



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CRIMINAL CAUSE NUMBER 65 OF 2008  
(Being Criminal Case Number 114 of 2008 at the Blantyre Magistrate  
Court)  
IN THE MATTER OF AN APPLICATION BY ZAINAB MUSSA FOR  
BAIL UNDER  
SECTION 355(1) OF THE CRIMINAL PROCEDURE AND  
EVIDENCE CODE**

**BETWEEN:**

**ZAINAB MUSSA .....PLAINTIFF**

**- AND -**

**THE REPUBLIC .....DEFENDANT**

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

Mr Ralph Kasambara, of Counsel for the plaintiff

Miss Kunitengo, Senior State Advocate, for the State

Mrs C Chimtande – Official Interpreter

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**ORDER**

**Manyungwa, J**

This is an application by Zainab Mussa the applicant herein, for bail pending the determination of an appeal. The application is made under Section 355(1) of the Criminal Procedure and Evidence Code. The applicant was

convicted by the Senior Resident Magistrate Court at Blantyre of the offence of uttering a false document contrary to Section 360 as read with Section 356 of the Penal Code, Chapter 7:1 of the Laws of Malawi.

The said Senior Resident Magistrate sentenced the applicant to 6 months imprisonment with hard labour. The applicant has appealed against conviction and sentence to this court against the judgement of the court below, and by the application herein, the applicant through her legal practitioner Mr R. Kasambara, is applying for bail pending the determination of that appeal.

In the applicant's appeal she has raised grounds of appeal namely:

- 1) That the trial magistrate failed to adequately consider alternative non – custodial sentence of imprisonment on the applicant, who has not previously been convicted of any offence and the learned magistrate thereby failed to comply with Section 339 and Section 340 of the Criminal Procedure and Evidence Code.
- 2) That the trial magistrate failed to adequately consider all the mitigating factors in this particular case that were laid before passing the custodial sentence.

- 3) That the circumstances in which the offence was committed did not justify the imposition of a sentence of 6 months imprisonment with hard labour.
- 4) In all the circumstances of the case the sentence of 6 months imprisonment with hard labour was manifestly excessive/wrong in principle.

I must state at the outset that the appeal is not for consideration now, but the grounds of appeal had to be introduced to deal with matters that are usually taken into account in an application for bail pending appeal such as the one before me.

In her affidavit in support of the application sworn on her behalf by Mr Jonathan Kara Counsel from the firm of Ralph & Arnold Associates, the applicant has laid information and grounds on which she relies that the applicant should be granted. Furthermore, the applicant has also included her grounds of appeal. In the said affidavit it is contended that this application for bail pending appeal should be allowed as in the applicant's belief, her appeal against sentence is likely going to succeed because the lower court erred in ordering a custodial sentence of 6 months as the

applicant pleaded guilty to the offence and that she was a first offender. The lower court should have, so the applicant contends, considered a non – custodial sentence.

It is not in doubt that under Section 355(1) of the Criminal Procedure and Evidence Code, this court has jurisdiction to grant bail to an applicant or to stay sentence pending the determination of his appeal. Section 355(1) is in the following terms:

S355(1) Subject to this Code, neither 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 appellant is in custody that he may be released on bail with or without sureties pending such hearing.

In order for a court to grant bail pending an appeal to an applicant, “exceptional and unusual circumstances” must be shown to exist before a

court can grant bail to such a person. In the case of *Kamaliza and Others V Rep*<sup>1</sup> Unyolo J, as he then was had this to say:

“I pause here to say something about the law. Yes, the law, because this is a court of Law. It is now well settled that exceptional and unusual circumstances must be shown before a court will grant bail to a person who has been convicted and sentenced. The court’s belief that the appeal will be successful and the likelihood that it can not be concluded within a reasonably short time, have been given as examples of such exceptional and unusual circumstances”.

See also: *Pandiker V Rep*<sup>2</sup>. Further it was stated by Mwaungulu J in *Maggie Nathebe V Republic*<sup>3</sup>, when the learned judge was considering an application for bail pending appeal that:

“It is idle to suppose that in this discourse I can improve on the statement of principle on which bail pending appeals can be made. The good work has been done by fellow common law judges in England. That principle has been

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<sup>1</sup> *Kamliza and Others V Rep* 1993 16(1) MLR, 198

<sup>2</sup> *Pandiker V Rep* 1971 – 72 ALR Mal 204

<sup>3</sup> *Maggies Nathebe V Rep* Miscellaneous Crim. Application No. 90 1997

accepted by this court first by Chatsika J, in *Pandiker V Rep* 1971 – 72 ALR Mal 204, although that was not a case of bail pending appeal...The court relied on principles applicable to bail pending appeal. The court approved the English Decisions in *R V Howeson* (1936) 25 Crim Applicant Rep 167, and *R V Leinster* (Duke), (1923) 17 Crim. Applicant R 147. The case was followed in this court in a case involving bail pending appeal in *Goode V Rep* (1971 – 72) 6 ALR Mal 351. The principle has been approved by the Supreme Court in *Chihana V Rep* MSCA Misc Crim. Application.

Where this court or any court has to decide whether bail should be granted to the applicant who has been convicted and serving a prison sentence the real question is whether there are exceptional circumstances which would lead the court to conclude that the justice of the case would be served by granting bail. That will be the case where *Prima facie* there is likelihood that the appeal will succeed or where there is a real risk that by the time the appeal is heard, the applicant will have served the sentence”.

In the *Chihana V Rep*<sup>1</sup> Chatsika JA articulated the principle of law as follows:-

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<sup>1</sup> *Chihana V Rep* [1992] 15 MLR

“In an application for bail pending an appeal it has to be borne in mind that, upon conviction, the applicant lost his freedom of movement. In essence, conviction is followed by punishment. The authorities have a duty to restrict, as one of the forms of the punishment, his freedom, on the basis of conviction.

He no longer is a free man. Therefore, in order to grant freedom to such a person whose fundamental freedom has been lost by conviction, there must exist some ‘exceptional and unusual circumstances.’ In other words the case must be so exceptional and unusual that having regard to all the circumstances surrounding it, the court will be justified in overlooking the order for his imprisonment and make a counter order that he be released at least until his appeal has been determined.”

Further, the learned judge went on to state circumstances which in the opinion of the court would be regarded as ‘exceptional and unusual,’

“It seems that where it appears, *prima facie* that the appeal is likely to be successful or where there is a risk that the sentence will be served by the time the appeal is heard, the

test will have been satisfied. I think that the two factors must exist concurrently in order for the condition to be satisfied.”

In the instant application, counsel for the applicant submitted that the applicant was sentenced to a custodial sentence of 6 months, only and that this being a short sentence, by the time the appeal is heard, the applicant shall have served the sentence. Counsel therefore submitted that this places the applicant’s appeal in the category of cases or instances that would be deemed or constitute exceptional circumstances to fit the scenarios depicted in the decided cases that have already been referred to.

Indeed I agree with Counsel for the applicant that the sentence is short, 6 months imprisonment with hard labour is not a long sentence. The sentence is effective 23<sup>rd</sup> July, 2008 and it is clear, in my considered opinion, that indeed by the time the appeal is heard, consideration being had to the length of sentence, the applicant shall have served the sentence or a substantial part thereof. This in my view constitutes an exceptional circumstance, which I think should persuade the court to grant the application. This is especially so when one considers that the applicant readily pleaded guilty in the lower court is a first offender and without being seen as pre – determining the

appeal there is in my view likelihood that the applicant could be successful in her appeal, and/or that there is a real risk that the applicant shall have served the sentence by the time the appeal is heard.

Consequently, I am inclined to consider the application favourably, and I hereby do grant bail to the applicant pending her appeal, on the following terms and conditions:-

1. The applicant to be bonded in the sum of MK40,000.00
2. The applicant to surrender her travel documents, if any, to the Registrar of High Court.
3. The applicant to be reporting to the officer In – Charge Blantyre Police once a week on Fridays before 4 pm.
4. The applicant to furnish the court with two reliable sureties each of whom shall be bond in the sum of MK20, 000.00 not cash. The sureties are to be examined by the Registrar.

Further, I direct that the appeal herein be set down by 30<sup>th</sup> September, 2008.

***Pronounced in Chambers*** at Principal Registry this 8<sup>th</sup> day of August, 2008.

Joseph S Manyungwa  
**JUDGE**