JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL CASE NUMBER 60 OF 2008

BETWEEN:

PHILLIP BWANALI ……...……PLAINTIFF

- AND -

THE REPUBLIC ……..……..DEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA
Mr Mbeta, of Counsel for the appellant
Dame Kayuni, Senior State Advocate, for the State
Mrs Edith Malani – Official Interpreter

R U L I N G

Manyungwa, J

INTRODUCTION:

This is the appellant's appeal against the decision of the Senior Resident Magistrate sitting at Blantyre in refusing to restore the appellant's bail which the lower court had earlier on granted to the appellant on 29th January 2008 ***inter alia*** on conditions that (1) the appellant had to deposit MK60,000.00 cash into court (2) That the appellant had to produce two reliable and traceable sureties who were each bonded in the sum of MK100,000.00 not cash (3) That the appellant had to be reporting to Blantyre Police Station twice a week on Mondays and Thursdays and finally (4) That the appellant had to surrender all his travelling documents to the court. The appeal is made under Section 118(3) of the Criminal procedure and Evidence Code

and Section 42 (2) (e) of the Republican Constitution. There is also an affidavit in support sworn by the appellant, Phillip Bwanali. The responded opposes the appeal, and there is an affidavit in opposition sworn by Janet Ndagha Kayuni, Senior State Advocate for the State.

In his affidavit in support of the appeal, the appellant states that he is currently answering to charges of Theft and Attempted theft before the Senior Resident Magistrate Court at Blantyre and that trial has already begun. The appellant further states that on 29th January, 2008 the appellant was granted bail by the said Senior Resident Magistrate Court and that his bail bond indicated that he would be required to appear before the said court on 18th March, 2008 as is evidenced by exhibit "PB1" a copy of the said bail bond dated 29th Janaury 2008. The said bail bond ***inter alia*** read.

THE REPUBLIC OF MALAWI
IN THE RESIDENT MAGISTRATE'S COURT AT BLANTYRE
CASE NUMBER 305 OF 2007
THE REPUBLIC VERSUS PHILLIP BWANALI
BAIL BOND AFTER ARREST TAKEN BY A COURT OR POLICE OFFICER (SECTIONS 118 AND 119 OF THE CRIMINAL PROCEDURE AND EVIDENCE CODE)

I, PHILLIP BWANALI of ……..being charged with the offence of Attempted Theft contrary to Section 401 of the penal Code, Theft contrary to Section 278 of the Penal Code and being required to appear before the above named court on 18th day of March 2008.

NEXT DO HEREBY BIND myself to attend the said court on the day named and continue so to attend until my trial shall be concluded, and should I fail to do so, I bind myself to forfeit to the government the sum of MK60,000.00.

Signature and address: Signed
PHILLIP BWANALI

18th day of March, 2008

SURETIES: We jointly and severally declare ourselves and each of us sureties for the appearance of the said **PHILLIP BWANALI** as above set out and in case of his making default therein hereby bind ourselves severally to forfeit to the Government the sum of Mk100,000.00 NOT CASH (EACH)

FIRST SURETY (signed)	**SECOND SURETY** (signed)
Name: KEN NDANGA CHAPITA/NSAMALA/ MACHINGA	ERNEST CHIKAKWIYA MAONI/NKALO/CHIRADZULU
Address: (Businessman)	REVENUE ASSISTANT (MRA)
Phone : 08778133	08877246

Entered into before me this 29th day of January, 2008.

Signed and sealed
H/W NEBI (RESIDENT) MAGISTRATE

The appellant further depones that when he went to report for bail at Blantyre Police on 17th March, 2008 in the afternoon, he was surprised when the officer to whom he used to report to asked him why he had missed trial on that day to which the appellant responded that he would report for trial the following day as indicated in his bail bond. The said Police officer noted the bail bond correct but nevertheless refused to sign the appellant's bail bond saying that the issue of the appellant's missing at court had to be sorted out first. On 18th March, 2008 so the appellant states, that when he appeared before the said Magistrate Court at Blantyre he was re – arrested for being absent from court on 17th March, 2008 under a Warrant of Arrest issued on 17th March, 2008 and he has since then been remanded at Chichiri Prison. The appellant further states that on 31st March, 2008 he appeared before the said Magistrate Court for further hearing of the prosecution's case, and his application for bail was denied. The appellant therefore contends that in the circumstances the learned magistrate has erred in refusing to grant him bail despite the fact that the appellant missed the court hearing on 17th March, 2008 out of a genuine mistake as is also evident from the affidavits of Ken Ndanga and Richard Lister, which affidavits are marked exhibits "PB2" and "PB3" respectively. The appellant further contends that the only other way he would have known that the said court had verbally ordered him to appear before it for trial on 17th March, 2008 would have been through Counsel Chiphwanya who had since stopped taking the appellant's calls from the week beginning 10th March, 2008 and that it appeared to the appellant that Counsel Chiphwanya had stopped acting for the appellant without notifying him, no wonder he did not inform the appellant of the next date of hearing. As a result, the appellant so depones, that he relied on the date that was indicated on the bail bond i.e. the 18th of March, 2008 as being the date on

which the appellant was supposed to appear before the court and further that the appellant would therefore not have reported to Blantyre Police Station on 17th March, 2008 had he known that he was supposed to appear before the court on the same date.

In his affidavit in support of the appeal for bail, Ken Ndanga depones that he escorted the appellant to court on 18th March 2008 according to the requirements of the bail bond, and that he was surprised at court on 18th, March 2008 to see the appellant being re – arrested when he appeared before court, for being absent in court on 17th March, 2008 under a Warrant of Arrest dated 17th March, 2008. Mr Ken Ndanga further stated that he did not recall whether the court verbally stated that the matter was coming for hearing on 17th March, 2008 due to the passage of time but that in any event he was being guided by the bail bond, which showed that the appellant was to appear before court on 18th March, 2008. The deponent further stated that the bail application on 29th January, 2008 was heard in Chambers in the absence of the appellant, when the court was setting down the matter for hearing on 17th and 18th March, 2008. And in his affidavit in support, Richard Lister deponed that the appellant asked him for a lift on 17th March, 2008 to go to Blantyre Police Station to report for his bail as he was required to report every Mondays and Thursdays. The deponent further stated that he took the appellant to the said Blantyre Police Station on 17th March, 2008 and thereafter he took him back home. On 18th March, 2008, he escorted the appellant to court in the company of Ken Ndanga, and the deponent further stated that in his belief the appellant did not intentionally abscond court proceedings on 17th March, 2008.

As I stated, the state vehemently opposes the appeal. In her affidavit in opposition Dame Kayuni deponed that the appellant herein is being prosecuted for the offences of Theft and Attempted Theft before the Senior Resident magistrate Court at Blantyre. Dame Kayuni further deponed that the appellant was first granted bail on 24th December 2007 and was asked to be reporting to state Advocate's Chamber on every Mondays, and that the appellant breached his bail conditions by failing to report to the State Advocate Chambers and on 11th January, 2008 the court revoked his bail hence the appellant's re – arrest. On 28th January, 2008 when the matter came for further hearing the appellant again applied for bail which the court granted to the appellant, but ordered that his earlier surety had to pay the money for the bond into court. The said court further ordered that the appellant had to furnish two sureties and that on the day sureties were being

examined in chambers, the court informed both parties that the case would come for further hearing on 17th and 18th March 2008. On 17th March, 2008, the appellant, did not show up for his trial, and the court made an order revoking his bail and ordered that the appellant be re – arrested. Dame Kayuni further states that on 25th March, 2008 the appellant applied for bail in the High Court on the ground that his bail was irregularly revoked by the learned Senior Resident Magistrate and that the High Court refused to grant bail on the ground that the application was brought after having breached procedure and that if, the court wanted re – instatement his bail he should have gone back to the Magistrate Court. It is further state that on 31st March, 2008 when the case same for further hearing, the applicant applied for the re – instatement of bail before the said Senior Resident Magistrate Court, on the ground that his alleged abscondment was based on a genuine mistake that the matter was coming on 18th March, 2008, and that the reasons that were advanced for the re – instatement were similar to those that were earlier used in the High court and are similar to the ones being advanced in the current appeal. Dame Kayuni further stated that the court dismissed the argument that the appellant was mistaken by the date on the said bail bond on the same grounds that the appellant's sureties were aware of the dates as they were present when the court was setting them down. Dame Kayuni further contended in her affidavit that since this is an appeal, then the appellant had to mention where the Magistrate erred in his decision to refuse re – instatement of bail, and prayed for an order dismissing the appeal.

The main issue for the determination of the court in this appeal whether the learned Magistrate erred in fact and in law by finding that the applicant did not turn up for trial on 17th May 2008 because he intentionally wanted to jump bail and not that there was a genuine mistake on the date on which he had to appear before the court.

ANALYSIS OF THE LAW AND EVIDENCE

Section 42(2) (2) of the Republican Constitution provides:

> S42(2) "Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as detained person, have the right –
>
> (e) to be released from detention, with or without bail, unless the interest of justice require otherwise.

And Section 118 (3) and (5) of the Criminal Procedure and Evidence Code[1] provides as follows:

> S118(3) The High Court may, either of its own motion or upon application direct that any person be released on bail or that the amount of, or any condition attached to, any bail required by a subordinate court or police office be reduced or varied.
>
> …
>
> (5) No application for a direction that any person in custody pending proceedings in a subordinate court be released on bail shall be entertained by the High Court unless such subordinate Court has first refused to direct such a release,"

Further, the Bail guidelines Act[2], lays down the procedure to be followed if one is to appeal is a case as the instant case. The said Act provides as follows:-

> S10 "Where the accused has been refused bail he may bring a fresh application before the same magistrate or court or another magistrate or court, only if there has been a change of circumstances."
>
> S11 "Where the circumstances have not changed, the accused may proceed by way of appeal setting out the grounds upon which the lower court is alleged to have erred."
>
> S12 "No application for bail in any case pending before a subordinate court shall be entertained by the High Court unless bail was refused in the subordinate court.

In the instant case, the appellant is appealing against the decision of the learned Senior Resident Magistrate's finding both in fact and in law when he found that the appellant did not turn up trial on 17th day of March, 2008 because, he intentionally wanted to jump bail and not that there was a genuine mistake on the date on which he was to appear before the said court.

Let me begin by dealing with the argument that was advanced by Dame Kayuni when she submitted that the appellant did not mention where the

[1] Criminal procedure and Evidence Code, Cap 8:01 of the Laws of Malawi
[2] Bail Guidelines Act, 2000

learned magistrate erred in his decision to refuse re – instatement. Clearly in my view, this is a proper ground of appeal. The matter is dealt with under Part XIII of the Criminal procedure and Evidence Code. Section 346(1) of the Criminal Procedure Code is in the following terms:-

> S346(1) "Serve as hereinafter provided any person aggrieved by any final judgment or order, or any sentence made or passed by any subordinate court may appeal to the High Court.
>
> (2) An appeal under Subsection (1) may be upon a matter of fact as well as on a matter of law."

The appellant's appeal in the instant case is both on a matter of fact and on a matter of law. Further Section 350 of the Criminal Procedure and Evidence Code provides as follows:-

> S350(1) "Every appeal shall be made in the form of a petition in writing presented by the appellant or his counsel, setting out the grounds of appeal
>
> (2) Where the appellant is represented by counsel, the petition shall contain particulars of matters of law or of fact in regard to which the subordinate court appealed from is alleged to have erred and shall be accompanied by two copies."

In the instant case the appellant indicated in his only ground of appeal that his appeal was based on both fact and law and that the learned magistrate erred when he refused to grant the appellant bail on the ground that the appellant had absconded bail on 17th March, 2008. The argument of the appellant on the other hand is that he was genuinely mistaken by the date that was appearing on the bail bond which was 18th March, 2008.

I must state here and now that I have gone thoroughly the lower court record and indeed it is very clear from the lower court record on page 78 that when the matter was called for the consideration or ruling for bail on 29th January, 2008 the appellant was not present, the Coram clearly indicates that there was the learned Senior Resident Magistrate, Defence Counsel and a certain Banda representing the state. The appellant was not absent, probably by this time he was still in custody since bail had not yet been granted. Further, the

court on the very same day ordered the appellant's surety Viva Nyimba to pay into court the sum of MK50, 000.00 within a week from the 29th of January, 2008 in Chambers. What then follows at page 83 is examination of sureties which was ordered by the court to be done in the afternoon of the same day the 29th January, 2008. The court then after the said examination and after being satisfied with the same adjourned the matter to the 17th and 18th March, 2008 for hearing in the presence of both sureties and defence counsel. Admittedly, the appellant was not there. However the bail bond exhibit that "PB1"was issued by the court indicated that the appellant was next to appear before court on 18th March, 2008. When on 31st March, 2008, the appellant again applied for bail in the lower court, the said court refused to re – instate the bail because in its view the argument by the appellant that he was under a genuine mistake could not hold water since he was duly represented and further that the sureties were there. The court further dismissed the argument that Counsel, then Mr Chiphwanya, was not under instruction, as according to the lower court he was still on record. However it is worthy to note that the lower court admitted in its judgement at page 169 of the lower court record when it ***inter alia*** said

> "Admittedly there was a mistake on the bail bond but that does in my view would not excuse the accused from failing to appear at court as he was duly represented when the date of 17th March, 2008 was set."

It is very clear, in my view, that when the proceedings were adjourned to the 17th and 18th March, 2008 in Chambers on 29th January, 2008, the appellant was not there. Secondly, it is also very clear that when afterwards the court was issuing its bail bond, the court made a mistake in that instead of showing that the appellant had to appear on 17th March, 2008, the said bail bond mistakenly showed that the appellant was supposed to appear on the 18th March, 2008. In my considered judgement, this error or mistake was wholly the court's mistake, for which the appellant can not be blamed as he played no part in it. Secondly, even if there was blame to be laid on somebody, for the non – appearance of the appellant on 17th March, 2008 the person to be blamed could not, in any case, have been the appellant, rather the court could have taken to task the defence lawyer as to why he never communicated to his client the appellant, or the sureties as to why they never communicated with the appellant about the date of hearing. In any case, it is in evidence, that the appellant on the same date of 17th March, 2008 went to Blantyre Police Station to report for his bail in line with the conditions of his

bail bond. In my most considered opinion, this can not be said to be conduct of a person who has an intention to run away. My finding is therefore that the magistrate in revoking bail without first hearing from the appellant and subsequently refusing to re - instate the appellant's bail erred on both fact and law. Had the lower court investigated the facts leading to the appellant's non – appearance on the 17th March, 2008 it would have perhaps arrived at a different conclusion. This is so because of Section 86 of the Criminal procedure and Evidence Code.

> S86 "Any accused summoned to attend before a court, who without lawful excuse, fails to attend as required by the summons or who having attended departs without having obtained the permission of the court or fails to attend after adjournment of the court after being ordered to attend, shall be liable by order of the court to a fine of £20."

Further, the paramount consideration in deciding whether to grant bail or not is whether or not the accused if released on bail will be available for his or her trial, and that as has been stated in several cases, is weighed by taking into account, among other factors, the following:-

1. The nature and seriousness of the offence alleged against the accused.
2. The strength of the case against the accused and the temptation that he may in consequence attempt to evade trial.
3. The nature and the severity of punishment which is likely to be imposed for the offence proved.
4. Whether the accused has a permanent place of abode.
5. Whether the accused is in custody for another offence.

See: ***Roy Mangame V Republic***[1]**.** It must also be borne in mind that the requirements of bail is to secure the attendance of the accused at his or trial in the case of ***Rex V Monrovin***[2] the court in answering the question as to what is the interest of justice, Mann L R said :

> "Interest of justice require that there be no doubt that the accused person shall not be present to take his trial upon the charge in respect of which he has been committed."

[1] ***Roy Mangame V Republic*** Miscellaneous Criminal Case Number 36 of 2005
[2] ***Rex V Monrovin*** 1911 Mann 1032

This in my humble view is in tandem with the requirement under Section 42(2)(e), that bail can only be granted subject to the interest of justice. See also ***Mvahe V Republic***[3]. In the instant case, having considered the instances that led to the revocation of the appellant's bail, and also having found that the appellant on the same date of 17th March, 2008 reported to Blantyre Police, and further having noted that the bail bond mistakenly showed that the appellant had to appear on 18th March, 2008 and not 17th March, 2008 a mistake admitted even by the learned Senior Resident Magistrate in his ruling, and further having considered that when the proceedings were being adjourned on 29th January, 2008 the appellant was not presently, it is my finding that indeed the learned Senior Resident Magistrate erred when he revoked the appellant's bail.

CONCLUSION:

On the basis of the foregoing and in the circumstances of the casetherefore, I allow the appellant's appeal, and I do hereby order that the appellant bail be and is hereby re – instated on the same conditions as were imposed by the lower court when it granted him bail.

I make no order as to costs.

Pronounced in Chambers at Principal Registry this 24th April, 2008.

Joselph S Manyungwa
JUDGE

[3] ***Mvahe V Rep*** MSCA Criminal Appeal No. 25 of 2005