JUDICIARY

IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CRIMINAL APPEAL NUMBER 16 OF 2005

BETWEEN:

GEORGE MILA ……APPELLANT

- AND -

THE REPUBLIC ……RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA
Mr Kandako Mhone, of Counsel, for the appellant
Mr Matumbi, of Senior State Advocate, for the State
Mr Nthondo – Official Interepreter

J U D G E M E N T

Manyungwa, J

This is an application for bail pending appeal made under Section 355(1) of the Criminal Procedure and Evidence Code Chapter 7:02 of the Laws of Malawi. The applicant is George Mila, who is serving a custodial sentence at Domasi Prison for the offence of Theft by a public servant. The application is supported by an affidavit sworn by Mr Kandako Mhone,

Counsel for the applicant who depones on behalf of the applicant that sometime in 2005, the applicant was convicted for the offence of Theft by a public servant by the Domasi Magistrate Court. Counsel Mhone further states that the applicant appealed against both his conviction and sentence. It is further stated that a High Court official visited Domasi court to collect the case record for onward transmission to the High Court but that he was told that the said case record was sent to Zomba High Court as is evident from exhibit "KM 1", which is an affidavit that was sworn by Mr Issac Mdoka, whose depositions were to the effect that a search at both the Zomba District Registry and Principal Registry yielded nothing. Further, Mr Mhone, has averred in his affidavit that there is a strong probability of the appeal succeeding that consequently it would not be fair on the applicant to remain in prison until the sentence is served, when there is likelihood of the appeal succeeding and. Mr Mhone also stated that in the year 2005 faced with a similar dilemma in Criminal Case Number 11 of 2005 when he was, he wrote to the then Chief Justice for his directions and that in response the Honourable Chief Justice advised him to make an application to the court, hence this application.

The state through Mr Matumbi, Senior State Advocate opposes the application. In his affidavit in opposition, Mr Matumbi deponed that in the absence of the lower court's record, the state is not in a position to assess the prospects for success of the applicant's application for bail.

Section 355 of the Criminal Procedure and Evidence Code provides for stay of execution and admission to bail pending appeal. The said section is in the following terms:-

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."

The legal principles, governing the granting of bail pending an appeal are, in my view, settled. Bail in such cases is only granted where justified by exceptional circumstances. See ***Pandiker V Republic***[1] and ***Goode V Republic***[2]**.** However, in ***Nyirenda V Republic***[3], the High Court held that bail would be granted pending an appeal if there is likelihood of success on such an appeal. This is the ground that has been advanced by learned counsel for the applicant that there is a strong probability of the appeal succeeding and that it would therefore be unfair to the applicant to continue to be in custody, when his appeal is likely to succeed. All this is being said against the background that the mother file is missing. However, although this state of affairs has been conceded by the state it has been submitted by the state that in these circumstances it is difficult to access the prospects of the applicants' appeal in the absence of the trial court record. This is especially so when one considers as was stated in ***Saidi V Rep***[4] that there is a presumption against bail if accused was found guilty at lower court.

[1] ***Pandiker V Republic*** [1971 – 72] 6 ALR Mal 204
[2] ***Goode V Republic*** [1971 – 72] 6ALR Mal 351
[3] ***Nyirenda V Republic*** [1975 – 77] 8 MLR 273
[4] ***Saidi V Republic*** 8 MLR 113

Further, my learned brother, Chipeta J in ***Daniel Kaliati V Republic***[1] has observed thus:

> "Throughout the wealth and weight of the authorities above referred, the simple legal reality I see running through all these varied cases, is that the phenomenon of granting bail after conviction and sentence, but before hearing and determination of an appeal whether lodged or contemplated, is the exception rather than the norm. Put slightly differently, the law presumes the sentence passed on a convict by any court of Law to be right, and to remain right and deserving to be undergone until such time as a superior court has had a chance to look at it and to pronounce it otherwise. The law accordingly only allows interference with such sentence by way of staying its operation, whilst awaiting an appeal if and only if the convict succeeds to dispel the applicable presumption by bringing to the attention of the court he is applying to for bail, circumstances that are visibly and convincingly 'special' or 'exceptional'. On Section 355 of the Criminal Procedure and Evidence Code, as it stands and as it has on numerous occasions been judicially interpreted in the chain of legal authorities that exist in great abundance on it, I can surmise with confidence, that a court of law, is not supposed to be too eager when it is faced with this type of application, to release a prisoner who has been duly convicted and sentenced by a court of law."

The learned judge continued

[1] ***Daniel Kaliati V Republic*** Miscellaneous Criminal Application Number 236 of 2006

> "The moment we create settled precedent and convicts get to know of it, that if a file goes missing one gets bail at the courts without hustles, by merely crying out that he badly wanted to appeal even if he does not mean it, or that he in fact took steps to appeal against conviction and or sentence even if he might not have done so…Convinced as I fully am, that accepting loss of a case file on which one could pursue an appeal is a compelling reason for a convict to get bail pending appeal would tend to set a bad and dangerous precedent and it would at the same time, in fact, work against the interests of justice, by indiscriminately, on this ground letting loose on an unsuspecting society people who the law has already decreed to be locked up behind bars, so as to serve their due punishment, for their proven earlier invasions on the same society, I hold that it is a lesser evil to refuse bail to such people than grant bail to them on the pretext they demand it.

I must say that I am in full agreement with the sentiments expressed by the learned judge and that although I am not bound by his decision, I am persuaded to follow his reasoning. In these circumstances and by reason of the foregoing I hereby decline to exercise my discretion in favour of the applicant and I dismiss the applicant's application.

Pronounced in Chambers at Zomba Registry this 22nd day of January, 2008.

Joselph S Manyungwa
JUDGE