



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CRIMINAL APPLICATION NO. 154 OF 2008**

BETWEEN:

THANDIZANI DAMISON..... 1ST APPLICANT

-and-

DOUGLAS CHINGOTA 2ND APPLICANT

-AND .-

THE STATE RESPONDENT

CORAM: HON. JUSTICE M.L. KAMWAMBE
Messrs Chiphwanya and Maele of Counsel for the State
Mr Kamkwasi of Counsel for the Applicants
Mrs Mangisoni, Official Interpreter

Kamwambe, J

RULING

This is an application for bail and for an order of retrial pursuant to recommendation of the Principal Resident Magistrate (Eastern Region) under section 361 (1) of the Criminal Procedure and Evidence Code.

I am asked to make an order of retrial as recommended by the Principal Resident Magistrate Court under section 361 of the Criminal Procedure and Evidence Code, and also to consider bail. I am also asked through the same application issued by the Registry on 25th June, 2008 that before hearing the retrial, items seized from the applicants be delivered to

the High Court by the Prosecution. Further that the retrial be conducted by another prosecutor other than Mr Chipwanyanya.

In passing let me express my surprise how this case came to be filed in the Principal Registry here in Blantyre when it was supposed to be before the Zomba High Court. Matters should not, at counsel's will, be transferred to other jurisdictional courts without court's leave. This would encourage court as well as Judge shopping. I understand that sometimes it is so, so as to speed up the hearing of the case. But I still maintain that matters must be conducted orderly.

This application is made under s361 of the Criminal Procedure and Evidence Code which reads as follows:-

"Any Resident Magistrate may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. "

Section 361 aforesaid is not complete unless you read it together with s362 (1). This means that by referring the matter to me the Principal Resident magistrate was merely doing so, so that I exercise my powers of review which are the same as those stated in s 353 (2) (a) (b) and (c) and by s356. I hereby reproduce s 362 (1).

"In the case of a proceeding in a subordinate court the record of which has been called for or which has been forwarded under section 361, or which otherwise comes to its knowledge, the High Court, by way of review, may exercise the same powers as are conferred upon it on appeal by section 353(2)(a), (b) and (c) and by section 356. "

I wish also to reproduce s353 (2) in its entirety as follows:-

“After perusing such record and, in the case of an appeal by the Director of Public Prosecutions, after hearing him, if he appears, and the respondent or his counsel, if he appears, or, in the case of any other appeal, hearing the appellant or his counsel, if he appears, and the Director of Public Prosecutions, if he appears, the Court may, it is considers that there is not sufficient ground for interfering, dismiss the appeal, or may-

(a) In an appeal by any aggrieved person from a conviction-

- (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial, or direct that he be retried; or*
- (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or*
- (iii) with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence;*

(b) in an appeal by any aggrieved person from any other order, alter or reverse such order;

(c) in an appeal by the Director of Public Prosecutions from a finding of acquittal-

- (i) If the finding of acquittal was arrived at without the defence having been called, remit the case to the subordinate court with a direction to proceed with trial and to call on the defence;*
- (ii) In any other case, convert the finding of acquittal into conviction and either make an order under sections 337, 338 or 339 or pass sentence or remit the*

case to the subordinate court for sentence,

And in any cases mentioned in this subsection the Court may make any amendment or any consequential or incidental order that may appear just and proper. "

Under s362 (1) of the Code the High Court has the same power as those conferred upon it when sitting as an appeal court. It is clear from the reading of s360 of the Code that the review powers over subordinate court proceedings are for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court. (My emphasis) S361 of the Code has merely provided another channel of review through the Resident Magistrate.

This is a matter calling for whether I have jurisdiction or not in this matter not concluded in the Second Grade Court. My powers of review are those powers I have on appeal as spelt out under s353 (2). I have asked myself which those powers are under s353(2) that I am asked to exercise. Am I asked to reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial or direct that he be retried? It is not so. Even if they request a retrial, the request has come prematurely because the lower court had not delivered its judgement which could be the basis of retrial if any irregularity was manifest in it. The lower court had not exhausted its jurisdiction over the case yet.

Further, I cannot reduce or increase or maintain sentence in the absence of a judgment nor alter any finding. However, since s362 (1) says on review the High Court "may exercise the same powers as are conferred upon it on appeal" probably it means those are not the only powers but may also have directorate powers so as to guide the lower court

how to proceed in particular proceedings. (My underling) This is a more generous interpretation which may take care of the inherent powers of the court which means the court can review a record even before judgment is through or the record is complete, ie dealing with issues arising before judgment.

In the **Rep v Ndau** 7 MLR 77 at 81 the court had this to say:-

“Section 362 (1) of the present Code prescribes the court’s powers on review what are there mentioned powers to make final, not interlocutory orders- namely, the powers conferred upon the court on appeal by paras (a) and (b) of s353(2)”.

If I were to adopt the above cited case I would immediately say I have no jurisdiction as the lower court never pronounced any final order. But if I am to consider the regularity of the proceedings so far, I chose to assume jurisdiction, I think rightly so, so that I ably direct the lower court how to proceed.

I am aware that the application was not made under s26 of the Court’s Act but I think it is worth referring to it. It reads:-

“In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may have, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give such subordinate court such directions as to the further conduct of the same as justice may require.”

In my view I think I would not be wrong to extend jurisdiction to this case on the auspices of s26 of the Courts Act which grants general supervisory and revisionary powers or jurisdiction. Note that these powers are exercisable at any stage of criminal proceedings.

Review entails judicial re-examination of a lower court's record. Since this case is not concluded I have to consider any order made by the lower court and the regularity of proceedings in the subordinate court. Findings of the Resident Magistrate are only informative and not binding on me. However, I do not have to ignore them. Having said all that I have said above, it is my view that I have jurisdiction to re-examine the conduct of proceedings in the subordinate court if they were regular or not or if they were procedural or not. I only need to be directed initially by the findings of the Principal Resident Magistrate in areas worth this court's review, of course in the light of the application made under s361 of the Code.

The first area is one of revocation of bail when no notice of hearing was served on the applicants or their lawyer. It is not disputed that it was not served. This was part of the conduct of proceedings putting their regularity in question. The prosecution and the court moved too fast in revoking bail when the date of hearing was unknown to the accused. The applicants may have known by other means of the date of rehearing, but it remains a fact that they were not served and therefore the benefit of doubt leans in their favour. They ought, by this order, to proceed on bail on condition previously granted. By this order this court will have removed one irregularity by way of review through s361 and not necessarily under the Bail (Guidelines) Act No. 8 of 2000 which I doubt if relevant under the said s361 of the Code. But admittedly, the lower court could have looked at this complaint ably.

The other irregularity as pointed out by the applicants is about the applicant's property, to wit, motor vehicles registration numbers BLK 1566 Mitsubishi Canter, a Toyota Cressida and Toyota Carina which were through the Blantyre Magistrate court (and not through the trial court in Mangochi) released allegedly to the prosecution. This was done despite the existence of preservation order made by

the Second Grade magistrate at Mangochi as the trial court. This court bears no fault. The applicants were not heard in the Blantyre Magistrate Court on the issue. This was procedurally unfair to the applicants who suffered detriment. I am aware that the State is investigating what transpired to the vehicles and the K900,000.00 money withdrawn from one of the applicant's bank account. I hope by now the investigations are through. I order consequently that the spirit of the preservation order made by the Second Grade Magistrate Court at Mangochi be respected and that the vehicles be kept at Mangochi Police Station. On the next day of hearing the State should report first outcome of its investigations to the Court.

On the request for retrial as recommended by the Principal Resident Magistrate, I really see no merit in it and the recommendations have not adequately and clearly pointed out why there should be a retrial. Satisfactory reasons must be given. Existence of one irregularity as regards bail is not enough to justify a retrial. The case was so far proceeding well before the Mangochi Magistrate Court.

It is not in my powers to order that a prosecutor do cease acting as such in a particular case. This complaint should be lodged with the office of the Director of Public Prosecutions. I note however that the affidavit of Mr Maele who works in the office of the Director of Public Prosecutions objects to replacing Mr Chipwanyana. This means they have found that there are no compelling reasons to doing so.

I hope I have covered all areas of the record submitted to me for review and that the necessary steps will now be followed so as not to delay the case any further.

Made in Chambers this 18th day August 2008 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE