

SUB-THEME 8: Gender and Work

Naming and Shaming as an Effective Tool to Curbing Sexual Harassment in Public Institutions: The Malawian Experience¹.

Abstract

This paper shares stories of three courageous Malawian women who pioneered the concept of, ‘naming and shaming’ to curb sexual harassment. Their stories are published in the Malawi Labour Law Reports, available to members of the general public. They form a big part of the Malawi Jurisprudence on gender and work. These women took senior officers in the office of the Ombudsman, the Malawi Electoral Commission and the Malawi Stock Exchange, to the Industrial Relations Court at a time when it had just opened its doors. They defied societal expectations on how women should be treated in the workplace. Their boldness has liberated women and opened doors for them to seek redress. The public exposure has, among other advantages, acted as a deterrent factor to potential perpetrators.

Background to Concept of Naming and Shaming

The Malawi legal system does not recognize the concept of naming and shaming as a deterrent mechanism to curb acts of non-compliance with the law. The concept does not appear in any piece of legislation or policy. It has not been a subject for public debate, except in one instance involving employers who failed to remit pension contributions to pension managers in contravention of the Pension Act 2010². Notwithstanding this state of the law, this paper argues that the Malawi Constitution, when read and interpreted broadly and purposively, provides for situations where, State institutions shall progressively adopt and implement principles of non-discrimination and ‘**such other measures as may be required**’³ in order to actively promote the welfare and development of women to attain gender equality.

It is argued that the Constitution envisaged progressive activism as a means of accelerating gender equality in a society which still regards women as inferior to men, women as chattels, women as belonging to the kitchen, women as child bearers and minders and nothing more, women as subordinate to men, women as not deserving pleasures and the good things in life, women not deserving good education, employment, business and that women do not complain, they take their grievances in their stride as part of being a woman among other beliefs⁴. It is the view of this paper that it was not the duty of the Constitution, to spell out in specific terms what form, ‘**such other measures as may be required**’ would take? This was left open to State

¹ This paper is in draft format. Please do not quote or reproduce. Further, part of this paper is adapted with approval from a previously published paper, Sikwese RS. *Women’s Economic Rights: Removing Barriers to Women’s Access to Justice In Malawi*, published in 2016 in Goal 16 of the Sustainable Development Goals: *Perspectives from Judges and Lawyers in Southern Africa on Promoting Rule of Law and equal Access to Justice* (Southern Africa Litigation Centre, Johannesburg, Republic of South Africa)

² Newspaper

³ Section 13(a) Constitution

⁴ Malawi culture has institutionalized these beliefs.

institutions and other stakeholders to fill in. For example, nineteen years after the Constitution was enacted and after much debate, lobbying and canvassing a piece of legislation was enacted to deal specifically with sexual harassment⁵. This is one justification supporting the view that, ‘naming and shaming’ can on the basis of the Constitution, be used to obtain gender equality for women and men. Eradicating sexual harassment in the workplace in Malawi will not be achieved by only using the Gender Equality Act. This is because of several factors, for example, low levels of education for both men and women, especially women, low levels of understanding of the law, fear of courts, complex court processes, lack of resources to access courts, poverty, generally women’s poor self- esteem, fear of stigma⁶ and culture. It is therefore imperative that ‘other measures’ suitable for Malawi environment be tested and pursued towards achieving zero tolerance to sexual harassment.

Naming and shaming, yield instant result on the offender and would be offenders. It is a cheaper means of getting result than going through the legal route. The news spreads faster than would be the case with other enforcement mechanisms. The news can be disseminated in any language therefore reaching most of the population. At policy level, the government saves resources because the offenders and would be offenders need not necessarily spend time in prison in order to reform. Named and shamed high profile individuals get their punishment through the embarrassment, discomfort, anger and fear that they are likely to experience. It is argued in this paper that the respondents in the three pioneer cases were State agencies, sued in that capacity, hence the individual offenders did not have to bear any costs of the litigation or suffer any personal financial or physical setback or discomfort. The only punishment that could affect them personally would be the one suggested by this paper, naming them in order to shame them. Once identified, the society plays the role of reprimanding, reproaching, censuring, controlling, influencing and supervising them⁷.

In general, before using the tool of naming and shaming, it is imperative to consider the effect of the concept on the named person so that it does not violate the right to privacy and personal dignity⁸. In the context of this paper, it is safe to say that ,the named persons appeared in court, either in person or through their representatives. The hearings were public. The records do not disclose that any of the parties asked for hearing in camera to shield their identity. After the decisions were delivered, the judgments became public information and available to members of the general public to use as case authorities, precedent, research material, academic material, sensitization information to raise awareness. Judgments are also known to shape future legislation where there are gaps and to inform the direction of policies. This emanates from the principle that the law does not operate in a vacuum.

Now having laid down this background, this paper shall proceed to ‘name’ the offenders that were taken to court by courageous Malawian women at a time when Malawi did not even have a

⁵ Gender Equality Act 2013

⁶ Phiri V Smallholder Coffee Authority (dismissed and lost marriage)

⁷ Mitrou L. Naming and Shaming in Greece: Social Control Law Enforcement and the Collateral Damages of Privacy and Dignity (Department of Information and Communication Systems Engineering, University of Aegean-Greece, 2012)

⁸ Section 19(2) Constitution

definition for sexual harassment. The purpose of naming these offenders is in solidarity with the women who started the fight against sexual harassment. The campaign must be sustained in order to have a zero sexual harassment society. It is hoped that, the named individuals will be shamed enough to rethink their conduct in future interactions with women and girls and also to deter would be individuals holding senior (in this case public office positions) from committing acts of sexual harassment.

1. Malawi Electoral Commission

The Malawi Electoral Commission was taken to court by one Miss Alice Nazombe. The case was registered as *Nazombe v Malawi Electoral Commission*⁹. The Executive Management of the Malawi Electoral Commission is headed by the Chief Elections Officer.

In the reported case, the Chief Elections Officer, Mr Chimwaza, was assigned a Personal Secretary, Miss Alice Nazombe, who had gotten to the post through competitive interviews. She was confirmed in her position in 2001. On 25 July 2002 she received a memorandum from her immediate boss, Mr. Chimwaza transferring her to serve the Deputy Chief Elections Officer, which office was at the time not occupied. Miss Nazombe's junior was appointed to take the position of Personal Secretary to the Chief Elections Officer. In due course, Mr. Chimwaza asked Miss Nazombe to surrender a cellphone which she was using by virtue of her position as Personal Secretary. On 13 November she got another letter from Mr Chimwaza advising her to transfer to the Audit Office and serve as copy typist. This is what broke the camel's back. She inquired from Mr. Chimwaza why she was being demoted and why her entitlement to cellphone was taken away. Mr. Chimwaza did not bother to respond. This is when Miss Nazombe (hereinafter referred to as the applicant) took to the courts. It was in the same year that the Industrial Relations Court had just been established on permanent basis¹⁰.

The claim was based on unfair labour practices under section 31 of the Constitution. The court noted that although the applicant did not cite the provision as the basis of her claim, it was clear from the pleadings that the claim was one based on section 31 and the court so allowed it after counsel for the respondent had raised an issue on the matter¹¹.

The particulars of the applicant's claim were that:

- (a) Being treated unfairly so that she can resign from her job
- (b) Denying her suitable facilities to perform her job
- (c) Denying her seminars and allowances
- (d) Assigning her to a junior office

It was the evidence of Mr. Chimwaza as a witness of the Malawi Electoral Commission (hereinafter referred to as the respondent) that he acted in the manner complained of because the

⁹ [2008] MLLR 460, IRC

¹⁰ It operated on ad hoc basis from 1999 to 2002 when its first permanent officers were appointed by the Judicial Service Commission

¹¹ This is one major advantage of the Industrial Relations Court in Malawi. The court will put emphasis on the facts (supremacy of facts) to achieve justice and not technicality. The Labour Relations Act 1996 mandates the court to exercise some flexibility when it comes to matters of evidence (section 71(2))

applicant was not performing to his satisfaction. He said the peak of her non-performance was established at the lake resort district of Mangochi, where she had gone to work. They had a misunderstanding about allowances. He averred that the applicant had acted rudely towards him. He reasoned that she had lost respect in him and that he could no longer work with her. Hence her demotion to the office of his deputy.

It should be noted that the applicant went to court unrepresented. She argued her case herself without any assistance. The respondent was represented by counsel. After hearing evidence from both sides, the Chairperson of the court found for the applicant. In his judgment he made ten findings. Relevant to this paper are the following findings:

- (a) That courts have a pivotal role to play when it comes to constitutional matters. The courts should take proactive role in order to help citizens of a country realize their rights;
- (b) That acts of moving the applicant to a junior office and withdrawing her cellphone constituted constructive demotion and was therefore unfair labour practice;
- (c) That the allegation that the applicant was rude and insubordinate was not supported by evidence;
- (d) That as a public officer the respondent was obliged to respond to the complaint by the applicant on her unfair treatment; and
- (e) The respondent was a judge in his own case. He laid a charge against the applicant and made a unilateral decision without hearing the applicant's side or affording her a fair hearing. This was an act of unfair labour practice.

After making these findings the court ordered the respondent to re-instate the applicant into her original position of Personal Secretary to the office of the Chief Elections Officer.

Lessons from this case

The Chairperson did not find that the conduct of the respondent constituted sexual harassment. He however observed that, "*it would appear as if there is something hidden between these two parties, that is, the applicant and the Chief Elections Officer, which thing does not come out clear in the open*" (page 471). This is a loaded observation made after the Chairperson assessed the demeanor of both parties. It is however not clear until now what that 'hidden thing' was. For purposes of this paper, the lesson that can be learnt is for persons holding senior public offices to be transparent, accountable and able to justify their actions. They hold their office on trust and it is their responsibility to act in a manner that instils public confidence in the office. They must act within the law.

2. The Malawi Stock Exchange

The Executive Management of the Malawi Stock Exchange is headed by the Chief Executive Officer. In this reported case, the Malawi Stock Exchange was taken to court in the matter of *Chinkondenji v Malawi Stock Exchange*¹². The applicant Mrs. Veronica Chinkondenji was employed as an Administrative Assistant. She fell sick. She had to undergo a procedure called D&C, a minor operation that saw her being admitted to hospital. After her discharge

¹² [2008] MLLR 379, IRC

and check- up the doctor recommended that she be on sick leave. She communicated all this information to her boss, the Chief Executive Officer, Mr. Tom Mpinganjira. On return to work, fourteen days after the sick leave, she found that her office had been assigned to someone else. When she enquired, she was advised to take up the reception area and work as a receptionist. She was not pleased with the arrangement. She asked that she be reinstated in her office but Mr. Mpinganjira did not attend to her demand. This prompted her to lodge a complaint in court. Her case was registered as IRC Matter Number 20 of 2002. She claimed that she had been demoted because of illness. Just like the previous case, it was lodged immediately after the court was set up.

The respondent argued that the applicant had not been demoted. She was entitled to the same benefits as she was before she was assigned reception duties. Nothing in her terms and conditions of employment other than the office had changed. They argued that they employed a temporary secretary to cover the applicant's absence. It transpired in evidence that previously the applicant had suffered a major illness that necessitated an operation. She had a tumour in the womb. The incident that led to her absence leading to her removal from her office also involved reproductive parts of her body. There was no justification for her to be victimized because of these problems. They were common problems affecting women.

After the evidence had been led by both parties, the court made a decision that the applicant had made her case. The respondent was ordered to re-instate the applicant to her original office and a further order restraining the Chief Executive Officer, Mr. Mpinganjira, from psychologically harassing the applicant. The following were the reasons for the decision:

- (a) A case of demotion is made out where an employee is asked to perform duties in an office of a lower rank even though her salary and benefits remain unchanged; and
- (b) It is unfair labour practice to make a decision that adversely affect an employee based on unsupported medical assessment.

Lessons from this case

By their biological nature women suffer from certain illnesses that men do not. It would be absurd and unfair to treat women unfairly on the basis of this biological state. It was fair that the court took into account this fact by mentioning the problem in the judgment. The applicant was entitled to fair treatment despite her health problem. Just like in the previous case, the Chief Executive Officer through the board made unilateral decision that affected the employment status of the applicant. This was held to be an unfair labour practice.

The case did not make any reference to sexual harassment although it did refer to, 'psychological harassment'. The Employment Act 2000 provides for sick leave. Every employee is entitled to minimum of four weeks sick leave on full pay and eight weeks sick leave on half pay during each year¹³. Upon return from sick leave the employee is entitled to her office and benefits. What transpired in this case was contrary to this provision and contrary to the Constitutional right to work.

¹³ Section 46(1) Employment Act 2000

3. Office of the Ombudsman

The third case involves the Office of the Ombudsman and concerned the Ombudsman himself. It was registered as *Kamkosi v Office of the Ombudsman*¹⁴. It was Mrs. Rose Kamkosi's (hereinafter referred to that applicant) evidence that she served the Ombudsman, Mr. Enock Chibwana as his Personal Secretary. The office was based in Lilongwe. They sometimes worked in out stations like Mzuzu where the office had a guesthouse. On this occasion, the applicant and the Ombudsman were working in Mzuzu until 5.00pm when the Ombudsman went to the applicant and said, "Rose, are you tired?- be frank? I want us to do some work this evening". The applicant answered by saying 'we shall see'. Later that evening the two had their dinner with the rest of the members of staff and retired to bed. The Ombudsman bid good night to everyone before retiring. He did not mention the purported work to the applicant. The applicant proceeded to sleep.

Upon returning to Lilongwe, the applicant did not find the Ombudsman. She was informed that he had travelled to Blantyre. She was then advised that the Ombudsman no longer needed her services. That she should move to another office. This was a makeshift office which had been created just for her. The reason for the decision to move her was that the Ombudsman had complained that while in Mzuzu she had not spoken to the Ombudsman well. When she was asked about working in the evening, her response was not offensive. The applicant was shocked. She asked the Ombudsman to forgive her, for the response in Mzuzu. The Ombudsman did not attend to the apology. This prompted the applicant to seek legal redress.

It was revealed in court that this incident in Mzuzu was not the first attempt by the Ombudsman to 'work' with the applicant in the evening. In 1999 when the applicant was attending a course in Blantyre, the ombudsman used to send her invitations to have dinner with him. She turned down his invitations. After turning down these invitations the relationship between the applicant and Ombudsman became strained. The respondent created hostile working environment for the applicant. He eventually demanded that the applicant be moved to another office and opted to work without a secretary.

The court analysed the evidence from both parties. The Ombudsman did not attend court in person. He opted to send his representative from the human resource office to speak for the office. The court found that a case of sexual harassment had been established. The reasons for the decision were as follows:

- (a) Sexual harassment at the workplace can take various forms. In this case, it was recognized as violence against women;
- (b) Acts constitute sexual harassment when the victim has reasonable grounds to believe that her objection would disadvantage her in connection with her employment including recruitment or promotion or when the conduct creates a hostile working environment;

¹⁴ [2008] MLLR 418

- (c) The applicant was subjected to a hostile working environment due to her strong stand not to give in to her boss's demands to have dinner with him. The invitations for dinner were unwelcome and constituted sexual harassment;
- (d) Fair labour practice requires that before an employer takes any disciplinary action, other than dismissal, the employer should act reasonably;
- (e) The applicant had legitimate expectations which included a good office, good furniture, a telephone, travelling allowances and high status of Personal Secretary. The respondent unilaterally deprived the applicant of all these benefits and expectations. This was a violation of the applicant's constitutional right to fair labour practice and lawful, procedurally fair administrative action as enshrined in the Constitution;
- (f) The applicant was not afforded an opportunity to explain her side of the story and to bring any mitigating circumstances. This was a violation of the rules of natural justice which require that a person should not be condemned unheard;
- (g) The applicant was subjected to degrading treatment. She was put in a makeshift office that had no facilities, including suitable secretarial furniture;
- (h) The applicant did not establish constructive dismissal because there was no termination of the employment contract; and
- (i) The order sought by the applicant to be transferred to another constitutional body required the court to carry out a thorough enquiry as to its practicability.

Lessons from this case

The court considered the facts and made a bold finding that the facts established sexual harassment although the applicant did not plead sexual harassment. Although at the time the Malawi laws did not have a definition of sexual harassment, the court was resourceful and applied definition from other sources, in this case from the Convention on the Elimination of Discrimination against Women (CEDAW)¹⁵. This is called judicial activism and it is highly commendable because it is aimed at righting the traditional wrongs against some disadvantaged groups in a society.

Holder of Ombudsman's Office

Needless to add that Mr. Chibwana's contract as Ombudsman was not renewed. Since he left the position in 2009, the appointing authority has appointed ladies to head this very crucial office. The first lady Ombudsman was Her Ladyship Mrs. Justice Tujilane Chizumila who served until her contract expired. She was succeeded by Madam Martha Mwangonde. It is not clear whether the appointing authority took into account the scandal that befell the Ombudsman in the Kamkosi case, in not renewing his contract or in its subsequent appointment of ladies to the position. Whatever the case, it is fair to know that employees close to the office of the Ombudsman work in a safe and secure environment.

¹⁵ CEDAW General Recommendation No. 12 of 1989

General Overview of the Legal Framework Today in relation to Sexual Harassment

1. Sexual harassment

The definition of sexual harassment in the Gender Equality Act (hereinafter referred as GEA), is in section 6. It provides that, “a person commits an act of sexual harassment if he or she engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature in circumstances in which a reasonable person, having regard to all circumstances, would have anticipated that the other person would be offended, humiliated or intimidated”. The Malawian society is dominated by male decision makers at both government and local level. These traditions regard women as inferior and subordinate to men. This reasonable person standard has its origins from England and Wales whose customs are different from those in Malawi. Therefore it probably unfair to subject the assessment of sexual harassment to a reasonable man test in Malawi.

Laws are supposed to move with times and must be adapted to suit local traditions, cultures, values, morals and beliefs of what is wrong or right. The standard of reasonable person as understood in common law countries is a wrong standard for Malawi in sexual harassment cases because in general the Malawian culture does not respect women. Women are still regarded as men’s property. Low literacy levels and economic disempowerment of women place them in a disadvantaged position regarding cases of sexual harassment. It is an insult to subject their fate in sexual harassment cases to a reasonable person’s standard. It does not make a difference if that reasonable person is a man or woman because the chances are that these cases will be handled by men either in the formal or informal justice system¹⁶.

It is a legal requirement under the GEA that public office must be occupied by not less than forty percent women. The High Court is at thirty- seven percent, women representation. As the enforcement machinery to enforce the provisions of the GEA it is imperative that the appointing authority bridges this gap to validate the spirit of the Constitution and the GEA.

It is also a requirement under the GEA to formulate flexible procedures and fees regime in all courts that allow for easy access to justice by vulnerable groups. A case should not fail on the basis of technicality. It is the substance of the matter which is critical. Judges ought to give facts priority and not make decisions in a vacuum when issues of human dignity are at stake.

It serves no good hiding behind archaic excuses that the ‘law has no eyes’. If the legislature thought the law cannot see it would not have made provisions in the law on affirmative action. This is why courts like the IRC have made tremendous inroads in access to economic justice for women through its deliberate policies of creating simple and straightforward procedures, minimum registration fees policy, women first and speedy disposal of cases. Further, a combination of considering cases from a human rights perspective while maintaining the supremacy of substance/ facts over technicality has helped the court reach out to many disadvantaged court users especially women.

¹⁶ For example, Malawi has one female justice of appeal in the Malawi Supreme Court Appeal comprising nine justices.

The Malawi Law Society (MLS) and other stakeholders in the justice system have complained about the tendency of some judges not to deliver judgments. There are no sanctions for judges or magistrates who do not deliver judgments or set down cases for hearing¹⁷. There is no performance standard or a monitoring system to assess judges and hold them accountable¹⁸. All courts have the mandate to ensure that they provide redress for sex discrimination, harmful practices and sexual harassment. The three sample cases above have shown that the court acted with speed and that the decisions were well founded both in fact and in law.

Conclusion

In conclusion, this paper has highlighted the importance of empowering women economically either through gainful employment or productive businesses. It is only where women are empowered economically that they can attain full autonomy over their lives and matters that affect them. It is not enough to just eliminate sexual harassment in the workplace.

Research at the Industrial Relations Court (hereinafter referred to as IRC) shows that the Court has consistently applied the law to give effect to the objectives of the Constitution on the question of non-discrimination and equal access to economic resources. The court has found that women can enter into contracts in their personal capacity to advance their economic empowerment and that women can marry, establish a family and still earn a living through gainful employment. The IRC endorses the participation of women affected with HIV/AIDS in economic development through employment.

It also found that procreation is a natural process and that women must not be discriminated against on this basis when it comes to their career advancement. IRC promotes conducive working environment for women so that they can freely enjoy their economic rights and freedoms by punishing institutions and employers that practice, encourage or condone hostile working environment including cases of sexual harassment.

Courts to Provide Awareness as a Means of Promoting Gender Equality in the Workplace

Bringing out cases from the Court is a form of creating awareness on different forms of discrimination against women. The above samples have the effect of informing women what they ought to do when faced with similar situations, which court to go to, what to tell the court and what remedy to expect. It also tells employers what not to do and what to expect if they did any of the prohibited acts. This sample also speaks to the courts on how cases have been handled, to learn from the other courts but also to improve in certain areas like remedies and admission of evidence. Awareness is also raised in policy makers and other stakeholders working on promoting gender equality that the courts are working and that they need more support so that more cases can be adjudicated upon. This message applies especially to the Malawi Human Rights Commission which has the legal mandate to enforce the provisions of the GEA. Therefore the courts have a big role of raising awareness on gender equality through its pronouncements

¹⁷ Some litigants have pending judgments for over five to ten years

¹⁸ Judges can be removed from office through an impeachment process by Parliament on grounds of incompetence in the performance of his/her duties or misbehavior (section 119 of the Constitution). A judge may also be suspended from duty where it is in the public interest to do so

and judgments. The more cases are adjudicated upon, judgments delivered and publicized, the more awareness is raised. Apart from the court's role in raising awareness on gender equality through its pronouncements, it is important to raise general literacy capacity of women starting with the girl child.

Girl Education as a form of Raising Awareness

It is reported that school participation and education attainment in Malawi is marked by disparities on key dimensions such as gender thereby hampering women's ability to be productive members of the society¹⁹. Therefore government's initiatives on promotion of girl education are timely. The initiatives include prohibition of early marriages and rescuing children from marriages. Early marriage is a critical area of concern especially when it is reported that 46 per cent of Malawian girls get married before adulthood²⁰. Early childhood education through the National Policy on Early Childhood Development is another intervention giving mothers equal opportunity to pursue education and economic activities while their young children are looked after through the childcare programmes.

Reproductive health

The right of a woman to choose when to have a child will guarantee her right to education, right to health, right to pursue a career and engage in economic activity of her choice at the right time. Forcing women to have children because they are at risk of arrest and criminal prosecution if they decide to terminate unplanned pregnancy is a form of discrimination. Therefore access to safe, cost effective and efficient sexual and reproductive health services is an area that must be supported to ensure women's equal integration in education and the economy. The role of Banja La Mtsogolo (BLM) in Malawi cannot be over emphasized in this regard²¹. Other organisations that are working hand in hand with government to raise awareness especially on economic rights of women are the International Labour organization, (ILO), the World Bank, World Health Organisation (WHO).

Role of the ILO in Removing Barriers for Attainment of Women's Economic Rights

The ILO has played a major role in the transformation of women's economic empowerment. Through it, Malawi adopted the Decent Work Country Programme whose main objective is to contribute to the objectives of the National Development Agenda through improved, gainful, secure and rights-based employment for youth, women and men. The government's role in decent work agenda is to create an enabling environment that will see women participating fully, effectively and on equal terms with men in economic activities.

The World Bank

¹⁹ Harnessing the Demographic Dividend to Accelerate Socio-economic Transformation and Economic Development in Malawi (April 2016) page 35 of the Report

²⁰ Supra, reported in the Sunday Times of September 11, 2016 by Levi Kabwato in his column Levi's Notebook

²¹ BLM has clinics throughout Malawi where they provide cost effective and sometimes free modern contraception services aimed at providing choices in reproductive healthcare.

The World Bank through the Women Business and the Law has been actively involved in collection of data and compiling reports covering over 141 countries around the world in order to provide an objective perspective on gender differentiation in written and legal regulation and its impact on women's economic prospects²². Some of the adverse findings in relation to Malawi include, lack of legislation of paternity leave, although the GEA provides for a quota of no less than 40% and no more than 60% of either sex in the public service compliance remains negligible. The GEA has no provision on access of nursing mothers to break times to nurse their babies neither are they entitled to flexible work times and schedules. There is no provision on prohibition against enquiring into a woman's marital status during job interviews. There are no specific tax credits applicable to women, there is no universal provision of free childcare education and support, and although primary education is free it is not compulsory.

1. The World Health Organisation

The WHO recognizes productive work as one of the major factors that determines a person's health. In 2011 WHO held a world congress on social determinants of health in Rio De Janeiro Brazil where issues that affect health including labour were discussed at political level as a means of raising awareness and garnering political support. Malawi has since been placed as the poorest country in the world. By protecting women in employment and business their health wellbeing and that of their families would be guaranteed.

Barriers to Women's Access to Economic Justice

The following are some examples of barriers to women's access to economic development and justice:

1. Legal Framework

In general Malawi has a conducive legal framework that prohibits and criminalises discrimination and promotes equality on the basis of gender. However most of the laws are ineffective because the beneficiaries are not aware of their rights, the remedies are ineffective and inadequate, the judicial system is not completely transformed from some entrenched cultural norms and values, the penal system is punitive on women especially in the area of reproductive rights. The requirement of higher standard of evidentiary proof in sexual offences and the stigma associated with crimes against women.

2. Labour Regime

There is serious lack of supervision of workplaces for compliance with minimum standards. Most employees are in the informal sector engaged in precarious work characterised by poor wages, long hours, lack of over-time and holidays, poor occupational safety, health and welfare standards and general poor work environment. Working women have no legal protection in terms of nursing, childcare, sanitation and career advancement. Lack of paid paternity leave means that only working women bear the burden of taking care of young babies. The universal minimum wage means that low income earning workers, who are mostly women bear the same standard of paying their domestic workers the same minimum wage as big corporates.

²² Women, Business and the Law Reports published in 2012 and 2014 respectively

3. Tax Regime

Women with family responsibilities bear the same tax burden on their income as men, although they spend more on family related responsibilities. The burden of child care including paying for pre-natal, antenatal and post- natal medical services, child minders, early childhood education and related expenses is borne more by women than men²³. There are no tax incentives for women. Associative discrimination is more pronounced in how the tax laws deal with women because it does not take into account the sacrifices that women make to reproduce and hold a successful job or business simultaneously.

4. Government Monetary Policy and Corruption

Perception of corruption is a major concern whereby corrupt individuals monopolise and abuse public resources at the expense of hard working honest individuals. Most SME's are struggling because of the high interest rates charged by banks and other lending institutions. There is no clear law that protects consumers in the financial services area. There is no threshold on charging interest on non-performing loans. The court system is too slow for businesses or individuals to recover their money tied in bad contracts or debts. Lending institutions have taken advantage of financial vulnerability of the people to charge exorbitant and unconscionable interest rates. Most of the affected people in all this are women. It is high time that Malawi adopted the *in duplum rule* to protect the people from the harsh effects of poor economic environment characterised by corruption²⁴.

5. Culture and Religion

The Constitution provides that every person shall have the right to participate in the cultural life of his or her choice²⁵. Examples of customs that promote women's inferiority status and hinder their access to economic development are polygamy, wife inheritance, property grabbing and lack of capacity to own real property in the patrilineal system.

Religion on the other hand has had similar discriminatory tendencies that have negatively impacted on women's access to economic empowerment. Some examples are religious employers that dismiss a female employee because she fell pregnant out of wedlock, because she is in a polygamous relationship and because she is divorced²⁶.

6. Dependency Syndrome or Economy of Affection

The economy of affection is well documented and perhaps the remaining question that the government can begin to consider would be regarding tax burden on those who are financially supporting the poorer community²⁷. In developed economies governments pay families to look

²³ These tax exemptions apply in some developed economies

²⁴ Businesses through the media are calling on the Government to pass a law which will place a cap or ceiling on interest chargeable on non-performing loans in this country. Other countries like Kenya have passed such law with positive impact. (Rt. Hon. Bazuka M.K. Mhango SC. LLD, **Statement on In Duplum Rule**, Bazuka & Company, Karonga, Malawi, 25 July 2016)

²⁵ Section 26 Constitution

²⁶ Men can easily hide the fact that they have extra wives or have extramarital children. This is not true of women

²⁷ It is reported that child dependency burden is very high in Malawi compared to other countries. Research commissioned by the World Bank revealed that for every 100 working or economically active people there were 95 dependent children. This is one of the challenges hindering development (Harnessing the Demographic Dividend report page 29)

after the poorer members of the community. In this country these individuals receive no support of any nature from government.

Transformative Developments

Most of these barriers can be removed through political will, transformation of people's minds and attitudes, institutional reforms and inclusiveness. Principles of national policy provide that gender equality shall be achieved through full participation of women in all spheres of Malawian society on the basis of equal opportunities with men; the implementation of the principles of non-discrimination and such other measures as may be required; and the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property²⁸.

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²⁸ Section 13 Constitution. Although principles of national policy contained in the Constitution are directory in nature, courts are entitled to have regard to them in interpreting and applying any of the provisions of the Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of the Constitution.

Statutes

Constitution

Gender Equality Act 2013

Employment Act 2000

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