application of international human rights law", above at note 41.

44 Compare with Page *Development, Sexual Cultural Practices*, above at note 21 at 61–80.

45 *Report of the Law Commission*, above at note 9 at 26.

46 For example, sec 16 provides that "every person has the right to life" and sec 18 provides that "every person has the right to liberty".

47 See Courts Act, cap 3:02 Laws of Malawi, sec 9; and M Nkhata "The High Court of Malawi as a constitutional court: Constitutional adjudication the Malawian way" (2020) 24 *Law, Democracy and Development* 442.

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that expressly and substantively relate to the interpretation and application of the Constitution. In practice, these courts routinely engage in constitutional interpretation and application, for example, when dealing with the release of suspects on bail, which is covered under section 42 of the Constitution.

The Court's assessment of *kulowa kufa* can be captured from the following passage in its judgment:

> "From the evidence in this court it appears that according to the practice a person is hired to perform the cleansing which is in form of sexual intercourse. The sero status of the person to perform the ritual is not ascertained before the act. The widow or widower has no say on the choice of person. Again his / her consent is immaterial. It is therefore clear in my view that kulowa kufa is a harmful practice in that it violates the dignity of person in that he / she is forced to sleep with a person not of their choice and it against their wishes or feelings. This can put the forced party into mental anguish. Again the practice can result in sexual harm. The court therefore come to the conclusion that kulowa kufa is cultural practice which is harmful."[48] [sic]

Given the charges against Aniva, it is arguable that what was partly at stake was the constitutional validity of *kulowa kufa* as a cultural practice. Strangely, the Court's judgment made no allusion to the role of the right to culture in its assessment of *kulowa kufa*. It is also notable that the Court held that *kulowa kufa* violates the dignity of a human being, due to the forcible sexual intercourse that is entailed, with no reference to the parameters of the right to dignity under section 19 of the Constitution. The Court could have, for example, explicitly demonstrated why *kulowa kufa* is unjustifiable under the constitutional right to culture, while also taking time to expose the demands of the right to dignity and how they intersect with *kulowa kufa*.[49] Further, section 44 of the Constitution provides the factors that must be considered in order legitimately to limit any constitutional right. The Court, however, never attempted to use the constitutional limitation scheme to assess *kulowa kufa*. There is, therefore, no compelling judicial analysis highlighting how *kulowa kufa* is not only factually a harmful practice, but also why it cannot be sustained under the right to cultural practices for which the Constitution provides.

It is arguable, however, that the Court's conclusions may have been influenced by Malawi's international human rights law obligations. By way of illustration, after recalling that Malawi is a party to CEDAW, the Maputo Protocol and the CRC, the Court stated:

> "Malawi has a specific obligation under national and international law to eliminate harmful social or cultural practices that negatively impinge on the right of vulnerable groups such as women. This obligation is explicitly mentioned in several international and regional human rights treaties and agreements and includes obligation to respect, protect and fulfil rights of women in eliminating harmful practice."[50] [sic]

As noted above, the application of international law in Malawi has constitutional fiat. However, it is important to recall that universal human rights tend to carry and convey serious compulsion around their core values. An age-old challenge is how universal human rights must respond to

48 *Aniva*, above at note 26 at 4.

49 A useful resource that the Court could have used here is the "Joint general recommendation / general comment No 31 of the Committee on the Elimination of Discrimination Against Women and No 18 of the Committee on the Rights of the Child on harmful practices" (November 2014), available at: <https://reliefweb.int/report/world/joint-general-recommendationgeneral-comment-no-31-committee-elimination-discrimination#:~:text=The%20Committees%27%20Joint%20General%20Recommendation,neck%20elongation%20and%20breast%20ironing> (last accessed 1 August 2023).

50 *Aniva*, above at note 26 at 4.

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the varied particular circumstances in which they are meant to be enjoyed. Aniva's trial highlighted some of the challenges of resorting to universal human rights when dealing with culturally particular questions. Given the public excitement that Ed Butler's report generated, it is arguable that Aniva's trial and conviction were simply a temporal reaction meant to assuage the demands of international human rights and portray Malawi as a human rights-compliant country. Critically, what seems to have been at play here is the "rhetoric of human rights", this being the ubiquitous universalizing message of the human rights movement.[51] Whatever the value in the judicial resolution of individual cases raising human rights issues, it is overambitious to assume that this somehow amounts to an advancement in the human rights of the group from which the victim comes. The paucity of prosecutions for *kulowa kufa* under the Act, until now, suggests, among other things, that Malawi has yet to devise a comprehensive strategy for dealing with the so-called harmful cultural practice beyond criminalization. Remarkably, it took almost three years after the Act was passed for the first trial under section 5 to be held and no further trials for *kulowa kufa* have been reported since Aniva's was concluded. Given that criminal cases rely on willing complainants and witnesses, the lack of further *kulowa kufa* prosecutions under section 5 of the Act may also be indicative of communal unwillingness to use the criminal law to deal with this cultural practice. Ironically, in an earlier interview, Aniva, also admitted to practising *kulowa kufa*, but that interview did not draw as much public ire as the one that led to his trial.[52] This lends credence to the fact that it was, largely, the international exposure that landed Aniva in trouble.

The contradiction at play here is that Malawi has readily embraced human rights but there persist certain elements in its social life that require careful reconciliation with the demands of human rights. Focusing on *kulowa kufa*, it is clear that the mainstream messages about its harmful effects have a high reception rate among the Sena people of southern Malawi.[53] Nevertheless, the communities concerned seem to have devised ways to continue with the practice while still participating in the various initiatives, either by the Government or civil society organizations, meant to eradicate the practice.[54] In fairness, therefore, Aniva's conviction was merely a salutary reaction that made little or no contribution towards the eradication of *kulowa kufa*. Put crudely, the country "needed" Aniva to be convicted so that an appropriate posture about Malawi as country that promotes and protects human rights could be sustained.

### *Over 100 victims and only six witnesses: Where were Aniva's victims?*

The state called six witnesses but only one testified to have had sexual intercourse with Aniva as part of *kulowa kufa*. The absence of witnesses, notwithstanding the alleged multiplicity of Aniva's victims, is baffling. A possible explanation, as explored below, could lie in the question of communal complicity in criminal conduct. *Kulowa kufa* requires the involvement of several community members. The process is set in motion when the concerned village headman, his committee and the relatives of the deceased discuss the matter and agree on the logistical arrangements, including identifying the *hyena* and agreeing on when *kulowa kufa* must be carried out.

In this context, it is important to note the following provisions of section 21(1) of Malawi's Penal Code, which the Court never considered:

51 F Kanyongolo "The rhetoric of human rights in Malawi: Individualisation and judicialization" in H Englund and F Nyamnjoh (eds) *Rights and Politics of Recognition in Africa* (2004, Zed Books) 64.

52 E Butler "Stealing innocence in Malawi", available at: <http://www.bbc.co.uk/programmes/p041dlfb> (last accessed 17 July 2023).

53 Kaufulu "A non-academic documentary", above note 13 at 16.

54 Ibid.

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"When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

(a) every person who actually does the act or makes the omission which constitutes the offence;
(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
(c) every person who aids or abets another person to commit the offence; and
(d) any person who counsels or procures any person to commit the offence."

Section 403 of the Penal Code provides: "[e]very person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof, shall be guilty of a misdemeanour."

Importantly, under section 5 of the Act, one's culpability can be engaged by doing several things, including committing the harmful practice, engaging in the harmful practice, subjecting another to the harmful practice or encouraging the harmful practice. Strictly speaking, therefore, everyone involved in arranging *kulowa kufa* could be caught by section 5 of the Act, at least for encouraging the commission of a harmful practice. Aniva, as may be recalled, was convicted of engaging in a harmful practice. The farcical suggestion that the Court's conclusion points to is that Aniva singly organized the *kulowa kufa* in which he was convicted of engaging. This is simply impossible, even though the Court demonstrates no awareness of the fact.

A number of peculiarities in Aniva's case are also worth noting. The BBC report, which was the precursor to his trial, indicated that he had confessed to having had sexual intercourse with 104 women and girls. The report, though, questioned whether this number was accurate seeing as Aniva had, allegedly, given the same number of women and girls that he had slept with in a 2012 interview.[55] Taking Aniva at his word, there were at least 104 potential witnesses against him. Yet, the state was only able to find one witness who testified to having had sexual intercourse with Aniva; remarkably, this witness's testimony ended up being disregarded by the Court. It is also notable that, according to another BBC report, "[w]hen Malawi's president … ordered the arrest, he wanted Aniva tried for defiling young girls, but no girls came forward to testify against him".[56] Additionally, Aniva's resort to his right to silence during his defence, it seems, was motivated by the fact that there was no one willing to testify on his behalf.[57] Even from among those who collaborated with Aniva in organizing *kulowa kufa*, it turned out, no one was willing to speak publicly in his defence.

The absence of witnesses is telling. While a firm conclusion may require further interrogation, the lack of witnesses may have stemmed from communal complicity in the commission of *kulowa kufa*. It must be recalled that, notwithstanding the alleged multiplicity of Aniva's victims, no one had filed a complaint against him before the publication of the BBC report. In this connection it is worth recalling that cultural practices that have been performed over a long period of time tend to acquire an aura of normality.[58] Any effort to deal with such practices is thus bound to encounter resistance; the lack of witnesses in Aniva's case may be a manifestation of such resistance.

55 Butler "Stealing innocence", above at note 52.

56 L Ashton "On trial: The man with HIV who says he had sex with 104 women and girls" (17 November 2016) *BBC*, available at: <https://www.bbc.com/news/magazine-38006053> (last accessed 17 July 2023).

57 Author's communication with M Goba Chipeta, counsel for Aniva (24 November 2016). The Malawi Law Society arranged for Aniva to have counsel assist with his defence on a pro bono basis. It deserves huge commendation for attempting to equalize the scales of justice amid a huge public outcry against Aniva.

58 M Maluleke "Culture, tradition, custom, law and gender equality" (2012) 15/1 *Potchefstroom Electronic Law Journal* 2, available at: <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812012000100001&lng=en&nrm=iso> (last accessed 17 July 2023).

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It is also useful to dwell, for a moment, on the testimony of one of the state witnesses (Mary Bornface). It was her testimony that she was informed by her late husband's parents that Aniva would be her *hyena*. Applying the principles of criminal law as contained in sections 21 and 403 of the Penal Code and also following the prohibited levels of participation in section 5 of the Act, everyone involved in arranging the conduct of *kulowa kufa* is criminally complicit. Although the state can choose to make some participants in a criminal enterprise state witnesses, nothing of this sort was done in Aniva's case. Despite the complicity of all those who may have been involved in arranging *kulowa kufa* with Aniva, no one was jointly charged with Aniva. Not even Mary Bornface's parents-in-law, whom she had implicated in her testimony, were tried. Indeed, if there were at least 104 victims of Aniva's deeds, the number of accomplices to his crimes was bound to be much higher. Given that Aniva was the only person who was charged and convicted, he can be said to have been treated as the proverbial sacrificial lamb on behalf of his community, if not the nation at large. According to José Safarao, Aniva was treated as a scapegoat and arresting him was treating the symptoms, not the disease, since "Aniva did not go looking for widows and adolescents to sleep with. They hired him". Safarao further claimed that "these custodians of the culture" would continue secretly to hire men like Aniva.[59]

Additionally, the state's failure to instigate a much broader investigation and prosecution suggests either non-appreciation of the true nature of the alleged criminal conduct or simply confirmation of the tokenism with which the matter was approached. Investigating the matter fully, and following up with sincere prosecutions, would have entailed implicating too many people and, perhaps, Aniva's trial was that token commitment to human rights that helped avert such a crisis. There may, therefore, be some truth in the assertion that the public outrage at Aniva wasn't so much out of reprehension for what he had done but more from national embarrassment at the global attention that the BBC report generated.[60]

## *Did the media unduly influence the outcome of Aniva's trial?*

Media coverage of criminal proceedings may, unwittingly, create pressure on a court to deliver certain outcomes as well as to dispose of cases in a way that does not expose judicial officers to the wrath of the media.[61] Aniva's trial generated much public interest both locally and internationally. For the purposes of the present analysis, the question is whether the media attention resulted in Aniva being tried and convicted by the media even before the Court concluded his trial. If so, this would suggest a significant erosion of the presumption of innocence.

The question of trial by media raises the dilemma of how to balance the media's freedom of speech and expression, on the one hand, with an accused person's right to a fair trial, on the other.[62] Undoubtedly, the media possesses the right to disseminate information about various societal matters including the occurrence of criminal behaviour. At the same time, however, courts must remain alert to the possibility that a fair trial, which is always due to an accused person, may be undermined by undue pre-trial publicity. Publicity of a pending trial may include uninformed opinions about the guilt or innocence of a particular accused person that may poison the minds of the public about the outcome of a pending case. This is particularly grave considering that the judges, in

59 O Gruenbaum "Malawi: The human hyenas" (20 September 2016) *The Round Table*, available at: <https://www.commonwealthroundtable.co.uk/commonwealth/africa/malawi/malawi-human-hyenas> (last accessed 17 July 2023).

60 TM Andrews "Malawi police arrest HIV-positive man paid by parents to have sex with scores of young girls" (27 July 2016) *The Washington Post*, available at: <https://www.washingtonpost.com/news/morning-mix/wp/2016/07/27/malawi-police-arrest-hiv-positive-man-paid-by-parents-to-have-sex-with-scores-of-young-girls/> (last accessed 23 August 2023).

61 VVLN Sastry *Influence of Trial by Media on the Criminal Justice System in India* (2019 doctoral dissertation, Walden University) at 149–59.

62 RS Chauhan "Trial by media: An international perspective" (13 September 2020) *SCC Online*, available at: <https://www.scconline.com/blog/post/2020/09/13/trial-by-media-an-international-perspective/> (last accessed 17 July 2023).

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many of the cases that will have been canvassed in the media, will also have access to the same publications. They cannot, therefore, be presumed to be insulated from the public discussions and preemptive conclusions of the public at large.

The publicity surrounding Aniva's case was predominantly negative.[63] As noted above, his arrest came in the wake of a presidential directive following the publication of the BBC report. It is not often that simple law enforcement activities require the intervention of the president. The presidential intervention, which was publicized by the media, may have created an expectation that a conviction was expected. In respect of the media's role, it is also not insignificant to note the time between the commission of the offence(s) by Aniva, and his arrest and trial. According to the charge sheet, Aniva's crimes were committed between 2013 and 2016 but he was arrested in July 2016. In addition to the reasons noted above, Aniva's arrest and trial may, therefore, have been a consequence of media attention in his case.

Given the media coverage, it is fair to conclude that the magistrate was aware that the case before him had generated considerable local and international media attention. It is difficult to ascertain precisely how much the magistrate's treatment of the evidence before him was because of the media attention. Legal realism, however, suggests that to assume neutrality on the part of the magistrate in such a context would be naïve.[64] The combination of factors highlighted above persuasively points to the fact that the magistrate may have, tacitly, been influenced by media coverage to ensure that Aniva was convicted. For example, from an evidential perspective, the state's case had significant weaknesses stemming from a failure by the state to procure key witnesses. The Court's judgment, however, aside from unequivocally condemning *kulowa kufa*, did little to canvass any weaknesses in the state's case. This suggests an unbalanced assessment of the relative strengths and weaknesses of the case for the prosecution and defence.

The clearest indication that the media may have had a role in the outcome of Aniva's case emerges in the Court's ruling on sentence. The Court conceded that the "the matter is undoubtedly of public interest" and that it would consider the public interest in determining the sentence. The Court, thus, partly justified Aniva's sentence based on deterrence and denunciation. It is also striking that the Court opted for a custodial sentence, not a fine, even though the law generally requires it to exercise the option of a fine for a first offender like Aniva. The choice of a custodial sentence may be indicative of a court under public pressure to demonstrate its "seriousness" in dealing with offenders such as Aniva. As the Court pointed out, "imposing a fine or a suspended sentence would be a mockery to the administration of justice. Reasonable members of society would query as to what has befallen the administration of justice".[65] Overall, the media coverage had a role in Aniva's arrest and, during the trial, worked to erode the application of the presumption of innocence, thus undermining his right to a fair trial.

### *Fair trial, confession evidence and defective charges*

From a criminal law perspective, the charges filed against Aniva, as will be demonstrated, were defective. Aniva was charged with engaging in a harmful practice and attempting to engage in a harmful practice. The charges attempted to specify the period when the offences were committed as well as the crime scene(s). For engaging in a harmful practice, the time span and location were indicated as being "between 2013 and June 2016 in villages in Nsanje District in the Republic of Malawi".[66] As for attempting to engage in a harmful practice, the charge specified

63 See Jacewiz "Malawi's 'hyena' men" and Shammas "HIV-infected man", both above at note 2.

64 See "Realism" *Britannica*, available at: <https://www.britannica.com/topic/philosophy-of-law/Realism> (last accessed 17 July 2023).

65 *Aniva*, above note 30 at 7.

66 Reproduced from the charge sheet as quoted by the Court in its judgment (copy on file with the author).

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that "in July 2016 at Chimkuzi Village in Nsanje District … attempted to have carnal knowledge of Mary Bornface".[67]

Malawi's criminal law, following the common law standard, requires all charges to contain sufficient particulars of the offence(s) charged. This, at the very least, requires a clear description of the offence, the offender and the place where the offence is alleged to have been committed. [68] The first thing to ask, therefore, is whether or not sufficient particulars were provided on the charge of engaging in a harmful practice to enable Aniva to take his plea and conduct a meaningful defence. In answering this question, the decision of the High Court of Malawi in *R v Dennis Spax Kambalame* (*Kambalame*)[69] is relevant. In this case, it was held that section 126 of the Criminal Procedure and Evidence Code (CP & EC) must be read together with section 42(2)(f)(ii) of the Constitution.[70] The result is that charges must contain sufficient particulars to inform the accused of the charge(s) against him and it is this that contributes to the holding of a fair trial. In *Kambalame*, the High Court struck out some charges because they failed to disclose the persons with whom the accused had allegedly engaged in corrupt practices. A failure to disclose the persons with whom the corrupt practices were committed, the High Court held, meant that the accused did not have sufficient particulars of the charges to allow him to conduct a defence. According to the High Court, any failure to frame the charges properly violates the right to a fair trial under section 42 of the Constitution.

Using the principles from *Kambalame*, one wonders how the Court convicted Aniva of engaging in a harmful practice. To start with, the charges failed to indicate with which people Aniva had engaged in a harmful practice. By alleging the commission of an offence in a generalized manner, the state failed to provide a charge with sufficient particulars to allow Aniva to conduct a meaningful defence and have a fair trial. The failure to provide details of the people with whom Aniva engaged in harmful practices meant that he was deprived of an opportunity to raise a defence that could have related specifically to named victims. It is also not insignificant that the charge of engaging in harmful practices referred to the offence as having been committed "in villages in Nsanje District" without attempting to narrow down which specific villages were the location of the crime. This should be contrasted with the way the charge of attempting to commit a harmful practice was framed. In respect of this offence, the prosecutor indicated the name of the person allegedly involved as a victim as well as the village, in Nsanje District, where the attempt occurred.

It is also doubtful whether the conviction for engaging in a harmful practice followed from the evidence before the Court. There was only one witness who led evidence on this point: Ntonya Fole. She is the only one who confirmed having had sexual intercourse with Aniva in pursuit of *kulowa kufa*. The Court, however, found that this intercourse happened before the Act was passed. It correctly refused to apply the law retrospectively and disregarded her evidence. If Ntonya Fole's evidence was disregarded, the question then becomes on what basis Aniva was convicted, as there was no other witness who testified to having had sexual intercourse with him by reason of *kulowa kufa*. Resolving this question requires consideration of the confession that Aniva made after his arrest, since this was the only evidence implicating him in engaging in a harmful practice.

Confession evidence is admissible in criminal proceedings in Malawi.[71] A court may, however, determine how much, if any, weight to attach to such evidence. In Aniva's case, the Court, relying

67 Ibid.

68 Criminal Procedure and Evidence Code cap 8:01, Laws of Malawi, sec 126.

69 Criminal cause no 108 of 2002, available at: <https://malawilii.org/akn/mw/judgment/mwhc/2003/6/eng@2003-01-19#:~:text=Particulars%20of%20Offence-,Dennis%20Spax%20John%20Kambalame%20being%20the%20General%20Manager%20of%20Petroleum,equivalent%20of%20MK1%2C%20660%2C132.92%20at> (last accessed 1 August 2023).

70 Sec 42(2)(f)(ii) provides that an accused person shall have the right to a fair trial, which includes the right "to be informed with sufficient particularity of the charge".

71 CP & EC, sec 176 provides: "Evidence of a confession by the accused shall, if otherwise relevant and admissible, be admitted by the court notwithstanding any objection to such admission upon any one or more of the following grounds

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on the judgments in *Mulewa v R*,[72] *Useni and Others v R*[73] and *Chiphaka v R*,[74] concluded that, "my take is to admit in [Aniva's] evidence the confession based on section 176 of the Criminal Procedure and Evidence Code".[75]

Notably, the Court conceded that the defence brought to its attention the decision in *Chisenga v R*, where the Malawi Supreme Court of Appeal held that:

> "The prosecution, not having proved an essential element of the offence, cannot rely on a confession, denied confession, whether or not it is corroborated, bearing in mind that a plea of not guilty puts every material fact in issue and anything in the nature of an admission by an accused person before the trial, ought, in such circumstances, to be disregarded by the court."[76]

The way Aniva's confession was dealt with suggests a disregard for the demands of a fair trial as provided by section 42 of the Constitution. Under section 42(2)(c), the Constitution protects all suspects from being compelled to make statements that can be used in evidence against them. Further, section 42(2)(f)(iv) protects accused persons from being forced to be witnesses against themselves. Against this background, the Court's key finding on Aniva's confession was that:

> "In view of the confession and the fact that the accused went to the house of PW3 and PW4 it is abundantly clear that the state has proved beyond reasonable doubt that the accused was doing kulowa kufa thereby engaging in harmful practices contrary to section 5 of the Gender Equality Act."[77]

The Court's analysis, in relation to the admissibility of confession evidence, fails to articulate how the constitutional safeguards, which should have operated to safeguard Aniva from being compelled to be a witness against himself, were trumped. Given that Aniva pleaded not guilty, the prosecution retained the duty to prove all the elements of the offences with which he was charged. The prosecution's duty was not relieved by him exercising his right to silence. Given the centrality of the confession to Aniva's conviction, one would have expected the Court to be thorough in justifying its admission into evidence, especially as the defence objected to the admission of the confession. Unfortunately, the Court's analysis on this point is superficial. The Court simply reproduced precedents that justify the admission of confession evidence and also alluded to at least one precedent, cited by the defence, urging caution in the admission of confession evidence before abruptly concluding that it would admit the confession. There was no analysis, even based on the very precedents cited by the Court, to demonstrate why Aniva's confession was admissible. It is submitted, therefore, that Aniva's confession was wrongly admitted into evidence, thus further strengthening the case for his wrongful conviction on the charge of engaging in harmful practices.

The victim requirement in criminal law, particularly how it was or was not applied in Aniva's trial, also deserves mention. Criminal law focuses heavily on the individual and this is manifested, for example, in the way liability for criminal offences is imposed at an individual level and also in how victims tend to be viewed as individuals.[78] With respect to the offence of engaging in a harmful practice, the state failed to produce a single witness who could prove that she was a victim of Aniva's

(however expressed): that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto."

72 (1997) 2 MLR 60.

73 (1964–66) ALR Mal 250.

74 (1971–72) ALR Mal 214.

75 *Aniva*, above note 26 at 6.

76 (1993) 16(1) MLR 52 at 56.

77 *Aniva*, above note 26 at 6.

78 A Norrie "Criminal law" in I Grigg-Spall and P Ireland (eds) *The Critical Lawyers' Handbook* (1992, Pluto Press) 56.

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conduct. As noted above, the failure to find witnesses was, probably, due to a lack of support for the prosecution by the very communities in which the victims and witnesses were supposed to be found.[79] As confirmed by one of the police officers who testified in Aniva's case, in his three years as a police officer in Nsanje District, where Aniva was living, he had received no complaints relating to *kulowa kufa*.[80]

Overall, although Aniva was tried under a specific provision in the Act, his conviction did not follow from the evidence that was led under each of the charges. The charges were also defective for offending the fair trial guarantees in the Constitution.

### *Why was Aniva denied bail?*

Under section 42(2)(e) of the Constitution, every accused person has the right to be released from detention with or without bail unless the interests of justice require otherwise.[81] The Bail Guidelines Act[82] details how a court must balance the various factors in deciding whether to grant or deny bail. Courts in Malawi have accepted that there is no unbailable offence but that the interests of justice may, sometimes, require that bail should be denied to certain suspects. As stated in *Amon Zgambo v R*,[83] an accused person is presumed to be innocent until his or her guilt has been proven and bail should not be withheld as a form of punishment. The primary consideration that must govern a decision whether or not bail should be granted is an assessment of whether the accused person, upon being released on bail, will return for his trial.[84]

As demonstrated above, the manner in which Aniva was treated suggests that he may not have benefitted from the presumption of innocence. Perhaps unsurprisingly, he was denied bail for the duration of his trial. In total, he spent about five months on remand before his conviction. Conceding that Aniva was to be presumed innocent until found guilty, it is hard to imagine the exact demands of the interests of justice that necessitated remanding him until conviction. Aniva's predicament is the more striking considering that Malawian jurisprudence on the right to bail is quite extensive and confirms that bail should, ordinarily, be available for all offences.[85]

The reason(s) for the denial of bail, it is argued, were extra-legal. At the outset, the manner in which Aniva was arrested (via a presidential directive) is telling and suggests that the presidency itself had an interest in the trial's outcome. The constant media scrutiny also entailed that the public was keeping a constant eye on what the Court was doing. Given the rather unfavourable media coverage, the trial magistrate, whether consciously or unconsciously, may have felt constrained to grant bail for fear of portraying the impression of lenience towards Aniva. The denial of bail, it is contended, is one way that demonstrates the victimization that Aniva suffered due to the media interest in his trial and in particular the negative reporting about *kulowa kufa*. Nevertheless, it is arguable that the Court missed an opportunity to demonstrate that fair trial rights extend to all accused persons, irrespective of the offence(s) with which they are charged or their station in life. In a way, while the Court exhorted various rights of women and girls, which must be upheld, denying Aniva bail suggests a selective recourse to human rights.

79 The debate that the Malawi Law Commission records as having surrounded the enactment of sec 5 of the Act is illuminating. The criminalization of harmful practices was a very divisive issue and opinions were split among commissioners and the public that was consulted: *Report of the Law Commission*, above at note 9 at 26–30.

80 According to the final submissions filed on behalf of Aniva (1 November 2016, copy on file with the author), the defence quoted Sub-Inspector Timvenawo, who was prosecution witness 5, as having testified to this effect.

81 See *R v Fadweck Mvahe and Others*, MSCA criminal appeal no 25 of 2005 (unreported).

82 Act No 8 of 2000.

83 MSCA criminal appeal no 11 of 1998 (unreported).

84 *Jahid Osman Ibrahim v R*, misc criminal application no 20 of 2008 (HC, PR) (unreported).

85 According to the High Court, while the right to bail is not absolute, courts should be slow to deny a person his right to bail: *Norman Chisale v R*, homicide bail appln no 130 of 2020 (unreported).

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It is also not insignificant that an appeal was filed on behalf of Aniva against his conviction and sentence. However, he ended up serving his whole sentence and was released before the appeal could be heard.[86] The High Court's "reluctance" to consider Aniva's appeal suggests disinterest in interfering with the findings of the trial court.[87] Given the analysis in this article, there was a realistic chance that Aniva's conviction would be overturned on appeal. This, however, could have resulted in a possible public backlash against the High Court. In fairness, the failure to hear Aniva's appeal could have been due to scheduling challenges within the High Court in a context where judges are perpetually overwhelmed.[88] However, it is also not far-fetched to imagine that the failure to hear the appeal could have been an evasive tactic to avoid the possible public backlash in case an acquittal became necessary.

## Final remarks

A popular adage asserts that justice must not only be done but must manifestly and undoubtedly be seen to be done.[89] The implication is that, in judicial processes, every effort must be expended to ensure the fairness of both the processes and outcomes. The analysis in this article focused on Aniva's trial and exposed some of the factors that may have influenced the eventual outcome. Evidently, Aniva's trial raised many issues that invite a more sustained analysis than was possible in this brief exposé. Overall, however, there is a strong case to be made that Aniva's conviction was not supported by the evidence adduced in Court, which in turn renders it very plausible that extra-legal factors motivated his conviction.

It is also clear that Aniva's trial exposed Malawi's legal, and perhaps even moral, dilemma. Since adopting a new Constitution in 1994, Malawi has been active in signing up to regional and global human rights instruments. As a result, Malawi is a party to all core international human rights instruments. Being a party to these instruments brings pressure on states to demonstrate that they are complying with the duties contained in them. When Aniva's story was given global publicity by the BBC, it became incumbent on Malawi to demonstrate that it could act decisively to deal with practices perceived to be inimical to human rights. A forgotten dimension in this effort to vindicate Malawi's human rights credentials, however, was the fact that international human rights law also protects the right to a fair trial for all accused persons, irrespective of the charges that they are facing.

Competing interests. None

86 See *Aniva v R*, criminal appeal no 25 of 2017, available at: <https://media.malawilii.org/files/judgments/mwhc/2018/677/2018-mwhc-677.pdf> (last accessed 1 August 2023).

87 Aniva's lawyer alleged that all documents for the appeal were filed and all that remained was for the Court to allocate a date for the hearing of the appeal. According to him, it was a mystery why no date for hearing the appeal was allocated timeously: author's interview with M Goba Chipeta (14 June 2017).

88 See "Chakwera appoints seven new High Court judges" (21 March 2022) *Malawi24*, available at: <https://malawi24.com/2022/03/21/chakwera-appoints-seven-new-high-court-judges/> (last accessed 1 August 2023).

89 *R v Sussex Justices* [1924] 1 KB 256 per Lord Hewart.

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