



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

Criminal Appeal No. 17 of 2017
(eCMS 5977 of 2017)

[being criminal cause no. 1745 of 2016, CRM, Blantyre Magistrates' Court]



In the matter between:

JOSE MANUEL	1 st APPLICANT/ APPELLANT
SIMAO FORTULNATO	2 nd APPLICANT/ APPELLANT
JULIO FWAMBAUONE	3 rd APPLICANT/ APPELLANT
LOTI FULAYITONI	4 th APPLICANT/ APPELLANT
MFUMU KIDI	5 th APPLICANT/ APPELLANT
HERMENGILDO SAMUEL	6 th APPLICANT/ APPELLANT
JUSTINE LAULI	7 th APPLICANT/ APPELLANT
JULIAO MANGIRA	8 th APPLICANT/ APPELLANT
AKIMU STEPHANO	9 th APPLICANT/ APPELLANT
ZAKEYO ALNANZA	10 th APPLICANT/ APPELLANT
ORASI DOMINGO	11 th APPLICANT/ APPELLANT
MONERA ALAMIDA	12 th APPLICANT/ APPELLANT
BERNADO LUCAS	13 th APPLICANT/ APPELLANT
KINGSLEY BANDA	14 th APPLICANT/ APPELLANT
MACNIWARD STEVEN	15 th APPLICANT/ APPELLANT
and	
THE REPUBLIC	RESPONDENT

RULING

nyaKaunda Kamanga, J.

The appellants filed this application for stay of forfeiture and bail pending appeal, under section 355 of the Criminal Procedure and Evidence Code. The application, the affidavit in support of the same and skeletal arguments were filed on 8th May 2017. The record of the case shows that on the same date that the abovementioned mentioned documents were brought to court the legal practitioners for the applicants, Joe and Max Chambers, also filed in the High Court of Malawi the following documents: a notice of appeal, a petition of appeal in accordance with

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section 350 of the CP and EC, a notice of hearing and skeletal arguments in support of appeal on sentence.

The brief facts in this criminal matter are that the applicants herein, and others who have elected not to appeal, are incarcerated at Blantyre Prison, Chichiri, following their convictions and sentencing by the Chief Resident Magistrate for various offences under the Immigration Act, National Parks and Wildlife Act and the Customs and Excise Act. In the subordinate court Criminal charges were proffered on 35 accused persons under criminal cause no. 1745 of 2016 after a group of people had entered a protected area, namely Lengwe National Park, without authority and committed criminal activities. On 2nd May 2017 the offenders were sentenced to various punishments. The maximum custodial term for some of the offenders, including the applicants, was 18 months' imprisonment, which was to operate with effect from their date of arrest, the 2nd November 2016. This court has to determine whether the order for forfeiture should be stayed and whether the applicants should be released on bail pending appeal.

In support of the present application the applicants have filed a joint affidavit which was sworn by the 15 applicants on 5th May 2017. It is deposed in paragraph 3 of the joint affidavit that

'the trial magistrate failed to impose fines on us (and instead ordered custodial sentences) because we are 'aliens' and it was difficult for him to assess our capacity and capabilities to settle the fines'.

The applicants submit that they are 'all capable of paying fines.' In paragraphs 6 and 7 of the said affidavit the applicants allege, but do not approve, that 'some of the property, equipment, goods, machinery and vehicles in the custody and control of Jose Manuel do not belong to Jose Manuel' but that they belong to unnamed third parties. The applicants assert that their appeal has very high chances of success.

On 31st May 2017 the 1st applicant, Jose Manuel, swore a supplementary affidavit in support of the application for stay of forfeiture order. Mr. Manuel alleges in the supplementary affidavit, but does not prove, that the government took 'possession, changed ownership and fixed a government number plate' on his car contrary to section 149(3) of the Criminal Procedure and Evidence Code. He further alleges but does not prove that the vehicle is 'being driven around lately and the same has been involved in an accident' and that its value 'has started to depreciate.' The applicants contend that the appeal herein will be rendered nugatory and become predetermined should the order of forfeiture be

enforced immediately. The prayer of the 1st applicant is that the motor vehicle be parked and the keys be kept by the Registrar of the High Court until after the determination of the appeal.

There are two grounds of appeal in this criminal matter. The first ground of appeal raised in the petition of appeal is that the applicants are dissatisfied with of the sentence of imprisonment for being manifestly excessive when the magistrate could have imposed a fine and that the order for forfeiture was wrong. On 30th May 2017 the appellants filed an additional ground of appeal challenging their conviction under count 4. Their contention on this ground is that the trial magistrate erred in law and fact to order that motor vehicles and equipment are weapons in terms of the National Parks and Wildlife Act.

The applicants argue that an appeal automatically operates as a stay of forfeiture order unless the property is of perishable nature. The applicants noting that they are remaining with five months to serve on their sentences of imprisonment urge the court to uphold the spirit of the case of *Jamadar v Republic*¹ by exercising its discretion more freely particularly in a case where there is a likelihood that the sentence is unfair and that by the time the appeal is heard, considered and determined, the convict will have served the full sentence. The applicants acknowledge that exceptional circumstances have to be shown to exist before an appellant can be liberated on bail pending appeal. The applicants rely on the case of *Pandiker v Republic*² to assert that a strong probability of the appeal being successful can be held to be a special circumstance. The applicants submit that there is a very likelihood of success of the appeal necessitating the granting of bail pending appeal.

According to the affidavit in opposition to the application that was sworn by Dr. Steven Kayuni and filed on 9th June 2017, the State contends, among other issues, that the applicants are misguided in stating that where a fine and custodial sentence are provided the courts should always impose a fine. The State is also of the view that the applicants being Mazombican nationals or residents of Mozambique who entered the country illegally would, if granted bail, bolt and defeat the interests of justice. The respondents oppose the application for bail pending appeal arguing that the applicants have failed to demonstrate that this case is one which has exceptional or unusual circumstances warranting the grant of bail pending appeal. In support of their argument that admission to bail after conviction is at the discretion of the court where it 'deems it fit,' the respondents

¹ Criminal Application no. 8 of 1975 (unreported).

² [1971-72] ALR Mal 208.

rely on the cases of *Kamaliza and others v Republic*;³ *Suleman v Republic*⁴ and *Mekiseni and others v Republic*.⁵ The State submits that this court should not be persuaded by the decisions in *Yamikani Letasi v Republic*⁶ and *Kenneth Kumuwa, Lameck John and Brighton Makopolo v Republic*⁷ which postulate that bail is a right whether it made pre or post-conviction as long as the court is of the view that it is in the interests of justice. The Senior Assistant Chief State Advocate advance the following reasons for the court to dismiss the application: that the convictions were safe and are unlikely to be overturned; that the applicants have no place of abode in the country, they came illegally and can go back through the same illegal means and that the applicants understanding of the principles of sentencing are wrong. The State submits that bail pending appeal is not a right and the respondent prays that the court denies the applicants' plea for bail pending appeal.

In regard to the application for stay of forfeiture order the State is of the view that there was no need for an application for stay of the forfeiture order as there is an automatic stay of the same.

The constitutional right to be released from detention and admission to bail pending appeal

In terms of the general applicable law, section 42(2)(e) of the Constitution grants an accused person a constitutional right 'to be released from detention with or without bail, unless the interests of justice require otherwise'. The case of *Kettie Kamwangala v Republic*⁸ affirms that the paramount law on bail is the Constitution. The case of *Zgambo v Republic*⁹ outlines some of the principles which should guide the courts in bail applications.¹⁰ These principles were repeated and affirmed in the case of *Phiri and another v Republic*.¹¹ The cases of *Phiri and another v Republic*¹² and *Zgambo v Republic*¹³ make it clear that 'section 42(2)(e) of the Constitution has not given an absolute right to bail. The section still reserves the right to the court which must refuse bail if it is satisfied that the interests of justice otherwise require' .¹⁴ According to the case of *Kenneth Kumuwa, Lameck John and Brighton Makopolo v Republic*¹⁵ the word 'accused'

³ [1993] 16(1) MLR 196.

⁴ [2004] MLR 398 (SCA).

⁵ MSCA Criminal Cause no. 14 of 2015 (unreported)(22 March 2016).

⁶ MSCA Criminal Appeal no. 13 of 2016 (unreported)(11 January 2017)

⁷ High Court Principal Registry, Bail Application Case no. 107 of 2012 (unreported 7 August 2013).

⁸ MSCA Misc criminal appeal no. 6 of 2013 (unreported 28 January 2014) at 5.

⁹ [1999] MLR 405 (SCA).

¹⁰ [1999] MLR 405 (SCA) at 407-408.

¹¹ [2000-2001] MLR 369 (SCA) at 371-372.

¹² [2000-2001] MLR 369 (SCA) at 370-371.

¹³ [1999] MLR 405 (SCA).

¹⁴ [1999] MLR 405 (SCA) at 409.

¹⁵ High Court Principal Registry, Bail Application Case no. 107 of 2012 (unreported 7 August 2013)

in section 42(2) of the Constitution ‘includes sentenced offenders, those convicted and sentenced of a crime’. However, the respondents submit that the decision in case of *Kenneth Kumuwa, Lameck John and Brighton Makopolo v Republic*¹⁶ that bail is a right and that ‘the interests of justice is the dominant test for all bail applications, before and after conviction, that is during appeal or review of decisions of court of first instances’ has been considered as erroneous in the case of *Emmanuel Uche v Republic*.¹⁷

The key principles developed by the courts in considering applications to be released from detention have been codified under s 3 of the Bail (Guidelines) Act.¹⁸ In considering whether to grant or refuse bail a court shall be guided by the uniform principles, factors and other matters, constituting Guidelines on Bail, specified in part II of the Schedule.¹⁹ Paragraph 4 of part II of the Schedule to the Bail (Guidelines) Act provide for some of the questions which a court should consider in deciding whether or not an accused should be released from detention on bail. Although most of the factors pertain to pre-trial detention, in applications for bail pending appeal reliance is still to be made to the guidelines as well as to the relevant provisions under the Criminal Procedure and Evidence Code, applicable rules and case law.

Section 355(1) of the Criminal Procedure and Evidence Code provides for stay of execution and admission to bail pending appeal. It stipulates that

‘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 appellant is in custody that he may be released on bail, with or without sureties, pending such hearing.’

The Supreme Court of Appeal decision in the case of *Mekiseni and others v Republic*²⁰ holds that ‘a person who has been convicted cannot be presumed to be innocent and therefore does not, any more, have the right to be released, with or without bail.’ According to *Mekiseni and others v Republic*²¹ admission to bail after conviction is at the discretion of the court where it ‘deems it fit’ in exceptional and unusual circumstances. The case of *Chimbanga v Republic*²² holds that when considering bail pending appeal the court seized with the matter should have due regard to the record of the case, the grounds of appeal filed in the matter and the likelihood of success of the appeal when it is finally heard and

¹⁶ High Court Principal Registry, Bail Application Case no. 107 of 2012 (unreported 7 August 2013)

¹⁷ Criminal Appeal no. 110 of 2015.

¹⁸ Act 8 of 2000, cap 8:05 of the Laws of Malawi.

¹⁹ Section 3 of the Bail (Guidelines) Act.

²⁰ MSCA Criminal Cause no. 14 of 2015 (unreported)(22 March 2016).

²¹ MSCA Criminal Cause no. 14 of 2015 (unreported)(22 March 2016).

²² MSCA Criminal Cause no. 1 of 2017 (unreported).

determined by the appellate court. The cases of *Christopher Dzole v Republic*²³ and *Yamikani Letasi v Republic*²⁴ discuss the procedure and practice for application for bail pending appeal and hold that bail applications should be made in public and that release from detention on bail can only be in the interests of justice.

Disposal of the matter

After a careful consideration of the affidavit evidence that were filed by the applicants in support of the application for bail pending appeal as well as the skeletal arguments and on seriously considering the submissions made by both the counsel for the applicants and Senior Assistant Chief State Advocate, this court notes that in the present application the court is dealing with convicted offenders and sufficient reasons must exist before such offenders can be released on bail pending appeal. Indeed the legal practitioners of the parties are in agreement that the applicants are required to establish that exceptional and unusual circumstances exist such as to merit the granting of bail pending appeal.

As has already been noted it is the opinion of this court that when it comes to consideration of applications for admission to bail pending appeal the applicants must still advance circumstances and factors that are integral to the question of whether, in the interests of justice, bail should be granted. For instance under the unusual and exceptional circumstances test, the High Court has granted bail pending appeal and the Supreme Court of Appeal has approved such orders for bail applications where it appears that: *prima facie* the appeal is likely to succeed; where there is a risk that the sentence will be served by the time the appeal is heard and where the grounds of appeal are arguable.

After seriously considering the factors which the counsel for the applicants has put across as informing the exceptional and unusual circumstances and the arguments advanced by the State in light of the applicable law this court finds as follows:

1. That the assertion that the applicants have no place of abode in this country and the evidence on record of the case that they entered the country illegally are some of the circumstances of this criminal matter that have persuaded this court to decline admitting the applicants to bail pending appeal. The likelihood of an accused to evade criminal proceedings and the possibility of extradition procedures are some critical factors to consider under paragraph 4 of part II of the Schedule to the Bail (Guidelines) Act.
2. In considering whether the applicants' grounds of appeal are likely to succeed, this court finds that the applicants have raised factual and legal issues that need to be resolved by the High Court on merits, such as,

²³ MSCA Criminal Appeal no. 14 of 2016 (unreported)(11th January 2017).

²⁴ MSCA Criminal Appeal no. 13 of 2016 (unreported)(11 January 2017)

those relating to the propriety of the convictions and the alleged failure to assess the means of the convicts during sentencing. It would be premature and prejudicial to both parties for this court, at this point in time, to delve into the grounds of appeal and speculate on the outcome of the issues that the applicants as appellants have raised in their grounds of appeal. The court will have to consider and determine these after hearing the appeal. However, from a perusal of the grounds of appeal it is the considered view of this court that the likelihood of success of all the grounds of appeal are dim.

Having considered the application as a whole in the present criminal matter this court is of the general view that each case is considered on its merits depending on the factors that are advanced as exceptional or unusual and which generally can be regarded as constituting the interests of justice. In the present bail application pending appeal this court finds that the applicants have not advanced sufficient factors to persuade this court and deem it fit to release of the applicants on bail pending appeal. This court exercises its discretion and dismisses the application for bail pending appeal.

Since the parties do not dispute the application for stay of the forfeiture order and section 149(3) of the CP and EC is clear that there cannot be execution of the forfeiture order following the filing of the notice of appeal, the prayer by the applicants that the motor vehicle in issue be under the Registrar of the High Court until after the determination of the appeal is granted.

The criminal matter is set down for hearing of appeal and cross appeal on Tuesday 4th July 2017 at 10 am in open court. The parties should file and serve grounds of appeal, cross appeal, skeletal arguments and any other supplementary documents by 23rd June 2017.

The Registrar must issue and serve a production order for all convicts in this criminal matter in readiness for hearing of the appeal and cross appeal.

Pronounced in open court this 14th day of June 2017 at Chichiri, Blantyre



Dorothy Nyakamanga
JUDGE

case information

Date of hearing
Mr. J. Kamkwasi
Dr. S. Kayuni
Mr. A. Ng'ambi

12th June 2017
Counsel for the appellants/ applicants
Senior Assistant Chief State Advocate,
for the respondent
Senior Court Clerk