JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL CASE NO. 07 OF 2020

BETWEEN:

THE REPUBLIC

AND

DR. THOMSON FRANK MPINGANJIRA

CORAM: THE HONOURABLE JUSTICE J. CHIRWA

Mr. C. Harawa, Counsel for the State.

Ms G. Rapozo, Counsel, for the State

Mr. A. Nampota, Counsel for the Applicant

Mr. F. Maele, Counsel for the Applicant

R. Chanonga, Official Court Interpreter.

Ms H. Chiusiwa, Court Reporter.

M. Chirwa, Court Marshall

RULING

1. Introduction:-

Before this Court is an application by **Dr. Thomson Frank Mpinganjira** ("the Applicant") for an order for the stay of the sentence of 9 years' imprisonment with hard labour imposed on him by the court on the 5th day of October, 2021. The application is supported by an Affidavit of **Fostino Yankho Maele**, of Counsel, and Skeleton Arguments.

The application is opposed by the Respondents. An Affidavit of **Victor Chiwala,** the Chief Legal and Prosecutions Officer, of the Anti-Corruption Bureau, and Skeleton Arguments have been filed for the purpose.

The Applicant has further filed an Affidavit in Reply to the Respondent's Affidavit in opposition and a Supplementary Affidavit in support both sworn by the Applicant himself and Skeleton Arguments in Reply.

2. Background:-

The Applicant had been charged with six counts under the Corrupt Practices Act in the High Court of Malawi, Principal Registry, Blantyre and was after a full trial found guilty and convicted on two counts on the 10th day of September, 2021. He was, consequently, sentenced to 9 years' imprisonment with hard labour on each count, the sentences were ordered to run concurrently.

Dissatisfied with both the convictions and the sentences, the Applicant has filed a Notice of Appeal.

3. Issue for determination:

The issue for determination by this Court is whether there are meritorious grounds advanced by the Applicant for the grant of bail pending the hearing and determination of his appeal by the Supreme Court of Appeal.

4. The Law:

The law relating to the grant of bail pending the determination of an appeal is, generally, settled. As regards statute law, Section 359 of the Criminal Procedure and Evidence Code ("the CP and EC") is pertinent. The Section provides as follows:

> *" The High Court may in its discretion in any case in which an appeal to the Supreme Court of Appeal is filed grant bail pending*

the hearing of the appeal".

The foregoing provision gives this Court discretionary powers to grant bail pending the hearing of an appeal only where the appeal has been filed but not otherwise. And as regards case law, the authorities which hold that bail pending the hearing of an appeal can be granted only where justified by exceptional or unusual circumstances abound. The first case on the point is the case of **Pandirker v Republic** (HC) (1971-1972) A.L.R (Mal) 204 where **Chatsika J** at p. 207 had this to say:

> *"An application for stay of an order such as this one is analogous to an application for bail pending an appeal. It is important to bear in mind the difference between an application for bail pending trial and an application for bail pending the determination of an appeal. Criminal Courts have always considered the former favourably, whereas exceptional and unusual circumstances have got to be proved before the latter can be granted. Before a person is convicted of any offence he is deemed to be innocent, and provided the court is satisfied that the accused person will report at his trial it will not find it necessary to deprive him of his freedom unreasonably. The reverse is true with a person who has been convicted because until his conviction is quashed by a superior court he is deemed to be guilty and does not deserve the free exercise of his freedom."*

Chatsika J. reiterated the grounds upon which bail pending appeal can be granted as only where "exceptional and unusual circumstances" exists in the case of **Chihana v The Republic,** Miscellaneous Criminal Appeal No. 9 of 1992 (unreported) when he said:

> *"In an application for bail pending an appeal it has to be borne in mind that upon conviction, the applicant lost his freedom of movement. In essence, conviction is followed by punishment. The authorities have a duty to restrict as one of the forms of punishment, his freedom, on the basis of his conviction. He is no longer a freeman. Therefore, in order to grant freedom to such a person whose fundamental freedom has been lost by the conviction, there must exist some exceptional and unusual circumstances. In other words, the case must be so exceptional and unusual that having regard to all the circumstances surrounding it, the court will be justified in overlooking the order for his imprisonment and make a counter-order that he be*

released, at least until his appeal has been determined. It seems that where it appears, prima facie, that the appeal is likely to be successful or where there is a risk that the sentence will be served by the time appeal will be held, the test will have been satisfied. I think that the two factors must exist concurrently in order for the condition to be satisfied."

The principle espoused by **Chatsika J** in the above cited cases was followed with approval by **Unyolo J** (as he then was) in the case of **Alfred v The Republic** Miscellaneous Criminal Application No. 6 of 1993 and by **Tembo J** (as he also then was) in the case of **Clever Nester Msosa v The Republic**, Miscellaneous Criminal Application No. 49 of 1997 (unreported).

On his part **Unyolo J** in the case of **Alfred v The Republic** *(supra)* had this to say:

"It is now settled that 'exceptional and unusual circumstances' must be shown before a court will grant bail to a person who has been convicted and sentenced. The court's belief that the appeal will be successful and the likelihood that it cannot be conducted within a reasonably short time, have been given as examples of such exceptional and unusual circumstances."

While **Tembo J** on his part in the case of **Clever Nester Msosa v The Republic** *(supra)* had this to say:

*"However, I agree with the observation of **Chatsika J** in the case of **Chakufwa Tom Chihana** that the fact that there would be delay in the hearing of the appeal was a factor to exist concurrently with that respecting the likelihood of the appeal being successful in order for the condition to be satisfied thus to warrant the court's grant of the application."*

In the present application, both the Applicant and the Respondents seem to agree on the law as espoused above. In his Skeleton Arguments in support of the application the Applicant has in paragraph 3.7 even relied upon the case of **Joseph Kapinga and Another v The Republic,** MSCA Criminal Appeal No. 16 of 2017 (unreported) where **Twea JA.** had this to say:

*"A convicted person **does not have a right** to be released on bail. See **Jonathan Mesikeni and Others v The Republic**, Criminal Appeal No. 14 of 2015. A convict can only be released on bail*

pending appeal at the discretion of the court, 'if it deems fit'. The practice of the courts, which is now trite, is that the courts would only exercise such discretion if there are ***'unusual or special or exceptional circumstances'.*** *I am aware that in the case of* ***Letasi v The Republic*** *(supra) and* ***McDonald Kumwembe and Others v The Republic of Malawi,*** *Supreme Court of Appeal Criminal Appeal Case No. 5A and 5B of 2017,* ***Mwaungulu SC, JA.*** *criticized this categorisation as curtailing the statutory discretion. I would not think so. As said in the* ***Jonathan Mekiseni and Others v The Republic*** *(supra) and this was acknowledged by my brother justice in the case of* ***Letasi (supra),*** *it is the duty of the courts to develop the principles under which discretionary powers should be exercised. In this respect the courts have developed the principle that the discretionary power should only be exercised where there are 'unusual or special or exceptional circumstances.' Unusual or special or exceptional circumstances include; that the appeal is likely to succeed or that the appellant will have served the full term before the appeal is decided: see* ***Suleman v The Republic*** *(2004) M.L.R. 393,* ***Chihana v The Republic*** *MSCA Criminal Appeal No. 9 of 1992. These, in my view, are examples of unusual or special or exceptional circumstances. I do not think that the list of what amounts to 'unusual or special or exceptional circumstances, is exhausted or closed. It is open to the courts to develop others."*

The Applicant has in his Skeleton Arguments in support of the application, further cited the case of **William Dovu v The Republic**, Criminal Appeal No.8 of 2016 (unreported) where **Kenyatta Nyirenda J** on the grant of bail pending appeal had this to say:

"In order for a court to grant bail pending appeal to an applicant, exceptional and unusual circumstances must be shown to exist before the court can grant bail to such a person. In the case of ***Kamaliza and Others v The Republic*** (1993) 16(1) M.L.R. 198 **Unyolo J**. (as he then was) had this to say:

> *"I pause here to say something about the law. Yes, the law, because this is a court of law. It is now well settled that exceptional and unusual circumstances must be shown before a court will grant bail to a person who had been convicted and sentenced. This court's belief that the appeal will be successful and the likelihood that it cannot be concluded within a reasonably short time have been given*

as examples of such exceptional and unusual circumstances'".

Now, and in what appears to be in sharp contrast with the foregoing position of law the Applicant in what is termed "the Appellant's Skeleton Arguments in Reply" contends that to insist on the existence of 'unusual or exceptional circumstances' as a condition to the grant of bail pending appeal is not in our law. It is the further contention of the Applicant that doing so is introducing words in the CP and EC and the Supreme Court of Appeal Act that the legislature did not intend (vide: paragraph 2.2.6 of the said Skeleton Arguments).

This Court is at pains to appreciate why the Applicant would end up conflicting himself as regards the correct position of the law in the same application, given that in the Skeleton Arguments in support of the application he correctly, in this Court's view, argues that bail pending appeal can be granted only where 'exceptional and unusual circumstances' are shown to exist before the court. Should we hold that M/s Maele Law Practice who filed the present application together with the Skeleton Arguments in support thereof on behalf of the Applicant are confused or is it as a result of an unholy alliance which they entered into with Messrs Ritz Attorneys? This Court has no explanation before it.

Be that as it may, this Court does not subscribe to the Applicant's contention that to insist on the existence of 'exceptional and unusual or exceptional circumstances' is introducing words in the CP&EC. For how else would the court exercise its discretion in Section 359 of the CP&EC judiciously without any guiding principles?

5. <u>Determination:-</u>

In the determination of the issue in this application, this Court intends to consider the merits of the various grounds relied upon by the Applicant as constituting 'unusual or exceptional circumstances'.

(a) <u>Delay or Uncertainty in the determination of the appeal</u>.

It is here the case of the Applicant that the appeal herein cannot be heard anytime soon as there is currently no quorum in the Supreme Court of Appeal to hear and determine the Applicant's appeal as four judges, namely, **Justice AKC Nyirenda, Chief Justice, Justice of Appeal Chikopa, Justice of Appeal Potani and Justice of Appeal Kamanga** out of the eight justices of appeal in

the Supreme Court of Appeal, currently, are conflicted and cannot hear the appeal. It is the further case of the Applicant that the minimum number of seven (7) judges required for the case is at the moment thus not attainable. As such, it is contended by the Applicant, the appeal may not be heard any time soon.

It is, in the premises, the view of the Applicant that it would thus be fair and just that the sentence be stayed and the Applicant be admitted to bail pending appeal.

It is on the other hand the case of the Respondents that in as much as the Practice Direction No. 1 of 2018 dated 6th February 2021 indicates that every appeal has to be heard by a panel comprising of seven (7) justices of appeal and that at the moment there are eight (8) justices of appeal in the Supreme Court of Appeal with four (4) of them being conflicted, there are always exceptions to every rule.

It is the contention of the Respondents that since this is a peculiar case where the said Practice Direction did not envisage that half of the justices of appeal would be conflicted and the minimum number of the judges of appeal would fall short and given that Practice Directions relate to issues of procedure to ensure proper administration of justice the Practice Direction, as aforesaid, being administrative in nature, the Chief Justice upon being requested owing to the prevailing circumstances in this case can issue directions on how this matter can be handled. It is the further contention of the Respondents that Practice Directions can be changed anytime where the Chief Justice is of the view that a certain procedure would help to achieve proper administration of justice.

It is, still further, the case of the Respondents that notwithstanding that the Chief Justice upon consideration of this matter can issue another Practice Direction within the shortest period possible before the appeal, other justices of appeal can be appointed any time before the appeal is heard.

It is thus the view of the Respondents that this ground lacks merit, is speculative and premature at this stage.

In the determination of this ground this Court is mindful of the provisions of Section 105 of the Constitution of the Republic of Malawi which deal with the composition of the Supreme Court of Appeal. The section provides as follows:

"(1) The Justices of the Supreme Court of Appeal shall be –

(a) The Chief Justice;

(b) Such number of other Justices of Appeal not being less than three, as may be prescribed by an Act of Parliament.

(2) When the Supreme Court of Appeal is determining any matter, other than an interlocutory matter, it shall be composed of an uneven number of Justices of Appeal, not being less than three.

(3) A Justice of the Supreme Court of Appeal may only be appointed in accordance with section 111,"

Given the wording of Section 105 of the Constitution quoted above, this Court is of the fortified view that the Applicant's appeal when ready can be heard by three (3) justices of appeal. It is the further fortified view of this Court that the Practice Direction does not and cannot in any way override the provisions of the Constitution so as to prevent an appeal being held by only three (3) justices of appeal. The delay or uncertainty in the hearing and determination of the appeal perceived by the Applicant thus has no legal basis.

This Court is also in agreement with the Respondents that a Practice Direction being for the proper administration of justice can be altered or varied at any time by the Chief Justice as the maker thereof if the circumstances require him so to do. This Court wishes to add that even if the said Practice Direction had been enacted by Parliament the same could still be amended by Parliament itself whenever the need for doing so arose.

This Court further finds the Respondents' contention that additional justices of appeal to fill the vacancies of the retired justices of appeal may be appointed at any time even before the appeal is ready for hearing also merited. It is here worthy of note that since the sentence the Applicant is serving is for a period of 9 years, it would thus not be proper to speculate that the said term may be served before the appointment of more justices of appeal.

It is, in the premises, the finding of this Court that there are no exceptional or unusual circumstances to warrant the grant of bail pending appeal shown by this ground. It is dismissed for lack of merit.

(b) <u>The conviction is not supported by the evidence and that there was a mistrial (i.e the prospects of the appeal succeeding).</u>

It is here the case of the Applicant that there was no evidence supporting the charges against him because there was no proof before the court that the Applicant had offered any money to any of the five (5) judges of the Constitutional Court. It is the further case of the Applicant that there was a

mistrial in the manner the case was conducted in the court on grounds of the persistent interjections by the court during cross-examination, the refusal of the judge to rescue herself, the conducting of the trial via video conference and the court persistently threatened the Applicant that he would be sent to jail if the court perceived any delays on his part of the defence.

It is on the other hand the case of the Respondents that the matters raised by the Applicant are issues which the court in the case of **Peter Katasya v The Republic,** MSCA Criminal Appeal Case No. 11 of 2020 (unreported) cautioned itself about, *viz-a-viz* going into the merits of the case during hearing of a bail application unless the case is so obvious that the conviction and sentence cannot be sustained by the appellate court. It is, however, the contention of the Respondents that the present case is not obvious that the Applicant can succeed on appeal and can thus be distinguished on that basis.

It is the further case of the Respondents that **Kachale J** in the case of **Uladi Mussa and Others v The Republic,** Criminal Case No. 2 of 2017 (unreported), rightly observed that it is better for the Supreme Court upon hearing bail pending appeal to rely on the prospects of success principle because at the time the application for bail is made, the court would have already heard the arguments by the parties and would be in a better position to know for a fact whether there is a prospect of success or not unlike bail applications made under Section 359 of the CP and EC where the application is made before the hearing of the substantive appeal case.

It is the further case of the Respondents that the argument that there was a mistrial has to be tested during trial and that the cases cited above have shown that the arguments cannot be relied upon at this stage of the case

In the determination of this ground this Court is mindful of the fact that its jurisdiction and that of the court which determined the present case are concurrent. It would thus be unreasonable to expect this Court to have the jurisdiction to review the judgment delivered by its sister court as if it had a superior jurisdiction over it. For the foregoing reasons, this Court, purposely, refrains from delving into the merits of the Applicant's appeal to the Supreme Court of Appeal.

This Court has found the sentiments of **Chikopa JA** in the case of **Peter Katasya v The Republic**, *(supra)* interesting when he said:

> *"Every convict touts the merits of their appeals. On our part we are always wary of testing such merits. There is always the*

temptation to while so doing deal with the appeal itself. This court has no mandate to do so. Of course, there is always that once in a while case where the conviction or sentence is so clearly untenable an appellate court is entitled to admit an applicant to bail pending on an appeal's prospects of success..."

Thus, if the judge of the Supreme Court of Appeal would be constrained to test the merits of the appeal which had been lodged with the said court, would it then be reasonable for this Court to proceed to do so? Certainly, not.

In the premises, it is the finding of this Court that there is also no merit in this ground of the application. It is also dismissed for lack of merit.

(c) <u>The Interests of Justice.</u>

It is the case of the Applicant here that the offence for which he was convicted and sentenced is a bailable one and further that he has people who are willing to stand as his sureties should the Court grant him bail pending appeal. It is the further case of the Applicant that during his trial, he was operating on bail and that he complied with all bail conditions that the Court imposed and that he has no record of absconding bail or contravening bail conditions.

It is thus the Applicant's view that his release would not interfere with the interests of justice in any way.

It is, on the other hand, the case of the Respondents that the Applicant has failed to appreciate the difference in what constitutes the interest of justice in an application for bail before conviction (where an accused person is entitled to apply for bail and the State has to show that it would be in the interest of justice for the court not to grant bail *viz-a-viz* that the accused is a flight risk, has no strong family ties or he will not avail himself during trial) and the interest of justice in an application for bail post-conviction.

It is the contention of the Respondents that it is trite that post co-nviction, the Applicant, a convict and not entitled to bail, must show that there are exceptional, special and unusual circumstances for the interest of justice to weigh in favour of granting him bail pending the hearing of the appeal. It is the further contention of the Respondents that the grounds relied upon by the Applicant that the offence of which he was convicted, and that he complied with all bail conditions during trial do not constitute the requirements of interest of justice post-conviction.

This Court is constrained to appreciate the Applicant's present ground for seeking bail pending the hearing of his appeal. It is the considered view of this Court that the interest of justice in the present case would require that the Applicant as a convict should proceed to serve his sentence as a form punishment for offending the law. It cannot be held to be in the interest of justice for the convict to be seen enjoying his freedom as if he had not offended the law. And as was held by **Chatsika J.** in the **Chihana** case (*supra) "the authorities have a duty to restrict as one of the forms of punishment, his freedom on the basis of his conviction".*

This Court also subscribes to the Respondents' contention that the Applicant as convict to be granted bail pending appeal he must prove exceptional and unusual circumstances failing which he has no right to the grant of bail. This is, in fact, the legal position.

Arguments similar to those of the Applicant's herein were thwarted by the court in the case of **R. v Howeson** (1936), 25 Cr. App. R. 167 where the Applicants were convicted of aiding and abetting the director of a company in the publication of a false prospectus. They were sentenced to 12 months' and 9 months' imprisonment, respectively. They both applied to be released on bail pending the hearing of their appeals. It was argued forcibly by counsel for the first applicant that the applicant was a man of many business activities and had many affairs which required to be wound up, and that the case being of great complication it would be useful if he could have free access to his legal advisers in the preparation of his appeal. It was further argued that he had been granted bail throughout the time of his trial and had previously, reported to surrender his bail when required to do so. The Director of Public Prosecutions did not support or oppose the application but left the matter entirely to the court. In his short Ruling the judge stated as follows:

> *"The Court sees in this case none of those exceptional circumstances which alone justify the granting of bail by this Court, and the applications must be refused. There is every reason to anticipate that the hearing of the appeals will not be postponed for long."*

On the premises of the just cited case, this Court finds that the reasons advanced by the Applicant under this ground do not constitute unusual or exceptional circumstances for the grant of bail pending appeal. This ground of the application is also, consequently, dismissed for lack of merit.

(d) <u>Health concerns and Age of the Applicant</u>.

It is the case of the Applicant here that he has medical conditions which at his age make for unusual, special or exceptional circumstances that militate for stay of sentence or grant of bail pending appeal. The Applicant is here relying on Exhibits "TFM 6", "TFM 7" and "TFM 8", letters from Dr Patrick Kamalo.

It is on the other hand the case of the Respondents that the issue of the Applicant's health concern and age formed part of the mitigating factors that the Honourable Court considered before passing sentence. As regards Exhibit "TFM 6" it is the case of the Respondents that the same was before the Court before the sentence was passed. And as regards Exhibit "TFM 7", it is the case of the Respondents that the said exhibit clearly shows that the Applicant had severe headaches but on examination, there was nothing remarkable. And finally, as regards Exhibit "TFM 8", it is the case of the Respondents that it is also clear from same that the Applicant's headache subsided and had no major incidence since admission, hence the recommendation for the discharge of the Applicant by Dr. Kamalo and his team since the symptoms were better.

It is the further case of the Respondents that the absence of further medical reports after Exhibit "TFM 8" dated the 29th of September, 2021 being exhibited by the Applicant is evidence that the Applicant is in good health and fit to serve his sentence. It is still further the case of the Respondents that Exhibit "TFM 8" is way before the Applicant attended court on the 5th of October, 2021 for sentence hence fortifies their contention that the Applicant is in good health as there have been no changes in the circumstances regarding his health since his sentence and that he is thus fit to serve his sentence.

It is, still further, the case of the Respondents that bail pending the hearing of appeal is dependent on existence of exceptional, special or unusual circumstances and not on the health concerns or that the Applicant is advanced in age as stated by the Applicant. It is, still further, the case of the Respondents that it is trite that there are many convicts with over 60 years of age who served their sentences, and some are still serving their sentences under the same circumstances or even worse than the Applicant.

It is observable that out of three Exhibits being relied upon by the Applicant only Exhibits "TFM 7" and "TFM 8" which are signed by the author thereof and thus admissible in this application. Exhibit "TFM 6" which is not signed is not admissible. It can thus not be relied upon by the Applicant, the relevance of the contents thereof, notwithstanding.

Upon a careful perusal of Exhibits "TFM 7" and "TFM 8" this Court finds nothing in the said exhibits suggesting or showing that the Applicant is not fit to

serve his said sentence. And as, correctly, in this Court's view, contended by the Respondents it is evident from Exhibit "TFM 8" that the headaches which the Applicant had been experiencing before had at the of the authoring of the said exhibit subsided and that the Applicant did not have any major incidence since admission. The foregoing has been given as the reason for the recommendation for his discharge.

This Court further subscribes to the contention by the Respondents that no further medical report signifying the further determination of the Applicant's health after the date of Exhibit "TFM 8" i.e. the 29th of September, 2021 had been exhibited by the Applicant. One would thus be inclined to surmise that the Applicant is just trying to find an excuse for not serving his sentence when as convict he does not deserve the free exercise of his freedom.

This Court also finds the Respondents' contention that there are many convicts of the ages of the Applicant herein serving their sentences merited. There can be no doubt in this Court's mind that in compliance with the Prisons Act the prison authorities do allow such convicts to be attended to by their medical personnel when they fall sick and that at times they are even taken to the hospitals for medical attention.

The provisions of Section 20(1) of the Constitution are also worthy of noting. The section provides as follows:

> *"Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition".*

Given the foregoing constitutional provision, would it not be discriminatory for this Court to grant bail pending appeal to the Applicant on this ground when there are other inmates with equally ailing health conditions or advanced ages who are not on bail? This Court prefers to answer this question in the affirmative.

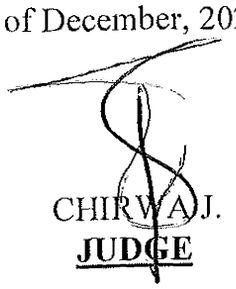
In the premises, it is the finding of this Court that the health concerns of the Applicant as articulated in this application and his advanced age do not

constitute exceptional or unusual circumstances to warrant the grant of bail to him pending the hearing of his appeal.

6. Conclusion:-

From the findings made above, it is evident that no unusual or exceptional circumstances have been shown by the Applicant on the premise of which this Court could have granted him bail pending the hearing of his appeal. The present application ought therefore, to be dismissed for lack of merit with costs to the Respondents. It is so ordered.

Dated this Twenty- second day of December, 2021



CHIRWA J.
JUDGE