

LL/CR/37/12/06

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 74 OF 2008**

HELIX MWAILAAPPELLANT

AND

THE STATERESPONDENT

From the Senior Resident Magistrate Court sitting at Lilongwe.
Being Criminal Case No. 210 of 2006

CORAM: HON. JUSTICE CHINANGWA, J.

Counsel for the Appellant, D.Kumange
Counsel for the State, G. Kalebe(Miss)
Court Reporter, I.S Namagonya
Court Interpreter, S. Baziliyo

JUDGMENT

The appellant Helix Mwaile appeared before the Second Grade Magistrate court sitting at Lilongwe from 6th December, 2006 to 24th April, 2008.It was on a charge of Aiding a prisoner to escape contrary to section 117(a) of the penal code.

Particulars of the offence averred that on 1st December, 2006 at Lilongwe police station Helix Mwaila aided one Peter Nzenda, a prisoner in lawful custody on a charge of personating a person employed in the public service to escape from lawful custody.

The appellant pleaded not guilty to the charge. Nevertheless at the end of trial he was found guilty, convicted and sentenced to perform 360 hours of community work.

At this juncture I wish to remind myself that I did not have the advantage which the trial court had of assessing the demeanour of witnesses. I further remind myself the provisions of section 5(l) Criminal Procedure and Evidence Code.

The appellant was throughout the trial represented by retired Hon. Justice Kumange of counsel from Kumange & Company. He continued to represent the appellant before this court in this appeal.

The petition of appeal has six grounds as follows:

- 1) *The learned magistrate failed to consider the value of documentary evidence.*
- 2) *There was no way the police could receive a single document of bail bond.*

- 3) *There was no reason why police failed to keep a copy of the alleged bail bond.*
- 4) *The case arose out of 'concocted' evidence*
- 5) *On the totality of the evidence, it was not safe to convict the accused.*
- 6) *The sentence is excessive.*

Facts are to the effect that the appellant until his conviction used to work as a court marshal for the Judiciary. He was based at the Chief Resident Magistrates Courts in Lilongwe. It was alleged that on 1st December, 2006 at about 4 pm he went at Lilongwe police station. He met No. A7002 Detective constable Katete (Pw1). Appellant told Pw1 that he had a bailbond issued by Lilongwe court. He said that prosecutor constable Mzunga and Constable Malube had given it to him to deliver at the police station for the release of Peter Nzenda. Pw1 said that it appeared genuine. He took it to Detective Sub-Inspector (D/Sub/Insp) Honde. This officer refused to act on it that is release Peter Nzenda. Pw1 returned it to appellant. The appellant went away.

Inspector Max Simon Malawa (Pw2) testified to the effect that on 1st December, 2006 at about 4pm he was approached by appellant. The appellant had a bail bond for the release of Peter Nzenda. Pw2 observed that it was issued by the Senior Resident Magistrate Court, Lilongwe. It had a date stamp. Pw2 instructed Constable Msiya to release Peter Nzenda based on that court bailbond.

At about 5 pm prosecution personnel brought a remand warrant for Peter Nzenda. Pw2 contacted sergeant Ntopela who denied knowledge of court bail. Pw2 said that he then realized that the bail was irregular. He said that there was only one copy of the bail.

Pw3-NoA 9563 D/Constable Malube based at Lilongwe police station testified that he knew appellant as a court marshal. He further testified that he was the investigation officer in which Peter Nzenda was an accused for personating a public officer. Pw3 arrested Peter Nzenda on 1st December, 2006. Before the case was taken to court the accused (Peter Nzenda) was released on court bail. He re-arrested Peter Nzenda and remanded him at Maula prison. Pw3 concluded his testimony to the effect there was no contact between him and Inspector Malawa.

Pw4 W/Constable Msiya testified that she was a custody officer at Lilongwe police station. She further testified that she was present when appellant produced a court bail bond in respect of Peter Nzenda. The appellant handed it to her boss one Malawa (Pw2). Pw4 said that Pw2 ordered her to release Peter Nzenda from police custody. Pw4 obliged to Pw2's order. She released Peter Nzenda. Pw4 handed over a copy of the bail bond. Pw4 testified further that appellant was present when Peter Nzenda was being released. They left together out of the police station. Pw4 testified that she

recorded information about the release of Peter Nzenda in the custody register.

Pw5 was Peter Nzenda who in the course of giving his testimony was declared a hostile witness by the prosecutor.

Pw6 D/Sub/Insp. Nkhunda based at Lilongwe police station. He testified that on 2nd December, 2006 he took charge of investigation in which appellant was alleged to have aided a prisoner to escape. Pw6 recorded a statement under caution statement from the appellant. He thereafter formally charged him. These statements were marked exhibit p1 and 2 respectively. Pw6 tendered in evidence a custody record register marked Exp3.

The appellant entered his defence as Dw1. He gave his particulars. He testified to the effect that prior to 1st December, 2006 appellant reported at Lilongwe police station that his servant had absconded with money. The servant was employed to sell chips. On 1st December, 2006 at about 3pm whilst at work he was approached by constable Nzunga and two police women. Constable Nzunga requested appellant to have a remand warrant signed. The appellant obliged. Appellant said that later he went at Lilongwe police station to enquire the progress of his complaint. He tipped police that his former servant was guarding at Kapala house at night. He left the police station. On Sunday 3rd December, 2006 he was arrested by police at his house in area 36.

Appellant denied to have met Pw1 and Pw2 at Lilongwe police station. Appellant said that he did not meet constable Msiya at the police station. He admitted to know Peter Nzenda because of cases he was being prosecuted at the court. Appellant denied taking court bail to police for the release of Peter Nzenda.

In xxD he maintained that constable Nzunga gave him a remand warrant, not a court bail bond.

Counsel Kumange attacked the finding of the trial court. In essence he argued that it was unsafe to convict appellant in the absence of the actually bailbond having been exhibited by the State. It was improper for the police to receive a single document of bailbond. Counsel argued that the case arose out of concocted evidence. On sentence it was his submission that the sentence was excessive. The operation of sentence ought to have been suspended.

Counsel Miss Jere for the State conceded that no bailbond in issue was exhibited. However the State witnesses testified that appellant went and was seen at Lilongwe police on the material day. Counsel Jere concurred with the observation of the trial court that the practice of presenting one copy to police was faulty. She argued that there was sufficient evidence to convict appellant. On sentence counsel submitted that the maximum imprisonment is 7 years. Whereas appellant was ordered to perform community service for

360 hours. The trial court was lenient to appellant. The conviction and sentence be upheld.

This was the evidence before the trial court.

My starting point is to look at section 117 (a) of the penal code. It provides:

“Any person who-

(a) *Aids a prisoner in escaping or attempting to escape from custody;*

(b)

Shall be guilty of a felony and shall be liable to imprisonment for seven years.”

It was the case for the State that appellant on 1st December, 2006 aided Peter Nzenda who was in police custody at Lilongwe police station to escape. Appellant tendered to the police a fake court bail bond purportedly issued by a magistrate court. On the strength of the court bail police released Peter Nzenda from custody.

The State paraded 6 witnesses. Except for Pw5 Peter Nzenda the rest were police officers based at Lilongwe police station. From the

court record Pw5 Peter Nzenda was purportedly regarded as a hostile witness.

The first issue to determine is whether the proper procedure was followed when declaring Peter Nzenda a hostile witness. This is what Supt Chafikana submitted at page 51 of the court record.

“PP: This witness is hostile so I will not proceed examining him in Chief. I will call other witnesses.

Counsel for Accused: No examination.”

It would appear that pw5 Peter Nzenda was not properly declared a hostile witness because no foundation was laid as required by procedure. In ***Magombo v Rep***, 1981-83,10 MLR 3 Banda Ag:J re-stated the procedure

“Before I consider the main contention of Mr Nakanga in this appeal, I would like first to consider his submission that the correct procedure was not followed when the application was made to treat the three prosecution witnesses as hostile. In my judgment, Mr Nakanga is right in his submission and I feel it necessary to put down for the guidance of prosecutors, and magistrates what I conceive to be the correct procedure. A foundation must be laid before an application is made to the court to treat

witnesses as hostile. In my judgment that foundation can be laid in the following way. It is the duty of the prosecutor where he has in his possession a statement by the witness for the prosecution which is in direct contradiction to his testimony to show the statement to the court and to ask leave to treat the witness as hostile. It seems to me that a court cannot properly exercise its discretion without first seeing the statement. The witness must be asked if he has made a statement on an occasion and his attention must be drawn to the occasion when the statement was made. Circumstances must be proved sufficiently to designate the occasion when the statement was made and usually the statement is shown to the witness to see if he can recognize it. In my view, once this foundation has been laid, the cross-examination of the witness with a view to discredit him can then proceed. It must, however, be emphasized that statements so proved are not admissible as evidence of the truth of the facts stated in them.”

In the present case the State did not lay down a foundation to discredit Pw5 and that he should be declared a hostile witness. Further more there is no record that the trial court had declared Pw5 a hostile witness. I hold the view that Pw5's testimony was admissible. I so find.

The second issue to determine relates to the purported bail which appellant produced to Pw2 and Pw4 to facilitate the release of Pw5. Pw1, 2 and 4 saw the bailbond. Whereas the appellant in his statement under caution stated that it was a remand warrant which constable Nzunga requested him to have it signed. Unfortunately the bailbond document in issue was not produced in evidence. Pw4 said that a copy was given to Peter Nzenda. Whereas Pw5 at page 50 of the court record said that he was not given any document at the time of release. He was told that he had been granted court bail.

The question is whether in the absence of the purported court bail there was sufficient evidence to sustain a conviction. It is my view that the whole case was based on this document. It was a crucial piece of evidence, I very much doubt that its absence would be filled by oral testimony of the police officers. Perhaps, had the State tendered a certified copy as secondary evidence. That would have added some weight.

The third issue relates to the statement under caution which police recorded from the appellant. It was tendered in evidence as Exp1. The appellant stated that he was given a remand warrant by constable Nzunga to have it signed. After causing it to be signed he returned it to him. He maintained the same statement in his defence before the trial court.

The State did not call constable Nzunga to challenge the assertion of appellant. Although the State is not obliged to call a witness, the circumstances of this case required constable Nzunga to testify whether to dispute or concur the allegation on the remand warrant. In the circumstances, the assertion of appellant that it was a remand warrant was not challenged. The trial court was obliged to make a finding of fact on this point. I find that it was a remand warrant.

This court hesitates to proceed to consider other grounds of appeal. It is a futile exercise because already the trial was biased against the appellant.

There is doubt whether the court bail ever existed. It is a principle of law that where there is doubt as to the guilt of an accused. Such doubt has to be resolved in accused's favour. The same applies in the present case. Consequently the conviction is quashed and the sentence of 360 hours community service set aside.

Appeal allowed.

Pronounced in open court on 19th day of June, 2008 at Lilongwe.

R.R. Chinangwa
JUDGE

