



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CRIMINAL APPLICATION NO. 175/2008
(Criminal Case Number 100 of 2008 in the Senior Resident Magistrate
Court, at Blantyre)**

**IN THE MATTER OF AN APPLICATION BY
MWIZA MKANDAWIRE FOR BAIL UNDER
SECTION 355(1) OF THE CRIMINAL PROCEDURE AND
EVIDENCE CODE**

BETWEEN:

MWIZA MKANDAWIREAPPLICANT

- AND -

THE STATERESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA
Mr Chayekha, of Counsel for the applicant
Mr Supedi, Senior State Advocate}
Miss Longwe, Senior State Advocate} for the respondent
Mrs S. P. Moyo – Official Interpreter

ORDER

Manyungwa, J

INTRODUCTION:

This is an application by Mwiza Mkandawire, the applicant herein, for bail pending the determination of his appeal. The application is made under Section 355(1) of the Criminal Procedure and Evidence Code. The applicant

was convicted by the Senior Resident Magistrate Court at Blantyre of the offence of Road obstruction contrary to Section 104 as read with Section 167 of the Road Traffic Act on 23rd July, 2008.

The said Senior Resident Magistrate convicted the appellant after his own plea of guilty and sentenced him to 6 months. The appellant has appealed against sentence that was passed by the court below, and by the application herein the applicant through her counsel, Mr Chayekha, is applying for bail pending the determination of that appeal.

In the applicant's grounds of appeal he has raised two grounds of appeal namely:

- i. That the learned Magistrate erred in law in failing to give the appellant an option of a fine when the same is allowed under the provision.
- ii. The learned Magistrate erred in law in failing to apply the provisions of Section 339 and Section 340 of the Criminal Procedure and Evidence Code by not meeting out a suspended sentence.

And the appellant seeks the reversal of the sentence of one month to a suspended sentence.

I wish to point out at the outset that the appeal is not for consideration now but the appellant's grounds had to be introduced to deal with matters that are usually taken into account in an application for bail pending an appeal such as the instant one.

In his affidavit in support of the application sworn on his behalf by Mr Chayekha the applicant has laid down information and grounds on which he relies that the application should be granted. In the said affidavit the applicant has stated that he is a mini – bus driver and the police arrested him on a charge of obstructing the road and was brought before the Senior Resident Magistrate on 23rd July, 2008. It is further stated that the applicant pleaded guilty to the charge and was convicted, and given a custodial sentence without an option of a fine. The applicant contends that he is aware that under the section the offence is created there is an option of a fine and that as a first offender the law prescribes a suspended sentence consideration being has to the nature of the offence. The

applicant therefore submitted that as he has high prospects of success in his appeal against sentence it would be unfair for him to remain in custody until the hearing of the appeal as this might mean that he would end up serving the sentence.

THE LAW:

This court has jurisdiction under Section 355(1) of the Criminal Procedure and Evidence Code, to grant bail to an applicant or to stay sentence pending the determination of his appeal. However before one can be granted bail pending an appeal it must be shown by the applicant that there exist ‘exceptional and unusual circumstances’ which would compel the court to consider granting the order. In the case of **Kamaliza and Others V Rep¹**, Unyolo J, as he was then, said this on the subject:

“I pause here to say something about the law. Yes, the law, because this is a Court of Law. It is now well settled that ‘exceptional and unusual circumstances’ must be shown before a court will grant bail to a person who has been convicted and sentenced. The court’s belief that the appeal will be successful and the likelihood that it can not be concluded within a reasonably short time, have been given as examples of such exceptional and unusual circumstances”.

Further, in the case of **Pandiker V Rep²** Chatsika, J held that there is an important deference in the practice of granting bail pending trial and pending as appeal. In the first case the accused is presumed innocent and provided the court is satisfied that he will appear for trial, it will not deprive him of his freedom unreasonably, in the case second case, the accused has already been convicted and bail will only be granted where exceptional circumstance are shown. This is what the learned judge said at page 207.

“An application for stay of an order such as this one is analogous to an application for bail pending an appeal. It is important to bear in mind the difference between an application for bail pending trial and an application for bail pending the determination of an appeal. Criminal Courts have always considered the former favourably, whereas ‘exceptional and unusual circumstances have got to be proved before the latter can be granted. Before a person is

¹ **Kamaliza and Others V Rep** (1993) 16(1) MLR, 198

² **Pandiker V Rep** [1971 – 72] ALR Mal 204

convicted of any offence he is deemed to be innocent, and provided the court is satisfied that the accused will report at his trial, it will not find it necessary to deprive him of his freedom unreasonably. The reserve is true with a person who has been convicted, because until the conviction is quashed by a superior court, he is deemed to be guilty and does not deserve the free exercise of his freedom”.

It is generally accepted that where it appears *prima facie* that there is likelihood of success of the appeal or where there is a real risk that the sentence will be served by the time the appeal is heard, the test will have been satisfied. The two factors must exist concurrently.

CONCLUSION:

In the instant case, the sentence was only one month and I think it is obvious that if the appellant were to wait to until his appeal is heard, the sentence shall have been served. Consequently I grant the applicant bail pending the determination of his appeal on the following terms:-

CONDITIONS

1. The applicant to surrender all his travel documents, if any, to the Officer In – Charge of Blantyre.
2. The applicant to be bound in the sum of MK10,000.00
3. The applicant to produce two reliable sureties each of whom shall be bound in the sum of MK20,000.00 not cash
4. The applicant to be reporting to the Officer In – Charge, Blantyre Police once a week on every Fridays before 4 pm

Pronounced in Chambers at Principal Registry this 19th day of August, 2008.

Joseph S Manyungwa
JUDGE