



Malawi Judiciary



IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

CIVIL APPEAL CAUSE NO. 14 OF 2015

(Being Criminal Case No 21 of 2012)

BETWEEN:

JONATHAN MEKISENI

DITTER SITIMA

JEKAPU JOSEPH

HAPPINESS MWINJIRO..... APPELLANTS

AND

THE REPUBLIC.....RESPONDENT

CORAM : HONOURABLE JUSTICE E. B. TWEA, SC JA

MR MaeleCounsel for the Appellant

Absent.....Counsel for the Respondent

Mr MinikwaCourt Clerk



RULING

The appellants, who were convicted on charges of robbery before the Principal Resident Magistrate, sitting at Midima Court, appealed the judgment to the High Court. The High Court dismissed their appeal and confirmed the convictions and sentences passed by the Principal Resident Magistrate. The appellants were dissatisfied with the judgment of the Court below and appealed the judgment to this Court. They have brought this application to stay the sentence and pray for bail pending appeal.

First and foremost, I must point out that this application falls under section 11 (2) of the Supreme Court of Appeal Act which provides that:-

“(2) Any person aggrieved by a decision of the High Court in its criminal appellate jurisdiction or exercise of the powers of review conferred upon the High Court by Part XIII of the Criminal Procedure and Evidence Code may appeal to the Court on a matter of law but such decision shall be final as to matters of fact and as to severity of sentence”.

It is important to state this at the outset because a person who has been convicted cannot be presumed to be innocent and therefore does not, any more, have the right to be released, with or without bail. Admission of a convict to bail, although provided for under section 24 (1) of the Supreme Court of Appeal Act, is not a right. Bail after conviction is at the discretion of the Court where it

“deems it fit” Admission to bail pending appeal is an exception not the rule. Such admission to bail therefore, is rare and only in exceptional and unusual circumstances.

In the present case the State did not appear and did not show cause, why? I read the affidavit and skeleton arguments for the applicants. I am well aware that my duty is to examine the submissions and determine whether this is a case which I would deem it fit to release the applicants on bail pending appeal.

Be this as it may, I have examined the submissions in issue. The applicants case rests on the opinion of this Court in the judgment of Tembo SC JA in the case of ***Suleman v Republic, [2004]*** MLR 393 at pages 400 -402. Wherein the Court said, “exception and unusual circumstances” include the fact that the appeal has a prima facie chance of being successful or that there is a high risk that the sentence would be served before the appeal is heard; thereby rendering it nugatory. It was argued that this case is authority that the above factors should be considered in the alternative. Counsel for the applicants pointed out that the earlier decision of this Court: in ***Chihana v The Republic MSCA Case No 9 of 1992***, which proposed that the two factors must exist concurrently must be expunged. The gist of the applicants’ case therefore, is that the appeal is likely to succeed. The other factor; that the sentences may be served before the appeal is heard, would not be applicable. The applicants sentences range from 12 to 15 years.

Notwithstanding the state of law in cases of this nature, the applicants sought to build their case on the facts and evidential issues on which the lower Court and the Court below made their findings. Further, the appellant went all the way to hypothesize on the facts. In the main, the arguments that have been advanced before me are the same that the applicants advanced in the Court below, and the lower Court. The Judgment of Nyirenda J in the Court below is robust. He was systematic in his analysis of the evidence and the law as applied in the lower Court. Where the lower Court was seen to have erred, he considered all the relevant facts and the evidence and made a finding. It is not open for me to review the facts and the findings of the Court below. After due consideration, I hardly get the impression that the applicants have a case that will succeed.

In the circumstances therefore, I find that there are not exceptional or unusual circumstances in this case which would persuade me to deem it fit to release the applicants on bail pending appeal. This application must fail.

Pronounced in Chambers this 22nd Day of March 2016 at Blantyre.

A handwritten signature in black ink, appearing to read 'E B TWEA, SC', with a long, sweeping flourish extending upwards and to the right.

E B TWEA, SC
JUDGE OF APPEAL