



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
MISCELLANEOUS CRIMINAL APPLICATION NO. 29 OF 2017

CLAY MSOMERA.....APPLICANT

AND

THE STATE.....RESPONDENT

CORAM: Hon **Justice M L Kamwambe**

Maele of counsel for the Applicant

Chisanga of Counsel for the State

Amos, Official Interpreter

RULING

Kamwambe J

On 17th November, 2017 Applicant filed summons for directions and consideration of Bail Pending a further Order from the High Court under the Courts inherent jurisdiction and section 16 of the Criminal Procedure and Evidence Code as read with section 5 (a) of the Courts Act.

The Appellant was convicted of the offence of house breaking and is serving a term of 90 months imprisonment.

The lower court file is missing. I heard the matter on 9th February, 2018. Appellant had been in custody for close to two years. The State is opposed to releasing the convict (Appellant) just because the record is missing. Counsel for the Appellant agrees that it is not sufficient reason to release the Appellant. The Assistant Registrar wrote to say that the record cannot be traced by the Chief Resident Magistrate (South). It is more likely that the file was not confirmed. The question is what is the effect of failure to confirm a matter in accordance with section 15 (4) of the Criminal Procedure and Evidence Code? Confirmation should have been done before the expiry of 2 years which must have expired by now. We have to be realistic to meet what obtains on the ground without being too legalistic. The remand warrant is couched in this manner:

"Unless confirmation of the said sentence shall sooner be communicated to you by the High Court you are required to release the prisoner at the expiration of the period appropriate in the case of sentence of (6 months, 12 months or 2 years)"

The spirit of the remand warrant is that after the expiry of the period stated therein, if a file is not confirmed, the convict shall be released. It would be unfair and unjust to entertain bureaucratic or institutional systems' lapses as an excuse. This is the reason why what was intended to be achieved on the ground has never been achieved. We should look at the convict as a vulnerable person who needs protection of the law and not to perpetuate his or her suffering. To simply say that loss of a record is not a reason to release a convict is, in my view, retrogressive and unconstitutional because effective remedy is effectively denied one who intends to appeal or to have his matter come for review. Justice must be seen to be done and not be allowed to be illusory. As such, the judiciary should be bold enough to face the truth that one is released due to missing record in its custody instead of trying to hide reality. Thus, the main reason for releasing the convict is that he is denied an

effective remedy according to section 41 as read with section 46 (3) of the Constitution. Section 41 reads as follows:

- 2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.
- 3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.

Section 46 (3) reads as follows:

"When a court referred to in sub-section 2(a) finds that rights or freedoms conferred by this Constitution have been unlawfully denied or violated, it shall have the powers to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such rights or freedoms, it shall have the powers to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated."

The very right to an effective remedy is violated if applicant cannot be allowed to have his request for review held. To allow the applicant to be released because he has served a substantial term of his sentence is strictly speaking, diversion of justice and blatantly punishing the applicant for the missing of the file (**see Abraham Kumbatira v The Republic Misc. Criminal Case No. 30 of 2017**). The judiciary should take ownership for the missing of the file rather than try to evade responsibility.

In my view, in the belief that the convict has been in custody for 2 years and that the court file has not been reviewed, and the unlikelihood of a bail pending the hearing of appeal taking place as the file is still missing, I permit him to be released unconditionally and I order accordingly.

Made in Chambers this 25th day of September, 2018 at Chichiri, Blantyre.



M.L. Kamwambe
JUDGE