IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CRIMINAL CASE NO. 36 OF 2016
(Being Criminal Case No. 95 of 2016)
(In the Second Grade Magistrate Court Sitting at Machinga)

BETWEEN

E.L (FEMALE) **APPELLANT**

AND

THE REPUBLIC **RESPONDENT**

CORAM **:** **Z. NTABA, J.**
: Mr. W. Mwafulirwa, of Counsel for the Appellant
: Mr. P. Salamba, of Counsel for the Respondent
: Mr. Nthondo, Official Court Interpreter
: Mrs. L. Mboga, Court Reporter

Ntaba J.

JUDGMENT

1.0 BACKGROUND

1.1 The Second Grade Magistrate Court sitting in Machinga convicted E.L (female) for the offence of unlawfully (negligently) doing an act likely to spread a dangerous disease contrary to section 192 of the Penal Code. The particulars of the charge were that the Appellant on or about the 25th August 2016 at Kotamo Village in the District of Machinga unlawfully, negligently and knowingly did an act likely to spread the infection of the disease HIV by breastfeeding a baby of five (5) month of Mrs. M.P.

1.2 The court found her guilty and sentenced her to nine (9) months imprisonment with hard subject to confirmation by the High Court on August, 2016. The conviction was on her own plea of guilt.

1.3 It is against this finding of the lower court that she appealed and raised the following as grounds–

1.3.1 that both conviction and sentence were unsafe and should be quashed;

and

1.3.2 section 192 of the Penal Code was unconstitutional.

2.1 THE APPEAL

2.1 The Appellant filed an appeal and an affidavit sworn by Counsel Mwafulirwa and supported it with written submissions which highlighted the charges and the circumstances of the case. She further attached to her appeal an affidavit sworn by Dr. Ruth Margaret Bland who is a British medical expert and researcher in the field of HIV Transmission including mother to child situations. Dr. Bland indicated that she has worked in the field of paediatrics and child health for over 20 years with half of those years as a clinic paediatrician and in the last years working in Africa including Malawi as clinical scientist. Her affidavit attested to the issues of mother to child transmission especially as they related to the circumstances of the case herein.

2.2 The third affidavit was sworn by Ms. Michaela Clayton, a British national who is permanently resident in Namibia. She attested that she is a lawyer with over 34 years' experience with 28 being a human rights lawyer with a focus on HIV. She indicated that she is currently the director of AIDS and Rights Alliance for Southern Africa which is a 106 civil society partnership working to promote a human rights based approach to HIV and TB IN 18 Southern and East African countries. Her evidence was that the court in determining this matter should bear in mind a number of issues. Firstly, international and regional recommendations are against overbroad criminalization of HIV transmissions and exposure as well as against vertical discrimination. Secondly, that in Africa, there is no evidence of the impact of criminal laws in preventing HIV transmission. Consequently, these laws have had a negative impact as such undermine the HIV prevention efforts. Thirdly, she alerted the court to the current approaches that are working to prevent the spread of HIV. She concluded that the court should note that criminalization of HIV exposure and transmission is a complex issue and currently in the world, there exist unjust and ineffective public policy on the matter. She did concede that when the matter before the court is an obvious case, that is, there was purposely or maliciously transmission with an intention to harm, the courts should utilize criminal law to punish the offender.

2.3 The Appellant stated that the facts were that on 25th August 2015, the Appellant attended a village meeting together with her smallest child who was then eleven (11) months old. She sat next to the complainant, M.P who also had an infant with her. The Appellant indicated that she had been breastfeeding her child but later handed the child to her grandmother. Incidentally, the Complainant asked the Appellant to carry her child in order to do other things. The Appellant and Complainant noted that the latter's child was breastfeeding from the Appellant. She stated that she tried to stop the child from doing so. On 28 August 2016, the Complainant reported the matter to police and E.L was arrested and charged under section 192 of the Penal Code. The Complainant was referred to Tholowa Health Centre for medical care after noting that E.L was on Anti Retro treatment (ART). The Complainant's child was treated with post-exposure prophylaxis (PEP) and sent home.

2.4 During trial, E.L pleaded guilty as charged and was convicted by the lower court. The court records indicated that the only evidence admitted was a hospital document indicating that E.L was on ART. The Complainant was not present at the trial. Furthermore, E.L during trial did not add anything after her caution statement was read out. It was only after sentence, during mitigation did she indicate that her baby was sick, she had three other children and she was her mother's caretaker. The Appellant noted that the magistrate's sentiments were wrong and should be a matter for the court to take into consideration -

> *"however the conduct she portrayed has a lot to be desired. She is aware that she is HIV positive. She come to breastfeed a baby which is not hers. It is the same thing as a man knowing to be HIV positive choosing to sleep with a school girl. Indeed such conduct cannot go unpunished."*

2.5 In arguing the appeal, the Appellant stated that the plea taken at trial was not in line with the prescripts of section 251 of the Criminal Procedure and Evidence Code which states -

> (1) When an accused appears or is brought before a court, a charge containing the particulars of the offence of which he is accused shall be read and explained to him and he shall be asked whether he admits or denies the truth of the charge.
> (2) If the accused admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and he may be convicted and sentenced thereon:
>
> Provided that before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification the truth of the charge against him.

2.6 It was further argued that despite her admission at trial to have breastfed the Complainant's child. However, it was her contention that the admission as well as plea to the charge was due to ignorance. In submitting that where one pleads guilty out of ignorance of the essential elements of the offence as applied to the facts of the case, on appeal, a conviction on plea of guilty ought to be set aside. Consequently, Justice Chatsika stated in the case of ***Maharaj v Republic*** **(**1971-1972) 6 ALR (Mal) 275 at 277 offers insight -

> *"In the first place it is to be observed that the appellant pleaded guilty to both counts in the lower court, and if his pleas are to be accepted no appeal against conviction would be available to him (see section 348 of the Criminal Procedure and Evidence Code (Cap 8:01)). The words used in reply to the second count were: 'I admit I contravened the law.' I would have no doubt in accepting these words as amounting to an unequivocal admission of the offence. In view, however, of his petition of appeal and the point on which he relies in support of his appeal against conviction, I am in some doubt as to whether the appellant fully appreciated the nature of the offence with which he was charged and whether he also appreciated what he was pleading to. It is further appreciated that the facts of the case are not at all in dispute and the appeal is based on an important point of law which was not fully understood by the appellant at the time he made his plea. That he did not appreciate the nature of the offence in the second count is made clear*

> *when one reads what the appellant said in mitigation immediately before he was sentenced. In these circumstances, having listened to the able argument of learned State Counsel on the subject, I have decided to treat the plea as one of 'not guilty' by reason of the fact that it was made without fully appreciating its nature."*

2.7 Therefore the result of entering, wrongly, a plea of guilty is that on appeal the High Court would quash the conviction and render the proceedings a nullity and in some cases, the High Court would order a retrial. This position was stated in ***Byson and others v Republic*** [1997] 1 MLR 47. In further pursuing the argument o the defective plea, it was also contended that she did not appreciate the nature of the offence when she pleaded guilty. This position could be better examined if one carefully examine the charge sheet -

> "E.L on or about the 25th august, 2016, at Kotamo village in the district of Machinga unlawfully, negligently and knowingly did an act likely to spread the infection of the disease of H.I.V by breast feeding a baby of five(5) months old of Mrs. M.P."

2.8 Arguably in examining the essential elements of the offence, the court should look at section 269 of the Indian Penal Code which is strikingly similar to section 192 herein. The Indian provision is in the following words -

> "Negligent act likely to spread infection of disease dangerous to life - whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment either description for a term which may extend to two years, or with fine, or with both."

2.9 The High Court of Delhi, commenting on section 269 of the Indian Penal Code in the case of ***Dr. Meeru Bhatia Prasad vs State*** 2002 Cri LJ 1674, 94 noted -

> *"4. Section 269 IPC makes the negligent act likely to spread infection of disease dangerous to life as an offence. The essential ingredients are: that the accused does any act unlawfully or negligently; that such act is likely to spread infection of any disease dangerous to life; and that he knows or had reasons to believe that the act is likely to cause such infection. Thus causing infection of the disease which is dangerous to life are covered by this section."*

2.10 The Appellant submitted that for a conviction to be safe under section 192 of the Penal Code, the elements in the provision must be answered in the positive and if there is a trial such need to be proved beyond reasonable doubt. These elements were –

2.10.1 the commission of an act which is **likely** to spread the infection of a **disease** which is a **danger to life**;

2.10.2 the act is done unlawfully, negligently or recklessly; and

2.10.3 the accused knows or has reason to believe that the act is likely to spread the infection of a "disease dangerous to life".

2.11 Incidentally, the lower court should have asked itself whether breastfeeding was likely to spread HIV. Further, the State in the Appellant's case should have provided proof to the requisite standard that the act of breastfeeding the Complainant's child was an act "likely" to spread HIV. It was her submission that this fact was not proven beyond reasonable doubt and that the State did not submit evidence to this effect nor was any available. This position was further compounded by the fact that the standard of "likely" was submitted to be an objective standard and is independent of its onus to prove the accused's knowledge of the transmission being a likely consequence of their action.

2.12 In arguing this point, she indicated that international jurisprudence offers assistance to ensure that the standard of "likely to spread a disease" is interpreted in a manner not to render the crime overbroad on this element. In the case of ***S v Gutierrez, United States Court of Appeals for the Armed Forces*** 23 February 2015, No 13-0522, Crim. App No 37913, the Court considered an appeal by a man convicted of aggravated assault for failure to disclose that he had [HIV] prior to engaging in otherwise consensual sexual activity with multiple partners. The expert testimony reflected that, at the most, the Appellant had a 1-in-500 chance of transmitting HIV to some of his partners. There was also no evidence that the accused had actually transmitted HIV. The offence of aggravated assault required that the accused committed assault by means or force *likely* to produce death or bodily harm. The appeal centred on whether the accused's conduct was "likely" to result in the spread of HIV. The Court considered the plain English meaning of "likely" and its precedent regarding aggravated assault generally to find that the means (various forms of sexual contact) used to commit the "assault" (having a less than 1-in-500 chance of infecting sexual partners with HIV) was legally insufficient to fulfil the element of "likely to produce death or grievous bodily harm". The accused's conviction of aggravated assault was therefore reversed. In considering the legal meaning of "likely", the court rejected the use the meaning attached to "likely" in other HIV exposure cases of "no more than merely a fanciful, speculative, or remote possibility". On the expert evidence presented on risk of HIV transmission through unprotected oral sex, the Court stated that there should be no question that a risk of 'almost zero' (as detailed in expert evidence) does not clear any reasonable threshold or probability. This was because no rational trier of fact would conclude that his conduct was likely to cause grievous bodily harm. The Court stated that -

> *"The ultimate standard, however, remains whether – in plain English – the charged conduct was 'likely' to bring about grievous bodily harm. As related to this case, the question is: was grievous bodily harm the likely consequence of the*

2.13 The ***Gutierrez*** Court affirmed that in determining the meaning of "likely", "the law should not adopt a *sui generis* standard in cases involving HIV exposure. Furthermore, expert evidence on the likelihood of HIV transmission through the various forms of sexual conduct should always be considered by the court.

2.14 While on the subject, the Applicant argued that the absence of any evidence that breastfeeding whilst HIV positive shall not meet the legal standard of being sufficiently "likely" to transmit HIV in this case. Therefore, a conviction under section 192 cannot be sustained. On this basis alone, the Appellant's conviction should be overturned as the State had failed to discharge its onus.

2.15 In supporting the above argument, the Appellant's evidence through the expert affidavit of Dr. Bland, opined that the risk of transmission to the Complainant's child after a single exposure to [the Appellant's] breastmilk whilst she was on ART would be infinitely small. She illustrated that for women on ART, as is the Appellant, the risk of HIV transmission through breastmilk is essentially eliminated to under 1%. She highlighted that studies which measured the risk in cases where infants are repeated exposed to breastmilk from women infected with HIV over many months concluded as such. The risk therefore upon a single exposure, as is the case of which the Appellant was accused was therefore even less and "infinitesimally small".

2.16 She also highlighted this position is expounded in globally recognized guidelines on breastfeeding for HIV positive mothers. She drew the court's attention to the affirmation of the safety and advisability of breastfeeding for women living with HIV. She stressed the 2016 Guidelines of the World Health Organisation (WHO) as well as Malawi's own Guidelines issued the Ministry of Health. Thus to hold that the act of breastfeeding is one which is "likely to spread" HIV is not only inaccurate and contrary to sound government and international policy and guidelines, but one may in effect render motherhood and breastfeeding a crime as the identity of the child being breastfed is not, she submitted, relevant to this element of the offence. In conclusion she argued that supporting breastfeeding for women living with HIV in both low and high-income settings has long term maternal and child health outcomes. Alternative practices such as the use of breastmilk substitutes and replacement feeds have had significant effects on child mortality and morbidity.

2.17 Turning to the argument of negligence, the standard is not found often in indictable offences without qualifying words. For instance in manslaughter cases, the concept is qualified and the standard of negligence required for manslaughter is peculiar to that crime. However, legally a person is said to be negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise. Thereby making the standard an objective one.

In the circumstances, the question becomes, would a reasonable woman, in the situation of the Appellant have exercised a different degree of care?

2.18 In New Zealand, ***The District Court of Wellington in Police v Dalley*** CRI2004-085-009168, 4 October 2005 considered a charge of criminal nuisance under section 145 of the New Zealand Crimes Act of 1961 against a man living with HIV for omitting to discharge a legal duty to inform his sexual partner of his HIV status before having unprotected oral intercourse and before having vaginal intercourse with a condom. The crime of criminal nuisance is framed in the following terms was framed that everyone commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual. The court held that there was a duty on the accused under Act, in line with the common law duty, not to engage in conduct which one can foresee may expose others to harm. The duty to take precaution or care arose in this case because the HIV virus could "endanger human life." However it held that the accused did not in fact breach his duty under the Act. To this end, the Court considered expert evidence on the risk of HIV transmission in terms of the different forms of conduct in question: unprotected oral intercourse and vaginal intercourse with a condom. Further, it found that the accused had not violated his duty of care as the risk of transmission was insufficient in both cases and therefore, even in the absence of disclosing his HIV status to the complainant, there had been no breach of his duty to take "reasonable care and precautions" to avoid an act endangering another's life. With respect to vaginal sex with the use of a condom, the Court held -

> *"It seems to me that most people would want to be told that a potential sexual partner was HIV positive. There may well be a moral duty to disclose that information. There is however a difference between a moral duty and a legal duty, the legal duty in this case being to take reasonable precautions against and use reasonable care to avoid transmitting the HIV virus. I note that the duty at common law is essentially the same — to take reasonable steps: R v Lunt [2004] 1 NZLR 498.*
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> *The expert evidence was relatively consistent. The risk of transmission of the virus where the male is HIV positive and does not use a condom is relatively low. The prosecution say that it is approximately 5.75 per cent. The defence put the risk at even lower, four different trials putting the risk between 820 per 10,000 exposures; other sources putting it at 0.1 per cent. The evidence for the defence was extensive, comprehensive and persuasive on this point."*

2.19 The Appellant's case has always been that she did not intentionally breastfeed the Complainant's child. Incidentally, a reasonable person in the position of the Appellant would not have considered the act of breastfeeding in general, when on ART, one which risked the transmission of HIV to an extent significant enough to refrain from the act.

2.20 At this point, she therefore argued the issue of whether the facts of the case disclosed 'knowledge' on the part of her that her conduct was 'likely' to spread HIV? She reminded the court that knowledge of the likelihood that one's conduct to spread a "disease dangerous to life" is a vital component of the offence. Lord Reid proved instructive on this issue in ***Sweat v Parsley*** [1970] AC 132, 149, HL. It was held therein that the Crown has to prove knowledge on the part of the offender of all the material circumstances of the offence. For example, on a charge of 'knowingly having in his possession an explosive substance', the Crown must prove that the accused knew both that he had it in his possession and that it was an explosive substance. Accordingly before a court of law convicts based on an allegation that the accused 'knowingly' committed an offence, the State must have tendered evidence proving knowledge of all the circumstances and particulars constituting the offence. In the case of ***R v Crawley*** (1862) 2 F & F 109, the court held that a person is not indictable for sending to a meat salesman meat he knows to be unfit for human food, if he does not know and intend that it is to be sold as human food.

2.21 Conclusively, the State lacked proof that Appellant had knowledge that her conduct was likely to cause the spread of HIV. However, to the contrary, in accordance with the 2014 Clinical Management of HIV in Children and Adults: Malawi Integrated Guidelines for Providing HIV Services in Antenatal Care, Maternity care, Under 5 Clinics, Family Planning Clinics, HIV Exposed Children / Pre-ART Clinics, and ART Clinics" and the "Young Child Nutrition Policy and Guideline, it is more likely that the Appellant's knowledge was such that breastfeeding was safe and not likely to transmit HIV while she was on ART.

2.22 On the constitutionality attack of section 192 of the Penal Code, it was submitted that it is trite that all laws, including the Penal Code, must be compliant with the Constitution and not unjustifiably inconsistent with any provision of the Constitution, otherwise, they can be declared unconstitutional and therefore invalid to the extent of the inconsistency and supported by section 5, 10, 199 and 200 of the Constitution. Furthermore, the Constitution provides for a right to equality before the law as per section 20, a right an effective remedy under the law as in section 48 and the right to fair trial per section 42. Thereby, it was noted that principles of constitutional interpretation generally require a court to first seek an interpretation of the law that is constitutionally compliant unless a provision cannot reasonably be read in a manner to preserve its constitutionality. As such the offence under section 192 is unconstitutional on the grounds of it being vague and overbroad and thereby violating constitutional rights.

2.23 Regarding, the propriety of sentence, the Appellant reminded the court some of the most important considerations when passing a sentence were as Mwaungulu

J (as he then was) in ***Republic v Nazombe*** [1997] 2 MLR 105 ruled that the nature of the crime, personal circumstances of the convict, interest of the community and impact of the crime on the victim should be issues to be examined and determined on. Likewise, the sentence should take into account the interests of the community as well as the impact of the crime on the victim. It was the Appellant's contention that the alleged criminal act had very no or very little negative impact. The child that was breastfed tested HIV negative and therefore the community interest to avoid the spread of HIV was not negatively impacted in any way.

2.24 In terms of section 340 of the Criminal Procedure & Evidence Code which states that where a person is convicted by a court of an offence and no previous conviction is proved against him, he shall not be sentenced for that offence, otherwise than under section 339, to undergo imprisonment, not being imprisonment to be undergone in default of the payment of a reasonable fine, unless it appears to the court, on good grounds, which shall be set out by the court in the record, that there is no other appropriate means of dealing with him… Additionally, section 339 of the Criminal Procedure & Evidence Code lays down the procedure for suspended sentences. The rule in sentencing is that the court would not normally treat as a mitigating factor the fact that a sentence would present hardships on other family members *unless* exceptional circumstances are proved as per ***Republic v Chilenje*** [1996] MLR 361. The court came to the conclusion that where exceptional circumstances are proved, the court may exercise 'mercy' and order immediate release of a convict if the Appellant's immediate family were to go through exceptional hardship because of the Appellant's custodial sentence. Further it held where such is especially true if there are serious known (and not unknown) medical conditions.

2.25 In terms of the current case, the incarcerating of the Appellant with her fourteen (14) month old infant who was also HIV positive was not the best option. It was observed that in all cases where the rights of a child are going to be affected, the courts ought to weigh in the best interest of the child. The principle of 'best interest of the child' is an issue which our courts have recognized. The Supreme Court of Appeal ***In Re: The Adoption of Children Act CAP 26:01; In Re: CJ A Female Infant of C/o P.O.Box 30871, Chichiri, Blantyre 3,*** MSCA Adoption Appeal No. 28 of 2009 expounded what it meant in the Malawian context as well as its application. The courts have also used this principle in bail applications, for instance in ***Neziyasi Dickson and Another v Republic,*** Misc. Crim. Case No. 107 of 2007(HC)(LL)(Unrep)**,** Singini J (as he then was) stated that one compelling factor for the grant of bail is the plight of this baby who is in custody with the applicant as her mother and in my judgment, the best interest of the child requires that the mother be released on bail. Recently Kapindu J, in ***Rhoda Alasoni v Republic***, Misc Criminal Appl No. 72 of 2015 (HC)(ZA)(Unrep) in considering whether to grant bail pending confirmation of sentence, stated that the best interests of the child of the applicant who was with

her in prison required that she be released on bail.

2.26 Further in ***In R (on the application of Stokes) v Gwent Magistrates Court*** [2001] All ER(D) 125**,** where Ms. Stokes, a mother of four children aged 16, 15, 6 and 9 months was committed to prison for 12 days but suspended on payment of £5 per week for outstanding fines and compensation orders. The High Court held at judicial review that the decision of the magistrates was perverse and stated that a court considering an order to imprison which -

> "*would separate completely a mother from her young children with unknown consequences of the effect of that order on those children, had to take into account the need for proportionality and ask itself whether the proposed interference with the children's right to respect for their family life was proportionate to the need which made it legitimate. Committal to prison must be a remedy of final resort if all else has failed."*

2.27 For mothers with infants, the Appellant submitted that contemporary human rights jurisprudence and the child's best interest entails that under very rare and exceptional circumstances should the court met out a custodial sentence whose effect would be to incarcerate both the mother and the infant. International guidelines like the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules'), December 2010 states clearly the preference for non-custodial alternatives to pre-trial detention and prison sentences for women offenders in general. In terms of pregnant women and mothers, Rule 64 specifies that non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

2.28 Lastly, the Appellant argued that it is a principle of sentencing that the court should always pass comparable sentences. In ***Flora Jeke v The Republic*** Crim. Appeal No. 139 of 2008 (HC)(LL)(Unrep) where the court considered an 18 month's custodial sentence of a woman, with a small child who had pleaded guilty to the charge of unlawful wounding contrary to section 241(a) of the Penal Code. The charge attracted a maximum of 7 years imprisonment with hard labour. The High Court substituted the custodial sentence to one that secured the immediate release of the Appellant based on the above factors as well as 'humanitarian grounds'.

2.29 In conclusion, the Appellant argued that she had a myriad of mitigating factors which the lower court should have considered in sentencing her. The Appellant highlighted that she was relatively young, only 26 years of age, had pleaded guilty to the charge, had a child who is around 14 months' old and was in

custody with her mother; had 3 other children, all less than 18 years and lived in the remote areas of Machinga and needed the care of their mother, married and looked after her mother. Further, she had pleaded guilty as such was remorseful. Furthermore, she had not transmitted the HIV virus to the Complainant's child (to the best of her knowledge) and noticeably there was no scientific evidence indicating that her conduct posed a threat at all in so far as transmission of HIV virus is concerned and she was on ARV treatment and therefore needing better care than that obtaining in the prison facilities.

2.30 It was the Appellant's final submission that her conviction and trial were wrong in law and unconstitutional. She concluded with the following prayers that this Court should quash the lower court's conviction of the Appellant herein because -

2.30.1 the facts before the Court did not prove the elements of the offence and therefore the lower court erred in entering a plea of guilty against her, therefore the court should acquit her;

2.30.2 the proceedings in the lower court were a nullity;

2.30.3 the Court should declare section 192 of the Penal Code unconstitutional and therefore invalidate it to the extent of the unconstitutionality; and

2.30.4 in the alternative, that the Magistrate erred in law and fact by sentencing the Appellant to 9 months imprisonment with hard labour when such a sentence was manifestly excessive in light of the circumstances of the case. Hence, this Court should set aside the sentence passed by the lower court and substitute it with one that will secure the immediate release of the Appellant from custody.

3.0 THE STATE'S RESPONSE

3.1 The State filed and adopted their submissions in response to the appeal by the Appellant. Firstly, they tackled the issue of whether the plea of guilty was defective. They cited the Supreme Court in ***Pryce v Republic*** 1971-72 ALR Mal 65 at page 77 which outlined the approach to be adopted by an appellate court (and on review obviously) when hearing an appeal on a matter of fact and where the court said –

> *"It is for the appellate court to review the record of the evidence, to weigh conflicting evidence and to draw its own inferences. The court in the words of* ***Coghlan v Cumberland [1898]1 Ch. @704-705,*** *'must then make up its own mind, not disregarding the judgement appealed from, but carefully weighing and considering it…'*
> *'It is always important for the appellate court to bear in mind that the magistrate has lived the case in the course of the trial and account should be taken of this factor. In making up its own mind the court must remember that it has neither seen nor heard the witnesses and that the view of the magistrate on credibility whether stated in express terms or*

seen from this judgement by necessary inference, is entitled to great weight."

3.2 The State agreed with the Appellant that section 192 of the Penal Code creates three offences. That is, the accused person will do the act either unlawfully, negligently or recklessly as such the charge sheet should therefore particularize the offence committed by the accused person as provided for in section 128 (b) of the Criminal Procedure and Evidence Code.

3.3 They also argued that under Malawian law, particularly section 251(2) of the Criminal Procedure and Evidence Code states that a plea of guilty can only be recorded where there is an unequivocal admission of guilt. The law on a plea of guilty has considerably been explained in many cases. In ***Magwaya v Republic*** 8 MLR 323 (SCA) at pages 325 lines 40-44 and 326 lines 30-41, Skinner C.J., where the applicant admitted the offence in general terms, had this to say –

"It was then necessary to determine whether the statement of facts, agreed to by the appellant, had cured the plea of its in defects. An examination both of the plea and of his statement referred to in it cast doubt on whether he intended to admit the charge. Indeed, the facts outlined did not appear to substantiate the offence charged against him. His statements were part of those facts and in them he gave an account of what he did with the money, viz. that he gave it to his superior, and he denied stealing. Such assertions had not been contradicted elsewhere in the statement of facts. Since the evidence had not cured the defective plea, the conviction would be quashed and the sentence set aside. The appellant would be remanded in custody pending a new trial".

3.4 They stressed that the trial court must explain to the accused before pleading the elements or ingredients of the charge and should make sure the accused understands them. In ***Lwanja v Republic*** 1995 1 MLR 212, the accused was charged with being rogue and vagabond. It was held that the accused's plea of guilty was defective because she did not understand the charge. It was their submission that then section 5 of the Criminal Procedure and Evidence Code would be invoked as well as that substantial justice should be done without undue regard for technicality as provided by section 3 the Criminal Procedure and Evidence Code.

3.5 The court applied such principle in ***Watson and Another v The republic*** [1994] MLR 383 (HC), where Kalaile, J applied the law on invoking provisions of sections 3 and 5 of Criminal Procedure and Evidence Code in cases where irregularity does not occasion failure of justice. In that case both accused pleaded guilty to the charge of being found in possession of property reasonably suspected of having been stolen or unlawfully obtained and failing satisfactorily to account for the same contrary to section 329 of the Penal Code. In answering to the charge the first accused said I understand the charge. I admit the charge. It is true I was found in possession of 16 drums of petrol. I was in the company

of the second accused. This is suspected property**.** The second accused also said I understand the charge. I admit to the charge. They were 16 drums of petrol, which I was found [with] in possession of petrol. The allegation is true.

3.6 The court held that the pleas were wrong in law because they were equivocal. A plea such as "I admit" to a charge is not sufficient to be regarded as a plea of guilty since it does not refer specifically to the various elements constituting a particular offence. An admission of the charge is unacceptable as a plea of guilty to an offence under section 329 of the Penal Code since the guilt of the accused depends upon whether the magistrate accepts his explanation of how the property in question was obtained. However, the accused confirmed the correctness of the facts as narrated to them. The court held that although the pleas were wrong, acquitting the accused would be on technicality. In view of sections 3 and 5 of Criminal Procedure and Evidence Code, the convictions were confirmed. The omission to ask the accused to give an explanation (the explanation was key to the offence as charged) to the court did not occasion a failure of justice.

3.7 It was their assertion that the Appellant herein pleaded guilty to the offence as charged. She had stated that she had understood the charge, that is, she had breastfed a baby which was not hers and that she knew that she was likely to infect the baby with HIV/AIDS. However, they did concede that the charge was ambiguous, lacked clarity and duplicitous because section 192 of the Penal Code creates three offences. They submitted that a person can do the dangerous act either unlawfully, negligently or recklessly. An accused cannot be charged with all the offences at the same time if they are not in the alternative. And also that section does not include that the act should be done knowingly. However, if the person does the act unlawfully, negligently or recklessly, he then should be proved to have had knowledge or reasonable belief that the act will likely spread a dangerous disease. Secondly, the charge did not contain the said element that the appellant had knowledge or reasonable belief that the act of breastfeeding will likely spread a dangerous disease.

3.8 Therefore, it was not proper to frame the charge in that way in this case. Further that the accused's right to fair trial under section 42(2)(f)(ii) was compromised. An accused person has the right to fair trial includes the right to be informed with sufficient particularity of the charge. They thought that it was ironic that the Appellant indicated that she understood the charge especially since she was unrepresented and there was no way she could respond to such an ambiguous charge which was not clear and lacked the key elements of the offence.

3.9 In terms of the plea, the key elements of the offence were that the Appellant must do act an either negligently, unlawfully or recklessly meanly only one of these aspects. Secondly, that the act is likely to spread the infection of any

disease which is dangerous to life. Thirdly that the Appellant had knowledge or reason to believe, again only one of these aspect that the act will likely spread the infection of any disease which is dangerous to life. Accordingly, the prosecution was therefore obliged to prove these elements beyond reasonable doubt. It followed that during plea the lower court was supposed to put these elements to the Appellant for plea taking.

3.10 They submitted that there was no evidence that these elements of the offence were put to the Appellant in plea taking. Obvious from her response, she merely said she understood the charge and admitted it. They concluded that she could not understand the charge as the charge was ambiguous, lacked clarity as well as lacked some key elements of the offence. The lower court also erred as it did not explain to her that how the act of breastfeeding was likely to spread HIV/AIDS *viz-a-viz* the charge. Lastly her reply in the plea taking cannot be could not be construed as being honest, clearly making the plea of guilty equivocal.

3.11 Additionally, the facts narrated could not cure the defective charge nor the unequivocal plea. The narration of facts did not establish any act of negligence, unlawfulness nor recklessness. Her caution statement indicated that the Complainant gave the child to her for safe keeping. Later she noted that the child was breastfeeding on her which she made attempts to stop. It was after she had handed the child back, the Complainant reported the same to the authorities at the meeting. This narration was not consistent with her reply in plea taking because she replied that she had knowingly breastfed a baby which was not hers. The plea was therefore qualified in that regard because in her caution statement she categorically indicated that she did not encourage the child to breastfeed from her. Moreover, the caution statement had not established any act of unlawfulness, negligence or recklessness. The Appellant did not encourage the child to breastfeed from her. Therefore she was not even negligent nor reckless in her actions because she was actually handed down the child to her by the mother. Her hospitable behavior cannot be interpreted as being negligence nor recklessness.

3.12 The court should have ordered the prosecution to amend the charge and to enter a plea of not guilty and commence full trial. It was also their view that an appellate court has the power to reverse the finding and sentence from the lower court, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial. However it was also possible that an appellate or review court has the powers to order a retrial where it feels that the appeal has been made out in terms of section of 362 as read with section 353(2)(a)(i) of the Criminal Procedure and Evidence Code. A retrial may only be ordered where there is an error in law and procedure which cannot be cured by section 5 of the Criminal Procedure and Evidence Code. Notably, discretion

to order a retrial should be exercised with reference to all the circumstances of the case particularly whether the evidence discloses a case, that is whether there is intention to recharge and is within the interests of justice as held in ***P Banda and others v Republic*** (SCA) 10 MLR 142. They did acknowledge that discretion to order a retrial should be exercised with reference to all circumstances of case, particularly whether evidence discloses case against appellant, whether there is intention to recharge, and interests of justice: a retrial should not be ordered to enable the prosecution to fill up gaps in the evidence.

3.13 On the issue of HIV/AIDS, the State argued that it is a well-known policy that a mother who is diagnosed with HIV/AIDS should seek counselling if she wants to breastfeed her child because the act of breastfeeding in that state is dangerous to the breastfeeding child as chances of transmitting the virus to the child are high. However, the Appellant herein had been breastfeeding her child even with her condition (she was on ARV/ART treatment). So if she did not intend to infect her own child with HIV/AIDS through breastfeeding her own child. Subsequently if she could have intended to cause harm to her own child through breastfeeding or in other ways especially where she was counselled to provide breast milk to her child, breastfeeding another child from the same health condition should not be misinterpreted to mean that she had knowledge or reason to believe that her actions were to spread HIV/AIDS to the other child. They submitted that the Appellant did not have the requisite knowledge or belief that breastfeeding the Complainant's child could likely spread the infection to the child. If the Appellant knew that she was safe breastfeeding her child in her condition, it could safely be concluded that she did not have the knowledge that breastfeeding another child will do the opposite, that the other child will not be safe from the sane breast milk.

3.14 The State also argued that it has also been held in many cases that where a convict has spent a substantial part of the sentence imposed, say, more than half of it, a review or appellate court should not order a retrial of his case where the conviction is overturned. In the present case, the prosecution will have to redraft the charge if this court orders a retrial. This is giving the state a chance to reconstruct the case and fill in the gaps exposed. Secondly, the appellant has already served a substantial part of her sentence if we factor in the issue of one third remission by the prison authorities of her sentence. Ordering a retrial will not be fair to the appellant and to the criminal justice as a whole. Above all, considering the circumstances of this case, there was no clear intention on the part of the appellant and she is weak and on medication, the proper sentence should be non-custodial sentence. Therefore, an order of retrial will not be appropriate as such she must be set free.

3.15 On the constitutional invalidation of section 192 of the Penal Code, the State argued that section 9 of the Courts Act provides for how constitutional

challenges should be tackled. It was their contention the Appellant's allegation that the section is unconstitutional for infringing on the principle of legality, in the broad meaning of the word, for being vague and overbroad was wrong. Further that her rights were infringed, that is, those under section 42 of the Constitution as well as the right to liberty. It was their view that this court cannot deal with the constitutionality of section 192 of the Penal Code when disposing of this appeal because this court is sitting as a single judge and not three judges. Lastly, it was their belief that that the lower court proceedings or section 192 of the Penal Code do not raise issues concerning interpretation or application of the Republic of Malawi Constitution. Nevertheless, this court may give directions on the referral of this case to the Chief justice in the event this court deems it appropriate to consider the constitutionality of section 192 of the Penal Code.

3.16 In conclusion, the State stated that in view of the arguments raised above, the conviction must be quashed and the sentence set aside.

4.0 THE LAW AND COURT'S DETERMINATION

4.1 Firstly, let us get the formalities of how this court is seized of the matter. By law, under sections 42 (2) of the Constitution, 25 and 26 of the Courts Act as well as 346 of the Criminal Procedure and Evidence Code, this court is seized of this case for purposes of appeal. In determining an appeal, this court is requested to examine the record of any criminal proceedings before any subordinate court for the purpose of ensuring that the trial at the lower court was correctly handled, legal or proper in terms of procedure as well any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such subordinate court.

4.2 Malawian criminal law has made it fundamental that substantial justice should always be done without undue regard for technicality shall at all times be adhered to in all criminal matters as stipulated under section 3 of Criminal Procedure and Evidence Code. This issue is what this court has principally adhered to in the examination of this appeal. However, this Court also acknowledges that where a finding by a lower court results in a failure of justice, such failure must be rectified. The rectification should done at the earliest possible time. Section 5 of the Criminal Procedure and Evidence Code is clear on this -

> 5.(1) Subject to section 3 and to the other provisions of this Code, no finding arrived at, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal of complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless such error, omission or irregularity has in fact occasioned a failure of justice.
>
> (2) In determining whether any error, omission or irregularity has occasioned a failure of justice the court shall consider the question whether the objection could and should have been raised at an earlier stage in the proceedings.

> (3) The important admission or rejection of evidence shall not, of itself, be a ground for the reversal or alteration of any decision in any case unless, in the opinion of the court before which an objection is raised—
>
> (a) the accused would not have been convicted if such evidence had not been given or if there was no other sufficient evidence to justify the conviction; or
>
> (b) it would have varied the decision if the rejected evidence had been received.

4.4 In determining matters before them, it is important that courts must always ensure and protect a person's constitutional rights. This court is in agreement that freedoms and rights provided for in the Constitution should be promoted and protected. Therefore, the Constitutional tenets of a right to a fair trial as espoused in section 42 are issues which this court and Malawian courts should be ever mindful in matters before them. It is paramount that throughout the process of trial, an accused person's rights should be considered and where possible upheld. Consequently, a recognition that justice must be done by ensuring fairness and equity for the persons involved as well as in all aspects of the trial.

4.5 For the matter herein, the first issue that was examined was the charge that was laid against E.L. Malawian principles on the framing of charge sheets are laid down in section 128 of the Criminal Procedure and Evidence Code. Notably, it has been held that a charge is the fulcrum of a case in every criminal trial so great care must be taken during its drafting. Hence, a charge sets out the parameters of any criminal case that the prosecution brings before the court as stated by Chipeta, J (as he then was) in ***Republic v Brian Chikometsa***, Confirmation case Number 790 of 2007(HC)(PR)(Unrep). Therefore a properly drafted charge will not only assist the court but also the accused person to know what exactly is the case that they are being asked to answer.

4.6 Malawian courts have ruled on various occasion on the effect of defective indictments *viz-a-viz* a court's finding. Such decisions have at most times been that defective indictments have been held to invalidate the trial court's decision. Courts have held so because a defective charge means the person did not get a fair trial especially in terms of section 42 of the Constitution. For instance in ***Rendall-Day v Republic*** [1966-68] ALR Mal. 155 which upheld the principle that the particulars of the offence are meant to bring sufficiently to the notice of the accused the precise nature of the charge against him so that he or she is in able to prepare his defence. In recent times, Justice Chikopa (as he then was) in ***Gusto Daston Ndalahoma v the Republic***, Criminal Appeal Number. 2 of 2008 (HC)(MZ)(Unrep) stated that the court's duty is to ensure that the accused is tried before an impartial and independent court and not to assist the prosecution in fixing defective charges by amending them. He observed as follows –

> *"Regarding the latter entitlement we also are of the view that an accused must in reasonable time before commencement of trial be given sufficient particulars of the charge against him. Such particulars as will enable him know the nature of the case against him and prepare his defence accordingly. In the Visomba case we said a mere mention of the actual charge is not enough. The accused should be given inter alia a list of the*

> *witnesses and a summary of their expected testimonies. Talking specifically about particulars of an offence charged it is essential that they give as accurate a picture of the allegations against an accused as possible. This is not just because you want to inform the accused of the allegations against him with sufficient particularity but because it is only on the proof of the particulars as stated that an accused is convicted..*
>
> *It is vital therefore that any decision to amend the particulars should be the exclusive preserve of he who brought them to court that is the prosecution. Equally important is the fact that such amendment should be as permitted under section 151 of the CP&EC but within the context of the right to a fair trial."*

4.7 Turning to the charge laid against E.L, it is this court's view that such would not have withstood the test of section 128 of the Criminal Procedure and Evidence Code by the fact the prosecutor failed to pick out whether she unlawfully or negligently or recklessly did the act accused of. The charge sheet put both aspects of unlawful and negligent in the commencement section. Notably, section 192 of the Penal Code has distinctly put three terms and which terms have different implications in criminal law. As noted by section 9 of the Penal Code which defines intention: motive as –

> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.
>
> (2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
>
> (3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

4.8 Regarding plea taking, the procedure is laid down in sections 251 and 252 of the said Criminal Procedure and Evidence Code. Furthermore, the courts have also laid down that each and every element of the offence must be read to the accused person and thereafter the court should record a reply for each count separately as pronounced in ***Magwaya v Republic***, 8 MLR 323. Furthermore, the plea taken should ensure that it passes the equivocal test. It is trite law that a trial court must only obtain an unequivocal plea. Where a plea is equivocal, the trial court is legally bound to proceed to trial if the plea is equivocal and in ***Republic v Benito*** (1978-80) 9 MLR 211, 213, Chatsika, J (as he then was) said -

> *"It is trite law which has been emphasized many times in this court that before a plea of guilty is entered all the ingredients of the offence must be put to the accused person and he must admit each and every one of those ingredients. It is only when this has been that a plea of guilty may properly be entered. If the accused person in making his replies to the charge modifies his admission by stating some justification, a plea of guilty should not be entered."*

4.9 The law further has stated that where a plea has been taken and a guilty plea

been recorded, the accused must also respond in the positive to the facts laid down by the State. This is to ensure that an accused adequately understands the charge they are pleading to and acknowledges to the court that the plea entered was correct. In the case of ***Lwanja v Republic*** [1995] 1 MLR 212, it was held that the accused plea of guilty was defective because she did not understand the charge. Malawian courts have further noted that this is an important process in our criminal system because a lot of the accused persons in our courts are unrepresented accused. As such the lower court must ensure that the substance of every aspect of the offence is said to the accused and individual responses be recorded and facts should also be positively acknowledged. Further it ensures that the admission to the offence is without limitations or qualification. Remarkably Mwaungulu J's (as he was then) emphasized this point in ***Cliff Njovu v Republic,*** Crim. Appeal No. 7 of 2010 -

> *"The facts court take in support of the plea are important. They help the court to appreciate whether the defendant really wants to plead guilty to the charge. This is important. The court can only accept an unequivocal plea. The plea is equivocal if facts the court accepts fail to raise sufficient material to account for the elements of the offence or raise a reasonable defence to the charge. Moreover the facts together with what the defendant raises in mitigation are significant for sentence.*
>
> *The prosecutor, in the supporting facts, establishes both the ingredients and the elements of the offence and the particulars in the count. If the facts undermine an ingredient or element of the offence or show a different factual complexion from the one in the particulars the court should consider changing the plea.*
>
> *The facts the prosecutor presents may render a guilty plea unsustainable. They may differ substantially from the particulars or fail to establish critical particulars. The trial court, in that case, until sentence, can and should alter a guilty plea to a not guilty plea. The particular's importance determines the trial court's course. If the variance is deminimis it may be unjust to the prosecution and the defence to go to a full trial. All will turn out on the facts before the trial court. For example, for a defendant who agrees committing an offence on a particular victim and place a variance on the date the offence was committed can and should be cured by amendment rather than a full trial. Where however the facts establish the defendant could not have committed the crime and an alibi emerges from the facts presented by the prosecutor the date of the offence is important. The matter can only be resolved by trial. The trial court must alter the guilty plea to one of not guilty where the doubt in the particulars can only be resolved by trial of the issue."*

4.10 Upon examining the court record herein, it is obvious that the plea taken in regard to the Appellant herein was unequivocal. This was further compounded by the fact that the principles of section 251 of the Criminal Procedure and Evidence Code states that a plea of guilty can only be recorded where there is an unequivocal admission of guilty. Therefore the words of Skinner C.J in the ***Magwaya*** case ring true –

> *"it was necessary to determine whether the statement of facts, agreed to by the appellant, had cured the plea of its defects. An examination of both the plea both of the plea and his statement referred to in it cast doubt on whether he intended to admit the charge. Indeed, the facts*

outlined did not appear to substantiate the offence charged against him. His statements were part of those facts and in them he gave an account of what he did with the money, viz that he gave it to his superior, and he denied stealing. Such assertions had not been contradicted elsewhere in the statement of facts. Since the evidence had not cured the defective plea, the conviction will be quashed and the sentence set aside. The appellant will be remanded in custody pending a new trial."

4.11 Suffice to say that any defectiveness in plea taking where such is measured against section 3 and 5 of the Criminal Procedure and Evidence Code would at most times be found wanting. This court agrees with Kalaile J's views (as he then was) in the case ***Watson and another v The Republic*** [1994] MLR 383 (H.C) where he decided that the provisions of sections 3 and 5 must be invoked especially where the plea simply states I admit. He noted that it is not enough in law to be considered as a plea of guilty because there is no specificity in terms of the various elements constituting a particular offence. However, in this case because the accused had confirmed the correctness of the narrated facts, the conviction was confirmed by the court.

4.12 Incidentally the Appellant pleaded guilty in the lower court. The lower court further got her to indicate that she understood the charge that she breastfed a baby which was not hers and that she **was aware (my emphasis)** that she was likely to infect the baby with HIV/AIDS. It should be noted that this response was sufficient if the charge was rightly framed. However one needs to note that she was admitting to a charge that was in the State's words ambiguous, lacked clarity and was duplicitous. Section 192 of the Penal Code distinctively creates three offences – doing dangerous acts either unlawfully, negligently, or recklessly. Therefore it goes without saying that the prosecution cannot therefore draft a charge for one single offence with all three (3) offences at the same time where they were committed in a single act or if they are not in the alternative. Besides, section 192 does not include the element that a person should have done the act knowingly but act unlawfully, negligently or recklessly. Thereby it must be acknowledged that during the trial and it could not have been proved that she had knowledge or reasonable belief especially that the act of breastfeeding will likely spread her HIV/AIDS.

4.13 The Appellant in her arguments listed down what three (3) elements, the facts on plea taking should have brought out. It obvious that from the reading of the lower courts record, there is no evidence that these elements were put to the Appellant for plea nor were the facts once read out sufficient to show such. From her response to the narration of facts after her plea, clearly her response was that the facts were true and correct with nothing to add to nor subtract from. I have carefully read the facts read out in narration as well as the caution statement. Agreeing with the State, the narration of facts did not establish any act of negligence, unlawfulness nor recklessness. Additionally, the Appellant's caution statement only indicated that the Complainant gave the child to her for

safe keeping and that later the appellant noted that the child was breastfeeding on her. It stated that she tried to refrain her from feeding on milk from her breasts and it was when the complainant reported to the same to the authorities at the meeting. This however was not consistent with the narrated facts in court. These clear inconsistencies undoubtedly qualified the plea as in her caution statement, the Appellant categorically indicated that she did not encourage the child to breastfeed from her. It is my opinion that these would have made the plea unequivocal. Further, the lower court if it had paid special attention would have noted such and taken necessary steps like entering a plea of not guilty or getting the prosecution to reconsider the charges. Accordingly, this court cannot uphold the plea recorded in the lower court because per law such would be an injustice.

4.14 It is important that after noting the legal issues above, it is pertinent that this court deal with the issue implied in this case that the Appellant aimed at passing on HIV/AIDS to the complainant's baby through the breast milk? I want to discuss this matter despite that my determination above has already shown that the lower court decision is defective. Firstly, there is fundamental issue which raised concerns for me, was the Appellant's right to dignity and privacy as guaranteed by section 19 and 21 of the Constitution violated. In the trial transcript, one notes that the Appellant's status as well as treatment were introduced into evidence in court. This court wonders how the police obtained information and how the court admitted such into evidence. I would like to caution that such matters need courts to be specially concerned and careful with. The police need to ensure that they do not in the pursuit of serving and protecting do so by breaking the law and violating people's rights. Further the court's need to be vigilant in terms of admission of such into evidence where such has very shaky basis to comply with the Criminal Procedure and Evidence Code.

4.15 HIV/AIDS continues to ravage the world and Malawi has not been spared. Malawi has developed various policies and guidelines to deal with prevention and treatment of the disease from an HIV and AIDS Policy to Clinical Management of HIV in Children and Adults: Malawi Integrated Guidelines for Providing HIV Services in Antenatal Care, Maternity Care, Under 5 Clinics, Family Planning Clinics, HIV Exposed Child/Pre-ART Clinics and ART Clinics. Malawi also subscribes to the WHO Guideline Updates on HIV and Infant Feeding. Various health experts have declared that mother who is on ART can breastfeed a child as the chances of transmitting HIV/AIDS are very minimal compared to a mother not on treatment. This is due to the fact that the ART reduces the HIV viral load in the body and if effectively managed reduces the transmission of HIV. Recent studies which included Malawi on the same have indicated that infants who received breastmilk from a mother on ART with a suppressed viral load have an extremely low transmission rate of zero point

three percent (0.3%). Notably, the Appellant's expert Dr. Bland was of the same opinion. Coincidentally, the State submitted that the Appellant herein had been breastfeeding her own child even with such a condition because she was on ART treatment and believed that she could infect her own child with HIV/AIDS. As a result, having no intention to cause harm to her own child through breastfeeding or other ways would not breastfeed another child and her intention be interpreted to mean that she had knowledge or reason to believe that her actions were likely to spread HIV/AIDS to the other child. It is this courts considered view that the Appellant did not have the requisite knowledge or belief that breastfeeding the Complainant's child would likely spread the infection to the Complainant's child.

4.16 At this point, it is also important that this court discusses the approach to intentional infection cases. The Appellant argued through their expert, Ms. Michaela Clayton, that Joint United Nations Programme (UNAIDS) 2013 on Ending Overly Broad Criminalization of HIV, Non-disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations (Guidance Note) at page 2 states hat the overly broad application of criminal law to HIV non-disclosure, exposure and transmission raises serious human rights and public concerns. However it advocates that the application of law should be limited to cases of intentional transmission that is where a person is fully aware of his/her HIV status, and acts with the intention of infecting someone else and does in fact transmit it. Notably, current trend worldwide is that most countries are moving towards criminalizing intentional infections- cases.

4.17 It has been argued that intentional transmission of infectious disease should be differentiated from instances where a person is not aware of his/her HIV status. However, this court subscribes to the view that criminal law should not be applied to cases where there is no significant risk of transmission or where the person did not know that he/she was HIV negative, did not understand how HIV is transmitted, did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences. Legal systems should be ensure their application to such cases should ensure application of general criminal laws to HIV transmission is consistent with their international human rights obligations.

4.18 Further criminal law and/or public health legislation, it has been advocated that such should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. The law should ensure that it includes such elements like foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties. In ***R v Cuerrier*** [1998] 2 S.C.R 371, the Supreme Court of Canada ruled that knowingly exposing a sexual partner to HIV constitutes a prosecutable crime of aggravated assault under Canadian law. Whilst in the United Kingdom, courts have recognized that person-to-person transmission of a sexual infection that will have serious, perhaps life-threatening consequences for the infected person's health can

amount to grievous bodily harm under the Offences against the Person Act, 1861 as held in ***R v Dica*** [2004] 2 Cr. App. R. 28. Consequently, these jurisdictions have ruled that the transmission of that infection can constitute the offence of inflicting or causing grievous bodily harm, which when intentional can attract a sentence of life imprisonment.

4.19 Whilst the case of ***R v Golding*** [2014] EWCA Crim. 889 raised the issue of whether genital herpes could be described as "really serious bodily harm" so as to come within section 20 of the Against the Person Act 1861. The appellant did not disclose his diagnosis of genital herpes to the victim who he had passed on the disease. The Court found that Mr. Golding understood both that he had the infection and how it was transmitted, and by not preventing transmission or disclosing his condition thereby allowing the complainant to make an informed decision whether or not she wanted to risk acquiring herpes. As such he was guilty of reckless grievous bodily harm under Section 20.

4.20 However, this court after noting the various material provided by the experts as well as upon its own reading of the various available jurisprudence, research and material, is of the view that negligence infection of a deadly disease through breast-feeding should not be put in the same category or class of intentional infections. The law must be sensitive to various issues including the lack of knowledge on how HIV is transmitted. Most importantly, the circumstances of the accused must also play a role. Unquestionably, the law must should still ensure the traditional standard of proof applies and should be established by prosecutors. Fundamentally, in this human rights era, the law should remember to uphold the accused person's rights to privacy, dignity and due process. Courts in the words of the renowned South African judge and HIV activist living with the disease, Edwin Cameron in his lecture, Using the Law in the HIV Pandemic: Sword or Shield at Birkbeck College, London delivered on 28th June 2007 accessed at http://www.aidsmap.com/SouthAfricas-Justice-Edwin-Cameron-irrational-fear-and-stigma-feed-increasing-callsfor-criminal-HIV-transmission-laws/page/1427669/on 9/03/2012 stated that the role of the law in a public health crisis should be to contain the epidemic and to mitigate its impact. He added that the law's function should be primarily protective and should aim to save the uninfected from infection and to protect the infected from the unjust consequences of public panic.

4.21 Lastly, this court wanted to also ensure that it addressed the issue raised by the State of a possibility of ordering a retrial despite that their final submission was that the conviction and sentence be quashed and set aside. The parameters for how a retrial should be ordered are provided for in the Criminal Evidence and Procedure Code, namely section 3 and 5. Further, this power is a discretionally one and should be exercised in light of all the factors of the case examined and found lacking of justice or illegal. Agreeing with the State, courts should not

order retrial where the evidence does not disclose a case against the appellant, whether there is intention to recharge but more so do the interests of justice demand it. Besides, Malawian courts have vehemently stated that they would not order a retrial if to do so would enable the prosecution to fill up gaps in the evidence as per ***Banda (P) and others v Republic*** SCA 10 MLR 142. Moreover such would continue to perpetuate the injustice already caused to the Appellant.

4.22 Arguably, the Appellant, stated that she has been in custody for four (4) months which is half of the prison term which was imposed against her. In addition, factoring in the issue of one third remission by the prison authorities, it will be seen that the Appellant has already served a substantial part of her sentence. A retrial would mean punishing her twice.

4.23 Turning to the final issue of sentence. This court wants to remind itself and the lower court, that sentencing should always follow the principles set down in section 339 and 340 of the Penal Code. The offence which the Appellant was found guilty of was a misdemeanor which is punishable with a sentence of not more than two (2) years as per section 34 of the Penal Code. It is trite law that misdemeanors to some extent show the seriousness of the offence as well as its impact. Courts are therefore are always supposed to be mindful of such nuisances in criminal matters before them. Therefore it was surprising that His Worship Boasi who stated –

> *"The offence is serious in nature, it is punishable with fourteen years imprisonment with hard labour. But I should admit that it is one of the rare cases that have come in our courts. As for my court, such case is coming for the first time.*
> *Be it as it may, she deserves a custodial sentence. She will serve nine (9) months imprisonment with hard labour with effect from her date of arrest."*

4.24 The circumstances in this case demanded leniency, especially when the tests revealed that the Complainant's child tested negative. Incidentally, that the facts themselves barely showed any wrongdoing on her part. Further that the Appellant also had a small breastfeeding child who if she had not been breastfeeding on that day and had her breasts exposed would not have led to her finding herself in this situation. The court should have remembered that Malawians courts have always upheld the principle of the best interests of the child.

4.25 This court was also very concerned with the magistrate's bias when he ordered the custodial sentence by the words he used –

> *"I have borne in mind the provisions as put in sections 339 and 340 of Criminal Procedure and Evidence Code as to whether I should pass a*

suspended sentence or not. In fact I am concerned with the baby, however the conduct she portrayed has a lot to be desired. She is aware that she is HIV positive. She comes to breastfeed a baby which is not hers. It is the same thing as a man knowing to be HIV positive choosing to sleep with a school girl. Indeed such conduct cannot go unpunished…. The sentence will assist her to be extra careful when she gets hold of other women's babies. The sentence shall serve as a lesson to the other would be offenders from her community"

4.26 The custodial sentence for an offence which was a misdemeanor and not a felony was grossly excessive. I would like to state that these statements I have made herein are conscious that the victim in the lower court was a five (5) month old baby. However, this court's main function is to ensure justice is administered. Thus having undertaken numerous prisons visits, this court very much knows the state of such prisons and incarcerating a woman with her child should always be the last resort for any court especially where the offence is a misdemeanor. In this regard, courts in Malawi should really take into account the guidelines set by the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders.

5.0 CONCLUSION

5.1 This court declares that the proceedings in the lower court had procedural irregularities including blatant bias especially when one examines how the sentence was passed. Therefore in upholding the constitutional freedoms and rights which E.L is guaranteed and recognizing the fundamental principles of criminal law espoused in section 3 and 5 of the Criminal Procedure and Evidence Code, it is evident that the plea could not stand the test of section 251 of the Criminal Procedure and Evidence Code. Undoubtedly, the Appellant's right to a fair trial was compromised as such the conviction of the Appellant was therefore wrong in law thus a nullity.

5.2 I therefore order that the conviction and the sentence imposed are hereby set aside which results in her immediate release.

5.3 On the matter of the constitutional challenge, it is this court's considered view that the Appellant makes a convincing legal argument. Understandably, under section 108(2) of the Constitution, this court has powers to grant the prayer of the Appellant, however it is my opinion that this is a matter which requires national input and as such I recommend that the Appellant do a proper referral under section 9 of the Court's Act.

Declared in Open Court this 19th day of January, 2016.

Z.J.V. Ntaba
Judge