



**IN THE HIGH COURT OF MALAWI**

**CRIMINAL DIVISION**

**Zomba Registry**

**Criminal Appeal Case No. 22 of 2022**

**[Being Criminal Case No. 436 of 2022 Before Senior Resident Magistrate's Court  
Sitting at Mangochi]**

**BETWEEN**

**DAVIE YAKITL.....1<sup>ST</sup> APPELLANT**

**SHARIFF MAKWINJA.....2<sup>ND</sup> APPELLANT**

**DAVIE FUNGULANI.....3<sup>RD</sup> APPELLANT**

**MACDAD NAZIYAYA.....4<sup>TH</sup> APPELLANT**

**AND**

**THE REPUBLIC.....RESPONDENT**

**CORAM: HONOURABLE JUSTICE D.H. SANKHULANI**

A. Salimu, of Counsel for the Appellants

N. Longwe, of Counsel for the Respondent

L. Mboga, Court Reporter

A. Kazambwe, Court Clerk

## JUDGMENT ON APPEAL

Date of Hearing : 10<sup>th</sup> February, 2023

Date of judgment: 21<sup>st</sup> February, 2023

**Sankhulani J.**

### **Introduction**

This judgment follows hearing that was held on the Appellants' appeal against the decision that the Senior Resident Magistrate's Court sitting at Mangochi (hereinafter referred to as 'the court below') had made on the two applications which they made before the court below.

### **Background**

The appellants appeared before the court below on a charge of possessing a specimen of a game species without a licence, contrary to **Section 80(1)** as read with **Section 109** of the **National Parks and Wildlife Act**. The particulars of the charge are that Davie Yakiti, Sharif Makwinja, Davie Fungulani and MacDad Naziyaya on the 17<sup>th</sup> day of July, 2022 at Idrusi Trading Centre in the District of Mangochi were found in possession of a specimen of game species namely ivory without either a valid licence or certificate of ownership.

At plea stage, all the four appellants denied the charge and, accordingly, the court below entered a plea of not guilty.

Before trial could commence, the Appellants, through Counsel, made two applications before the court below. The first application was for bail pending trial. The second application was for the court below to stay the criminal proceedings and remit the matter to the High Court for the High Court's further

reference of the same to the Honourable the Chief Justice for possible certification of the matter as a constitutional one. By a ruling dated 17<sup>th</sup> August, 2022 (hereinafter referred to as 'the Ruling'), the court below denied both applications.

Being dissatisfied, the Appellants appealed against the Ruling. There is, on record, a notice of appeal as well as grounds of appeal filed by the Appellants. The appellants also filed skeleton arguments in support of the appeal. On their part, the Respondents also filed skeleton arguments in response to the appeal. May it be noted that after initiating the appeal process, the Appellants sought, before this Court, stay of proceedings in the court below pending hearing and determination of the appeal. That application was duly granted. So, as it now is, the proceedings in the court below stand stayed pending determination of the present appeal.

The appeal was heard in the presence of both sides hereto. After the hearing, this Court adjourned this matter for judgment. Hence this judgment.

May we, at this juncture, mention that, for the sake of properly guiding ourselves, we shall split the appeal into two, which we shall deal with separately. The first appeal to be dealt with shall be the appeal against the denial of the application to admit the Appellants to bail pending trial by the court below. The second appeal shall be the appeal against the denial of the application to stay the criminal proceedings and refer the matter to the High Court for the High Court's further reference of the same to the Honourable the Chief Justice for possible certification of the matter as a constitutional one.



**This Court's Determination On The Appeal Against The Denial Of The Application To Admit The Appellants To Bail Pending Trial By The Court Below**

This appeal, according to the grounds of appeal herein, has got the following grounds:

- (1) The learned trial Magistrate erred at law in holding that there was likelihood that the Appellants would interfere with state witnesses, investigations having been completed and the matter being ready for trial;
- (2) The learned trial Magistrate erred at law in holding that the Appellants were a flight risk, when the State had not proffered any evidence to that effect; and
- (3) The learned trial Magistrate erred at law in holding that the Appellants would be tempted to flee because the case they were facing was a serious one, even before a single State witness had testified.

We shall, now, deal with these grounds separately. May it be noted, before we do so, before we do so, that this appeal was brought under **Article 11 of Part II** of the **Schedule** to the **Bail (Guidelines) Act**.

**Ground (1) – Non-Likelihood Of Interference With State Witnesses**

The ground of the appeal here is that the learned trial Magistrate erred at law in holding that there was likelihood that the Appellants would interfere with state witnesses, investigations having been completed and the matter being ready for trial. This ground appears as Ground I in the grounds of appeal herein.

This ground appears to us to be misconceived, as it seems to suggest that interference with State witnesses by an accused person cannot happen after investigations have been completed. Our firm view, in this regard, is that interference with State witnesses by an accused person may also happen even after investigations have been completed. Indeed, a State witness may be influenced or intimidated even after investigations have been concluded, thereby affecting the veracity of their testimony, should they proceed to testify, or



preventing them from attending court altogether. Hence our position that the present ground of appeal is misconceived. In the premises, we hereby dismiss the present ground of appeal.

May it be noted that we have not interrogated the basis on which the court below held that there was likelihood that the Appellants would interfere with state witnesses, since that has not been called into question by the present appeal.

### **Ground (2) – Appellants Not Being a Flight Risk**

The ground of the appeal here is that the learned trial Magistrate erred at law in holding that the Appellants were a flight risk, when the State had not proffered any evidence to that effect. This ground appears as Ground II in the grounds of appeal herein.

This ground of appeal is unfounded. Having read through the Ruling, we have not found an indication of a finding that the Appellants were a flight risk. We, therefore, find that this ground of appeal is unfounded and, so, we dismiss it.

### **Ground (3) – Non-Likelihood Of Fleeing**

The ground of the appeal here is that the learned trial Magistrate erred at law in holding that the Appellants would be tempted to flee because the case they were facing was a serious one, even before a single State witness had testified. This ground appears as Ground III in the grounds of appeal herein.

We find this ground to be misconceived, as it seems to suggest that seriousness of a case an accused person is facing can be gauged only after evidence has been proffered. Our firm view, however, is that seriousness of a case an accused person is facing is determined by the nature of a charge he is facing, and not by evidence that is proffered against him. Hence our finding that the present ground of appeal is misconceived. In our most considered opinion, the fact that no single State witness had testified would have been relevant if the basis of the holding by the court below that the Appellants would be tempted to flee was that the

evidence against them was strong. Additionally, according to **Article 4(a)(i) of Part II of the Schedule to the Bail (Guidelines) Act**, the court, in taking into account the principle of the likelihood of the accused attempting to evade trial, is enjoined to consider the nature and the seriousness of the offence for which the accused is to be tried. Therefore, the court below cannot be faulted for having taken into account the nature and the seriousness of the charge the Appellants are facing therein. On the foregoing, we hereby dismiss the present ground of appeal.

In view of the foregoing dismissals of all the three grounds of the appeal against the denial to admit the Appellants to bail pending trial by the court below, we ultimately dismiss this particular appeal in its entirety.

Before we go to the second appeal, we would like to comment on the Appellants' bail application as was made before the court below. Having read through the relevant record of the court below, we found that the information that was laid before the court was far from being sufficient. The court below was not informed about where the Appellants herein were staying before their arrests, where the Appellants would be staying if granted bail, the Appellants' family ties, the Appellants' means of livelihood, the Appellants' attachment to their communities, *et cetera et cetera*. All that information was not laid before the court below. It is, therefore, not surprising that the court below found that there was nothing, as of then, showing that the Appellants herein were attached to their communities. Instructive in this regard are the words of Mwaungulu, JA, in the case of **Kaudzu & 4 Others v R** [2017] MWSC 6, at Page 23, who said as follows, and we quote:

"...Where, therefore, the accused person is the one who requests bail, the onus and standard of proof are subsumed in that it is the accused person who requests for such an undertaking. The accused person, as an applicant, has an evidential burden to raise facts for entitlement to release — in the interests of justice. The burden then shifts to the state to demonstrate that it is not in the interests of justice to release the accused person.."

It is clear from the above-reproduced dictum that it behoves an applicant for bail to furnish sufficient information based on which the court may decide whether or not to grant bail. And once that is done, the burden then shifts to the State to show that the interests of justice weigh against the granting of bail. Therefore,

coming to the matter at hand, even if we were to consider the bail application afresh, even on the ground that the pre-trial custody time limit has expired, we would still deny the same on account of there being insufficient supporting information.

**This Court's Determination On The Appeal Against The Denial Of The Application To Stay The Criminal Proceedings And Refer The Matter To The High Court For The High Court's Further Reference Of The Same To The Honourable The Chief Justice For Possible Certification Of The Matter As A Constitutional One**

This appeal arose from the denial of the application, brought under the court's inherent jurisdiction, to stay the criminal proceedings and refer the matter to the High Court for the High Court's further reference of the same to the Honourable the Chief Justice for possible certification of the matter as a constitutional one. The basis of the application was that the collation of evidence by the State through an agent provocateur was a violation of the Appellants' right to a fair trial, as that approach amounted to entrapment. This appeal, according to the grounds of appeal herein, has got the following grounds:

- (1) The learned trial Magistrate erred at law in holding that he had no jurisdiction to stay the criminal proceedings and refer the matter to the High Court for the High Court's further reference of the same to the Honourable the Chief Justice for possible certification of the matter as a constitutional one;
- (2) The learned trial Magistrate erred at law in holding that he would not refer the matter to the High Court as all criminal matters that come before the lower courts have constitutional implications and thus he would be encouraging a practice where all criminal matters are stayed and referred to the High Court.

We shall, now, deal with these grounds separately.



## **Ground (1) – Lower Court’s Inherent Jurisdiction**

The ground of the appeal here is that the learned trial Magistrate erred at law in holding that he had no jurisdiction to stay the criminal proceedings and refer the matter to the High Court for the High Court’s further reference of the same to the Honourable the Chief Justice for possible certification of the matter as a constitutional one. This ground appears as Ground IV in the grounds of appeal herein.

Under this ground, the Appellants argue that the court below had jurisdiction to stay the criminal proceedings and refer the matter to the High Court for the High Court’s further reference of the same to the Honourable the Chief Justice for possible certification of the matter as a constitutional one. They argue, therefore, that the court below erred at law in holding that it had no jurisdiction to stay the criminal proceedings and refer the matter to the High Court. We are, however, unable to subscribe to the Appellants’ position on this issue. Unlike the High Court, which has got unlimited original jurisdiction to handle any criminal matter (see **Section 108(1) of the Constitution**), a magistrate’s court’s criminal jurisdiction is limited in the sense that it is prescribed by statute, which statute does not confer unlimited jurisdiction (see, mainly, **Sections 13 and 14 of the Criminal Procedure and Evidence Code**). Accordingly, generally speaking, a magistrate’s court may act, or be moved so to act, only under some specific statutory provision. In other words, generally speaking, a magistrate’s court does not have inherent jurisdiction to take any judicial step that may not be said to be backed by some statutory provision. As a matter of fact, it was held, in the case of **Mbele v R [2022] MWHC 74**, that a magistrate’s court does not have inherent jurisdiction. Therefore, coming to the matter at hand, the court below did not have inherent jurisdiction to stay the criminal proceedings and refer the matter to the High Court. We so opine and hold. In fact, in the case of **Mbele v R [2022] MWHC 74**, it was held that the concerned Senior Resident Magistrate’s court in that case did not have inherent jurisdiction to refer to the Honourable the Chief Justice the constitutionality of **Section 200 of the Penal Code** or indeed any other question for certification as a constitutional matter. And, as it has been mentioned earlier on, the application to stay the criminal proceedings and refer

the matter to the High Court, as made before the court below, was so made under the court's inherent jurisdiction. Our final finding, therefore, is that the court below correctly held that it did not have jurisdiction to stay the criminal proceedings and refer the matter to the High Court for the High Court's further reference of the same to the Honourable the Chief Justice for possible certification of the matter as a constitutional one. In the premises, we hereby dismiss the present ground of appeal.

### **Ground (2) – Lower Court's Wrong Basis For Refusal To Refer Matter**

The ground of the appeal here is that the learned trial Magistrate erred at law in holding that he would not refer the matter to the High Court as all criminal matters that come before the lower courts have constitutional implications and thus he would be encouraging a practice where all criminal matters are stayed and referred to the High Court. This ground appears as Ground V in the grounds of appeal herein.

In view of our immediately foregoing finding that the court below did not have inherent jurisdiction to stay the criminal proceedings and refer the matter to the High Court, it means, in the first place, that the application itself was not properly before that court. The consequence of this is that it will be an academic exercise for this Court to make a determination on the present ground of appeal. In the premises, we hereby dismiss this ground of appeal for being inconsequential.

In view of the foregoing dismissals of both grounds of the appeal against the denial of the application to stay the criminal proceedings and refer the matter to the High Court for the High Court's further reference of the same to the Honourable the Chief Justice for possible certification of the matter as a constitutional one, we ultimately dismiss this particular appeal in its entirety.

As a last point, we were asked, should this particular appeal succeed, to refer this matter to the Honourable the Chief Justice for possible certification of the matter as a constitutional one. In view of the above dismissal of this particular appeal, we shall not consider that prayer.

**Conclusion**

In view of the foregoing dismissals of the two appeals as segregated herein, we hereby dismiss the present appeal in its entirety.

The appeal fails in its entirety.

In view of the above dismissal of the present appeal, the order of stay of proceedings in the court below is hereby discharged, since it was granted to abide determination of the appeal. Accordingly, we order that trial in the criminal matter in the court below be resumed within 21 days from the date hereof, failure to do which shall constitute a change of circumstances, which shall then entitle the Appellants to re-apply for bail.

Delivered in Open Court at Zomba this 21<sup>st</sup> day of February 2023



**Dick Harry Sankhulani**

**JUDGE**

