



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
APPLICATION CRIMINAL APPLICATION NO. 30 OF 2017

BETWEEN:

ABRAHAM KUMBATIRA.....APPLICANT

V

THE REPUBLIC.....RESPONDENT

CORAM: Hon Justice M L Kamwambe

Maele of counsel for the Applicant

Chisanga of counsel for the State

Ngoma....Official Interpreter

RULING

Kamwambe J

The Applicant filed a notice of review on 27th March, 2017 being dissatisfied with the conviction for the offence of breaking into a building and committing a felony therein when a sentence of 72 months imprisonment was imposed on 30th September, 2016.

On the 16th October, 2016 Kenyatta Nyirenda J confirmed the matter being Confirmation Case No.1100 of 2016. The Applicant wrote the Registrar to produce the file in June 2017, but there was no reply from the Registrar. He wrote again on 22nd September, 2017 again there was no reply. The Applicant alleges that he serving a sentence for an offence he did not commit but his brother who is

allegedly at large. The Applicant is desirous to go ahead with the review process which is rendered impossible due to the missing file. Applicant sought from this court directions on the further conduct of this matter, and also for the court to consider granting him bail pending a further order from the court.

The State responded that it is not possible for the court directing its mind on the evidence (as adduced by witnesses) as well as demeanour of the accused person, to convict a person for an offence committed by another. Further, the file was confirmed by Justice Nyirenda at the High Court. The Registrar has failed to trace the file as per my order of 26th February, 2018. The matter has come back to me to give directions on the further conduct of the matter.

I should say in the outset this case differs from where a file is not confirmed. In the latter, the court may release the convict if he has served a substantial amount of the sentence (see Chalera case). Once a file is confirmed it means that the High Court supports the conviction. The reviewing judge would have spotted that it was unfair for one to serve a sentence in substitution of the actual offender. I do not fathom how a court of first instance would act as an investigator and proceed to convict a person who did not commit the offence. It is general knowledge that investigators have at times arrested an innocent person so that the offender shows up, but not to the extent of taking that person to court to answer a charge which he did not commit. The elements of the charge can never be proved in this regard. This is why there is great doubt that this would happen in a court of law, and this, I have not heard of in the many years I have been a prosecutor and have been at the bench. I am not saying that the unlikely cannot happen but chances are very slim. This is not a situation one can quickly say the Applicant must enjoy the benefit of doubt because of great unlikelihood.

It may be argued that the constitutional right of the Applicant to an effective remedy by way of review or appeal has been violated. I am sorry to say yes it is so, but I do not think that could not be the basis of releasing the offender even if he did not, he alleges, take part in causing the file to miss.

Instances of missing record are very worrying be it before or a confirmation. My hindsight dictates to me that no blame should be placed on the applicant, as such it would just be fair to release him on bail pending review. This might be an unpopular move but I support it. As such I grant him unconditional release.

Pronounced in open court this 22nd day of August, 2018 at Chichiri, Blantyre.



M L Kamwambe

JUDGE