



# **Malawi Violence Against Women and Girls Prevention and Response Programme**

Reflections on Court Operations during COVID-19

Implementation Year 1: 1<sup>st</sup> May 2019-31<sup>st</sup> May 2020

# Reflections on maintaining Court Operations in Malawi during the COVID-19 Pandemic

## 1.0. Background

Malawi recorded its first 3 cases of coronavirus on 2 April 2020. Prior to this and on 11th March 2020, the World Health Organization (WHO) characterized the Coronavirus Disease (COVID-19) as a pandemic and called on all countries to take urgent and aggressive measures to combat the pandemic. Consequently, the President of the Republic of Malawi Professor Arthur Peter Mutharika declared Malawi as a state of disaster on 20<sup>th</sup> March 2020. Government accordingly promulgated regulations on precautionary measures for prevention of the further spread of the virus and mitigation of the pandemic.

On 27 March 2020, the Malawi Judiciary through the office of the Chief Justice also released measures to adjust the operations and processes of the Judiciary with a view to minimizing the health risks which coronavirus poses to judicial officers, members of the staff of the Judiciary as well as court users.<sup>1</sup> Amongst other measures, the Judiciary has slowed down work on all 'non-urgent' court matters in order to reduce the potential of overcrowding at the court premises, and thereby controlling the spread of the corona virus. The Judiciary has also procured PPE for use in its courts either from its own budget or through the support of its partners.

## 2.0. Implications of COVID-19 on GBV

With the prevalence rates of gender based violence and violence against children in Malawi being high compared to the global average; women and girls are at risk of increased violence as a result of COVID-19 due to livelihoods losses coupled with restrictive gender norms and harmful cultural practices.<sup>2</sup> The UN has warned that 'during the current pandemic, as people spend more time in close proximity in household isolation, coping with additional stress such as school closures, increased care burden and financial constraints, women and children are at risk of experiencing higher levels of violence.'<sup>3</sup> Recent reports from parts of Asia, North and Latin America and Europe show a significant rise in the number of women calling helplines and reporting abuse during the current pandemic.<sup>4</sup> In Kenya, there has been a significant spike in Sexual Offences in many parts of the country, constituting 35.8 per cent of the criminal matters reported during this period.<sup>5</sup> Similarly, South Africa registered 2,300 gender based violence cases during the 1<sup>st</sup> week of the lockdown, with hundreds of other unreported cases. In Malawi, there is also anecdotal evidence

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<sup>1</sup> Office of The Chief Justice Of The Republic Of Malawi 'Judiciary Measures On Coronavirus (COVID-19) issued on 27 March 2020

<sup>2</sup> Ministry of Gender, Children, Disability and Social Welfare 'Malawi covid-19 rapid gender analysis' (2020)

<sup>3</sup> UN Women 'COVID-19 and Essential Services Provision for Survivors of Violence Against Women and Girls' available at <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-covid-19-and-essential-services-provision-for-survivors-of-violence-against-women-and-girls-en.pdf?la=en&vs=3834>

<sup>4</sup> As reported in UN Women 'COVID-19 and Essential Services Provision for Survivors of Violence Against Women and Girls' available at <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-covid-19-and-essential-services-provision-for-survivors-of-violence-against-women-and-girls-en.pdf?la=en&vs=3834>

<sup>5</sup> Statement issued by Hon. Justice David K. Maraga, Chief Justice & Chairman, National Council On The Administration Of Justice Nairobi on April 1, 2020. Available at <https://www.judiciary.go.ke/statement-on-justice-sector-operations-in-the-wake-of-the-covid-19-pandemic/>

that is showing a spike in the number of cases of GBV reported with the police as well as some community structures that handle GBV.<sup>6</sup>

The COVID-19 pandemic, and measures adopted in order to prevent its spread (i.e. social distancing), significantly impacts the provision of essential health, justice and policing and social services for women and girls who have experienced or are at risk of experiencing violence.<sup>7</sup>

### 3.0. Determining ‘urgency’ of GBV cases during the pandemic

#### 3.1. Defining Urgency

Recent decisions by judges from other jurisdictions have helped to clarify what the courts consider to be “urgent” during the pandemic. On March 30, 2020, a Canadian court in *Thomas v. Wohleber*<sup>8</sup> found that, in order to meet the requirement of urgency during the pandemic, the concern must be:

- Immediate, meaning one that cannot await resolution at a later date;
- Serious in the sense that it significantly affects the health or safety or economic well-being of parties or their children;
- Definite and material rather than speculative; it must relate to something tangible (a spouse or child’s health, welfare, or dire financial circumstances) rather than theoretical; and
- Clearly described in evidence and examples that explain how the concern reaches the level of urgency.

In South Africa, the Minister of Justice in consultation with the Honorable Chief Justice of South Africa has issued Directions<sup>9</sup> that access to the courts, court precincts and justice service points are restricted to only essential and urgent matters, which include:

- Service and execution of court orders relating to Covid-19;
- Service of domestic violence protection orders;
- Service of protection from harassment orders;
- Service of urgent court process in family law matters (including removals of children in need of care and protection of children, placement of children in child centres and applications for enforcement of maintenance orders).

Within the Irish District Courts, urgent matters have been defined as consisting of certain criminal, family and childcare matters (including applications for protection orders and childcare orders); whilst all civil

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<sup>6</sup> Presentation from the Malawi Police Service during the Covid 19 Protection Cluster meeting

<sup>7</sup> UN Women ‘COVID-19 and Essential Services Provision for Survivors of Violence Against Women and Girls’ available at <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-covid-19-and-essential-services-provision-for-survivors-of-violence-against-women-and-girls-en.pdf?la=en&vs=3834>

<sup>8</sup> *Thomas v. Wohleber*, 2020 ONSC 1965 (CanLII), <<http://canlii.ca/t/j63dm>>, retrieved on 2020-05-19

<sup>9</sup> Directions Issued In Terms Of Regulation 10 Of The Regulations under The Disaster Management Act, 2002 (issued on 31 March 2020)

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matters in the District Court are considered non-urgent. However, the District Court may consider a civil matter urgent if a good case can be made.<sup>10</sup>

Kenyan Courts have less specific guidance on what 'urgency' denotes, but the Courts require parties to file for a 'Certificate of Urgency.' Where the Court is satisfied that the matter is urgent, the Court may grant interim orders or give directions in Chambers to the party filing the matter based on the pleadings or affidavits filed with the Certificate without holding a hearing on the matter. In the instance that the Court determines that the matter is not urgent, the Court gives appropriate directions for the handling of the matter. However, a Statement issued by Hon. Justice David K. Maraga, Chief Justice & Chairman of the National Council On The Administration Of Justice in Kenya points out that 'there has been a significant spike in Sexual Offences in many parts of the country in the last two weeks. These offences constitute 35.8 per cent of the criminal matters reported during that period. In some cases, the perpetrators of such offences are close relatives, guardians and/or persons living with the victims. Depending on the individual facts of each case, upon application by the DPP, the courts will consider giving directions on early hearing dates in such cases.'<sup>11</sup>

In its Guidance Note Ensuring Access to Justice in the Context of COVID-19 UNDP, emphasis has been outlined that priority should be given to cases involving violence against women and children; accountability for serious crimes; and where the statute of limitation may apply.

It is also worth noting that as early as 2009 and prior to Covid 19, the European Court of Human Rights adopted a priority policy with a view to speeding up the processing and adjudication of the most important, serious and 'urgent' cases. It therefore directed that urgent applications refer 'in particular risk to life or health of the applicant, the applicant deprived of liberty as a direct consequence of the alleged violation of his or her Convention rights, other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue...'<sup>12</sup>

### 3.2. Classifying 'urgency' in Gender Based Violence cases during the pandemic

Violence against women and girls is widespread, systemic and culturally entrenched in Malawi- often robbing women and girls of their fundamental freedoms under the bill of rights including their right to life, dignity and health. 34% of Malawian women experience physical violence and 20% experience sexual violence.<sup>13</sup> 42% of married women experience spousal violence with 34% reporting physical injuries, of which 11% were serious injuries.<sup>14</sup>

Globally, gender based violence is recognized as one of the most notable human rights violations across the world<sup>15</sup> and has been classified as a global pandemic affecting at least 1 in 3 women in their lifetime.<sup>16</sup> During the pandemic, women and children not only face a particular risk of violence during home

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<sup>10</sup> See

<http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/CFBD614F393A630880258494003A8B40?opendocument>

<sup>11</sup> Statement issued by Hon. Justice David K. Maraga, Chief Justice & Chairman, National Council On The Administration Of Justice Nairobi on April 1, 2020. Available at <https://www.judiciary.go.ke/statement-on-justice-sector-operations-in-the-wake-of-the-covid-19-pandemic/>

<sup>12</sup> See the Courts Priority Policy available at [https://www.echr.coe.int/Documents/Priority\\_policy\\_ENG.pdf](https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf) (accessed 19 May 2020)

<sup>13</sup> Malawi Demographic Health Survey 2015/2016

<sup>14</sup> Malawi Demographic Health Survey 2015/2016

<sup>15</sup> <https://www.hrw.org/news/2006/10/08/un-new-report-says-violence-against-women-human-rights-violation>

<sup>16</sup> World Bank 'Gender-Based Violence (Violence Against Women and Girls)' (September 2020) available at <https://www.worldbank.org/en/topic/socialdevelopment/brief/violence-against-women-and-girls>

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confinement but also more limited access to justice due to the impact on the justice system<sup>17</sup>. Thus, cases involving gender-based violence are 'urgent' in their very nature. Nonetheless and recognizing the unprecedented public health emergency situation that COVID-19 has presented to the Malawian society, there is need to strike a delicate balance of curbing the further spread of the corona virus by ensuring the safety of judicial officers and court users on one hand, whilst also undertaking all reasonable measures to ensure access to justice and legal remedies as well as protection for survivors of gender based violence. Whilst acknowledging that gender-based violence cases are, in their nature, urgent cases; there is need to prioritize which cases can still be reasonably and expeditiously attended to during this pandemic.

### 3.3. Adopting a priority approach in handling GBV cases during the Pandemic by Courts in Malawi

Informed by best practice in other jurisdictions as outlined in 3.1 above, the following matters would need to be attended to by the Courts- even in the event of a lockdown:

- Applications for and granting of protection orders
- Matters that significantly affect the health or safety or economic well-being of parties;
- Matters relating to the care and protection of children;
- A deprivation of liberty as a direct consequence of the alleged violation;

It is also notable that a number of jurisdictions have provided room to assess "urgency" on a case-by-case basis as raised by the affected party. As the circumstances may demand, Malawian Courts would need to conduct a careful assessment of the safety risks a particular applicant faces on a case-by-case basis in order to determine whether the matter can be prioritized for hearing. Risk factors to consider include:

- The victim's own assessment of her safety and risk levels,
- The alleged perpetrator has a history of violence,
- Indications of mental health issues of the perpetrator which have prompted violence,
- The perpetrator's access to weapons or dangerous objects
- A threat of violence by use of weapons or dangerous objects; or the survivor is in receipt of death threats or threats of physical violence;
- previous or current breach of protection order;
- Denial of essential resources which jeopardizes the safety and well-being of the survivor and/or her children;
- lack of social support including financial/economic dependence on the perpetrator;
- destroying or damaging a partner's property;
- severe and ongoing coercion and control, including stalking
- The violence is targeted at disadvantaged groups (disadvantaged groups would include children, groups of persons that experience a higher risk of poverty, social exclusion, discrimination and

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<sup>17</sup> UNODC/UNDP Guidance Note on Ensuring Access to Justice in the Context of COVID-19 (2020)

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violence than the general population, including, but not limited to, ethnic minorities, migrants, women/girls with disabilities, and isolated elderly people)

A preliminary risk assessment can be conducted by an Assistant Registrar during the process of case registration. The determination of which matters are 'urgent' and should proceed during an emergency should be non-discriminatory and free from undue external influence.

A review should further be undertaken of the types of cases that could be dealt with remotely (via teleconferencing for example) without compromising due process rights and victims' participation, including the right to consult and be represented by a lawyer.

As it is not certain when the courts will be able to resume their full functionality and resume full trials, judicial officers need to exercise extra caution and conduct a risk assessment before releasing persons accused of serious offenses of violence on bail pending trial, so as to ensure that any risk of harm to the survivor is avoided. This includes offenses such as rape, defilement, murder, grievous bodily harm, indecent assault and other forms of serious incidences of GBV.

## 4.0. Way Forward

Based on this analysis, the Technical Legal Advisor is submitting this research as part of guidelines to the judiciary. In addition to this, the Technical Legal Advisor will also submit a compilation of provisions of applications under gender related laws that need to be prioritized during this pandemic in order to ensure the safety and welfare of survivors of VAWG. It is hoped that the judiciary will adopt the guidelines for circulation to all courts across the country.