



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
ZOMBA DISTRICT REGISTRY  
CRIMINAL APPEAL NUMBER 11 OF 2005**

**BETWEEN:**

**OSMAN MPONDA .....APPELLANT**

**- AND -**

**THE REPUBLIC.....RESPONDENT**

**CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA**

Mr Kandako Mhone, of Counsel, for the appellant

Mr Matumbi, Senior State Advocate, for the State

Mr M F Nthondo – Official Court Interpreter

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**J U D G E M E N T**

**Manyungwa, J**

This is application for bail pending appeal filed by Mr Kandako Mhone, of counsel, on behalf of the appellant, namely one Osman Mponda. The application is made under Section 355(1) of the Criminal Procedure and Evidence Code. There is an affidavit in support of the application sworn by Mr Mhone. The State through Mr Matumbi, Senior State Advocate, opposes the application and there is an affidavit in opposition to that effect.

Mr Mhone deponed in his affidavit that sometime in July 2005 the applicant was convicted for the offence of breaking into a Building and Committing a Felony therein by the Machinga Magistrate Court. It is further stated that the appellant appealed against both conviction and sentence. Counsel further deponed that when a High Court official visited Machinga Court to collect the mother file for purposes of these proceedings he was told that the said file had already been sent to this court as is evidenced by exhibit 'KM 1'.

However, despite a thorough search at both this registry and the Principal Registry at Blantyre the said file has not been located nor are its whereabouts known. Mr Mhone further avers that there is a strong probability of the appeal succeeding and that it would therefore be unfair for the appellant to continue to remain in prison awaiting his hearing when the appeal is likely to succeed. Moreover, according to Mr Mhone two of the appellant's accomplices have already been freed by my departed brother judge after a similar application. Counsel further stated that when faced with a similar dilemma in Criminal Appeal Number 11 of 2005, he wrote to the then Honourable Chief Justice as is evidenced by exhibit 'KM 2' and was subsequently advised to make an application to this court as is evidenced by exhibit 'KM 3'. It is consequently on these premises that the appellant prays to this court to be released on bail pending the hearing and the determination of his appeal.

The state through Mr Matumbi, Senior Stated Advocate objected to the application arguing that the court should consider the seriousness of the offence and further that in the absence of the lower courts record neither the state nor the court is in a position to assess the prospects of success for the impending appeal.

The relevant provision governing admission to bail pending appeal is Section 355 of the Criminal Procedure and Evidence Code, which provides as follows:-

S355(1) "Subject to this Code, neither a notice of intention to appeal given under Section 349 nor a petition of appeal under Section 350 shall operate as a stay of execution of any sentence or order but the subordinate court which passed the sentence or made the order, or the High Court, may order that any such sentence or order be stayed pending the hearing of an appeal and if the applicant is in custody that he may be released on bail, with or without sureties, pending such hearing."

Bail pending the hearing of an appeal is granted only where justified by exceptional circumstances. See *Pandiker V Rep*<sup>1</sup> and *Goode V Republic*<sup>2</sup>. And in *Nyirenda V Rep*<sup>3</sup> the High Court held that bail pending the hearing

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<sup>1</sup> *Pandiker V Rep* [1971 – 72] 6 ALR Mal 204

<sup>2</sup> *Goode V Republic* [1971 – 72] 6ALR Mal 351

<sup>3</sup> *Nyirenda V Rep*[1975 – 77] 8ALR Mal 204

of an appeal would be granted if there is a likelihood of the appeal succeeding.

This would appear to be major argument that has been advanced by Counsel for the appellant coupled with the fact that the mother file is now missing. I must state that in Criminal Appeal Number 16 of 2005 *George Mila V Republic*<sup>1</sup> I refused to grant bail to the appellant in that case and I followed the reasoning of Chipeta J in *Daniel Kaliati V Republic*<sup>2</sup> that courts of law should not be too eager, when faced with such application to release a convict on bail on the grounds as advanced, as to do so would be setting a dangerous precedent, and might in fact, work against the interests of justice if courts were to indiscriminately on this ground let loose on an unsuspecting society people who the law has decreed to be behind bars.

However, in the circumstances of this applications, I think that it is distinguishable from the situation in *George Mila V Rep*<sup>3</sup> considering that two of three suspects were already released on bail by my brother judge the late Justice Chiudza Banda. Consequently I hold that it would be unfair to continue to keep the applicant in custody awaiting his appeal when his two accomplices are out on bail. On this basis therefore, I hereby exercise my discretion in favour of the appellant and consequently I grant him bail on similar terms and conditions as was imposed on Jamali Ndecha and Ziwani Ismael the two accomplices herein as follows:

**CONDITIONS:**

- 1) That the appellant produces three satisfactory sureties
- 2) That the appellant be bound in the sum of MK2000 not cash
- 3) That the appellant do surrender all his travel documents if any to the Officer In – charge of Machinga Police Station
- 4) That the appellant reports to the officer In – charge, Machinga Police Station, once a month.

The sureties are to be examined by the Assistant Registrar.

***Pronounced in Chambers*** at Zomba Registry this 22<sup>nd</sup> day of January, 2008.

Joseph S Manyungwa

<sup>1</sup> *Goerge Mila V Rep* Crim Appeal No 16 of 2005

<sup>2</sup> *Daniel Kaliati V Rep* (Ibid)

<sup>3</sup> *George Mila V Rep* Crim Appeal No, 16 of 2005

**JUDGE**