



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CRIMINAL CASE NO. 65 OF 2013  
THE STATE  
VERSUS  
MacDonald Kumwembe  
Pika Pascal Manondo  
Raphael Kasambara**

**CORAM**

**Honourable Justice Dr. M.C. Mtambo**

Kasambara, Applicant/3rd Accused representing himself

Mrs Kachale, DPP for the Respondent

Mr Chibwana, Assisting the DPP

Mr Malunda, Assisting the DPP

Mthunzi and Mrs Mbewe, Court Reporters

**RULING**

This is an application by Notice of Motion by the 3<sup>rd</sup> accused to be re-admitted to bail after his bail was revoked by the Court on 23 September 2015 on the grounds

that he was delaying the conclusion of the case by infringing on the private space of the trial judge in sourcing his purported Curriculum Vitae (CV); made a second application for recusal of the judge through the 1<sup>st</sup> accused; and generally displayed no interest to have the matter concluded. The application is supported by an affidavit sworn by the applicant and another by one Dr. Lughano Kalongolera, a Medical Doctor and Surgeon who has been family doctor to the applicant. In his affidavit, the applicant details his medical history in particular his sickness and how his health is said to be deteriorating while in custody at Zomba Central Prison and according to him, causing delays in the conclusion of the case. He submits that there has been a change in circumstances since bail was revoked in terms of deteriorating health necessitating this application. The doctor adopts his previous affidavit filed in this matter in an unsuccessful application for the applicant to be allowed to travel out of the jurisdiction for medical treatment. In that affidavit, the health history of the applicant is also highlighted particularly the applicant's loss of ten kilogrammes in a short space of time and the release from remand of the applicant on medical grounds sought so that he can recover his good health in a more conducive healthy environment and access medical attention without let or want.

The application is opposed by the State. There is an affidavit sworn by Mr. Chibwana, learned special public prosecutor and another by Superintendent Moses Chigayo, clinical officer in charge of Zomba Central Prison where the applicant is remanded. As a preliminary issue, Mr. Chibwana depones that the application is an abuse of the process of the Court since the applicant has appealed against the decision of a single member of the Supreme Court of Appeal dismissing his appeal against the revocation of his bail by the trial Court and while that appeal is still subsisting, he has made this application to this Court seeking the same remedies. Substantively, Mr. Chibwana depones that there has been no change in circumstances in relation to the interests of justice, the basis of the Court's revocation of the Applicant's bail. He submits that releasing the applicant on bail does not guarantee that the case will be concluded in a timely manner because the delays in concluding the case were there even when the applicant was on bail as for five months since April 2015 when the Court ruled that the applicant and others had a case to answer up to September 2015 when the applicant's bail was revoked, minimal progress was made towards completion of the case due to the conduct of the applicant.

On his part, Mr. Chigayo disputes that the health of the applicant has deteriorated while at Zomba Central Prison. He depones that he has been monitoring the applicant since his incarceration in the prison and after his discharge from Mwaiwathu Private Hospital where he had received treatment and that the applicant has since 7 December 2015 not had serious medical problems apart from a mild diarrhea which has since subsided. Mr. Chigayo concludes that the applicant is currently in good health.

The DPP has submitted that it is misleading to term the application one for bail when it is in fact one for restoration of bail. The gist of her submission is that the guideline in the Bail Guidelines (Act) 2002 allowing the making of another application for bail on change of circumstances should be restricted to the case where bail was refused and not where it was granted and then revoked. On his part, the applicant has submitted that according to sections 3 and 5 of the Criminal procedure and Evidence Code (CP&EC), substantial justice must be done without undue regard to technicalities and as such whether the right terminology about the application has been used or not should not deter the Court from providing him an effective remedy. Section 3 provides:

*“The principle that substantial justice should be done without undue regard for technicality shall at all times be adhered to in applying this code.*

And section 5(1) provides:

*“Subject to section 3 and to the other provisions of this Code, no finding arrived at, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal of complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless such error, omission or irregularity has in fact occasioned a failure of justice.  
...”*

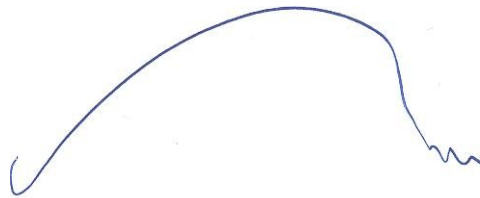
The applicant, apart from invoking these sections generally, has not particularly related them to the matter at hand. It is unclear how the current application involves the invocation of the code in terms of section 3 of the CP&EC or reversal or alteration of a finding of a court in terms of section 5 of the CP&EC. I therefore find that these sections are not helpful to the applicant on the particular facts of

this application.

Having considered the affidavits and the submissions for and against the application, I come to the conclusion that indeed the applicant's conduct in pursuing the same relief in the trial Court and the Supreme Court of Appeal at the same time amounts to an abuse of the process of the Court. I do not desire to pre-empt the determination of the Supreme Court of Appeal and defer to them to adjudicate on the matter first. Depending on that determination, the applicant will if necessary be at liberty to resuscitate this application before me. It is at that time that the Court will delve into the substantive arguments.

I therefore dismiss the application for bail.

Dated the 18<sup>th</sup> day of December 2015 at the High Court of Justice in Blantyre.

A handwritten signature in blue ink, consisting of a large, sweeping arch that curves downwards on the right side, ending in a small, wavy flourish.

**Dr. M.C. Mtambo**  
**JUDGE**