IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

FINANCIAL CRIMES DIVISION

CRIMINAL REVIEW NO. 02 OF 2024

BETWEEN:

MIKE CHIPALA .....1ST ACCUSED

RASHID MSUSA.....2ND ACCUSED

CHRISTOPHER MZILAHOWA.....3RD ACCUSED

-AND-

REPUBLIC.....RESPONDENT

CORAM: HONOURABLE JUSTICE KAPINDU

Dzikanyanga, Court Clerk/Official Interpreter

RULING

KAPINDU, J

1. On 25th March, 2024, the Applicants herein filed an *ex-parte* application by way of Summons, for the review of the orders of the Magistrate Court sitting at Lilongwe on the 13th March, 2024 denying the accused persons herein bail allegedly due to the strong evidence of the prosecution implicating the accused persons leading to the high likelihood of the

accused persons evading trial. This is the language used in the substantive part of the said Summons.

2. However, the Court also notes that the heading of the Summons is titled: *"EX-PARTE SUMMONS FOR A CALL OF THE RECORD OF THE MAGISTRATE COURT SITTING AT LILONGWE IN CRIMINAL CASE NO. 72 OF 2024 [Section 26 of the Courts Act and Section 360 of the Criminal Procedure and Evidence Code]"*

3. Further, at the end of his affidavit in support of the application, Counsel Umali Hazrat Mataka, representing the applicants, states that:

> *"I pray before this honourable Court to exercise its powers under Section 360 of the Criminal Procedure and Evidence Code as read with Section 26 of the Courts Act to call the record of the case in the lower Court for review to determine the correctness of the reasons advanced by the Court to deny the accused persons bail in the proceedings on the 13th March, 2024 and the accused further prays that he should be heard on the review."*

4. It follows, therefore, that in essence this application relates to the first step in the review process under the above referenced supporting legal provisions, namely for the Court to evaluate whether sufficient basis has been laid for this Court to call for the record from the lower Court. It must be said that if the Court decides to call for such record, the effect of such decision is to automatically stay the proceedings in the subordinate Court pending this Court's decision upon review. Section 26(2) of the Courts Act clearly states that:

> *"Upon the High Court calling for any record under subsection (1), the matter or proceeding in question shall be*

stayed in the subordinate court pending the further order of the High Court."

5. Thus, the decision of this Court to call for the record from the subordinate Court, prior to its actual review decision, still has very significant implications as it has the effect of immediately stopping any proceedings relating to the matter in issue in the lower Court.

6. This is what the applicants are inviting this Court to do in the present case. They have their reasons which are basically already summarised in the wording of the Summons referred to above. The more detailed reasons are now set out herebelow.

7. In the affidavit in support of the application for this Court to call for the record from the lower Court, Counsel Mataka for the Applicants states that the accused persons are jointly facing Four counts of Fraud Other than False Pretences contrary to Section 319A of the Penal Code, Conspiracy to defraud contrary to Section 323 of the Penal Code, Making a Document Without Authority contrary to Section 364(a) of the Penal Code and Uttering a False Document Contrary to Section 360 of the Penal Code, under Criminal Case No 175 of 2024 being heard before the Principal Magistrate Court sitting at Lilongwe.

8. He states that the three accused persons were arrested on 14th February, 2024 and were taken to Court on 16th February, 2024 where the Principal Resident Magistrate's Court informed the three of the reasons for their arrest and that the State applied for further remand of the three for 14 days in order to complete its investigations.

9. Counsel states that in view of the application for further remand of the accused, the three accused persons applied for bail through Counsel which was heavily objected to by the State on account that the three

might interfere with the investigations. He indicates that the Court reserved rulings on both applications and set Thursday, 22nd February, 2024 as the date when it would deliver the rulings.

10. He proceeds to state that on 22nd February, the Court did not sit and that the matter was further adjourned to Wednesday, 28th February, 2024. Counsel then states that on this day, namely the 28th February, 2024, the State indicated that they had concluded their investigations and were ready to commence trial. He mentions, however, that he had just received disclosures for the case from the State on that same day and he therefore indicated to the Court that in the interests of expediting the trial, the State be allowed to parade their witness for examination-in-chief, but that cross examination of the said witness be done on another date in order to allow the defence to go through the disclosures, and that this request was duly granted by the Court.

11. Counsel indicates in his affidavit that the accused persons took plea on 6th March, 2024 and all of them pleaded not guilty to all the three counts above, and that the State paraded its first witness. Counsel states that he prayed to the Court to proceed and deliver its reserved bail ruling after the state paraded its witness, but that the Court directed that it would only deliver its ruling after conclusion of taking evidence from the first witness. The matter was then adjourned to 13th March, 2024.

12. On 13th March, 2024, according to Counsel, the State continued with the evidence of the first witness, before he was cross examined by the defence and after cross examination, the Court adjourned to 3pm the same day for delivery of bail ruling. At around 3:45pm, the Court delivered its ruling declining bail to the three accused persons on the basis that the evidence of the State witnesses implicated the three and that there was a high likelihood of the three evading trial if the three were released on bail. He stated that the Court went further to invoke section

250(3) of the CP & EC to have the matter adjourned for not more than 15 days.

13. Counsel however bemoans that contrary to the spirit of Section 250(3) of the CP & EC, the Court did not set a specific date to which the hearing of the matter was to continue and only advised the State to secure a date within the 15 days to complete parading its witnesses. He depones that to date, the State has not secured the said date.

14. Counsel states, in his affidavit, that the ruling of the lower Court on the reasons for denying the release of the accused persons on bail do not conform to the prevailing law on bail and the principles laid down to guide the court when faced with an application for bail. Similarly, he argues, the reasons advanced by the State for denying the accused persons bail were mainly to do with the fear of the three accused persons interfering with the investigations which do not apply as of now considering that the investigations are over, and trial has commenced.

15. Counsel states that he is aware that the right to bail is limited in the interests of justice, which is largely determined by the availability of an accused person to stand trial to the end. He however states that he believes that in the present case, there is nothing which has been demonstrated before the Court to support a conclusion that the accused are likely to evade trial if released on bail, arguing that no evidence was adduced before the Court to support such a conclusion.

16. Counsel argues that denying an accused person bail on the basis of substantive evidence of the matter goes against the right of an accused person to be presumed innocent until proved guilty by a competent court of law.

17. Counsel contends that notwithstanding the discretion of the Court whether or not to grant the accused persons bail, the reasons advanced by the Court denying the accused persons bail in the instant matter are not supported by any evidence adduced before it to arrive at such a conclusion and they are not supported by the prevailing law on bail.

18. The Court has given the above issues raised by Counsel for the applicants the most serious consideration.

19. First, the Court wishes to quickly address one issue of law which the applicants have evidently dwelt on with emphasis, namely that denying an accused person bail on the basis of substantive evidence of the matter, goes against the right of an accused person to be presumed innocent until proved guilty by a competent court of law.

20. On matters relating to bail, the Bail Guidelines Act (Cap. 8:05 of the Laws of Malawi) consolidated most of the major principles that guide a Court in making a determination as to whether or not to release a detained accused person on bail. With specific reference to bail by the Courts, these principles are specifically outlined under Part II, Section 4 of the Act. Four major bases have been provided for in that Section for determining whether or not bail should be granted. These are:

(a) the likelihood that the accused person, if released on bail, will attempt to evade his or her trial.

(b) the likelihood that the accused person, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence.

(c) the likelihood that the accused person, if he or she were released on bail, will endanger the safety of the community or any particular person or will commit an offence; and

(d) in exceptional circumstances, the likelihood that the release of the accused person will disturb the public order or undermine the public peace or security.

21. In respect for basis (a) above, under paragraph (ii), the Bail Guidelines Act provides that in considering the likelihood that the accused, if released on bail, would attempt to evade his or her trial, the court may, where applicable, take into account the strength of the case against the accused and the temptation that he or she may, in consequence, attempt to evade his or her trial.

22. In the case of ***Father Thomas Muhosha vs The Republic***, Miscellaneous Criminal Application No. 138 of 2018 (HC, Zomba), on the accused person's application for release on bail, this Court, in remarks that the Supreme Court of Appeal did not fault on appeal, made the following observations, under paragraphs 29-31, with regard to Section 4(a)(ii) under Part II of the Bail Guidelines Act:

> *"In the instant case, the State opposes bail. The first reason the State has advanced is that there is overwhelming evidence against the Applicant and that this makes it likely that the Applicant may attempt to evade his trial if released. The State evidently bases its proposition in this regard on Part II Section 4(a)(ii) of the Bail Guidelines Act which provides that the Court is entitled to consider the strength of the case against the accused and the temptation that he or she may in consequence attempt to evade his or her trial. I must immediately mention here that although some evidence was laid before me by the State purporting to*

implicate the Applicant, defence Counsel is right to caution that such evidence has to be treated with great care as it has not yet been tested in Court and taken through the rigours of cross-examination during trial. However, be that as it may, the Court is still entitled to make a preliminary or prima facie assessment of the strength of the prosecution's case based on the available evidence, and to consider whether the evidence has any hope at all of standing out as admissible evidence with meaningful weight during trial. The Court at this stage reminds itself that in discharging this duty, it is not required to make a provisional finding on the guilt or other wise of the accused Applicant. Bail proceedings are not, it has been stated elsewhere, "a full dress rehearsal for trial" (See ***Molefe vs S*** *[2014] ZAFSHC 1). Still more, however, the Court must make a preliminary assessment of the strength of the prosecution's case through a prima facie assessment of the evidence. If the Court were not allowed to assess the evidence by any measure at all at this stage, then the law laid down in Section 4(a)(iii) of the Bail Guidelines Act to the effect that the Court is entitled to consider "the strength of the case against the accused and the temptation that he or she may in consequence attempt to evade his or her trial" may be rendered meaningless. If, upon such preliminary assessment of the evidence availed to the Court, the purported evidence is on its face totally hopeless, then the Bail Guidelines Act suggests that a Court is entitled to conclude that the hopeless nature of the evidence entails that the accused person may have no temptation to seek to evade his or her trial. If however there is a real possibility that the evidence might as well stick during trial, then a Court is entitled to take that factor into account as one that may tempt the accused person to evade his trial."*

23. In view of this position, the Court does not agree with the argument that that denying an accused person bail on the basis of the available substantive evidence of the matter and its weight, goes against the right of an accused person to be presumed innocent until proved guilty by a competent court of law. This right as well is subject to constitutionally permitted limitations.

24. Pausing there, I must proceed to address the central issue for determination of the present decision.

25. The starting point is to refer to Sections 10, 11 and 12 under Part II of the Bail Guidelines Act, which make provision for a system of checks and balances relating to the denial of bail by a Magistrate's Court. They are in the following terms:

> *"10. Where the accused has been refused bail he or she may bring a fresh application before the same magistrate or court, or another magistrate or court, only if there has been a change of circumstances since the earlier application.*
> *11. Where the circumstances have not changed, the accused may proceed by way of appeal setting out the grounds upon which the lower court is alleged to have erred.*
> *12. No application for bail in any case pending before a subordinate court shall be entertained by the High Court unless bail was refused in the subordinate court."*

26. So, two major things are evident under these provisions:

(a) If an accused person is denied bail in the Magistrate's Court, he or she can appeal against that decision to the High Court, outlining the reasons why he or she believes the lower court made an error.

(b) The High Court can entertain a fresh bail application only when bail has been refused in the subordinate court. This means that if the accused person has already been denied bail at the lower court level, he or she can then approach the High Court with a new (fresh) bail application.

27. This means that there are two avenues open to an accused person aggrieved by a decision of a subordinate Court on how to approach the High Court: either to appeal or bring a fresh application.

28. This means that it is up to the High Court, in any given case, to give directions as to whether the matter should come by way of appeal or fresh application. Needless to say, of course, that the aggrieved party will first choose what he or she believes to be the convenient procedure, but this choice will be subject to the High Court's directions.

29. At this juncture, the Court wishes to mention that both this Court and the Supreme Court of Appeal have previously spoken on the approach that the High Court takes or ought to take, when invited or when minded to exercise its revisionary and supervisory jurisdiction as laid down by the law.

30. This Court stated, in the case of ***Paul Norman Chisale vs Republic***, Miscellaneous Criminal Application No. 4 of 2021, at paragraphs 15 and 16, that:

"The Court is of the opinion that the High Court should be very slow to interfere with ongoing proceedings in subordinate Courts through the exercise of its supervisory and review powers over subordinate Courts as provided for under the Courts Act and the Criminal Procedure and Evidence Code. It should be under very compelling circumstances that such jurisdiction and powers of this Court are invoked so as to stop such ongoing proceedings and review the same. The approach of invoking this Court's supervisory and/or review powers in ongoing proceedings in subordinate Courts very sparingly is, in this Court's view, necessary for purposes of proper case management and the smooth process of judicial proceedings in the subordinate Courts. Judicial processes in subordinate Courts might become chaotic, and the High Court would become clogged with review applications, if this Court were to readily admit applications for review in ongoing proceedings every time a party feels disagreeable with a particular decision made by such Court during a proceeding."

31. In the case of ***Shepherd Buxley Bushiri & Another vs Government of the Republic of South Africa***, Criminal Review Case No. 11 of 2021, again this Court further elaborated on its views regarding the review and supervisory jurisdiction procedure under the Courts Act, stating at paragraphs 9 and 10 of the decision, that:

"It must be recalled that the supervisory and review mechanism under section 26 of the Courts Act is not meant to be an alternate mechanism to an appellate process. Afortiori, the process is not meant to be used as a

replacement for an appellate process by an aggrieved party to a proceeding. Rather, it is an unusual process that is meant to check against the handling of cases in subordinate courts that appears to be flagrantly incompetent, abusive, unlawful or such as would otherwise show that the proper administration of justice is clearly being frustrated or is such as would demonstrably lead to a manifest and incorrigible failure of justice. If the Court detects the existence of any or a number of these serious risk factors in the trial procedure, and that failure to immediately intervene may result in an incorrigible failure of justice, the Court may call for the record, review the proceedings and the High Court, with its unlimited original jurisdiction has extensive powers of remedying them. See ***In re: Criminal Case No 42 of 2013 and related matters; Ex parte People's Trading Centre Ltd: S v Attorney General (The First Grade Magistrate Anthony C. Banda)*** [2013] MLR 96 (HC), *at Page 98 (per Kamanga J, as she then was). The threshold for triggering the supervisory or revisionary jurisdiction of the Court under Section 26 of the Courts Act is necessarily higher than a court would ordinarily require in order to hear an appeal. This is so because intervention by the Court under Section 26 of the Courts Act is an unusual and special measure that is, in most of its forms, an invasive, intrusive or obtrusive device on the exercise of judicial authority by the subordinate Court concerned. This is why, in the vast majority of applications of this nature that have come before this court, if not all of them, the applications come well supported by affidavits and anchored on legal foundations properly articulated in skeleton arguments. Such supporting documents help to put the Court in proper perspective as to whether or not the interests of justice*

require that the proceedings in the subordinate Court should be stopped and then reviewed by the High Court."

32. The Court is pleased to note that its views were recently shared by the Supreme Court of Appeal in the case of ***Lin Yun Hua vs The Republic***, MSCA Miscellaneous Criminal Application No. 02 of 2023, where Chikopa, JA, JP, stated that:

"If only in passing let us say something about the powers of criminal review exercisable by the High Court and the Resident Magistracy. Under the Courts Act [Cap 3:02 of the Laws of Malawi] they are provided for from sections 25 to 28. Without going into specifics, the powers are exercisable in accordance with the law for the time being in force in relation to criminal procedure. In other words, the Criminal Procedure and Evidence Code [CP&EC]. The powers are supervisory and revisionary. In that regard the High Court can, if it appears desirable in the interests of justice, either by its own motion or on application call for the record of any matter before a subordinate court and give such directions for the further conduct of that matter as justice may require. The emphasis is on the interests of justice and justice. The High Court should therefore only act if it is convinced that the same is in the interests of justice. Similarly, whatever directions it gives should only be motivated by justice. In the exercise of the above powers the parties to the matter have no right to be heard. Except where the court seeks to make an order prejudicial to any such party. There are similar provisions in the CP&EC. In section 360 the High Court can call and examine the record of proceedings before a subordinate court in order to satisfy itself as to the correctness, legality propriety or regularity of any finding, sentence, order or the proceedings themselves. In section

361 the High Court can receive from a Resident Magistrate for purposes of review records of proceedings before a subordinate court. Just like under the Courts Act parties whose matters are up for review do not have the right to be heard. Except where the High Court intends to make an adverse order. Of great importance in the above scheme is the fact that reviews are not appeals. As much as possible therefore neither the State nor the accused should be allowed to bring appeals via the backdoor by dressing them up as reviews. When the Courts Act speaks of reviewing at the instance of any party or person interested it is talking more about locus standi and obvious irregularities being brought to the attention of the High Court as opposed to providing an avenue, alternative to appeals, for taking any and all grievances within a proceeding to the High Court in the manner of an appeal. That will only serve to delay proceedings. Similarly, the High Court itself must never call files for review willy nilly. They should as much as possible only intervene in cases where intervention is clearly merited. Apart from occasioning delay needless reviews will most likely amount to undue/unwelcome interference with the trial court's management of its case load. But perhaps more importantly they might raise questions about the reviewing court's impartiality. The Constitution in section 42 assumes an impartial court. Jumping into proceedings in the name of reviews might needlessly create the impression that the reviewing court is favouring one litigant as against the other. Let the aggrieved party appeal. Thirdly reviewing courts should be careful how they deal with the right to a hearing during reviews. The rule of thumb is that the parties have no right to be heard unless invited by the reviewing court and only where an adverse order is a possibility. We are also of the view that it is best practice

that parties are heard where a review is on request by a party or other interested person. An impression must never be created that one party was heard to the exclusion of the other. Lastly it is imperative that the basis for a review and any resultant orders are clearly set out. It allows, where applicable, for the parties to properly respond and for a higher court to better understand and appreciate the reason[s] for the review and the consequent orders/ directions."

33. In the light of these pronouncements, the following is a summary of key but non-exhaustive points that the Court takes into account in approaching the issue of the exercise of its revisionary and supervisory jurisdiction under the Courts Act:

(a) The Powers are exercised with caution

The general approach is that the High Court is cautious and slow to interfere with ongoing proceedings in subordinate courts. Interference should only occur under very compelling circumstances.

(b) Avoidance of Judicial Chaos

If the High Court frequently interferes with ongoing proceedings in subordinate courts under the guise of the exercise of its revisionary and supervisory powers, the overall result could be chaos in the whole judicial process and the High Court could become overwhelmed with review applications.

(c) Review and supervisory powers not an alternative to or substitute for appeals

The review and supervisory mechanism under sections 25 to 28 of the Courts Act is not an alternative or a substitute for appeals, and it should not be used to circumvent the usual appeals process. The High Court therefore generally refrains from calling for reviews without clear merit in order to, among other reasons, avoid delaying proceedings and interfering with the trial court's effective case management.

(d) Threshold for Intervention

Intervention by way of revision or supervision is warranted only in cases where there is flagrant incompetence, abuse, unlawfulness, or a clear risk of frustrating the administration of justice, which could lead to an incorrigible failure of justice. In this regard, the threshold for triggering revisionary jurisdiction is higher than for hearing an appeal due to the special and unusual nature of such intervention.

(e) Supporting Documentation

Applications for review, especially where filed by Counsel, should be well-supported with affidavits and legal arguments to help the Court determine whether the intervention sought is justified.

(f) Interests of Justice and Justice Alone

As emphasised by the Supreme Court of Appeal, any intervention or directions given by the High Court in exercise of its revisionary or supervisory powers, should be motivated solely by the interests of justice and justice alone.

(g) No Right to Be Heard in Reviews

Parties do not have a right to be heard in the review process unless the Court seeks to make an order that is adverse to a party. However, although the general rule is that parties have no right to be heard in reviews, best practice suggests hearing parties when the review is requested by a party or other interested person.

(h) Conclusion

In conclusion, it is evident that what the Courts are emphasising in the above case law, which in fact represents a broader body of Malawian jurisprudence to the same effect, is a restrained and principled approach to the exercise of revisionary and supervisory jurisdiction, reserving such powers for only the most serious of cases where the justice system's integrity is at stake, and thereby ensuring that due process and fairness in the judicial process are upheld.

34. What is evident in the instant matter is that when the present application is stripped to its bare essence, the applicants are aggrieved by the decision of the Principal Resident Magistrate's Court at Lilongwe to deny them bail. They disagree with the reasons that he gave for such denial.

35. The Bail Guidelines Act has, as shown above, set out a clear procedure and pathway that a person aggrieved by the decision of a subordinate Court denying him or her release from custody on bail should follow in order to secure the desired remedy. The aggrieved accused person may either appeal or bring a fresh application for bail in the High Court.

36. In the instant matter, the applicants have ignored the route expressly spelt out under statute and, without any compelling explanation, or indeed any explanation at all for not following such procedure, they have decided to approach this Court following the more demanding revisionary and supervisory procedure. This procedure is more demanding in the sense that, as stated above, the threshold for triggering the Court's jurisdiction is much higher than would be required for an appeal or a fresh application.

37. In the present matter, the applicants have not stated that there is no effective alternative avenue for addressing their concerns other than the resort to the Court's revisionary and supervisory procedure.

38. In the circumstances, this Court concludes that the applicants have not succeeded in demonstrating that the threshold for triggering this Court's revisionary and supervisory jurisdiction has been reached.

39. The application for this Court to call for the record of the Principal Resident Magistrate's Court sitting at Lilongwe, in Criminal Case No. 72 of 2024, is therefore hereby dismissed.

40. The Court is of opinion that the Principal Resident Magistrate had not, at any point, been restrained from taking any further steps in these proceedings since there was no order of stay of proceedings, and hence the said Court will simply proceed with its business in the present matter as normal.

41. If the Applicants remain aggrieved by the decision of the Principal Resident Magistrate's Court denying them bail and desirous of challenging it on the merits, then they should bring such application before the High Court in proper order, whether by way of appeal or fresh

application as the Applicants and their Counsel will judiciously see fit under the circumstances.

42. It is so ordered.

Delivered in Chambers at Lilongwe, this 16th Day of April, 2024.

R.E. Kapindu

JUDGE