IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL CASE NO 65 OF 2013

THE REPUBLIC

V

MACDONALD KUMWEMBE…….1st Applicant

PIKA MANONDO …….2nd Applicant

RAPHAEL KASAMBARA……3rd Applicant

CORAM

Honourable Justice Dr. Michael Mtambo

Mrs Kachale, Director of Public Prosecutions (D.P.P)
Chibwana, Special Prosecutor, assisting the D.P.P.
Malunda, Senior State Advocate, assisting the D.P.P.
Goba Chipeta, Counsel for the 1st and 2nd Convicts
Gondwe and Msisha SC, Counsel for the 3rd Convict
Kalambo, Court Clerk

RULING ON BAIL PENDING APPEAL

The 1st and 2nd applicants were on 21 July 2016, convicted by this Court on charges of attempted murder and conspiracy to murder while the 3rd convict was convicted on a charge of conspiracy to murder. On August 2016, the 1st and 2nd applicants were sentenced to 15 years and 11 years imprisonment each on the convictions of attempted murder and conspiracy to murder respectively, the sentences to run consecutively. The 3rd applicant was sentenced to 13 years imprisonment on the conviction of conspiracy. All the tree appealed against conviction. They now apply to be released on bail pending appeal.

Section 359 of the Criminal Procedure and Evidence Code (CP & EC) confers discretion on the High Court to grant bail pending appeal. It provides:

> "The High Court may in its discretion in any case in which an appeal to the Supreme Court of Appeal has been filed grant bail pending the hearing of an appeal".

There is therefore no question whether a convict can be released on bail.

The learned Director of Public Prosecutions (D.P.P.) submits that the recognised and well established test when considering whether or not to grant bail pending appeal is whether there are exceptional and unusual circumstances. She relies on the High Court decision in **Kamaliza and Others v Republic [1993] 16 (1) MLR 196.** This case has been buttressed by the Supreme Court of Appeal in **Suleman v Republic [2004] MLR 398 (SCA)** in which Tembo JA said:

> "The expression 'exceptional and unusual circumstances' [in the context of applications of bail pending appeal] means circumstances where, on the one hand, it appears prima facie that the appeal is likely to be successful or, on the other hand, where there is a risk that the sentence will have been served by the time the appeal is heard".

The **Suleman dictum** (supra) has been recently affirmed by the Supreme Court of Appeal in **Jonathan Mekiseni and Others v Republic, Civil Appeal Cause No. 14 of 2015** (unreported)**,** where Twea JA stated:

> "Bail after conviction is at the discretion of the Court where it 'deems it fit'. Admission to bail pending appeal is an exception not the rule. Such admission to bail therefore is rare and only in exceptional and unusual circumstances".

Obviously, the burden to prove exceptional and unusual circumstances warranting release on bail is on the applicant unlike in an application before conviction where the burden to show that the interest of justice militates against granting bail is on the state. This is so because before conviction, a person is presumed innocent whereas upon conviction, there is no presumption of innocence.

On his part, Mr. Goba Chipeta, learned counsel for the 1st and 2nd applicants, submits that there is a new test in applications for bail and that the test of exceptional and unusual circumstances is a 'traditional old test' which has been overtaken by the dictates of section 42 of the Constitution. He relies on the reasoning of Mwaungulu J (as he then was), in the High Court decision in **Kenneth Kumuwa and others v Rep, Bail Application Case No. 107 of 2012** (unreported) which held that there is only one test for both bail prior to conviction and after conviction. This is the interests of justice test. The reasoning of Mwaungulu J in the **Kumuwa Case** has been rejected a fellow High Court Judge, Dr. Kachale J in **Emmanuel Uche v Republic, Criminal Appeal No. 110 of 2015** (unreported). The judge stated that upon consideration of the **Kumuwa** judgment, he declined it as being erroneous.

Mr. Goba Chipeta argues that the reasoning of Dr. Kachale J is not as persuasively articulated as that of Mwaungulu, J. As the learned D.P.P. rightly observes, this is his opinion. I agree that since pursuant to the doctrine of precedent, rulings in the High Court are merely persuasive, the fact that there is a lack of agreement within the High Court on this specific issue means that any persuasive nature of the **Kumuwa Case** on the point is significantly weakened. This is more so

that despite the issue not having been addressed, the Supreme Court of Appeal has not adopted the Mwaungulu reasoning subsequent thereto.

When I asked Mr Modecai Msisha SC as an officer of the Court to advise whether there is a new and old test, his view was that this discussion is unhelpful and that the test is still whether there is a prima facie case for the success of the appeal. On my part, I feel it is unfair to ask a judge who convicted an applicant whether there is a prima facie case for his decision to be reversed on appeal as it would be like asking him to sit on appeal in his own decision. It is illogical for one in one breath to convict on the ground that the state has proved the case beyond reasonable doubt and in another breath express doubts about the conviction. If I thought that my conviction would easily be appealed, why convict in the first place? The reasonable action would be to acquit.

However, I am compelled to address the question whether the appeal has a prima facie chance of success.

The learned D.P.P. submits that another factor to consider in applications for bail pending appeal is enunciated by the Supreme Court of Appeal in **Mekiseni case**. It relates to the arguments advanced to support the application, which are indicative in the determination of whether there is a likelihood of success of the appeal or not. If the reasons given are substantially the same as the arguments advanced during trial, then the likelihood of success is significantly reduced. In **Mekiseni** (supra), Twea JA, in denying bail, stated:

> "The Applicants sought to build their case on the facts and evidential issues on which the lower Court and the Court below made their findings…in the main the arguments that have been advanced before me are the same that the Applicants advanced in the Court below…
> In the circumstances therefore I find that there are no exceptional or unusual circumstances in this case which would persuade me".

Whilst the applicants have cited that there is insufficient evidence supporting the conviction, the State asks the Court to take judicial notice that most of the applicant's arguments with regard to the insufficiency of evidence are analogous to those made in their submissions on conviction. In view of the comprehensive nature of the judgment on conviction, the repetitiveness of the submissions with regard to likelihood of success and the ruling in **Mekiseni**, I agree with the learned D.P.P that the applicants' appeal to the Supreme Court of Appeal does not have a prima facie likelihood of success.

The state observes instances where the trial Court, having disbelieved State witnesses on some aspects still proceeded to convict due to its consideration of the totality of the evidence and submits that this is not basis for the argument advanced by the applicants that their convictions might be overturned. This is so because gone are the days when Courts approached evidence piece by piece. Comparative case law puts the importance of such an approach in its proper perspective. In **Director of Public Prosecutions, Gauteng v Pistorius [2015] ZASVA 204**, the South African Court of Appeal, in faulting the approach that the trial Court Judge (High Court) took to analysing and attaching weight to the evidence, said:

> "**A trial court must consider the totality of the evidence led to determine whether the essential elements of a crime have been proved**. As Nugent J stated

in *Van der Meyden* [1999 (1) SACR 447], a passage oft cited with approval in this court:

> 'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt…what must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) **must account for all the evidence**. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable;…' (emphasis added)

I agree with the State's submission that the fact that the Court in this matter in its judgment clearly articulated the instances in which it disbelieved State witnesses on certain issues only goes to demonstrate the objectivity, reasonableness and strength of the findings of guilt against the applicants, and not weakness as argued by the applicants.

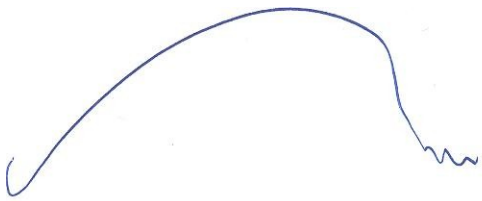
In **Suleman** (supra), Tembo JA stated that where there is a risk that a sentence would be served before the hearing of an appeal, a court may grant bail pending appeal. In view of the long sentences meted to the applicants, it is unlikely that they will have finished serving their sentences before their appeal is heard.

The applicants have stated that the grant of bail pending appeal would not prejudice the State. That they have ascertainable locations within Malawi, and that the 3rd convict has an impeccable personal record both in public and private life. No evidence has been adduced about the character of the 3rd accused. From his conduct during the trial, he did not display any impeccable conduct. I agree with the state that the matters listed by the applicants are not relevant considerations at this stage, and definitely are neither exceptional nor unusual circumstances.

Further, the applicants have argued that according to the Supreme Court of Appeal decision in **Republic v Mvula**, **MSCA Criminal Appeal No. 7 of 1212** (unreported), it is not safe to convict on call log evidence. The trial Court held that the Supreme Court of Appeal came to this conclusion based on the evidence before them (see last but two lines in the quotation). As such, the case is not a blanket authority for the proposition that one can not convict based on call log evidence. Further, there was additional evidence to the call logs on the basis of which the trial judge convicted. So, the totality of the evidence in the **Mvula case** and the case at hand are not the same.

Consequently, no unusual or exceptional circumstances have been established by the applicants. I therefore dismiss the application for bail pending appeal.

Dated the 3rd day of October, 2016 at Blantyre.



Dr.M.C. Mtambo

JUDGE