

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CRIMINAL APPEAL NO. 104 OF 2007

BETWEEN

JOSEPH NDUBUISI NWANGWU

-VS-

THE REPUBLIC

CORAM : HON. JUSTICE NYIRENDA

: I. Wadi/Chiphwanya, Counsel for the Plaintiff
: S. Kayuni/Nkhono, Counsel for the Defendant
: F.H. Njirayafa, Court Interpreter
: Mthunzi/Jere, Court Reporter

RULING

Before me is an application for bail pending the determination of appeal pursuant to section 355(1) of the Criminal Procedure and Evidence Code. The Applicant seeks his release on bail following his conviction on a charge of incest contrary to section 157 of the Penal Code by the Chief Resident Magistrate Court at Lilongwe. He was sentenced to 13 years imprisonment with hard labour. He seeks bail pending the determination of his appeal on two accounts. The first is that he has a strong case on appeal and argues that the prospects of the appeal succeeding are very high. The second reason is that he is of ill health.

The affidavit of Ishmail Wadi on the applicant's behalf asserts that the applicant has a life threatening illness. He has High Blood Pressure which for the past three years has required constant medication and review. A medical report by Dr. J. Aryee has been exhibited which speaks for the applicant's blood pressure running out of control ranging between 180/110 and 240/140 as recorded by a doctor and prisons medical staff. His blood pressure is said to put him at risk of a stroke, heart attack and kidney failure. The Doctor recommends that the applicant should be hospitalized. Another report from Kamuzu Central Hospital by Dr. A. Hiba has also been exhibited. The report describes the applicant as a hypertensive patient; otherwise he is normal in other respects.

In arguing for the applicant, Mr. Chipwanya stresses that his condition requires care at a proper medical institution or a homely environment to ease the tension and for proper medical attention. It is further submitted that there should be no doubt that the applicant would attend to the conclusion of his appeal. After all he was on bail pending trial and all that time he waited around until he was tried, convicted and sentenced.

The application is strongly opposed by the state. Mr. Kayira assisted by Mr. Nkhono submit that the applicant's condition is not unusual and comes with anxiety of conviction and sentence. That Prison Authorities have arranged for the applicant's medication when his condition demands attention.

More to it though is the argument that this is bail pending appeal. It is rare that it is allowed and courts have always required exceptional circumstances to be shown if at all such an application were to be allowed. Learned Counsel for the State see nothing exceptional about the circumstances of the applicant.

I have very little myself to say in all this and wish to acknowledge the strong arguments on both sides. Let me proceed and also pay deference to the candid opinion and principles expressed by my brother judges in the cases cited before me; that of *Yeremiah Chihana v Republic Criminal Application No. 17 of 2005*, *Maggie Nathebe v Republic, Misc Criminal Application No. 90 of 1997* and the old *Pandirker v Republic 1971-72 M.L.R. 208*. All these cases and many others that have and could have been cited uphold the view that courts are reluctant to allow bail pending appeal and protect the principle that unless unusual (exceptional) circumstances are established, courts will not normally allow bail pending appeal.

At this stage of the case an applicant will already have been found guilty and is to serve the penalty meted out. It is unlike before trial is concluded because at that stage the presumption of innocence is primary.

Coming more to the case at hand let it be known that the appeal has already been heard and therefore that any moment from now the final judgment of the High Court is at hand. Any attempt at this stage by this court to incline towards the merits of the appeal will very clearly be an indication of the actual outcome of the appeal. If the court was inclined thus then perhaps the prudent thing to do is to actually determine the substantive

appeal. I will therefore desist from considering the matter from that perspective and merely commit the court to coming up with its judgment soonest.

The state of health of the applicant is a condition he has been with for some time. High Blood Pressure is a condition which is bound to mount serious levels when a person is under stress and anxiety. This is a common fact amongst us, well known even to the common man. As a matter of fact High Blood Pressure is a condition that is so common among us. Hospitals and Clinics are usually ready for it. The applicant himself has been attended to privately and at the Government Hospital resulting into some degree of relief. According to the report from Kamuzu Central Hospital the overall condition of the applicant is not alarming.

What this application says to me is that the court should expedite the determination of the appeal which has already been heard. I will do my part to make sure judgment is handed down soonest.

In all therefore the application for bail pending determination of the appeal is rejected.

PRONOUNCED in Open Court at Lilongwe this 6th day of December 2007.

A.K.C. Nyirenda

J U D G E