IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 37 OF 2017

IAN NDALAMA

V

THE REPUBLIC

Coram: Hon Justice M L Kamwambe

Kadyampakeni of counsel for the Appellant

Salamba of counsel for the State

Amos...Official Interpreter

BAIL RULING

Kamwambe J

This is an application for bail pending appeal taken under section 355 (1) of the Criminal Procedure and Evidence Code. Appellant was convicted of the offence of defilement and sentenced to 6 years imprisonment. This court has granted the Applicant opportunity to adduce further evidence on the pretext that he was enticed to plead guilty on the promise by the girl victim's father to discontinue the case.

The law on bail pending appeal has not changed for a long time. Applications for bail pending appeal differ from applications for bail before trial or conviction in that in the latter, one is presumed innocent while in the former, one is a convict as such only in

exceptional and rare circumstances would one be granted bail. The case of **Suleman v Rep [2004] MLR 398 (MSCA)** stands in support of the long standing principle that bail pending appeal can be granted only on existence of "exceptional and unusual circumstances." Later, the cases of **McDonald Kumwembe and others v The Republic, MSCA Criminal Appeal No. 5A and 5B of 2017** and **Letasi v The Republic MSCA Criminal Appeal No. 13 of 2016** developed another principle emphasising on the "interest of justice" as provided for in section 42(2) (e) of the Constitution. Then came the case of **Joseph Kapinga and Annie Kapinga v The Republic, Criminal Appeal No. 16 of 2017** which seemingly overruled the **McDonald Kumwembe and Joseph Kapinga cases** (supra). I would support the old school of thought on the reason that section 42(2) (e) refers to rights of arrested persons or persons accused of an offence contrary to what section 42 (1) which refers to detained persons including sentenced persons which obviously means convicted persons. As such, convicted and sentenced persons would not fall under section 42 (2) (e) which provides as follows for ease of comprehension:

> *"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 a detained person, have the right-*
>
> > *to be released from detention, with or without bail unless the interests of justice require otherwise."*

To include sentenced persons in the above section would bring confusion which was not intended by the legislature. The separation made between this section and section 42 (1) was deliberate to differentiate bail dealings with accused persons pending trial and sentenced persons pending appeal. There is thus no legal basis for applying the principle of 'interests of justice' to sentenced persons and more likely convicted persons. Without labouring to produce many words to justify the old school of thought, I hope the explanation above is clear and acceptable to our legal minds. The Malawi Supreme Court has invariably and consistently held that in making arguments for bail pending appeal, parties must show a prima facie case of likelihood of success while resisting the temptation to argue the substantive appeal case. A

party must only show that the lower court decision was obviously wrong in the eyes of the court in that it is so obvious that a miscarriage of justice was occasioned and that it will not be proper to keep the appellant in custody pending his appeal as it is more likely that the appellate court will reverse the lower court's decision. This means that there is an obvious error by the lower court, such as, convicting on outright hearsay evidence or a defective plea of guilty

As per the case of **Vincent Kusowa v Rep MSCA Criminal Appeal No. 9 of 2015**, the question to ask is whether the applicant's case is so exceptional and unusual that having regard to all circumstances surrounding it, the court will be justified in making an order that he be released until his appeal has been determined. In such situations of bail pending appeal, court's exercise of their discretionary powers are repressed in that it is less free to grant bail than where one applies for bail pending trial. The rules are now stricter and less accommodating.

The applicant is applying for bail pending appeal contending that the appeal has high chance of success and that it is not known when the appeal will be heard since the State has not complied with the order of this court given on 26th February, 2018 for new evidence of the Appellant and the State to be given within three months pursuant to section 356 of the Criminal Procedure and Evidence Code. On 28 August, 2018 this court made another order that the new evidence will now be taken by this court on a date to be set. So, the fears that a date for hearing the appeal is not known falls out as this court will now take charge of the new evidence production and the way forward. To be fair and just the parents of the victim shall be required to give evidence on the issue.

Applicant relies on the argument that he was not informed of the consequences of pleading guilty in accordance with section 251 of the Criminal Procedure and Evidence Code. He has cited a number of local cases which led to convictions being quashed for non-compliance with the proviso to section 251 of the Code. Some of these cases are **Thokozani Malenga v Republic Criminal Review Case No. 19 of 2015** and **Daniel Chikapenga v Rep Criminal Case**

No. 21 of 2016. In **Isaac Sitole and Emmanuel Cosmas v Republic Criminal Appeal Case No. 37 of 2016,** I granted bail pending appeal in a similar situation because of non-compliance with section 251 proviso thereto. Many foreign cases were also cited which influenced Malawian cases to quash convictions for lack of non- compliance with provisions similar to section 251 proviso, such as, **Michael v R [1966] 12 FLR** which stated that:

> *"In our view there is a duty cast on a trial judge when the accused is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted, the accused person should fully comprehend exactly what a plea of guilty involves."*

According to the above cited case with which I agree, it is mandatory for a court to inform the unrepresented accused person the consequences of pleading guilty and the nature of the offence. In the Malaysian case of **Lee Weng Tuck and Amor V PP** [1949] MLJ 98, the Supreme Court of Malaysia held that when an accused person pleads guilty, there must be an indication on the record to show that he actually knows not only the plea of guilty to the charge but also the consequences of his plea, including that there will be no trial and the maximum sentence may be imposed on him. Similarly in the case of Chua Ah Gan v Public Prosecutor [1958] MLJ Liv, it was held that if the plea is one of guilty, the magistrate must make it clear on the record that the accused understands the nature and consequences of the plea.

The big question however is, what is the likely consequence of failure to comply with the proviso to section 251 of the Code? Compliance is mandatory no doubt. In my view the guilty plea becomes irregular. This would nevertheless be cured by the narration of the facts and in my view, it would be fair to order a retrial. This would mean that the accused person would no longer be a sentenced and convicted person. But this status would only arise after the appeal has been held.

The second limb of Applicant's arguments is that the court abdicated its duty to bring to the attention of the Applicant the statutory defence in defilement cases in section 138 of the Penal

Code. A number of foreign cases were cited such as **State v Bareki [1979-1980] B.L.R. 35**and the Botwana case of **Gare v The State [2001] 1 B. L.R. 143, CA at** p148 which led to convictions for defilement being quashed.

Hence in **Allan Willard v The Republic Criminal Appeal No. 33 of 2016** the Applicant was granted bail. Later, the Supreme Court of Appeal gave what I consider as some guide in dealing with such cases. In **Yamikani Letasi v The Republic MSCA Criminal Appeal No. 11 of 2017** the court held that the requirement to inform the accused is not part of the elements of the offence. This is what the court said:

> *"In that case knowledge, or advance knowledge, about the existence of this defence on the part of the accused is, in our understanding of the law, neither material nor a pre-condition to his taking benefit of the statutory defence.*
>
> *In saying so, however, we should not be understood to be saying that courts must never under any circumstances reveal the existence of this statutory defence to any accused person. It is possible that a rare situation could arise where it will be obvious to the court that the best way of ensuring justice is to alert the particular illiterate and/or unrepresented accused before it about this statutory defence. In such case there would be nothing wrong, and no harm would result, if the court did so alert the accused about the defence. Then, however, the court would not be doing so as a matter of compulsion. It would be doing so in its own discretion upon assessing the prevailing situation.*
>
> *.....It is our judgment that there was in this case, as there is in every defilement case, no obligation"*

My understanding of the above quote is that, although it is not mandatory to inform the accused of the statutory defence, in exceptional and unusual situations, bail could be granted. According to accepted practice, the known exceptional circumstances are where the appeal may run into danger of being heard after the sentence is served, leading the appeal being nugatory, or likelihood of the appeal being successful leading to acquittal or retrial.

Our present case is likely to be referred to the lower court for retrial which would mean that the accused person would no longer be a convicted or sentenced person. I am inclined to grant him bail since it cannot be known how long the appeal hearing will take; and if the appeal is successful, the applicant should enjoy the rights of an innocent person.

Made in Chambers this 2nd day of November, 2018 at Chichiri, Blantyre.

M L Kamwambe

JUDGE