



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 34 OF 2021

(Being criminal case number 206 of 2021, before the Senior Resident Magistrate,
sitting at Mangochi)

BETWEEN:

GIFT SIMBA.....1ST APPELLANT
LIMBANI CASIANO.....2ND APPELLANT
OMAR NASRE ADIMU.....3RD APPELLANT
SABIT ABDUL.....4TH APPELLANT

AND

THE REPUBLIC.....RESPONDENT

CRAM: HONOURABLE JUSTICE T. S. MASOAMPHAMBE

S Khalifa, of Counsel for the Appellant
R. Mkweza, (STATE), of Counsel for the Respondent
C. Tweya, Official Court Interpreter
G. Amosi, Court Reporter

RULING

INTRODUCTION:

This is an appeal against the decision of the lower court in revoking and denying bail pending trial.

The appellants were charged with the offence of Robbery which is contrary to section 301(2) of the Penal Code.

THE APPELLANTS CASE

The State alleges that Appellants, Gift Simba, Limbani Casiano, Omar Nasre Adimu and Sabit Abdul, on the 14th of May 2021 at Bwalo la Ndege, in the district of Mangochi, stole K400,000 from Migueliamo Mario Joaquim a Mozambican National and they used violence by handcuffing him.

The third accused, Omar Nasre Adimu, in addition, is also charged with the offence of theft contrary to section 278 of the penal code. The particulars are that Omar Nasre Adimu, on the 14th day of May 2021, at St. Augustine 3 in the district of Mangochi, stole K300,000.00 from Migueliamo Mario Joaquim a Mozambican National.

The accused persons denied the charges. The state paraded two witnesses to prove their case. The appellants are Malawian nationals and each of them is married with children. The first, second and third appellants are businessmen and were arrested on the 20th May, 2021. The fourth appellant is a police officer from Mangochi and he was arrested on the 21st May, 2021. After their arrest they were remanded. After plea taking they were given police bail which was later substituted with court bail. After several adjournments the court revoked their bail and expressly said they would not restore the bail but make sure there is speedy trial.

GROUND OF APPEAL

Dissatisfied with the decision of the court, the appellant filed an appeal in this court. Below are the grounds of appeal:

The learned Magistrate erred in revoking bail to the appellants when there was nothing in the interest of justice which could compel him to revoke the bail.

The learned Magistrate erred in law and in fact in revoking bail to the appellants on the ground that he believed that the appellants deliberately delayed to retain legal representation with intent to delay trial/justice.

The learned Magistrate erred in refusing to restore bail to the appellants when there was nothing in the interest of justice which could compel him to deny restoring the bail to the appellants.

The learned Magistrate erred in law and in fact by failing to consider that at the time of revoking the bail, the appellants were fully complying with their bail conditions and that the state did not apply/prove to the court for any bail revocation.

The learned Magistrate erred by not taking into account that at the time of the appellants' second bail application, the state had finished parading its witnesses and that in its testimony, the state said nothing which can connect the offence charged and the appellants.

The learned Magistrate erred in failing to consider the position of the appellants that they are all Malawians, with fixed places of abode in the country and that the fourth appellant, is a serving member of the Malawi Police Service.

The learned magistrate erred in not considering that in the circumstances, the appellants are likely to appear for their trial and that there was nothing on record to show that the appellants were likely to abscond their bail.

The lower court erred in not considering that every offence isailable and that there are cases which the court should take judicial notice of where the applicants who were charged with treason, rape, murder or even theft by public servant suspects were granted bail and that the possible sentence upon conviction cannot be used as a ground for denying bail in the absence of other factors against the granting of bail.

The learned Magistrate's decision in refusing to restore bail to the appellants was wrong in principle and contrary to the right to be presumed innocent until conviction and the general right to fair trial as provided for in the Constitution.

The appellants consequently asked this court to set aside the decision of the lower court should be set aside and an order granting bail to the appellants be given by the court on such terms and conditions which the court deems fit.

ISSUES TO BE DETERMINED

Whether or not the decision of the lower court in revoking bail to the appellants was correct at law and should be upheld.

Whether the decision of the lower court in denying restoring bail to the appellants was correct at law and should be upheld.

Whether the court should set aside the decision of the lower court revoking bail to the appellants and order that the appellants be released on bail pending their trial in the lower court on such terms and conditions it deems fit in the circumstances.

THE LAW

According to Section 42 (2) (f) (iii) of the Republican Constitution provides as follows:

(2) "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 -

(f) as an accused person, to a fair trial, which shall include the right -

(ii) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;"

Section 118 of the Criminal Procedure and Evidence Code also provides for the right of an accused person to be released from detention on bail.

Section 118 (5) of the said code provides that no application for a direction that any person in custody pending proceedings in a subordinate court be released on bail shall be entertained by the High Court unless such subordinate court has first refused to direct such release.

In the case of **John Tembo and Two Others v The DPP, MSCA Criminal Appeal No. 16 of 1995**, Unyolo, JA as he then was, and Kalaile JA stated that bail should be granted by court even in murder cases unless the interests of justice would be prejudiced or frustrated. Banda CJ (rtd), also made similar comments in the case of **Amon Zgambo v Republic, MSCA Criminal Appeal Case No. 11 of 1998**. He said:

"...An Accused is presumed by law to be innocent until his or her guilt has been proved in court, and bail should not ordinarily be withheld from him as a punishment. The court should therefore grant bail to an accused, unless this is to prejudice the interests of justice."

In the case of **Mvahe v Republic, MSCA Criminal Appeal No. 25 of 2005** the court observed that in considering the issue of the interests of justice the paramount issues the court will consider will include the likelihood of the accused person attending at his trial; the risk that if released on bail the accused will interfere with the prosecution witness or tamper with evidence; the likelihood of his committing another offence or other offences and also the risk to the accused person, if granted bail and he returns to his village where the deceased's relations may harm him. See also **John Tembo and Two Others v The DPP (supra)**.

RESPONDENTS ARGUMENTS

The Appellants are being tried on the offence of robbery contrary to section 301 (2) of the Penal Code. After plea taking the appellants' Police bail was revoked and replaced by the court bail. The matter was then transferred from the First Magistrate to the Senior Resident Magistrate.

The Senior Resident Magistrate then revoked bail after observing that the conduct of the appellants amounted to deliberate delay of court proceedings.

Having being dissatisfied with the decision of the lower court in revoking bail, the appellants appeal to this court against such a decision, and prays for the restoration of the court bail-

ISSUES

The court is invited to answer the question: Whether or not the lower court erred in law and fact in revoking bail granted to the appellants, and subsequently denied them bail upon resubmitting their request.

DETERMINATION

It is clear from the record that there were several adjournments occasioned by the Appellants. It was the assessment of the trial Magistrate that the same was designed to frustrate the trial. On page 34 the trial court went on to observe that:

"The crime was committed by all the 4 of them. If bail is granted to one of them, it will be selective justice. The other three are fright risk. They frequent RSA."

I am of the view that where the trial Magistrate, after observing the progress of the trial, forms the firm view that the accused persons may jump bail, he may revoke bail at any stage of the trial. In the case of **Penama v State, Misc. Criminal Application Number 47 of 2005**, the court had this to say:

"..after bail is granted by court, the court can at any time revoke bail if the interest of justice so require."

It is clear in the present case that the accused persons were found with the case to answer. The maximum penalty available to the accused persons should the court convict them, is death or imprisonment for life. The Magistrate observed that the three accused persons are a fright risk. They frequent RSA.

In the case of **Rex v Monrovin (1911) 3 Mann LR 582** the court commented on the concept of the interests of justice. Mann L R had this to say:

"Interest of justice require that there be no doubt that the accused person shall be present to take his trial upon the charge in respect of which he has been committed."

On the basis of the foregoing and in the circumstances of the case, I am of the view that there is no good reason for me to interfere with the decision of the trial Magistrate. I can only order speedy trial. This entails the court assigning the nearest dates available for continued trial.

For avoidance of doubt the accused persons will remain in custody as trial continues unless circumstances substantially change.

Made this Wednesday, the 27th Day of April, 2022 at Zomba.


Texious S Misoanphambe
JUDGE